

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *K.T. v. Saskatchewan Government
Insurance, 2006 SKAIA 039*
Date: 20060530
File: 151 of 2004

BETWEEN

K.T., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
K.T., for the Applicant
Dale Brown, for the Respondent

Before: **Beverly Cleveland, Chair**
Carol Olson, Commission Member
Jeffrey Scott, 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
June 1 & 27, 2005
September 12, 2005

DECISION

INTRODUCTION

[1] The Appellant, K.T., was injured in a motor vehicle accident in Regina, Saskatchewan on April 21, 2001. By a letter dated June 10, 2004 (the “Decision Letter”) the insurer, Saskatchewan Government Insurance (“SGI”), made several decisions concerning the Appellant’s entitlement to certain benefits. The Appellant appeals from the Decision Letter.

FACTS

[2] On April 21, 2001 the Appellant was a passenger in a car being driven by her husband when it was rear-ended by a half-ton truck. At the time of impact, the Appellant’s vehicle was stopped for a red light.

[3] Because of the injuries that she suffered in the accident, the Appellant attended at the Outpatient/ Emergency Department, Regina General Hospital. The handwritten entries on the Outpatient/Emergency Department form are difficult to read. However, it is noted on the form that x-rays of the Appellant’s back were ordered. The x-ray report states:

“Dorsal Spine
There are flowing marginal osteophytes throughout consistent with the diagnosis of DISH. No other abnormality is seen.”

[4] On May 3, 2001, the Appellant completed an Application for Benefits. In the Application the Appellant described the injuries that she suffered in the accident as follows:

“Pain in my mid back on impact, later burning in mid back, upper back, left shoulder, left arm and hand as well as spasms in left side of neck (side/back). Also pains radiating into left ribs and across mid back to right ribs.”

[5] Due to her injuries, the Appellant attended upon a number of health care providers. She received over a number of years treatments from those health care providers.

[6] SGI, also, arranged for the Appellant to undergo a Secondary Assessment and a Tertiary Assessment by multidisciplinary teams of health care providers (the “Assessments”). Arising

from the Assessments, SGI funded the costs for the Appellant to, amongst other treatments, have physiotherapy treatments. The physiotherapy treatments included the development and implementation of a home exercise program for the injuries that she suffered in the accident.

[7] By a letter dated December 30, 2003 Dawn Angell, Personal Injury Representative, SGI arranged for the Appellant to undergo an independent medical assessment by Western Medical Assessments, Edmonton, Alberta. Dr. Diane Gordon examined the Appellant and prepared a report. The portions of Dr. Gordon's report, which are relevant to this appeal, are as follows:

“[The Appellant] stated she is not performing any of her home activities at this time and stated that she was performing very few activities prior to her recent right leg injury. She was doing well on an exercise program and I would strongly recommend that [the Appellant] continue with an active home exercise program. I believe that while she is performing the program, she will be at maximum medical improvement. According to the physiotherapy notes, she has been extensively trained in an active home exercise program and has received a number of aids including a recumbent bicycle in order to aid her home exercise program. In addition, she has concerns about travelling to physiotherapy however this shouldn't be necessary given that she has been taught how to perform a home exercise program.

...

[The Appellant] is not disabled as a result of the motor vehicle accident pending the results of the MRI scan. Other than the left paracervical and trapezius muscular symptoms, I suspect that [the Appellant's] remaining symptoms were exacerbation of previously existing conditions.”

[8] By a letter dated January 29, 2004 Dr. Gordon prepared, after receiving the results of a MRI of the Appellant's back, an updated report. In the final paragraph of that report, Dr. Gordon stated as follows:

“The MRI scan report indicated degenerative change in multiple areas of the spine. These results do not change my opinion that [the Appellant] is not disabled as a result of the motor vehicle accident on April 21, 2001.”

[9] After receiving the reports from Dr. Gordon, Ms. Angell sent a letter to the Appellant. In her letter, Ms. Angell informed the Appellant that she had sent the reports to a SGI medical consultant for a review.

[10] In a letter addressed to Ms. Angell dated May 6, 2004, Dr. P. Taillon, Medical Consultant, SGI stated as follows:

“In response to your recent memo, I have reviewed the IME report as well as the MRI.

The IME was performed through Western Medical Assessments in January 2004 by Dr. Diane Gordon. She concludes that this low speed motor vehicle accident of April 2001 resulted in soft tissue injuries to the neck and upper back as well as mid back and possibly low back.

Dr. Gordon recognized [the Appellant’s] pre motor vehicle accident illnesses and symptoms and concluded that she is both at maximum medical improvement and not disabled. The main barrier to her recovery has been her own perception of disability.

The MRI done in Edmonton in January 2004 did not reveal any traumatic based lesions of the cervical, thoracic or lumbar spine. Indeed, the entire spine and spinal cord as well as the exiting (sic) nerve roots all would be considered normal aside from the normal age-related degenerative changed (sic) identified.

I would agree that it would be reasonable for [the Appellant] to attend a physical therapist one more time to review the home based program. This would conclude SGI’s involvement.

Dr. Gordon did not specifically mention any further permanent impairment from that which the claimant received in February 2003 for the left shoulder range of motion loss.”

[11] The Decision Letter was then sent to the Appellant.

ISSUES

- (1) What is the scope of the jurisdiction of the Commission in this appeal?
- (2) Was it reasonable for SGI to decide that the Appellant has reached Maximum Medical Improvement?
- (3) Was it reasonable for SGI to conclude that the January, 2004 MRI of the Appellant’s back did not show any “traumatic based lesions of the cervical, thoracic or lumbar spine”? Further, was it reasonable for SGI to conclude that the Appellant’s “... spine, spinal cord and existing nerve roots are considered normal aside from normal degenerative age-related changes”?
- (4) Was it reasonable for SGI to fund one more visit for the Appellant to see a physiotherapist to review her home exercise program following which SGI’s responsibility for the injuries that the Appellant suffered in the accident would end?
- (5) Was it reasonable for SGI to fund (including the cost of travel) one more visit for the Appellant to see Shirley Norlund to review her home exercise program

following which SGI's responsibility for the injuries that the Appellant suffered in the accident would end?

STANDARD OF REVIEW

[12] The Commission can review the legal correctness of SGI's decision. In reviewing a decision of SGI, the Commission has the same jurisdiction under section 193(7) of *The Automobile Accident Insurance Act* (the "Act") that the Court of Queen's Bench previously had under section 198(3) of the Act then in force to:

"set aside or vary the insurer's decision; or make any decisions that the insurer is authorized to make pursuant to this Part."

[13] The discretion to make decisions must be exercised in a judicial manner. The discretion can only be exercised in favour of the claimant if it is demonstrated that the decision of SGI was erroneous or based on erroneous assumptions, or at the very least, the decision was unreasonable.¹ The Commission will exercise its discretion in the same way.²

[14] Before leaving the Standard of Review, we do acknowledge that the Saskatchewan Court of Appeal has not yet decided the appeal from *A.O. v. Saskatchewan Government Insurance*.³ In that matter, the Court of Appeal is being asked by the Appellant to consider whether an appeal before this Commission should be a hearing *de novo*. In the event the Court of Appeal decides that appeals before this Commission are hearings *de novo*, we will consider this appeal based upon the two tests for standards of review:

- (a) Is SGI's decision wrong in law, or based on erroneous assumptions, or unreasonable?
- (b) Based on the evidence that was placed before us during the Hearing would we decide the issues differently than SGI?

¹ *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB7557; *Donan v. Saskatchewan Government Insurance* [1998] TWL QB98224; *Collis v. Saskatchewan Government Insurance* [1998] TWL QB98113.

² *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 001.

³ 2005 SKAIA 023.

DISCUSSION OF THE ISSUES

1. What is the scope of the jurisdiction of the Commission in this appeal?

[15] The document that brings an appeal before the Commission is an Application Form. In the Application Form, the Appellant indicated, under item 5, that she is appealing from the Decision Letter. She then set out under item 6 of the Application those aspects of the Decision Letter that she is appealing. More will be said later about the Decision Letter.

[16] Under item 4 of the Application the Appellant, also, stated that she disagreed with SGI's decision that she had reached Maximum Medical Improvement. Further, she stated that she believes that she is entitled to a number of Part VIII benefits. Many of those benefits were the subject of previous decisions made by SGI (the "Previous Decisions"). The "Previous Decisions" were the subject of letters from SGI dated November 4, 2002,⁴ February 17, 2003⁵ and August 25, 2003.⁶

[17] The Appellant did not appeal from the Previous Decisions. The time periods permitted to appeal from the Previous Decisions have expired. Since the time periods permitted to appeal from those decisions have expired, the Commission does not have jurisdiction to hear an appeal from the Previous Decisions, nor can it extend the time periods for the appeals.⁷

[18] Now going back to the Decision Letter. The Commission has the jurisdiction to review the decisions, as set out in the Decision Letter, made by SGI.⁸ What decisions are identified in the Decision Letter?

[19] The Appellant did not address the issue directly. However, she did assert in her Opening Statement that:

- (a) she is not at Maximum Medical Improvement; and

⁴ Medical Expenses and Treatment, Income Replacement Benefit/Caregiver Benefit, Travel and Other Expenses

⁵ Permanent Impairment Benefit.

⁶ Maximum Medical Improvement, Permanent Impairment Benefit, supportive care and further diagnostic investigations.

⁷ *Mintzler v. Saskatchewan Government Insurance* 2001 SKCA 43.

⁸ *E.I. v. Saskatchewan Government Insurance*, 2005 SKAIA 052.

- (b) she is entitled to a number of benefits including a larger permanent impairment award, income replacement, daily living expenses and treatment costs.

[20] Given her Opening Statement we are assuming, therefore, that the Appellant interpreted the Decision Letter as putting into issue her entitlement to most, if not all, of the Part VIII benefits.

[21] Mr. Brown, counsel on behalf of SGI, on the other hand, asserted in his Opening Statement that the Decision Letter only puts into issue:

- (a) whether the Appellant has reached Maximum Medical Improvement; and
- (b) The Appellant's entitlement to the specific treatment costs identified in the Decision Letter.

[22] In other words, Mr. Brown asserts that the Decision Letter was not intended to address the Appellant's entitlement to all of the Part VIII benefits. However, Mr. Brown did go on to state during his Opening Statement that the Commission, given the particular wording used in the Decision Letter, might interpret the Decision Letter as putting into issue the Appellant's entitlement to all of the Part VIII benefits. In paragraph 6 of his Written Argument, Mr. Brown stated:

“6. The Respondent raised the issue of jurisdiction at the beginning of the hearing on June 1, 2005, and the Commission will need to decide if their jurisdiction is limited, as argued by the Respondent that the June 10, 2004 [letter] really goes to the issue of rehabilitation/treatment issues only, or whether the decision letter allows the Claimant to appeal and question each Part VIII benefit. In effect, the appeal of the Claimant and the evidence led at the hearing does exactly that: it puts into issue each and every Part VIII benefit and the Claimant's entitlement to the same. While the June 10, 2004 decision letter was not intended to effect a decision on each and every Part VIII benefit, it does refer to the IME of Dr. Gordon, causation issues and concludes that SGI's responsibilities have been met. Therefore, as counsel for SGI recognized at the hearing, the wording of the decision letter does leave open the interpretation that all Part VIII benefits are before the panel as issues under appeal.”

[23] As noted in his Opening Statement, Mr. Brown asserted that the Decision Letter puts causation in issue before the Commission. Mr. Brown reiterated that point in paragraph 8 of his Written Brief where he states:

“The essential issue, then, is whether the motor vehicle accident remains the cause of the Claimant’s injuries.”

[24] We have reviewed the wording used in the Decision Letter. We are all of the view that the Decision Letter only puts into issue the following:

- (1) Has the Appellant reached Maximum Medical Improvement?
- (2) Does the MRI of January, 2004 demonstrate only age-related degenerative changes of her spine?
- (3) Was it reasonable for SGI to fund only one physiotherapist visit to review the Appellant’s home exercise program?
- (4) Was it reasonable for SGI to fund (including travel costs) only one more visit with Shirley Norlund to review her home exercise program?

[25] We do not interpret the Decision Letter as putting into issue whether the Appellant is entitled to all of the benefits contained within Part VIII. If that was the intention of SGI, we would expect to see wording to that effect in the Decision Letter. That is, particularly, the case when one considers the Previous Decisions.

[26] Also, and contrary to the position of Mr. Brown, we do not interpret the Decision Letter as putting in issue causation. If SGI had intended to put causation in issue, we would expect to see specific wording to that effect in the Decision Letter. Further, if Ms. Angell had intended to put causation in issue it is not consistent for her to then agree to fund, as she does in the Decision Letter, two additional treatments (for a review of the home exercise program) for the injuries that the Appellant suffered in the accident.

2. *Was it reasonable for SGI to decide that the Appellant has reached Maximum Medical Improvement?*

[27] This case primarily centers on whether the Appellant is entitled to additional rehabilitation benefits for the injuries that she suffered in the accident. Section 110 of the Act, then in force, provided as follows:

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:

- a) physical and acquired brain injury program and treatment;
- b) occupational and vocational training and programs;
- c) alterations to a victim’s residence;
- d) modification or purchase of a vehicle for a victim;
- e) purchase of special equipment for a victim;
- f) any additional 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 an accident”.

[28] As previously stated SGI arranged for Dr. D. Gordon to conduct an independent medical assessment of the Appellant. Dr. Gordon concluded that, as long as the Appellant is doing her home exercise program, the Appellant has reached maximum medical improvement. SGI relies upon the finding of Dr. Gordon, whose finding was subsequently supported by Dr. Taillon, that the Appellant has reached maximum medical improvement.

[29] Dr. Gordon did not define in her report the term maximum medical improvement. She did not testify during the Hearing. The *Act* and *Regulations*, in place at the time of the accident, do not use the term maximum medical improvement. Consequently, we must determine what Dr. Gordon meant when she offered the opinion that the Appellant will have reached maximum medical improvement as long as she is doing her home exercise program.

[30] In the context of her entire report, we understand Dr. Gordon to be of the opinion that other than the Appellant’s home exercise program there is no rehabilitation or treatment modality that the Appellant requires in order to reach her full medical potential arising from the injuries that she suffered in the accident.

[31] The Appellant does not accept Dr. Gordon’s opinion that as long as she is doing her home exercise program she is at maximum medical improvement. The Appellant asserts that she has not reached maximum medical improvement.

[32] The Appellant advanced the argument that some of the medical information that Dr. Gordon considered in arriving at her conclusions is not accurate. For example, the Appellant testified that before the accident she did not have symptoms of “generalized pain”. Dr. R. McDougall, in a letter dated February 27, 2002 addressed to the Appellant’s family physician, stated that the Appellant had symptoms of “generalized pain” for “roughly five years”. Dr. McDougall went on to note in his report that the Appellant was “diffusely tender throughout the musculature numbering 18/18 regions for fibromyalgia”. He then concluded in his report that the “... findings are consistent with fibromyalgia”.

[33] Upon a review of Dr. Gordon’s report we note that she did review Dr. McDougall’s report. However, we also note in her report that the Appellant informed Dr. Gordon that before the accident she did not have symptoms of fibromyalgia. Consequently, we do not know what significance, if any, Dr. Gordon placed on Dr. McDougall’s comment that the Appellant had symptoms of “generalized pain” for approximately five years.

[34] The Appellant filed a number of medical reports. The Appellant claims that those medical reports support her assertion that she requires additional treatment and rehabilitation and that she has not reached maximum medical improvement.

[35] Upon a review of those medical reports we are not able to conclude that the Appellant’s treating physicians are recommending additional and/or continued treatment other than her home care exercises. Take, for example, Dr. Robert E. Capp. In his August 29, 2003 correspondence addressed to Dr. G. Pieterse, Dr. Capp states that as of the date of his assessment of the Appellant she was being seen “from time to time by the therapist in Tisdale for short courses of physiotherapy or massage. She has a regular stretching program which she says she does on a regular basis”. He then goes on to recommend in his report that the Appellant undergo a MRI examination of the thoracic and lumbar spine. Further, Dr. Capp stated: “I have no other specific suggestions at present other than to carry on with the present treatment program”.

[36] Dr. Capp does not state in his report why he believed the Appellant should “...carry on with the present treatment program”. Nor does Dr. Capp state in his report for what future period of time he would recommend the Appellant to “...carry on with the present treatment

program”. Nor does Dr. Capp specifically state what “treatment program” he is referring to in his report. Dr. Capp did not testify at the Hearing.

[37] The Appellant did undergo a MRI of her spine, including the thoracic and lumbar spine. The report arising from the January 22, 2004 MRI examination was filed for the Hearing. Consequently, that aspect of Dr. Capp’s treatment recommendations has occurred.

[38] We are assuming that the “regular stretching program” referred to in Dr. Capp’s report is the home exercise program.

[39] In addition to the medical reports that she filed, the Appellant testified that she is not the person that she was before the accident. She claims that the injuries that she suffered in the accident are causing her significant discomfort. The Appellant believes that her condition, arising from the injuries suffered in the accident, is worsening. For all of those reasons, the Appellant claims that she has not yet reached maximum medical improvement.

[40] The Appellant impressed two of the Commission members as a credible witness. For example, she openly and frankly acknowledged she had intermittent pain before the accident. We all, however, found her to be pain-focused as did some of the health care practitioners.

[41] We have no evidence that additional and further treatment will improve the Appellant’s function, lessen her disability or facilitate her recovery. We all accept Dr. Gordon’s opinion that as long as the Appellant continues with her home exercise program she will reach medical maximum improvement. Consequently, we are of the view that it was reasonable for SGI to rely on Dr. Gordon’s assessment when SGI informed the Appellant that she had reached maximum medical improvement. Further, based on the evidence that was presented to us during the Hearing we decide this issue as did SGI.

3. Was it reasonable for SGI to conclude that the January 2004 MRI of the Appellant's back did not show any "traumatic based lesions of the cervical, thoracic or lumbar spine"? Further, and with respect to this issue, was it reasonable for SGI to conclude that the Appellant's "... spine, spinal cord and existing nerve roots are considered normal aside from normal degenerative age-related changes"?

[42] SGI is relying upon the opinion of Dr. Taillon to substantiate that the January, 2004 MRI of the Appellant's back did not show any "traumatic based lesions of the cervical, thoracic or lumbar spine" and that her "spine, spinal cord and existing nerve roots are considered normal aside from normal degenerative age-related changes".

[43] The Appellant does not accept those interpretations of the January, 2004 MRI. However, the Appellant did not call a physician to offer testimony nor did the Appellant file a medical report to contradict those medical interpretations of the January, 2004 MRI.

[44] In her January 29, 2004 report, Dr. Gordon's summarizes that the MRI scans show "...degenerative change in multiple areas of the spine. These results do not change my opinion that the Appellant is not disabled as a result of the motor vehicle accident on April 21, 2001".

[45] The opinions of Dr. Gordon and Dr. Taillon are uncontroverted. Consequently, we are all of the view that SGI's conclusion concerning this issue is reasonable. Further, based on the evidence that was filed for the Hearing and relying primarily on the opinion of Dr. Gordon we conclude that the MRI indicates "degenerative change in multiple areas of the spine".

[46] Before leaving this issue, during the Hearing the Appellant made repeated references to a "radial tear" in the lumbar area as the reason for much of her back discomfort. The MRI report concerning the Lumbar Spine states:

"There is generalized disc prominence consistent with a physiologic bulge recognized at the L4-5 level. Signal alteration within the posterior midline of the disc at this level suggests the presence of a radial tear. Minimal hypertrophic change is recognized within the posterior elements at this level but the spinal canal remains patent. The right L4-5 foramina appears minimally narrowed by eccentric disc prominence at this level. The exiting and descending neural structures appear unremarkable however.

Impression:

Minimal degenerative change involves the lumbosacral spine as described above. The disease is maximal at the L4-5 level where a midline radial tear exists and generalized disc prominence with a slight right of midline bias is noted..."

[47] In her January 24, 2004 report, Dr. Gordon refers to a “radial tear” and goes on to state: “A ‘radial tear’ was noted extending slightly to the right of the mid-line”.

[48] Ms. Angell asked Dr. Taillon to comment on the “radial tear”. In a letter addressed to Ms. Angell dated July 28, 2004 Dr. Taillon stated, in part, as follows:

“I agree with Dr. Gordon that the MRI Scan indicates degenerative changes in multiple areas of the spine. The radial tear would likely be a degenerative tear. It is impossible to determine whether the MVA would have resulted in any of these changes noted on the MRI”.

[49] We are not able to conclude, on the balance of probability, that there is a causal link between the injuries that the Appellant suffered in the accident and the “radial tear”. As an aside, we did not hear any medical evidence on the significance of a “radial tear”. That is to say, what is the consequence of a “radial tear”?

4. Was it reasonable for SGI to fund one more visit for the Appellant to see a physiotherapist to review her home exercise program following which SGI’s responsibility for the injuries that the Appellant suffered in the accident would end?

5. Was it reasonable for SGI to fund (including the cost of travel) one more visit for the Appellant to see Shirley Norlund to review her home exercise program following which SGI’s responsibility for the injuries that the Appellant suffered in the accident would end?

[50] We will consider these two issues together. SGI relies upon the reports of Dr. Gordon and Dr. Taillon to support these two funding decisions.

[51] The Appellant did not call a physician to testify nor did she file a medical report to dispute the recommendations of Dr. Gordon and Dr. Taillon. Since the opinions of Dr. Gordon and Dr. Taillon are uncontroverted, we conclude it is reasonable for SGI to pay two further treatments for the Appellant’s home exercise program. Further, based on the material that was filed for the Hearing and the testimony that we heard during the Hearing we conclude that SGI shall pay two further treatments for the Appellant’s home exercise program.

CONCLUSION

[52] We are all of the view that the Decision Letter is reasonable. In the alternative, based upon the evidence that was filed for the Hearing and the testimony that we heard we would come to the same decisions as did SGI. Consequently, the Decision Letter is upheld.

Dated at Regina, Saskatchewan, on May 30, 2006.

Beverly Cleveland, Chair

Carol Olson, Commission Member

Jeffrey Scott, Commission Member