

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *R.S. v. Saskatchewan Government Insurance,*
2006 SKAIA 008
Date: 20060220
File: 106/2004

BETWEEN

R.S., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Glen W. Dowling, for the Applicant
Tamara Harasen, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
 Beverley Cleveland, Commission Member
 Marjory Gammel, 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
January 11, 2005

DECISION

[1] The Appellant, R.S., appeals the decision of Saskatchewan Government Insurance (“SGI”) of June 1, 2004 that advised her that further treatments (medication, chiropractic, physiotherapy, massage or any other form) would not be funded after July 1. SGI acknowledged that she had chronic pain problems, and that they might be ongoing. On the advice of its medical consultant, SGI believed that this ongoing discomfort would continue to be related to the injuries she incurred in a motor vehicle accident two years before, on May 5, 2002.

[2] SGI further relied on its consultant in physiotherapy, who thought that further “passive care”, i.e. massage and chiropractic, had the potential to prolong recovery, rather than assist it.

[3] The Appellant was in her late fifties when she had to swerve at highway speeds to avoid a collision, and rolled her car, perhaps three times. She lost consciousness, had head bruising and lacerations, a broken thumb, and chest bruises. She was diagnosed with both whiplash associated disorder (WAD II), and low back pain (LBP II).

[4] She needed and received extensive treatment: primary physiotherapy, an early tertiary assessment (on the basis that it was thought she would have a difficult recovery), secondary treatment with pain management counselling, and a second tertiary assessment about a year after the accident. She also had more primary physiotherapy, massage treatments, chiropractic treatments. She had a one month gym pass, and equipment such as low back support, a theraband, lumbar rolls and medications funded by SGI.

[5] Despite her difficulties, she was able to take up a new job as a seamstress (light level of work) in September 2002, and has been able to hold it since that time. SGI did provide homecare benefits until the end of April 2003 to assist the Appellant and her family.

[6] To us, the most helpful report is that from Wascana Rehabilitation Centre, which provided recommendations based on its tertiary assessment carried out in June, 2003 by a team including a physician, chiropractor, physical therapist, occupational therapist, exercise therapist, psychologist and nurse.

[7] The team diagnosed the main ongoing complaint related to the injuries in the motor vehicle accident as “chronic pain complaints of Whiplash Associated Disorder II / Thoracic II/ Low Back II — resolving”. They characterized her closed head injury, driving phobia, and thumb fracture as “resolved”, adding that she showed no evidence of post-concussive syndrome.

[8] They considered her symptoms in detail, including pain in many areas, intermittent numbness, poor sleep, occasional but improving dizziness and blurred vision, and concerns about memory and concentration. Her ranges of motion (limited) and strength were assessed. The job demands were measured against her ability to complete them. She was able to do so in most areas, but limited testing, refusing to do more on several occasions. One exception was her low strength in gripping with both hands, well below average.

[9] Her effort in the functional testing was described as inconsistent, less than full, and questionable. Symptom magnification was suggested.

[10] While describing her pain at the time of her interview with the psychologist as 10/10 (the worst pain imaginable), she did not appear objectively to be in this degree of pain. She reported that the physiotherapy, massage therapy and chiropractic she received weekly (plus active coping techniques) helped reduce her pain to about 5/10. Though working nine hours a day, four days a week, she said she was unable to do most housework, and was functioning at about 20% of her pre-accident ability. She was exasperated and upset by the accident and her injuries, and in particular with the police and SGI in helping her to deal with it.

[11] The team recommended:

- (1) Continuation of the primary physiotherapy recently begun for a 6 to 8 week period.
- (2) Continuation of weekly massage and occasional chiropractic during the primary physiotherapy, in consultation with her physiotherapist.
- (3) After completion of the primary physiotherapy, “periodic treatment of her choice, either massage, physiotherapy, chiropractic or a combination”. The reason was

that she would continue to have pain for an extended period, and ceasing passive treatment too soon might exacerbate pain complaints. “Time Frame: 18 visits in total over the next 12 months”. (emphasis added)

- (4) Offer of pain management counselling (6 visits) to help her become less pain focused and deal with unresolved anger over the accident.

[12] The Appellant did see a registered psychologist following the last recommendation. After an initial evaluation, the psychologist thought more than 6 sessions (she suggested 8) were necessary, because of the lapse of five months between the tertiary assessment and the initial interview, incomplete psychometric information, and what she described as “severe emotionality” and language limitations.

[13] We are unable to determine whether the counselling sessions continued. A file note indicates that the SGI adjuster was telling the Appellant’s family physician that she could not continue to authorize funding of treatment, and required from him a detailed report with objective findings (he had recently referred her to the registered psychologist mentioned in the previous paragraph.) Another file note mentions the various treatments, including pain management counselling, and remarks “SGI funded all treatments that have been recommended by both assessments”¹ SGI’s medical consultant raised this general issue twice: first, he asked if a psychiatric referral had been considered, then following termination of treatment, he referred to the suggestion of eight pain management counselling sessions, adding “Hopefully they were completed”. We too hope they were completed. The Appellant testified she had had five sessions with this psychologist, who she said did not help but made her angrier. If they were discontinued short of the number of treatments recommended by the psychologist for any reason (except the Appellant’s own choice), we are all of the view that she is entitled to receive them, if she wishes. (SGI points out that the decision letter does not specifically deal with pain management counselling, but it does discontinue funding for “any other form of treatment”.) Neither the Appellant nor her lawyer raised the question of pain management counselling as an issue, however.

¹ Presumably meaning both tertiary assessments.

[14] We accept that SGI did follow and fund the recommendations of the tertiary assessment team for physiotherapy, and limited continuation of massage and chiropractic. The file reviews by Dr. Alexander, physician, and by Louise Ashcroft, physiotherapist, resulted in very brief reports. The former expressed the view on April 29, 2004 that it would take at least until May or June of that year before some of the chronic pain problems of the Appellant would have reached the point where they are to be considered outside the boundary of the MVA related injuries. The following day, April 30, he reviewed the time to “at least until the end of June” before some of the chronic pain problems will have reached a significant point of recovery, at which point they would be considered outside the boundary of the MVA-related injuries. The physiotherapist agreed with this opinion, and added that further passive care could prolong recovery. Since neither testified to explain their thinking, all we can say is that it is not apparent why the pain problems would reach the recovery point at that particular time. Two years may be a generally accepted recovery period, but it is clear that the Appellant was from the very beginning a patient who was likely going to have a difficult recovery. Further, the fact that she had seen a number of practitioners for a long time is not, in our view, a valid test.

[15] The statutory standard is set out in section 110 of *The Automobile Accident Insurance Act* in force at the time of the accident in May 2002 (the old Act):

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 an accident and to facilitate the victim’s recovery from the accident: ..”²

[16] Are we satisfied that SGI funded all the treatments that were necessary or advisable to contribute to the Appellant’s rehabilitation?

[17] Her chiropractor reported to SGI in August 2003 that she should receive weekly treatments, to be reassessed at 3 week intervals. He described her progress at that time as “minimal improvement”. Her physiotherapist referred to limitation of cervical spine and trunk in all directions, due to pain or stiffness. She had left knee pain and this knee and ankle were weak. She was very stressed because of the treatment schedule (including massage and chiropractic)

² The actual measures and programs outlined are not relevant to the issues in this case. Physiotherapy, chiropractic, massage and counseling are all acknowledged forms of treatment that SGI uses.

and her work. Physiotherapy was providing only temporary relief: “difficult to wean off from treatment!!”

[18] This information suggests to us that the rehabilitation efforts at that time were not having much effect.

[19] New problems arose: in December 2003, her family physician wrote SGI referring to stress (which among other things made her existing hypertension difficult to control), myofascial pain and tenderness in several areas (neck, right shoulder, upper back, right mid and lower back, left knee and ankle). She still had limitation of cervical range of motion (right lateral flexion). He felt she had shown an improvement and had been compliant and positive about treatment. He recommended funding for further physiotherapy, massage therapy and chiropractic.

[20] Her knee problem was investigated: the orthopedic surgeon found no significant abnormalities and thought no further investigation was needed. He commented: “Apparently she has been helped in the past by massage and I have no problem with her continuing massage of her neck area or with her continuing to take ibuprofen for the mild arthritic changes that are noted in her knee on the reports forwarded to me from your office.” This was, however, a note to the Appellant’s family physician, and we do not consider it a recommendation that SGI fund either the massage or the medication.

[21] In February, a cardiovascular specialist commented on the leg swelling, saying that her varicose veins likely contributed to the swelling, but not to the pain of which she complained. We think he was implying the pain was attributable to the arthritis in her knee.

[22] In April, she attended a chiropractor in Calgary, who provided a working diagnosis of rotator cuff injury, bilateral chronic low back pain, knee injury with myofascitis and related adhesions. We did not find this document particularly helpful, as it seemed superficial, especially in light of the tertiary assessment, and the reports of local practitioners.

[23] In late May 2004, just before SGI's decision letter was written, she attended a new chiropractor, Dr. Goertzen. SGI advised him of the termination of treatment funding at June 30, and summarizing her previous treatments.

[24] The treating physiotherapist at Arcola Physiotherapy provided a report faxed to SGI on May 29. Significantly, the treatment plan was not to discharge, but to continue treatment to decrease pain and muscle spasm, by soft tissue stretching and joint mobilization, to increase strength, flexibility and joint mobility. A home program and education were included. Objective findings: mild decrease of cervical and lumbar range of motion at end of range; shoulder range of motion was full with pain on forward flexion, low strength in right shoulder, also with pain; left hip positive for arthritis³.

[25] More reports followed: Her knee was injected with steroid and local anesthetic, which gave immediate relief. The orthopedic surgeon referred to arthritic changes, which would eventually require knee resurfacing, though not for several years.

[26] SGI had its chiropractic consultant, Dr. Kitchen, review the chiropractic treatment notes it had obtained from her previous chiropractor, as well as the physiotherapy report described in paragraph [24] and others. His review, which we found useful, discussed her previous chiropractic treatment dating back to 1990, usually for the lower back, knees, neck, right foot pain and headaches. She had had two WCB injuries involving the lower back in 2001, and neck pain complaints later that year, and sacroiliac and thoracolumbar pain from April 2001 to January 2002. He observed that her present (2004) complaints were similar to those experienced before the accident, and that she appeared to be at the level she was at before May 2002.

[27] The Appellant's family physician, chiropractor and massage therapist wrote SGI in August (following her appeal) about her ongoing problems. The massage therapist described extreme soft tissue pain and myofascial involvement, with some (unelaborated) neurological symptoms. He thought she needed ongoing massage therapy. Her family physician said she continued to work and managed her symptoms with regular massage therapy and chiropractic

³ FABER test.

treatment. She had an appointment with an ophthalmologist due to a floater in her left eye, which she had had after the accident and which reappeared in June 2004. The chiropractor, who had seen Dr. Kitchen's report, noted that she told him she had no symptoms before the accident of neck, mid back, chest or arm pain, and commented on the conflict. He said he had given her exercises for biomechanical pain, and was using an active rehabilitative approach, with supportive soft tissue therapy techniques and spinal mobilization.

[28] SGI obtained a medical services report showing the Appellant's chiropractic attendances before the accident:

Year	
1994	10
1995	0
1996	19
1997	7
1998	5
1999	0
2000	10
2001	0
2002 to November (6 months after accident)	0
2002 (Nov-Dec)	10
2003 (to mid-March)	14

[29] The Appellant testified she had been attending her chiropractor and her massage therapist weekly. She filed receipts for payments she had made, which substantiate 26 visits to chiropractors (including the one in Calgary in November) during the 6 1/2 months from termination of benefits July 1, and 25 visits to her massage therapist. Thus, while we agree with Dr. Kitchen that the nature of her complaints is essentially similar to those before the accident, the frequency with which she now attends indicates a difference. That difference is the pain she experiences.

[30] Despite the treatment plans described in August by the chiropractor and the massage therapist, the Appellant did not describe any improvement in her function, although she said she could not work or function without them. She mentioned that her shoulder felt better after treatment. She thought she needed treatment "longer".

Discussion

[31] As always, when a patient heals slowly, or does not heal to his or her pre-accident state, or does not achieve pain-free status, the issues are whether to end treatment, or when to end treatment. The statutory standard for rehabilitation does not refer to pain, only to “disability”, and pain, of course, can be disabling, although one can also function adequately despite pain.

[32] The members of the tertiary assessment team did not think the Appellant’s pain would go away upon completion of their recommended program. Their program was intended to help restore the Appellant to function, including being able to better deal with her pain.

[33] What evidence do we have that the Appellant is disabled, by pain or otherwise? She has been working regularly, and we commend her for this. She says she cannot do heavy housework, shovel snow, wash out the tub, or bend down. The objective findings (range of motion, strength) indicate some limitations, but of a relatively mild nature. There is evidence, which we accept, that her expectations for home and yard maintenance are high, and that she is pain-focussed. At the hearing, it was apparent that she found it difficult to acknowledge that before the motor vehicle accident she described to her then chiropractor the frequent pain and soreness she was experiencing. As for many accident victims, the difficulties experienced after the event have become the only ones. On balance, we think she is functioning adequately, although with pain. In our judgment, she is not “disabled”, by pain or otherwise.

[34] Is the treatment she is receiving rehabilitative? Does it “lessen her disability”? Since we have concluded that she is not “disabled”, is there any evidence that it is improving her function? In August 2004, the massage therapist had been treating her regularly for a year. He refers to “steady improvement since that time”, but thought she would need ongoing therapy to complete her recovery. Despite this, we believe that weekly massage treatments are more “maintenance” or “comfort”, rather than rehabilitative. We do not think they are improving her function, or lessening any disability.

[35] The chiropractic situation is a little different. Dr. Goertzen had just taken over her care, and his treatment plan seemed to focus on active rehabilitation. We are concerned, however, that

the pattern of treatment continued on a weekly basis. We would have expected to see tapering off (after at least six months), in line with the active approach. We would have expected Mrs. D'Iorio to have noticed a difference, and mentioned it at the hearing. We conclude that at some point, what might have been rehabilitative became "maintenance" or "comfort", although we are unable to say when that was, in the absence of any evidence one way or the other.

[36] SGI's termination of treatment benefits as of July 1, 2004 seems somewhat arbitrary, in terms of date. Dr. Alexander's remark "it is very likely that it will take at least until the end of June" implies, in our view, a longer period. The Arcola Physiotherapy report of May 28 contemplated further active treatment.

[37] We are in agreement that at some point in 2004, it would have been completely appropriate to terminate funding for treatment, based on the medical recommendations referred to in paragraphs [32], [35], and [36]. However, if we were to say "We think that date should be _____", we would be making a decision just as arbitrary as SGI, and on less evidence, and with less medical information.

[38] We are unable to say that SGI acted on an erroneous assumption, or that its decision was unreasonable, despite the concerns in paragraph [36] and [37].

[39] The appeal must be dismissed.

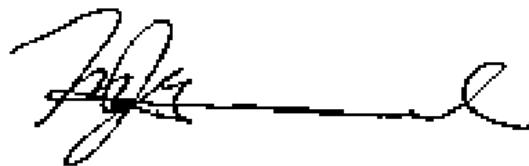
Dated at Regina, Saskatchewan, on February 20, 2006.



Ann Phillips, Q.C., Chair



Beverley Cleveland, Commission Member



Marjory Gammel, Commission Member