

**Automobile Injury Appeal Commission**

**Province of Saskatchewan**

**Citation:** *I.R. v. Saskatchewan Government  
Insurance, 2007 SKAIA 005*  
**Date:** 20070108  
**File:** 70 of 2004

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**BETWEEN**

**I.R., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**I.R. for the Applicant**  
**Dale Brown for the Respondent**

**Before:** **Beverly Cleveland, Chair**  
**Marjory Gammel, Commission Member**  
**Conrad Hnatiuk, Commission Member**

**THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL AND HEALTH  
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND  
OTHER IDENTIFYING INFORMATION**

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Heard at Saskatoon, Saskatchewan  
May 12, 2005

## DECISION

[1] The Appellant, I.R., appeals three decisions of Saskatchewan Government Insurance (SGI): February 27, 2004 denying reimbursement for hair loss medication, payment of golf membership, naturopathic treatment, herbal remedies/vitamins and related travel; April 28, 2004 regarding reduced living assistance benefits and April 30, 2004 denying funding for a metatarsal bar.

### FACTS

[2] The following chronology is partly taken from a medical summary prepared by Dr. Taillon, Medical Consultant for SGI.

[3] On July 17, 2002 the Appellant was injured when the vehicle she was the driving was struck from the rear. She reported pain and stiffness in her neck, shoulder, arms and right hand numbness. An x-ray report dated July 18, 2002 indicated osteoarthritis at C3 to C6 with mild narrowing of C4-5 and C5-6. Minor changes of spondylosis and degenerative disc disease were also noted.

[4] The Appellant was referred to Daniels Kimber physiotherapy and diagnosed with a neck whiplash associated disorder 2 (WAD) but no neural deficit and rotator cuff strain.

[5] On September 9, 2002, the physical therapist reported improvement in symptoms, range of motion and function but that she was still limited in activities due to fatigue, lightheadedness, headache pain and tightness in the shoulder.

[6] On September 20, 2002, the Appellant's family doctor, Dr. McGettigan reported her dizziness was less but neck, back and should pain was just as bad as initially reported and that headache pain was debilitating.

[7] On November 1, 2002, the Appellant attended for a secondary assessment at Bourassa & Associates with accident/injury related problems: WAD 2 with associated cervicogenic headache, mechanical low back pain 2 and mechanical thoracic pain, left shoulder myofascial

pain, mild disability, and borderline psychosocial response to testing. The secondary team recommended 8 weeks treatment with subsequent 10 biomechanical sessions as needed.

[8] On December 18, 2002, the physical therapist reported good compliance and progress with independence in activities of daily living and house cleaning. She anticipated that the Appellant would be able to undertake a graduated return to work starting in January 2003.

[9] The Appellant was referred to Dr. Wine, Neurologist, for continued headaches and left facial numbness. On January 8, 2003 he reported neck pain, headache, head and facial numbness and shoulder pain considered to be referred from neck and diagnosed cervical myofascial pain syndrome. He advised that exercise should be undertaken within reasonable comfort level, as activating sensitive nociceptors with intense exercise is not recommended. He prescribed oxycodone for pain relief.

[10] Subsequently, Dr. Wine noted that the Appellant could resume a functional treatment program monitored by a physical therapist but should avoid progressive conditioning and restoration beyond reasonable comfort levels. He also noted that these kinds of exercises to date have had side effects beyond the normal post-exercise soreness.

[11] On February 21, 2003, the physical therapist discharged the Appellant from secondary treatment before the program was completed based on Dr. Wine's report. She noted that overall, the Appellant made gains in function but did not meet her job demands prior to when the program was halted. It was recommended that the Appellant undergo a tertiary level assessment.

[12] Dr. Wine reported on April 30, 2003 that the Appellant's symptoms are worse with exercise, specifically she reports increased pain, nausea and exhaustion. He again advised that exercise and activities can be performed to reasonable comfort levels but intense exercise was to be avoided.

[13] On May 6 and 7, 2003, the Appellant attended at FIT for a tertiary assessment with accident/injury related injuries: WAD 1, low back pain 2, mechanical back pain, left shoulder dysfunction, mild left wrist tendonitis, anxiety and secondary diagnosis of depression, fatigue

and deconditioning. Dizziness and altered vision of uncertain origin and cause are noted. The team recommended tertiary care pending Dr. Wine's review.

[14] On May 27, 2003, Dr. Wine reports a number of symptoms the Appellant has that correlate with cervical myofascial pain syndrome. He noted she expresses interest in myofascial release and advocates its use. He noted the FIT recommendations are likely to aggravate her symptoms and advocates a home-based (exercise) program and analgesic relief (Oxycodone) instead.

[15] On May 29, 2003, Dr. Taillon reported the difference of opinion as to the treatment that would best serve the Appellant. He noted that SGI must respect the medical caregivers involved (Drs. Wine and McGettigan) but that his opinion favored the active rehabilitation recommended by the tertiary assessment team. He recommended Dr. McGettigan serve as a guide and requested his input and as well, requested Louise Ashcroft, SGI's physical therapy consultant, review the file regarding the request for myofascial release.

[16] The Appellant attended Brousseau physical therapy for myofascial release therapy. In June and July 2003, Dr. McGettigan and Dr. Wine both report that the Appellant finds this approach is significantly more beneficial to her than exercise rehabilitation. Dr. McGettigan stated the Appellant seemed to be making progress with this therapy and for now advised continuing with the myofascial release.

[17] On July 15, 2003 an injury note reports a conversation with Jeff Brousseau. He stated that the Appellant reported overall she was improving, strengthening may be required which would be done at an outside facility. He felt it would be reasonable to leave things as they are for the next 3 months and then re-evaluate.

[18] On July 16, 2003, Ms. Ashcraft advised the use of myofascial therapy technique is passive in nature that while it can be part of biomechanical treatment, it was not a substitute for a functionally directed rehabilitation program. She did not support the treatment plan of a single service myofascial release therapy and home exercise program for the Appellant.

[19] On July 18, 2003 SGI advised there was more evidence to support active-based treatment for chronic disability but agreed to fund one further month of myofascial release therapy. If no significant functional gains are made toward her independence, the Appellant would be referred for a tertiary assessment at FIT.

[20] A Return to Function/Work Program by Wendy Grey, disability management consultant, was prepared and monitored by Patti Njegovan, occupational therapist commencing September 22, 2003 to ensure her safety. On January 22, 2004, Ms. Njegovan reported the Appellant was motivated to return to her work activities but was still having some problem with tolerance for physical activity and pain and soreness.

[21] The Appellant attended a tertiary assessment at FIT on January 28 and 29, 2004. The team recommended 6 week program of conditioning/strengthening including weekly physical therapy, acupuncture treatments and psychological counseling, followed by a 6 week graduated return to full activities of daily living and work. On September 16, 2004 the Appellant was discharged from active programming at FIT due to ongoing medical investigations. Readmission would be considered on receipt of further medical direction.

#### LAW AND ANALYSIS

[22] Section 193(7) of *The Automobile Accident Insurance Act* (the Act) provides the Commission may set aside, confirm or vary a decision of SGI or make any decision that SGI is authorized to make pursuant to Part VIII. The basis upon which we would do this may differ depending on the nature of the issue before us.

[23] When the claimant places the facts in issue and challenges a decision of SGI in respect of a benefit that it is obligated to pay, the standard for our review will be correctness. That is, after considering the record and any new evidence, the Commission will decide the matter on the basis of what it thinks is the correct decision in the circumstances.

[24] If the claimant places the facts in issue and challenges a decision of SGI in respect of a benefit that SGI has discretion to pay or not, the Commission will consider whether the decision

was reasonable. In this regard, we will consider whether the decision was wrong in law, based on erroneous assumptions or whether it was unreasonable.

#### Hair Loss Medication

[25] The Appellant seeks reimbursement for 5% minoxidil (Rogaine) for alopecia. She had previously been treated for female pattern baldness but had not used any medication since 1998 (4 years before the accident) and had no further hair loss. Following the accident her hair started falling out again and the Appellant saw dermatologists, Drs. Roos and Jen.

[26] The Appellant testified her hair loss was caused by the stress of the accident and that she experience on-going stress caused by the loss of her independence and chronic pain.

[27] Dr. Roos stated the accident definitely contributed to her hair loss but felt that after more than one year, the stress from the accident was no longer the main cause of her hair loss. On the other hand, Dr. Jen opined that it was the stress due to the accident that was continuing to adversely affect her hair loss. Dr. Taillon reviewed both doctors' reports and was seemingly inclined to agree with Dr. Roos and felt that SGI should be responsible for 75% of the cost of minoxidil for one year. Dr. Taillon doesn't say why he used a percentage and we assume it was because of her pre-existing condition.

[28] The standard of review for the reimbursement of an eligible expense is correctness. We prefer and accept Dr. Roos' opinion to that of Dr. Jen's, and find the accident contributed to her hair loss but the main cause was androgenic alopecia and unrelated to the accident. We do not agree however with the 75% apportionment given that the Appellant had not experienced significant hair loss since 1998 until the accident in 2002.

[29] It appears that SGI funded 100% of the cost of the minoxidil up to April 23, 2003. There are two prescription receipts (which were paid) with "Repeats" shown as 8 and 7 respectively in our documents. We don't know how long each prescription lasted but she is entitled to be fully reimbursed for the cost of minoxidil to July 2003.

#### Naturopathic treatment, herbal remedies/vitamins and related travel

[30] The Appellant submitted a number of receipts to SGI for professional services of Dr. Bailey, naturopathic physician and purchase of products. Two personal injury representatives testified and confirmed that SGI's policy was to not provide funding for herbal remedies or vitamins.<sup>1</sup> Ms. Roming testified that currently naturopathy is not considered an intervention that has proven to be effective.

[31] Treatment however falls under s. 110 of the Act - "rehabilitation". Mr. Brown, counsel for SGI, argues that Dr. Bailey is not a "practitioner" for purposes of s. 110 and thus has no application.

[32] Section 110(1) specifically provides that the term "rehabilitation" includes a number of specified measures, none of which include naturopathic treatments. Although 110(1)(f) provides that "rehabilitation" includes "any additional measure, program or treatment prescribed in the regulations", the Regulations do not specify any type of naturopathic care as a "measure", "program" or "treatment".

[33] Section 49 of *he Personal Injury Benefit Regulations*, R.S.S. c. A-35, Reg 3 provides:

49 The insurer shall reimburse a victim for an expense incurred by a victim to receive medical or paramedical care where:

- a) the care is medically required and is dispensed by a practitioner, whether inside or outside Saskatchewan; and
- b) the cost of the care would not be reimbursed pursuant to any other Act.

[34] Mr. Brown submits that Kent Bailey is not a "practitioner" as contemplated in s. 165 of the Act which defines "practitioner" to mean: (a) a physician or surgeon; (b) a dentist; (c) a physical therapist; (d) an optometrist; (e) a psychologist; (f) a chiropractor; (g) a massage therapist; (h) any prescribed practitioner (there are none prescribed). Brian Salte, Associate Registrar of the College of Physician and Surgeons confirmed Dr. Bailey is not a registered medical doctor or podiatric surgeon.

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<sup>1</sup> See also Policy Guidelines for Administration of Expense Claims

[35] Mr. Brown also filed a copy of *The Naturopathy Act* and argued while Dr. Bailey may be a doctor of naturopathy and considered a naturopathic practitioner, he is not a physician as per s. 165 of *The Automobile Accident Injury Act*.<sup>2</sup>

[36] We agree with Mr. Brown's submissions in this regard and find that SGI has no responsibility for reimbursement of this expense based on the above analysis. We do however want to confirm that nothing in our above analysis is intended to impugn or in any way dismiss naturopathic or alternative medicine, treatment or remedies. They simply do not fall within the legislative scheme.

#### Metatarsal bar

[37] The decision by SGI denying funding of the orthotic was based on a determination the arthritis/neuroma of the right great toe was not caused by the accident. the Appellant must prove the neuroma was caused by the accident on a balance of probabilities.

[38] She testified that her right foot was on the brake at the time of impact and problems didn't show up until she was exercising on a treadmill. In November 2003 she told Wendy Grey that she would get what she described as "electrical shocks." At first it was irritating but worsened over time. She reported it to Dr. McGettigan in December 2003 and was referred to Dr. Classen in January 2004. An x-ray of the right foot on November 27, 2003 revealed mild degenerative change in the first MTP joint.

[39] As indicated above, Dr. Classen recommended the orthotic to relieve the pressure on the digital nerve. Neither doctor offered an opinion on causation. At best, all that can be said is The Appellant was not symptomatic before the accident and she was afterwards. In our view this is not enough to discharge the burden of proof on her. We therefore find the decision by SGI to deny funding for the metatarsal bar was correct.

#### Travel claims to Dr. Classen and McGettigan

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<sup>2</sup> See also *Susan Peterson v. Saskatchewan Government Insurance* and *Belchamber, v. Saskatchewan Government Insurance*

[40] Based on our findings that the arthritis/neuroma of the right great toe was not caused or contributed to by the accident, SGI has no responsibility to pay related travel expenses.

#### Golf Membership

[41] Mr. Brown submitted there was nothing specific in the legislation that permitted payment for this sort of item but filed the brief policy note for discretionary expenses. It stated "...is used for expenses incurred prior to the accident, that, as a consequence of the accident, the insured is unable to use. This would include expenses that are non-refundable such as plane tickets, tickets for concerts, etc."

[42] The Appellant was an avid golfer and a member of the Warman Golf Club. As a result of her injuries she was unable to golf the remainder of the 2002 season and SGI reimbursed the Appellant under its discretionary expense policy for one-half of the membership fees.

[43] The Appellant stated that she has not "swung a club" since the accident because of her injuries and seeks reimbursement for 2003 and 2004 golf membership fees (\$320 annually). She testified that if she cancelled her membership she would lose her spot. "Jack" from the Warman Golf club confirmed the Appellant's evidence and went on to say that the club is now so busy they are only selling memberships to Warman residents (which the Appellant was not). Jack stated that if a member was injured and couldn't golf, the club would give them a 25% off the cost of their membership but only for one year.

[44] SGI may make payments under s. 210 "(W)here the insurer considers that the payment of a person's claim is in the interest of the insurer and the better administration of this Part, the insurer may authorize an *ex gratia* payment to be made to that person."

[45] The Court of Appeal has stated that this Commission has no jurisdiction to order SGI to make any *ex gratia* payment.<sup>3</sup>

[46] Accordingly, as the payment of the Appellant's golf membership was in the nature of a discretionary or *ex gratia* payment and, as we have no authority or jurisdiction, the decision by SGI to deny payment stands.

### Living Assistance Benefits

[47] Section 158 provides that benefits for personal assistance expenses may be paid by SGI if a person is unable to care for herself or perform the essential activities of everyday life without help. We think the standard of review for living assistance benefits is correctness.

[48] SGI determined the Appellant's entitlement to benefits for personal and homecare assistance according to the grids in the Regulations to the so-called "new" Act (August 2002). Although entitlement to benefits crystallize on the date of application (and in the Appellant's case under the "old" Act) we understand it is the policy of SGI, for purposes of calculating living assistance benefits, to provide the claimant with the better result of the grids under either Act.

[49] A series of evaluations were conducted and the Appellant was paid living assistance benefits accordingly. On May 16, 2003 Ms. Njegovan completed an in-home assessment and subsequently on May 21, 2003, Ms. Fraser, the personal injury representative, completed an evaluation grid based on her report that resulted in a weekly benefit of \$52.25. The Appellant was reported as being independent in all activities of daily living but for heavy housekeeping, yard work/gardening/shoveling for which she was completely dependent and purchasing supplies in which she required minimal assistance.

[50] On April 14, 2004 Ms. Njegovan completed a final in-home assessment and subsequently on April 28, 2004, Ms. Fraser completed an evaluation grid based on her report and that resulted in a weekly benefit of \$15.00. The Appellant was reported as being independent in all activities of daily living but for heavy housekeeping for which she was partially dependent and required moderate assistance and yard work/gardening/shoveling for which she was assessed as minimally dependent and requiring assistance with pruning trees.

[51] Ms. Fraser testified that this last report only looked at the summer and if the Appellant experienced seasonal difficulties, eg. snow shoveling, it would be addressed in the fall and winter.

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<sup>3</sup> *Saskatchewan Government Insurance v. Andrews* 2005 SKCA 135

[52] The basis of the Appellant's argument was that \$15 per week was insufficient and that she simply couldn't get done what she needed to on that amount of money. She stated that Ms. Njegovan's assessment of her ability to complete tasks was subjective and didn't take into account how long it took her to complete a task because of her limited endurance.

[53] We accept that it took the Appellant longer to complete tasks than before the accident and that she experienced pain and soreness but we find the grids were based on Ms. Njegovan's professional assessment, which we accept, and accurately calculated. The decision by SGI to pay a weekly benefit of \$15 for living assistance is upheld.

### **CONCLUSION**

[54] The Appellant's appeals are dismissed with regard to all issues except for the reimbursement for 100% of prescription receipts for minoxidil to July 2003. If it has not already been done, SGI is ordered to pay any outstanding receipts for minoxidil accordingly.

[55] With the exception noted above, the decisions of SGI dated February 27, 2004, April 28, 2004 and April 30, 2004 are upheld.

**Dated** at Regina, Saskatchewan, on January 8, 2007.

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Beverly Cleveland, Chair

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Marjory Gammel, Commission Member

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Conrad Hnatiuk, Commission Member