

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *O.N. v. Saskatchewan Government
Insurance, 2007 SKAIA 032*
Date: 20070307
File: 133 of 2004

BETWEEN

O.N., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
O.N., Applicant
Dale Brown, for the Respondent

Before: **Jane Lancaster, Q.C., Chair**
Stephanie Pfefferle, Commission Member
Carolyn Jones, Commission Member

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

Heard at Saskatoon, Saskatchewan
February 21, 2007

DECISION

[1] The Appellant, O.N., appeals 3 decision letters from Saskatchewan Government Insurance which terminated her benefits pursuant to *The Automobile Accident Insurance Act*.

[2] The Appellant was injured in a motor vehicle accident on June 21, 2003 and applied for benefits on July 16, 2003. Her injuries consisted of neck, upper back and bilateral shoulder pain, decreased memory, left shoulder pain, right arm pain, loss of strength and occasional numbness, and headaches. She was unable to fully perform her work as a joint owner of a farming operation and welding business, nor could she perform a number of her daily living tasks.

[3] As a result of her injuries, she was entitled to receive living assistance benefits, income replacement benefits, and rehabilitation pursuant to Part VIII of *The Automobile Accident Insurance Act*.

[4] At the outset of this appeal, the Appellant clarified the issues that were under appeal. They were as follows:

- a) September 8, 2004 – appeal of a **June 18, 2004 decision letter** of SGI which suspended her income replacement benefits and living assistance benefits from June 18, 2004 to July 14, 2004.
- b) February 21, 2005 – appeal of a **December 3, 2005 decision letter** of SGI which suspended her income replacement benefits from December 3, 2004 to February 10, 2005.
- c) June 7, 2005 – appeal of **March 17, 2005 decision letter** terminated living assistance benefits effective March 7, 2005 based on the FIT discharge report.

[5] The Appellant advised that she was not appealing the calculation of her income replacement benefits.

[6] The Appellant testified on her own behalf. The panel found her to be a forthright and credible witness. She explained clearly her role in the family business, including the fact that both she and her husband were injured in the same motor vehicle accident and the impact of the accident on both of them as they tried to return to their previous health and their employment and normal living activities.

June 18, 2004 Decision Letter suspending Income Replacement and Living Assistance Benefits

[7] The Appellant had cancelled an appointment with Ms. Patti Njegovan on June 17, 2004. As a result, the Appellant's personal injury representative, Sharon Bregg, suspended the Appellant's living assistance and income replacement benefits. Ms. Bregg indicated as authority for this suspension of benefits subsections 183 (d) and (e) of *The Automobile Accident Insurance Act*.

183 The insurer may refuse to pay a benefit to a beneficiary or may reduce the amount of a benefit or suspend or terminate the benefit if the beneficiary:

(d) without valid reason, neglects or refuses to undergo an examination by a practitioner, or interferes with an examination by a practitioner, requested or required by the insurer;

(e) without valid reason, refuses, does not follow or is not available for treatment recommended by a practitioner and the insurer;

[8] The Appellant indicated that Ms. Njegovan had performed her in-home assessment on April 6, 2004 as well as an ergonomic assessment on the same date. The in-home assessment summarized that "As the Appellant is to attend tertiary level treatment upon clearance by her orthopedic surgeon, no further follow-up is recommended for her at this time. Should the Appellant not attend tertiary treatment and further occupational therapy interventions are required, this occupational therapist would be pleased to assist".

[9] In addition, in the ergonomic evaluation of the Appellant's work-site, Ms. Njegovan reported:

SUMMARY:

All recommendations from the Ergonomic Evaluation have been implemented. [The Appellant] was open to improving the set-up of her work environment. With the interventions provided, she demonstrated improved working postures and verbalized improved comfort and tolerance at her workstation. She verbalized and demonstrated a good understanding of the equipment and education provided.

PLAN:

No further occupational therapy interventions are planned with [the Appellant] at this time.

[10] The Appellant testified that she was asked to set up an appointment in late June with Ms. Njegovan. Ms. Njegovan had provided her with a number of dates with specific times and had advised the Appellant that she would be taking vacation June 25, 2004 to July 4, 2004. The Appellant made an appointment for June 17, 2004.

[11] On June 16, 2004, the Appellant telephoned Ms. Njegovan and advised her that she would have to reschedule the June 17, 2004 appointment as she was needed by her sons to assist in the farming operation and she would re-schedule when Ms. Njegovan returned from her holiday.

[12] At the hearing, the Appellant advised that she had not realized that the appointment with Ms. Njegovan was seen as crucial by Ms. Bregg as the April reports had not indicated any issues until the tertiary treatment had taken place. In addition, she had just seen a specialist on June 16, 2004 and her husband was currently participating in a Monday to Friday rehabilitation program with FIT, as he also had been injured in the accident. The Appellant testified that her sons were assisting her and her husband with the farming. As her husband was not available due to his commitment at FIT, she was responsible for running errands for her sons. At the time in question, she advised that her sons were spraying the crops and that they had a small window of opportunity when the weather was good to perform this essential farming task.

[13] The Appellant indicated that she had thought that she had a good relationship with SGI. She had no history of missed appointments and had no recollection of being verbally warned of the consequences if she missed her appointment. She had thought that she would be able connect with Ms. Njegovan upon her return from vacation and set a new date.

[14] Therefore, it was a complete surprise to her to receive Ms. Bregg's letter terminating her benefits. She advised that she immediately phoned Mr. Dutton who was a colleague of Ms. Njegovan's and set an appointment to see Ms. Njegovan on July 9, 2004. She also contacted Ms. Bregg to try and explain her situation and that she had a new appointment for July 9, 2004. Not only did Ms. Bregg not reinstate her benefits, but Ms. Bregg did not reinstate the benefits until she had received Ms. Njegovan's report dated July 15, 2004. The Appellant's income replacement and living assistance benefits were reinstated by SGI on that date.

[15] Counsel for SGI did not provide any documents indicating that the Appellant had received any warnings either verbal or written prior to her cancelled appointment with Ms. Njegovan. Nor did SGI provide any evidence that there was urgency in the Appellant's attendance with Ms. Njegovan and that urgency had been in any way communicated to the Appellant.

[16] In previous decisions of this Commission dealing with section 183 of the *Act* which empowers SGI to suspend or terminate benefits for perceived non-compliance with treatment, the Commission has ruled that SGI should use a graduated approach of verbal warnings, written warnings, before suspending or terminating a customer's benefits. The customer should have a clear understanding of SGI's expectations and the consequences of not following through.¹

[17] In this case, the Appellant had no history of previous missing or canceling appointments; and she had never been given a verbal or written warning before the suspension. She testified that she was surprised to receive the suspension letter as she had

no idea that she would be suspended for rescheduling an appointment. Not only was she suspended, but the personal injury representative continued the suspension to the date in which Ms. Njegovan provided her report, even though for some period of that time, Ms Njegovan was on vacation. There is nothing to indicate that Ms. Bregg contacted the Appellant to ask her why she was canceling the appointment before she took it upon herself to suspend the Appellant's living assistance and income replacement benefits.

[18] The decision letter of June 18, 2004 is set aside.

December 3, 2004 Decision Letter suspending Income Replacement Benefits

[19] The Appellant enrolled for tertiary rehabilitation at the FIT Centre for Active Living, located at City Hospital in Saskatoon. This rehabilitation program commenced on August 31, 2004 and was scheduled to take place Monday to Friday for 12 weeks.

[20] The mid conference progress report from FIT remarked positively as to her attendance at FIT, attending 20.5 days out of 21 days.

[21] On November 30, 2004, while attending at FIT, the Appellant's blood pressure went abnormally high and she went to emergency at City Hospital where she was treated as a possible heart attack victim.

[22] The cardiac doctor who saw her in emergency on November 30, 2004 felt that she was a candidate for coronary artery disease (the Appellant had a pre-existing hypertensive condition treated with medication) and advised that she should have a treadmill stress test before returning to the FIT program.

[23] This event was reported by FIT to the Appellant's new personal injury representative, Gary Hamblin. Mr. Hamblin then wrote to the Appellant on December 3, 2004 terminating the Appellant's income replacement benefits on the grounds that "you are

¹ *O.L. v. Saskatchewan Government Insurance*, 2007 SKAIA 026 , *M.S. v. Saskatchewan Government Insurance* 2005 SKAIA 001

unable to participate in rehabilitation due to complications from a non motor vehicle accident related condition. We understand that you have been unable to participate in the program FIT for Active Living Centre since November 30, 2004. This being the case we will be suspending the payment of income replacement benefits until such time as you are again able to participate in the rehabilitation program. These benefits will not be reinstated retroactively once you are able to participate”.

[24] The Appellant’s family doctor wrote to Mr. Hamblin advising him that the cardiac doctor at City Hospital had booked the Appellant for a stress test and had recommended that she be off her regular FIT program until further re-assessed by him. The family doctor emphasized that the Appellant’s blood pressure had been stable until this incident on November 30, 2004. She also mentioned that the Appellant’s level of pain has been poorly controlled due to poor co-ordination with her level of activity and level of tolerance, as well as, capability of doing physical work.

[25] The doctor’s concern over the increased level of the Appellant’s pain during the FIT had been brought to FIT’s attention on October 19, 2004. The doctor indicated that, in her view and the view of the Appellant’s orthopedic surgeon, Dr. Ernst, the Appellant’s pain and difficulty sleeping is a direct relationship with her increased level of activity. They felt that the program for the Appellant should be tailored to assist her in promoting range of motion, as well as keeping her pain under control.

[26] The Appellant testified that on November 30, 2004 while attending FIT, she had experienced shortness of breath, heaviness in the chest and abnormally high blood pressure. As a result, she was referred to the Emergency of City Hospital where she was advised not to continue with FIT until she had received a stress test, which she did on January 18, 2005 at City Hospital. Fortunately, the incident on November 30, 2004 was not cardiac. This was communicated to SGI and she was cleared to resume her treatment at FIT. She was rescheduled to return to FIT on February 10, 2005 and her income replacement was reinstated at that date.

[27] The Appellant testified that she was concerned that her mid term report from FIT on November 24, 2004 had indicated that her participation in the program was rated as fair as “she has been somewhat resistant regarding problem solving around returning to former activities.” She advised us that the rehabilitation program had increased her pain dramatically, requiring her to increase her pain medication which then had side effects such as nausea which then required her to use Gravol which then made her drowsy. In addition, the Appellant had been taking Vioxx for over a year and she advised us that she had stopped taking the medication in October 2004 when it was linked to heart related problems. She advised that concern about her medications and the increase in pain had all added to her stress.

[28] Counsel for SGI conceded that SGI had inappropriately suspended the Appellant’s income replacement during the time that the Appellant was ordered by her doctor not to continue at FIT to the date in which she was scheduled to return to work. Counsel advised that it appeared that the Personal Injury Representative may have been under the mistaken belief that the Appellant was receiving income replacement benefits pursuant to section 143 of the *Act* and SGI’s policy to provide income replacement at minimum wage to customers who were unemployed at the time of the accident and were participating in a rehabilitation treatment program at the request of SGI.

[29] It is unfortunate that the personal injury representative did not talk to the Appellant as he would have quickly realized that the Appellant was not receiving income replacement pursuant to section 143 of the *Act*.

[30] The December 3, 2004 decision letter is set aside.

March 17, 2005 Decision Letter terminating Living Assistance Benefits

[31] SGI terminated the Appellant’s Living Assistance benefits based on the FIT Discharge Report sent to SGI March 15, 2005. SGI advised the Appellant that, based on the FIT Discharge Report, the Appellant no longer required living assistance benefits effective March 7, 2005.

[32] The FIT Discharge Report advised the following:

Home and Community Management: The client's current functional abilities with home management including bathroom cleaning, floors, windows, dusting, laundry, cooking, yard work, child care, driving and grocery shopping were reviewed during the client's treatment program. Patti Njegovan(Occupational Therapist) carried out a Home Assessment on November 3, 2003. The following equipment was recommended: long handled mop, long handled duster, long handled sponge brush for tub and hand held shower. Patti Njegovan (Occupational Therapist) also carried out an Occupational therapy Assessment on February 21, 2005, to assess the viability of adaptations that were recommended during the tertiary treatment. The tertiary treatment team concur with the recommendations in this report. **Please refer to this report for full details. Based on this assessment completed on February 21, 2005, and abilities demonstrated during the treatments and evaluations, it is concluded that [the Appellant] is independent with her home management activities. It is also recommended that she utilize the equipment and adaptations that were provided.** (Emphasis added)

[33] The Discharge Report also identified the Appellant's progress during the tertiary treatment program. Although there was some improvement in the areas injured in the motor vehicle accident, the Appellant identified on discharge her left shoulder pain was worse than at admission. She advised there was some positive progress in her right arm, decreased sleep, right hip pain, right leg heaviness, mid to low back pain, neck, upper back and bilateral shoulder pain, and lightheadedness.

[34] Counsel for SGI called Patti Njegovan, occupational therapist, to provide more information to us about her February 21, 2005 assessment. We appreciated that counsel provided this witness knowing that Ms. Njegovan's evidence would be positive for the Appellant's appeal.

[35] Ms. Njegovan testified that she has a Bachelor of Science in Occupational Therapy from Queen's University and that she is a member in good standing of the provincial association of occupational therapists and the federal association of occupational therapists.

[36] She advised that her profession as an occupational therapist is to evaluate a person's ability to do activities and to make recommendations as to how to enhance independence or to suggest modifications or different approaches to activities to assist a person to achieve this independence. Independence, in the view of her profession, is when a person can perform their tasks safely.

[37] She advised that she was self employed and was contracted by SGI to provide her services to the Appellant after her motor vehicle accident.

[38] She advised that she met with the Appellant and did a home assessment,² provided a report to SGI and the Appellant with recommendations and then did follow ups to see if recommendations and implementation were of assistance to the client.

[39] Ms. Njegovan provided information to SGI in order to assist them in assessing living assistance benefits. Although she did not directly input the living assistance grids located in the *Personal Injury Benefits Regulations*, the information that she provided was used by SGI in making their decisions pursuant to these grids.

[40] In addition to doing a home assessment for the Appellant, Ms. Njegovan also did a work site evaluation as the Appellant also assisted her husband in the welding business in which both were partners.

[41] On July 9, 2004, she was referred by SGI to review the Appellant's living assistance. She met with the Appellant and identified the following issues:

Heavy Housekeeping – required 50% assistance

Yard Maintenance - this includes all aspects including lawn care, pruning hedges and in the winter, shoveling snow. She advised that she could only make an assessment of the seasonal tasks at the appropriate season ie., shoveling snow in the winter.

Purchasing supplies - required 25% assistance as [the Appellant's] lifting and carrying ability was compromised. This particularly effected [the Appellant's] ability to manage water softener salt.

[42] Ms. Njegovan advised that she does not complete the living assistance grid as the personal injury representative at SGI completes this using her assessments.

[43] Ms. Njegovan advised that she was contracted by SGI for the purpose of completing an In-Home Assessment. She stated that the goal of the In-Home Assessment was to address issues identified by the Appellant during her FIT for Active Living Program that were barriers to her independence with household and yard work tasks.

[44] As a result of this she reviewed the report of Ms. Parker, occupational therapist for FIT as well as the Appellant's medical information, and then did a 2 hour evaluation of the Appellant's home and her ability to participate in the activities identified in Ms. Parker's report.

[45] The following activities were identified by Ms. Njegovan and the Appellant:

- (a) **Pushing and starting a mower** – as the assessment took place in February, Ms. Njegovan could not assess this activity. Ms. Njegovan advised the following, “She (the Appellant) was encouraged to attempt this activity in the spring before determining that she was unable to mow her lawn. Should she have difficulty with this activity, she was instructed to contact her Personal Injury Representative with Saskatchewan Government Insurance. Ms. Parker had put forth the recommendation of adapting the mower by “fixing” an electric start to it if she was unable to start her mower. This is an appropriate recommendation should it be required.
- (b) **Cutting Tree Branches** – [the Appellant] was responsible for cutting fallen branches of the trees surrounding the farmyard. She has a lightweight hand saw weighing approximately 2 lbs. that she used to cut the fallen branches. [The Appellant] demonstrated the ability to handle the hand saw independently and safely. Again, she reported that she had not participated in this activity since last spring. Should she have difficulty with cutting tree branches, she was instructed to contact her Personal Injury Representative with Saskatchewan Government Insurance. Ms. Parker had put forth the recommendation of a small chainsaw (hedge trimmer) to adapt

² Ms. Njegovan reported Home Assessments and Worksite Assessments for the Appellant on November 3, 2003; on April 4, 2004; on July 14, 2004; and March 1, 2005

this activity should she be unable to use the handsaw to cut tree branches. This is an appropriate recommendation should it be required.

(c) **Hauling bags of dirt** – [the Appellant] reported that she purchased 85 litre bags of dirt for attending to the planters around her home. Her ability for lifting and carrying will be assessed during her treatment program at FIT for Active Living Program. She was instructed to purchase bags of soil appropriate to her abilities for lifting and carrying. She has a lightweight wheeled cart to move her dirt around her yard environment. The wheeled cart worked well and was an appropriate accommodation for helping her to move her soil throughout her yard.

(d) **Hauling 20 kg bags of water softener into her basement** – [the Appellant's] abilities with regards to lifting and carrying will be assessed during her treatment program at FIT for Active Living Program. As such, her ability to carry the bags of water softener into her home will be known at this time. Once the bags of softener are in her home, an appropriate accommodation would be for [the Appellant] to break down the 20 kg bags into manageable loads for her to carry down the 13 stairs to the basement of her home and load into the water softener.

Should she be unable to safely carry the 20 kg bags of water into her home, as there are steps at the entrance of her home, an accommodation such as an installation of a ramp at the front entrance of her home, would eliminate her need to climb stairs and would allow for the use of a wheeled cart to haul the bags of softener into the home. The stairs at the entrance of the home are broken and unsafe. Discussion took place with the [the Appellant and her husband] regarding the need for them to replace the existing stairs at the entrance of their home.

[46] Ms. Njegovan was directed to the FIT Discharge Report which identified the Functional Activity, the Appellant's Functional Capacity Evaluation (FCE) on March 1, 2005, and the job demand. She advised that the Appellant's Functional evaluation regarding the following activities did not match her job demands:

Functional Activity	Functional Capacity Evaluation March 1, 2005	Job Demand	Match
Floor to waist lift	25 pounds	75 pounds	no
Waist to eye level lift	20 pounds	75 pounds	no
Two handed carrying	28 pounds	75 pounds	no
Pushing (force pounds)	40 pounds	75 pounds	no
Pulling (force pounds)	35 pounds	75 pounds	no

[47] Ms. Njegovan was also directed to comment on the statement located in the FIT discharge report which indicated that based on her in home assessment, that the Appellant is independent with her home management activities.

[48] Ms. Njegovan advised that she did not know that her in-home assessment had been interpreted by FIT and SGI to say that the Appellant was independent in her home management activities. This was not an accurate interpretation in her view. She pointed to her report, especially that a number of the seasonal activities could not be successfully evaluated during winter. She testified that she fully expected that she would be contacted by SGI during the summer to provide an updated report on the issues of yard work and gardening and further contacted with regard to the issue of the water softener salt in light of the Appellant's functional capacity evaluation which took place after her report. She had received no call from SGI to clarify anything or for further information.

[49] As SGI relied on the FIT Discharge Report to terminate the Appellant's living assistance benefits and the FIT Discharge Report was in error when it stated that Ms. Njegovan's assessment was that the Appellant was independent with her home management activities, the March 17, 2005 decision letter is set aside.

[50] The Appellant further testified that she had tried a number of different modifications to do her home management activities. She advised that starting her lawn mower aggravated and caused her significant pain. She was responsible for cutting the grass for her large farm site. As a result, her son purchased a ride on mower on his credit card with the understanding that the Appellant will pay the monthly installments. She advised that this has helped her with this task.

[51] The Appellant advised that the farm site is bordered by mature carragana bushes which need to be trimmed on a regular basis. She is currently using a hand saw but is unable to sustain this task for long periods without significant pain and so she does this task over a period of time. She had never heard from SGI with regard to the purchase of a small chain saw and does not know if she would be able to handle it. It would have to be assessed

further by an occupational therapist to see if this provides a safe adaptation for the Appellant.

[52] With regard to the water softener salt, the Appellant indicated and Ms. Njegovan confirmed the standard weight of salt sold is 20 kg. This weight is over her functional capacity to carry or lift. The Appellant advised that once she had the salt in the house, she could break it down into smaller quantities, but it was getting the salt from the truck and into the house which caused her great difficulties.

[53] The Appellant advised that their farm relies on well water and that their water softener requires 6 bags of water softener and the condition of their water requires approximately 6 bags a month or 70 -80 bags per year. She advised that SGI had never contacted her about the possibility of a ramp or other suggestions to assist her. She said that after the March 17, 2005 letter, it appeared to her that SGI was no longer interested in her file.

CONCLUSION

[54] The Appellant is successful in all three of her appeals. Regarding the June 18, 2004 suspension, the Appellant is entitled to receive her income replacement and living assistance from June 18, 2004 to July 15, 2004 plus interest. Regarding the December 3, 2004 suspension of the Appellant's income replacement, she is entitled to receive her income replacement with interest from December 3, 2004 to February 9, 2005 (it appears to have been reinstated on February 9, 2005). With regard to the Appellant's termination of living assistance dated March 17, 2005, her living assistance should be reinstated with interest at the level it was before termination. In addition, SGI should make arrangements to have an occupational therapist return to evaluate the Appellant's ability to perform the identified home tasks and make the appropriate adjustments to her living assistance as well as to any modifications that the occupational therapist recommends which could allow the Appellant to perform these tasks independently.

[55] We thank counsel for SGI and the Appellant for the clear, organized and professional way that both parties presented their case.

COSTS

[56] As the Appellant has been successful in her three appeals, she is entitled to reasonable costs of her appeal, including her Appeal fee in accordance with Section 193(1) of *The Automobile Accident Insurance Act* and Section 86(4) and 96 of *The Personal Injury Benefits Regulations*, subject to the maximum amount of \$2500.

Dated at Saskatoon, Saskatchewan, on March 7, 2007.

Jane Lancaster, Q.C., Chair

Stephanie Pfefferle, Commission Member

Carolyn Jones, Commission Member