

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *I.S. v. Saskatchewan Government Insurance,*
2004 SKAIA 021
Date: 20040607
File: 101 of 2003

BETWEEN

I.S., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
I.S., Applicant
Darrell Mack, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverley Cleveland, Commission Member
Al Knippel, 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 Saskatoon, Saskatchewan
January 8, 2004

DECISION

[1] The Appellant, I.S., appeals a decision of Saskatchewan Government Insurance (SGI) made July 16, 2003 denying her rehabilitation expenses under section 112 of *The Automobile Accident Insurance Act* and section 12 of *The Personal Injury Benefits Regulations* now in force.

FACTS

[2] The Appellant suffered complete paraplegia as a result of a fracture of L1 when her motor vehicle rolled on February 3, 2003. The fracture was extremely unstable and required anterior and posterior stabilization procedures done by neurosurgeon, Dr. Fourney, on February 19 and 26, 2003. She was in rehabilitation in Saskatoon until April 24, 2003.

[3] The expense for which she seeks rehabilitation benefits is an indoor lap pool, 12 feet by 24 feet. SGI denied it on the basis that it was “not medically necessary as part of your rehabilitation”.

[4] The decision that we have reached – setting aside SGI’s decision – has not been an easy one. The arguments advanced by the Appellant and a number of her caregivers have been cogent. On the other hand, an indoor swimming pool in Saskatchewan has more than a whiff of luxury about it, and does not sound like something that should be funded by a government insurer.¹

LEGISLATION

[5] The relevant legislation is:

¹ See *Belchamber v. SGI* [1997] S.J. 754; 161 Sask. R. 292, at paragraph 38: “The discretion must be exercised in a reasonable manner after considering the interests of not only the victim but also those of insured motorists who provide the funds sought to be disbursed.”

*The Automobile Accident Insurance Act*² (“the Act”)

“112(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 an insured, to lessen the insured’s disability caused by the accident and to facilitate the insured’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 insured’s residence;
- (d) modification or purchase of a motor vehicle for an insured;
- (e) purchase of special equipment for an insured;
- (f) any additional prescribed measure, program or treatment.

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

(3) The total combined maximum benefits payable to an insured pursuant to this Division and Division 7 is \$5,000,000 for each accident in which a person suffers bodily injury.”

*The Personal Injury Benefits Regulations*³ (“the Regulations”)

“12 If the insurer considers it necessary or advisable for the rehabilitation of the insured, the insurer may provide the insured with one or more of the following:

- (a) funds:
 - (i) to acquire, once during the insured’s life, one motor vehicle that is equipped to be used and operated by the insured; or
 - (ii) to reimburse the insured for extraordinary costs required to adapt a motor vehicle for the use of the insured;
- (b) funds to reimburse the insured for extraordinary costs required:
 - (i) to alter the insured’s principal residence;
 - (ii) if alteration of the insured’s principal residence is not practical or feasible, to relocate the insured; or
 - (iii) to alter the plans for or construction of a residence that is being planned or constructed for the insured at the date of the accident;
- (c) funds to reimburse the insured for extraordinary costs required to alter the insured’s principal residence, if:
 - (i) the insured is moving in order to accommodate an approved academic or vocational rehabilitation plan; or
 - (ii) the insured was a dependant at the date of the accident and is moving from the family home;”

[6] From the foregoing, we must ask and answer the following question:

Is the proposed measure, program or treatment which is necessary or advisable to:

² In force from August 1, 2002.

³ Chapter A-35, Reg. 3, as amended by Sask. Regs. 70/2002 and 121/2002.

- (a) contribute to rehabilitation;
- (b) lessen disability caused by the accident;
- (c) facilitate recovery from the accident?

[7] As far as whether purchase of equipment is a “measure, program or treatment” or is rehabilitation, section 112(1) of the *Act* includes as “measures, programs and treatments”:

- (c) alterations to an insured’s residence;
- (e) purchase of special equipment for an insured.

[8] Moreover, section 12 of the *Regulations* specifies that funds may be provided, if necessary or advisable for rehabilitation: “...to reimburse the insured for extraordinary costs required to alter the insured’s principal residence”.

SGI’S DECISION

[9] After quoting the relevant legislation outlined in paragraph [5] above, SGI stated:

“It is our opinion that the swimming pool is not medically necessary as part of your rehabilitation and we are unable to provide any funding for it.”

[10] In doing so, SGI had available to it the following letters written to the Appellant’s personal injury representative, Susan McDonald, strongly endorsing the use of swimming and a pool for the Appellant, as set out in paragraphs [14] to [16] below:

June 24, 2003 Trent Litzenberger, Physical Therapist and Karin Diedrich-Closson,
Occupational Therapist

June 26, 2003 Dr. H.T. Gerein, Kindersley Clinic

July 2, 2003 Janna Herbison, Exercise Therapist, Armstrong’s Physiotherapy Clinic

[11] It was not until October 15, 2003, three months after its decision, that SGI obtained an opinion from its medical consultant, Dr. Barry Bernacki, a physiatrist (specialist in rehabilitative medicine). He stated:

“There has been a request by the insured re provision of indoor swimming pool for exercise.

Mostly the issues with the above request are the following:

1. Role and choice of exercise.
2. Access to exercise.
3. Standard of care.

All individuals in this province have the right to choose their form of recreation/exercise, which they find most beneficial. Aerobic activity is beneficial to all individuals regardless of age, sex or race. Individuals with a spinal cord injury also benefit from aerobic activity. This issue is not in dispute.

The issue of access to exercise is an individual matter. There are several variables which impact upon this including location of residence, mobility, as well as personal choice in type of exercise dictated by fitness goals, season, (e.g. winter vs. summer) and others. In this situation, [the Appellant] has a preference for swimming.

The last issue is standard of care. It is not the standard of care to provide an indoor swimming pool for paraplegics for exercise. This is best considered a personal choice for access to a type of exercise that the insured enjoys. It should therefore be considered a personal choice whether the insured pursues modification to their own home provide for this personal choice.”

[12] It can be seen at once that Dr. Bernacki’s letter does not specifically address the legal issue of whether the funding of the pool is a necessary or advisable rehabilitation measure. He states only that it is not the standard of care to provide an indoor swimming pool for paraplegics for exercise. From the context, it appears that “not the standard of care” may be equivalent to “not medically necessary”. His letter does not address the issue of whether or not it is “advisable”.

[13] Moreover, it does not discuss in any way whether the proposed measure contributes to her rehabilitation, lessens her disability or facilitates her recovery. At the time, Dr. Bernacki would (or should) have had available to him, in addition to the letters referred to paragraph [10] above, other letters submitted to SGI by the Appellant:

| | |
|-----------------|---|
| July 24, 2003 | Sarah Clappison, Aquatic Foreman, Kindersley Aquatic Centre |
| August 19, 2003 | Dr. H.T. Gerein and four other doctors at the Kindersley Clinic |

[14] These five documents make the following points:

- (1) The Appellant was a swimmer before her accident and used the therapeutic swimming pool at Saskatoon City Hospital during her rehabilitation there.
- (2) She lives on a farm outside [town], about 45 kms. away from the public pool in town (i.e. 90 kms. return trip), which is closed from October to April, seven months of the year.
- (3) Swimming provides a cardiovascular workout, maintenance of upper body strength and achieves total body pressure relief.

[15] Specifically:

- It is the only activity that facilitates a total body workout.
- Swimming in a heated pool is ideal for stretching of contractures.
- Water resists movement by means of friction allowing strengthening and conditioning.
- It is the only activity that provide resistance to movement in all directions.
- A pool acts as a natural and adjustable weight training machine.
- Swimming improves cardiovascular fitness and respiratory function.
- The hydrostatic pressure of water pushes equally on all body surfaces and helps the heart circulate blood by aiding venous return.
- Swimming provides pain relief by improving health and relaxation as a result of water temperature and hydrostatic pressure.
- The buoyancy of water allows a greater range of positions due to the elimination of gravity.
- Increases kinesthetic and proprioceptive awareness.
- Swimming improves coordination.
- Swimming is the only experience of unaided body movement for a paraplegic.
- Swimming helps to maintain a lower body weight, which is crucial for successful transfer from a wheelchair.

- Facilitates independence, a sense of control and improved fitness, which promotes mental health.⁴
- Swimming increases the strength of all innervated muscles
- Swimming strokes, particularly unilateral strokes promote improved coordination
- Passive movements and swimming exercises in a heated pool reduce spasticity
- Swimming increases respiratory function
- Swimming increases exercise tolerance, vital capacity and cardiovascular efficiency
- Prone swimming increases the activity of the diaphragm and lung volume
- The heated water of a pool facilitates passive stretching of contractures
- The mobility facilitated by water is the only experience of unaided body movement for a paraplegic
- Swimming helps maintain a healthy low body weight, which is crucial in order to transfer from a wheelchair
- Most importantly, swimming fosters the growth of independence, self-expression and provides the opportunity to mix with able-bodied friends and family members.⁵

[16] It also provides psychological benefits:

“For [the Appellant], the psychological benefit of movement in the water is unparalleled. Swimming is clearly a source of rejuvenation (sic) and inspiration for [the Appellant]. It is obvious that a swimming pool would clearly enhance the quality of [the Appellant]’s life not only with respect to fitness, recreation and leisure, but also with respect to her social and psychological sense of well being.”⁶

ECONOMIC CONSIDERATIONS

[17] As a paraplegic, the Appellant has received and will receive benefits from SGI such as home renovation, vehicle modification and mobility aids. Over her lifetime, these will be considerable.

⁴ Dr. Gerein and other doctors at the Clinic.

⁵ Janna Herbison, Exercise Therapist, Armstrong’s Physiotherapy Clinic.

⁶ Trent Litzenberger, Physical Therapist and Karin Diedrich-Closson, Occupational Therapist.

[18] An estimate provided for SGI in October, 2003 for modification to the Appellant's house, including modifications to the kitchen, bath, laundry and garage, was over \$125,000 plus GST. "Mobility aids", presumably her wheelchair, were an additional \$23,000.

[19] At the time of the quotation for the house modifications, the Appellant's family obtained a quote for the pool addition as follows:

| | | | |
|---|----|-------------------------|-------------------------------------|
| Pool building addition | \$ | 36,500 | |
| Upgraded flooring (including tile and hardwood) | | 10,075 | |
| Pool room shower | | 975 | |
| Drain in shower room | | 890 | |
| Garden door in pool room | | 1,595 | |
| Insulate and drywall garage | | <u>2,525</u> | |
| Sub-total: | | | \$ 52,560 plus GST |
| Pool base cost | | 13,700 | |
| Increase shallow end depth | | 396 | |
| 125,000 BTU heater | | 1,975 | |
| Energy efficient pump upgrade | | 170 | |
| Upgrade to pattern liner | | 186 | |
| Full foam blanket | | 340 | |
| Roller system | | 550 | |
| Automatic vacuum | | 525 | |
| Chemical package | | 500 | |
| Corner stairs | | 1,030 | |
| Travel and expense-not to exceed | | 2,500 | |
| Pool drains | | <u>to be determined</u> | |
| Sub-total: | | | \$ 21,872 plus GST |
| TOTAL: | | | \$ <u>74,432</u> plus GST |

[20] This quote did not include electrical and gas hookup in the pool utility room, costs to move a gas line from the house to the shop, additional drains in the pool room.

[21] The Appellant compared the approximately \$75,000 cost for the pool to the costs of equipment purchased by SGI for other victims with spinal cord injuries. She referred to the StimMaster™ used to combat the secondary symptoms of a spinal cord injury. This device enables people with little or no voluntary leg movement to "actively" pedal a stationary bicycle

with the power of their own muscles. Computer controlled low level pulses of electricity are sent via surface electrodes to cause leg muscles to contract in a coordinated order. This causes the user's own legs to pedal in a smooth and natural motion at 50 rpm, with their own leg muscles supplying the power and doing the actual work.

[22] The StimMaster™ is said to relax muscle spasms, prevent or retard disuse atrophy, increase local blood circulation, increase range of motion and re-educate muscles. There can be an increase in cardiopulmonary function, an increase in muscle mass and tone, reduced frequency of pressure sores, improvement of bowel and bladder function and an decrease in urinary tract infections and other secondary medical complications, as well as enhancing self-esteem. The cost for such a device was quoted at \$12,000 to \$14,000 in late 2000.

[23] The Appellant estimated the expense of getting her to town to swim as follows:

| | | |
|--|----|---------------|
| From May to October, twice a week – 24 x \$3.75 | \$ | 90.00 |
| Distance travelled – 90 kms x 24 x \$0.35 per km | | <u>756.00</u> |
| Cost incurred this year: | \$ | 846.00 |
| To swim every day – 365 x \$3.75 – yearly cost | \$ | 1,368.75 |
| Mileage – 90 kms x 365 x \$0.35 per km – yearly cost | \$ | 11,497.00 |

[24] She correctly acknowledges that these are expenses that *she* would incur, as SGI's travel reimbursement is limited by the *Act* and *Regulations* to transportation for the purpose of receiving medical and paramedical care,⁷ and transportation in connection with an examination by a practitioner.⁸ She pointed out, as did the [town] physicians, that there are limited physical therapy services in [town]. However, if she is able to maintain health and fitness through swimming, it is likely to reduce the costs of medical and paramedical care that SGI might otherwise have to incur over her lifetime.

[25] The pool is not a large one. It is 12 feet x 24 feet. It ranges from 4 to 7½ feet in depth. There are stairs in which she can lower herself without the need for a lift.

⁷ *The Automobile Accident Insurance Act* now in force, section 157(1)(a).

⁸ Section 159(1) of the *Act*.

[26] Before her accident, the Appellant participated with her husband as an active farmer. In addition, she was an aerobic instructor, a fitness instructor for 18 years. She was a part time employee of [employer]. Her activities included horseback riding, tap dancing, scuba diving, swimming, hiking, skiing and other sports and outdoor activities.

SUMMARY AND CONCLUSION

[27] In setting aside SGI's decision, we direct that it reconsider the question of this particular pool (and associated facilities) for this particular woman, addressing the following in its new decision:

- (1) Is the pool necessary or advisable to contribute to the Appellant's rehabilitation, to lessen her disability caused by the accident or to facilitate recovery from the accident?
- (2) What alternatives are there from a rehabilitative point of view?
- (3) What expenses would SGI incur if these alternatives were adopted, including an estimate of long term medical and paramedical costs for which SGI would be responsible?
- (4) Are the costs that have been incurred by the Appellant in constructing the pool appropriate, and is there an aspect of their pool use that is clearly non-rehabilitative?

[28] The Appellant is entitled to her reasonable expenses incurred from the date of filing the appeal, including meals, lodging and travel expenses for herself and her husband, and any expense incurred in obtaining the reports that form part of her case.

Dated at Regina, Saskatchewan, on June 7, 2004.

Ann Phillips, Q.C., Chair

Beverly Cleveland, Commission Member

Al Knippel, Commission Member