

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *A.A. v. Saskatchewan Government
Insurance, 2007 SKAIA 009*

Date: 20070112

File: 41 of 2005

BETWEEN

A.A., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Reginald A. Watson, Q.C.

and Lindsay Ferguson, for the Applicant

Stephen McLellan, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Conrad Hnatiuk, 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
October 6, 2006

DECISION

INTRODUCTION

[1] The Appellant, A.A., was injured in a motor vehicle accident on August 28, 1996 (the “Accident”). Due to the injuries that she suffered in the Accident, the Appellant qualified for a number of benefits under *The Automobile Accident Insurance Act* (the “Act”). The benefits included the funding of physiotherapy treatments.

[2] The Appellant, appeals from a decision, made by Saskatchewan Government Insurance (“SGI”) dated December 22, 2004 (the “Decision Letter”) in which SGI decided, effective December 22, 2004, to terminate the funding of physiotherapy treatments to the Appellant. SGI did, however, agree in the Decision Letter to fund beyond December 22, 2004 an additional 12 physiotherapy treatments.

POSITION OF THE PARTIES AND IDENTIFICATION OF THE ISSUE

[3] Mr. Watson, Q.C. lawyer for the Appellant, argued that the Appellant is entitled to continued funding of physiotherapy treatments since the treatments are medically required and/or necessary or advisable to contribute to her rehabilitation from the injuries that the Appellant suffered in the Accident. In support of his argument, Mr. Watson relied upon the testimony of the Appellant, the testimony and reports of Dr. P. Fonstad¹, the Appellant’s treating physiotherapist, and a report prepared by Dr. B. Scurfield, the Appellant’s family physician.

[4] Mr. McLellan, lawyer for SGI, argued that physiotherapy treatments are not medically required for the Appellant. Consequently, Mr. McLellan argued that SGI was justified in terminating the payment of physiotherapy treatments. In support of his position, Mr. McLellan primarily relied upon the reports of SGI’s consultants: Dr. J. Alport, Medical Director, SGI and Louise Ashcroft, SGI Physiotherapy Consultant.

[5] Consequently, the issue for this appeal is whether SGI was justified in terminating the funding for physiotherapy treatments.

NATURE OF THE HEARING AND THE ONUS OF PROOF

[6] In reviewing a decision of SGI, the Commission has jurisdiction under section 193(7) of the *Act* to:

“set aside or vary the insurer’s decision; or make any decision that the insurer is authorized to make pursuant to this Part.”

[7] In *George Allary v. Saskatchewan Government Insurance*,² the Saskatchewan Court of Appeal considered the nature of a hearing before the Commission and the standard of review of an appeal before the Commission. In *Allary*, as in this appeal, the appellant put the facts in issue before the Commission. The Court in *Allary* held, in part, as follows:

“Where the facts are placed in issue, as they are here, the appeal commission has an obligation to receive and consider any new evidence submitted by the appellant and, depending on the nature of the hearing which is conducted, to consider as well the evidence received by SGI in making the finding of fact in dispute on the appeal. The appeal commission must determine whether the decision of SGI was erroneous having regard to all of the evidence” (See paragraph [20]).

[8] The Commission received and considered all of the new evidence submitted by the Appellant and SGI. As held by the Court of Appeal in *Allary*, we will determine whether “...the decision of SGI was erroneous having regard to all of the evidence”.

[9] The Saskatchewan Court of Appeal has held that where SGI decides to terminate benefits to an accident victim SGI has the onus to prove, on a balance of probabilities, that the benefits are no longer payable under the *Act*.³ Given all of the evidence, we will consider whether SGI has proven, on a balance of probabilities, that it was justified in terminating the funding for physiotherapy treatments.

FACTS, REVIEW OF SELECT DOCUMENTS AND TESTIMONY OF THE APPELLANT AND DR. FONSTAD

[10] As previously noted in this decision, the issue is whether the Appellant is entitled to funding from SGI for physiotherapy treatments for the injuries that she suffered in the Accident.

¹ Patricia Fonstad obtained the degree of doctor of science in February 2006 (transcript, page 13). In this decision, we will refer to her as “Dr. Fonstad” when referring to her testimony, and “Ms. Fonstad” when referring to her earlier reports. The curriculum vitae does not include the D.Sc. degree.

² 2006 SKCA 89.

³ *Gerald Job v. Saskatchewan Government Insurance*, 2004 SKCA 164.

Since the issue in this appeal is narrow, we will only briefly identify and discuss the facts and medical materials that are most relevant for this appeal.

[11] On August 30, 1996 the Appellant attended upon the Emergency Department of the Plains Health Centre, Regina, Saskatchewan. Under the heading “History and Physical” on the Out-Patient Health Record it is stated: “Car accident this past Wed. Scaphoid #-c-collar in place”. At the bottom of the Out-Patient Health Record there is stated: “Cervical sprain. Soft collar, Physio, Analgesics”.

[12] On September 8, 1996 the Appellant attended upon Patricia Fonstad, Physiotherapist, Calgary, Alberta for the injuries that she suffered in the August 28, 1996 accident and continues to do so. In her Practitioner’s Report, Ms. Fonstad reported: “MVA-side impact. Note had a near miss accident in the city [?]-has been exacerbated since”. Ms. Fonstad stated there are “old” pre-existing conditions. She also reported that there was pain and limitation of the spine. She diagnosed a Grade II “++” Whiplash-associated disorder (Neck symptoms, Musculoskeletal Signs-decreased ROM and pain tenderness). [Within her report], Ms. Fonstad goes into greater detail concerning her findings.

[13] The Appellant testified that the injuries that she suffered in the Accident are significantly affecting her quality of life. She testified that the injuries have caused her to be depressed and hospitalized for depression; have caused her to contemplate suicide; and have caused her to experience chronic pain. Due to the chronic pain, the Appellant received a referral to the Chronic Pain Centre in Calgary, Alberta. She testified that at the Chronic Pain Centre she undergoes treatment and management for the pain.

[14] The Appellant testified that, due to the injuries, she experiences “constant flare-ups” resulting in pain, discomfort, and reduced level of function. She testified that she cannot control, by way of medication and exercise, the flare-ups on her own. The Appellant testified that the physiotherapy treatment that she receives when she experiences the “flare-ups”, provides her with relief.

[15] During his Examination-in-Chief of the Appellant, Mr. Watson asked the Appellant to elaborate on the benefit that she believes she receives from physiotherapy treatment. The following exchange occurred:

Mr. Watson - "Tell me about what you can do – I want to know about what difference physiotherapy makes in your functioning, so let's go through a recent day in the life when you need it and you haven't had it and then compare that to a couple of days after you've had it. Tell us about the differences".

[The Appellant] - "If I don't have physiotherapy on a – you know, day to day I do make do, I make do, but when it's a flare-up situation I am basically either bedridden or in the bathroom vomiting".

Mr. Watson - "So tell me about a day in the life when you're having a day like that".

[The Appellant] - "What is a day like? It's horrible. I'm in severe pain, I have a really bad headache. It goes on the left side of my head, along the back of my skull, around the left side of my face, into my eye, my left ear is – has an underwater sensation, and I can't hear properly out of it, my jaw is very tight, a lot more clicking and popping, I have quite bad pain going down my left arm and buzzing down my right. All of this I think aggravates my upper back as well. The vomiting is sort of like a (inaudible) vomiting, and just the position I have to be in to throw up and, as you can imagine, it's sort of kind of the violence of vomiting seems to, you know, aggravate the neck even more, so it's very miserable. I – you know, I'm not pleasant to be around during that time and it's gross".

Mr. Watson - "So what does physiotherapy do for you when you're in a situation like that that you've noticed?"

[The Appellant] - "Before – if I know that the situation is coming up not because of my neck clunking or, you know, a fall or a slip or a jarring myself, when it's just a reg - when a flare-up just, you know, starts it just to come, I would, you know, generally I would get Pat to work on that area of my neck area so that she can sort of stop it before it gets to the situation where I'm incapacitated with the vomiting and the severe pain. When it's a situation where there's a clinking or a slip and a fall or a jarring situation, it's already under way, so I can only once it subsides – not really subsides, but once it's less severe after four days, physiotherapy helped me recover faster than the, you know, the long, you know, nine days, 14 days it took to get me back to what my normal status was".

[16] The Appellant was not cross-examined by Mr. McLellan on the injuries that she suffered in the Accident. Nor was she cross-examined concerning the effects of the injuries and the positive effect that she experiences when she receives physiotherapy treatment. Consequently, for the purpose of this appeal we accept the Appellant's testimony that the effects of the injuries are severe, and do continue. Further, we accept the Appellant's testimony that she experiences a significant benefit from the physiotherapy treatments that she receives from Dr. Fonstad.

[17] Dr. Fonstad testified by telephone that the Appellant requires physiotherapy to treat the “flare-ups” from the injuries. In her opinion, funding by SGI for two physiotherapy treatments per month will provide adequate physiotherapy treatment to the Appellant for the ongoing effects of the injuries that she suffered in the accident.

[18] The Appellant also testified that she is looking to SGI to fund physiotherapy treatments on a periodic and on an as needed basis.

ANALYSIS OF THE LAW AND THE ISSUE

[19] Mr. McLellan argues that section 163(1)(a) of the *Act* and section 49 of *The Personal Injury Benefits Regulations* (the “*Regulations*”) are the relevant statutory sections when determining whether the Appellant qualifies for continued funding for physiotherapy treatments. Further, he specifically argues that section 110 of the *Act*, as it then was, is not relevant to the issue of whether the Appellant is entitled to funding for physiotherapy treatments.

[20] Mr. McLellan’s position is novel and interesting. The Commission and the Courts of Saskatchewan have heard many claims where the issue is funding by SGI for physiotherapy, massage therapy, etc. for an accident victim. With respect to those claims, however, it is probably correct to assume that there was no issue that section 110 was the operative section.

[21] Section 163 of the *Act* is found within Division 7 of the *Act* under the heading “Benefits for Expenses. Section 163 (1)(a) states as follows:

“Benefits-other expenses

163(1) Subject to the regulations, a victim is entitled to a benefit to reimburse the victim for paying for any of the following items:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care”.

[22] Section 49 of the *Regulations* is found under the heading “Benefits for Expenses”. Section 49 states as follows:

“Reimbursement of medical expenses

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.”

[23] Section 110 of the *Act*, on the other hand, is found under Division 3 under the heading “Rehabilitation” and states as follows:

“Rehabilitation

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 programs and treatment;

(b) occupational and vocational training and programs;

(c) alteration 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.

(3) The total maximum amount of 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.”

[24] Mr. McLellan asserted that section 110(1) should not be interpreted to include physiotherapy treatments. He stated that physiotherapy treatments are different from the rehabilitation measures enumerated and identified within section 110(1) [for example, section 110(1)(c) - alteration to a victim’s residence, section 110(1)(d) - modification or purchase of a vehicle for a victim]. Consequently, Mr. McLellan argued that the legislators did not contemplate physiotherapy treatments to fall within section 110(1).

[25] Mr. McLellan also argued, given the reference in section 163 to “medical and paramedical care,” that section 163 is the operative section when determining whether an

accident victim is entitled to funding for physiotherapy treatments. We understand Mr. McLellan to mean that physiotherapy treatment is a form of “medical and paramedical care”.

[26] Finally, and given the opening reference in section 163 to “subject to the regulations”, Mr. McLellan argued that pursuant to section 49 of the *Regulations* it must be shown that physiotherapy treatments are “medically required”. He went on to assert that only a medical doctor can determine whether physiotherapy treatments are “medically required”.

[27] Mr. Watson did not take a firm position on whether physiotherapy treatments fall within section 110 or 163 of the *Act*. He asserted that the Appellant is entitled to funding for physiotherapy treatments under each section.

[28] We do not agree with Mr. McLellan that section 163 of the *Act* is the operative section. We are of the view that section 110(1) of the *Act* is the operative section.

[29] In coming to our conclusion, we have reviewed the *Act* as a whole.⁴ In reviewing the *Act* as a whole, we are mindful of the following:

“Not only must the whole Act be read, but every provision of the Act should, if possible, be given meaning; hence, if there are rival constructions the general principle is that the construction that gives effect to the whole of the statute, or to the provision under construction, should be adopted in preference to one that renders part thereof meaningless.”: *The Construction of Statutes, supra*, page 72.

[30] When interpreting the *Act*, we are assisted by the various headings located within the *Act*. At page 112 in *The Construction of Statutes, supra*, there is quoted from Channel B. in *Eastern Counties Railway v. Marriage* (1861), 9 H.L. Cas. 32, at p. 41 the following:

“These various headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me, a better key to the construction of the sections which follow than might be afforded by a mere preamble.”

[31] Given our understanding that physiotherapy is a form of treatment and rehabilitation and given the above noted principles of statutory interpretation, we conclude that when determining

whether an accident victim is entitled to funding from SGI for physiotherapy treatments the Rehabilitation part of the *Act* (Division 4) and specifically section 110 must be considered.

[32] Further, we interpret section 110(1)(a) of the *Act* as meaning “physical injury programs and treatment AND acquired brain injury programs and treatment”. Since physiotherapy is a form of treatment for a physical injury we hold that physiotherapy treatment comes within section 110(1)(a).

[33] In response to Mr. McLellan’s position that section 163 is the operative section for physiotherapy funding by SGI, we note that section 163 is found generally under “Division 7 Benefits for Expenses”. Section 163 is specifically under the sub-heading “Benefits-other expenses”. Given those two headings, we are of the view that section 163 is the operative section of the *Act* where an accident victim presents, for example, SGI with an invoice for an expense for a physiotherapy treatment and requests reimbursement for the expense from SGI. Such a situation may occur where a victim, without prior consultation with SGI, undergoes physiotherapy treatment and then seeks reimbursement for the physiotherapy expense from SGI. Such a situation is different from the situation in this appeal. That is different from what the Appellant is claiming in this appeal. The Appellant is claiming that she is entitled to funding by SGI for ongoing physiotherapy treatments and that SGI was wrong in terminating the funding for such treatments.

[34] In summary, we do not agree with Mr. McLellan that section 163 is the relevant section of the *Act* when determining whether the Appellant is entitled to funding by SGI for physiotherapy treatments. We are of the view that section 110 is the relevant section of the *Act* to determine whether the Appellant is entitled to funding to physiotherapy treatments.

STANDARD OF REVIEW

[35] Given our decision that section 110(1)(a) provides for funding by SGI for physiotherapy treatment, what is the standard of review for this appeal? Section 110(1) reads as follows:

“In this section, “**rehabilitation**” includes any or all of the following measures, programs and treatments that the insurer considers necessary or advisable to

⁴ *The Construction of Statutes*, E.A. Driedger, Butterworth & Co. (Canada) Ltd., 1974 at page 69.

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...".

[36] When determining the standard of review for this appeal, we have considered and intend to follow the decision in *I.S. v. Saskatchewan Government Insurance*.⁵ In the *I.S.* case, the Commission considered a benefit pursuant to section 112 of the Act (formerly section 110). The Commission held in *Spier* that where the benefit is "necessary" the standard of review is "correctness". However, where the treatment is "advisable" then the standard of review is whether the decision was "unreasonable".

[37] Adapting the comments of the Commission in the *I.S.* case to this appeal, the question for us to consider is whether, given all of the evidence, physiotherapy treatment is "necessary" or "advisable" for the Appellant. If the evidence supports the finding that physiotherapy treatment is "necessary" then we must determine whether the decision made by SGI was correct. On the other hand, if the evidence supports the finding that physiotherapy treatment is "advisable" then we must determine whether the decision made by SGI was reasonable.

[38] The Appellant testified that physiotherapy treatment helps her when she experiences a "flare-up".

[39] Dr. Fonstad testified that physiotherapy treatment prevents the Appellant from becoming worse. Her testimony was consistent with a March 2, 2005 report that she prepared and sent to Mr. Watson. She stated, in part, as follows:

"Given that [the Appellant] always responds well to physiotherapy intervention, I feel that it is important for [the Appellant] to continue to have the opportunity to attend physiotherapy. Whereas physiotherapy is not expected to result in resolution of her symptoms, it is certainly expected to maintain her symptoms at the current level and reduce any deterioration that she suffers when she discontinues physiotherapy treatments. Given that [the Appellant] is unlikely to recover fully from this injury, it is likely that she will require physiotherapy treatments for an extended period of time quite possibly for the rest of her life."

[40] Dr. Fonstad testified that in her opinion it will be sufficient if SGI provided to the Appellant funding for two hours of physiotherapy treatments per month. Those two funded treatments will be used on an as needed basis.

⁵ 2006 SKAIA 097.

[41] Mr. McLellan did not cross-examine Dr. Fonstad or the Appellant with respect to their testimony.

[42] Mr. Watson also filed a letter from Dr. Barbara Scurfield dated September 22, 2006. In her report, Dr. Scurfield stated that she has been the Appellant's "primary caregiver since Jan. 2001". Dr. Scurfield went on to say:

"She [the Appellant] has had ongoing neck and lumbar back pain since being involved in a MVA in August of 1996. It is my medical opinion that physiotherapy is medically required and that such treatment may be required for the foreseeable future."

[43] Dr. Scurfield did not state in her report why she is of the opinion that "physiotherapy is medically required" for the Appellant. Dr. Scurfield did not testify at the Hearing. In light of the lack of detail within her report, we do not give a great deal of weight to Dr. Scurfield's report.

[44] We have considered the opinions of Dr. Alport and Louise Ashcroft, physiotherapist. Dr. Alport is the Medical Director for SGI. Louise Ashcroft is a physiotherapist consultant for SGI.

[45] The medical basis for the Decision Letter was the information contained within a report dated October 4, 2004 prepared by Dr. Alport. Dr. Alport reviewed the information contained within SGI's file and came to a number of conclusions. For the purpose of this appeal, the most relevant of his conclusions is as follows:

"I see no medical evidence that continuing with Physiotherapy is maintaining a level of function that could not be achieved if Physiotherapy were discontinued. There is a strong suggestion that a dependency on this form of treatment has been established, and therefore I suggest that the claimant be advised that she will receive 12 more treatments, that can be taken on a diminishing frequency in order to make the withdrawal gradual, rather than sudden in nature. This is my opinion. I will be referring this chart to our Physiotherapy Consultant for her opinion within the next few days."

[46] Louise Ashcroft then prepared her report dated October 13, 2004. In her report, Ms. Ashcroft stated:

"I concur with Dr. Alport's opinion concerning physiotherapy management. I think it is fair to conclude that at this time, the customer has achieved maximal medical improvement, that is, further physiotherapy treatment will not likely improve her outcome. She has had eight years of physiotherapy at the primary care level. She has had aggressive medical and rehabilitative intervention with good intent but poor result. I recognize the customer has a significant and

complex pain syndrome, however, I am not sure of the benefits of ongoing handling of sensitive tissue at this point in time, and there is a strong suggestion of significant dependency toward passive care. No objective argument has been presented for supportive care.

Should the customer be offered and elect to proceed with further surgery, there may be a need for a short course of post-operative care. Beyond this, however, I am reluctant to support further physiotherapy treatment.”

[47] After SGI received Dr. Fonstad’s letter dated March 2, 2005 (referred to in paragraph [39] Dr. Alport prepared a further report. In his report dated May 12, 2005 Dr. Alport addressed, amongst a number of items, the issue of additional physiotherapy for the Appellant. Dr. Alport stated in his report, *inter alia*, as follows:

“As far as Ms. Fonstad’s suggestion that physiotherapy is likely required for the rest of her life at a frequency of four treatments per month, my opinion is the treatment she proposed is absolutely contraindicated and ill advised. I can’t be much more definitive. This, of course, is only my opinion based on the review of the entire file. I could perhaps point out, that the neuropsychological report I referred to in my previous report strongly endorsed avoidance of iatrogenic illness, and I would suggest that passive treatment on a life-long basis could/would contribute to that.

...

I would like to include in this report that I reviewed the clinical notes provided by Ms. Fonstad. While I didn’t read each and every page, I reviewed most, and I (sic) it appears quite clear that there is no evidence that functional abilities have ever been tested. I make this point because I think it is important. You will note that in her letter advocating for life-long physiotherapy treatments, she suggests that when physiotherapy is withdrawn, she deteriorates clinically. As I (sic) general rule I support treatment in passive forms on a short-term basis to relieve pain. In order to support long-term and permanent passive treatment, it would only be supported if it could be proven that it maintains a level of function that could not be achieved if the therapy was withdrawn. As there are little, if any, assessments of her functional ability in the notes written by Ms. Fonstad, and because her clinical course has, if anything, deteriorated over time, there is no justification for further passive treatments, in my opinion, and certainly not for permanent passive treatments.”

[48] In response to Dr. Alport’s assertion that there is “little, if any, assessments of [the Appellant’s] functional ability in the notes written by Ms. Fonstad” a Commission panel member asked Dr. Fonstad what information she was relying upon to justify her assertion that the physiotherapy treatment that she is providing is maintaining a level of function for the Appellant. Dr. Fonstad candidly replied, in part, that she is relying upon the subjective comments expressed by the Appellant that the physiotherapy treatments are maintaining her level of function. However, she went on to testify that:

“I will tell you that if I were in the room with you there is a way of demonstrating how-you know, I can take a look at a joint and tell you if that particular joint is moving better now than before, and that is-you know, and other physiotherapists with the same skills could do the same thing, but it isn’t a measurement, it’s a feel of how it moves, and, as I said, it can’t have an actual number put it to it, but yes, I rely on [the Appellant], but not totally, so part of it is what I feel in terms and what I observe—and what I observe in terms of her posture, her ability to move in my office. Two weeks ago there was no question when she walked in she could not do the stairs appropriately to get into my office, she could not put her shorts on to get on my table. Those are things I can observe. I looked at the mobility of her sacroiliac joints in her low back. She couldn’t side bend, she couldn’t move her sacroiliac joints. After we finished treating her she was better. A week later she was better yet, so her walking had improved, her sitting, her putting her clothes on, her changing her clothes. Those are all observable things from my part that don’t necessarily have a number of measurements that I can put to them, but those are observable things.”

[49] Dr. Alport and Ms. Ashcroft were not at the Hearing. Consequently, they did not have the benefit of hearing the testimony of the Appellant and Dr. Fonstad that periodic physiotherapy treatments prevents the Appellant’s condition from worsening. Specifically, Dr. Alport did not have the benefit of hearing the testimony of Dr. Fonstad that she observes improvement in the Appellant’s level of function after the Appellant has received physiotherapy treatment from Dr. Fonstad. We found her testimony thoughtful and convincing.

[50] The Commission often receives submissions from appellants and their treatment providers recommending further “hands-on” intervention: chiropractors, physiotherapists, massage therapists. Almost as frequently, we receive submissions from SGI opposing this continuation of treatment on the grounds that the appellant has been restored to pre-accident condition, or that the treatment is “passive” rather than “active”, which tends to encourage the appellant not to take active steps in his or her rehabilitation. Very frequently, the Commission accepts SGI’s submission.

[51] The remonstrations from Dr. Alport that further treatment is “absolute contraindicated” in this case is unusual -- if not unique -- in our experience, and his strong hint that he believes the Appellant’s present condition to be iatrogenic, i.e. caused by the treatment, is again a warning that we do not lightly disregard.

[52] The reason that we do not in this case accept SGI's consultants' views is similarly unique to this case. Seldom do we have a treatment provider of "hands on" treatment so highly qualified. Seldom does the treatment provider have such long term experience with a particular patient. We are satisfied that Dr. Fonstad is highly conscious of the "active" versus "passive" modalities of physical therapy, and if she practices passive modalities for this patient (who she says is also carrying out active measures regularly) then we think she knows what she is talking about. If she had not previously been aware of the concern of others that she might be fostering a continuation of [the Appellant's] condition, we expect she will now factor that into her treatment of [the Appellant's] flare-ups.

[53] Given the testimony of the Appellant and Dr. Fonstad that physiotherapy prevents the Appellant's condition from becoming worse and our acceptance of their testimony, it is our conclusion that physiotherapy treatment is "necessary" (in the sense contemplated by section 110 of the *Act*) for the Appellant's rehabilitation and or to lessen the Appellant's disability caused by the accident. Consequently, we find that the decision by SGI to terminate the funding for physiotherapy treatments was not correct.

[54] In the alternative, should we be wrong and section 163 of the *Act* and section 49 of the *Regulations* are the operative sections when determining whether a victim is entitled to funding for physiotherapy treatments we find, given the testimony of Dr. Fonstad, that physiotherapy is "medically required" for the Appellant. In coming to that finding, we do not agree with Mr. McLellan that only an opinion from a medical doctor can determine whether physiotherapy is "medically required".

[55] Section 49 (a) of the *Regulations* refers to care that is "medically required and is dispensed by a practitioner...". Section 165 of the *Act* defines "practitioner" to include a physical therapist. Consequently, for the purpose of section 49(a) of the *Regulations* and whether physiotherapy treatment is "medically required", we conclude that the opinion only of a physical therapist can be sufficient when determining whether such treatment is "medically required". That is not to say that an opinion of a medical doctor might also be helpful in determining whether the care is "medically required". However, we are of the view that an opinion of a medical doctor is not a prerequisite when determining whether physiotherapy is

“medically required” and that the opinion only of a physiotherapist can be sufficient to find that physiotherapy is “medically required”. In coming to that conclusion we also take notice of the fact that in many of the appeals that come before us, physiotherapists are frequently retained by SGI (by way of, for example, secondary assessments and tertiary assessments) to treat and assess injured appellants. SGI then relies upon the reports prepared by physiotherapists when determining whether to fund and/or continue to fund physiotherapy treatments to accident victims.

CONCLUSION

[56] SGI has failed to prove that it was justified in terminating the funding of physiotherapy treatments to the Appellant. We find that periodic physiotherapy treatment does prevent the Appellant’s condition from becoming worse. Consequently, the Decision Letter is set aside.

[57] SGI will fund two physiotherapy treatments per month for a total of 24 physiotherapy treatments per year for the Appellant, to maintain function during flare-ups. Should the Appellant not actually require two physiotherapy treatments in any given month she may apply the funding to months when she requires more than two physiotherapy treatments. She may not carry forward from year to year.

[58] Given the success that the Appellant has had in this appeal, she will be reimbursed for her application fee. Further, she will be entitled to her costs pursuant to section 193 (11) of the *Act* and sections 86(4) and 96 of the *Regulations*, subject to the legislative cap of \$2,500.00, at double Column 3 of the Queen’s Bench Tariff of Costs. Finally, and pursuant to section 169 of the *Act* and section 76 of the *Regulations*, the Appellant shall be reimbursed for her expenses in obtaining the May 4, 2005 report from Dr. Fonstad.

Dated at Regina, Saskatchewan, on January 12, 2007.

Ann Phillips, Q.C., Chair

Conrad Hnatiuk, Commission Member

Jeffrey Scott, Commission Member