

**Automobile Injury Appeal Commission**

**Province of Saskatchewan**

**Citation:** *I.T. v. Saskatchewan Government Insurance,*  
2007 SKAIA 042

**Date:** 20070313

**File:** 090 of 2004

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**BETWEEN**

**I.T., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**

**I.T., for the Applicant**

**Elizabeth Flynn, for the Respondent**

**Before:** **Ann Phillips, Q.C., Chair**  
**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 Regina, Saskatchewan  
July 28, 2005 and May 24, 2006

## DECISION

[1] The Appellant, I.T., appeals from a March 18, 2004 decision of Saskatchewan Government Insurance (SGI), denying ... “funding further treatment or related expenses.”

[2] The basis for terminating benefits is the “Medical Consultant’s” opinion that the Appellant’s current symptoms are due to health conditions that existed prior to a January 7, 2004 motor vehicle accident.

## FACTS

[3] The Appellant was involved in a motor vehicle accident (MVA) on January 7, 2004. She was the driver and sole occupant of a vehicle that was rear-ended at a stop light. She was wearing a seat belt. The damage to the rear bumper was relatively minor.

[4] The Appellant was unemployed at the time of the MVA due to being disabled by a diagnosis of fibromyalgia and arthritis. She had not been able to perform her duties as a nurse’s aide since 1989.

[5] The Appellant was involved in motor vehicle accidents in 1976 and 1979. She has a history of health related issues including a metal hip replacement which limits options for obtaining an MRI.

[6] The Appellant testified that immediately after the MVA, she began suffering from a persistent and extreme headache which continued for days, accompanied by pain in her left arm and leg. The pain and discomfort continues.

[7] The Appellant testified that the MVA has contributed to her inability to socialize; care for a previously ill daughter and an ailing husband or enjoy and help care for her grandchildren.

[8] The local waiting list for physiotherapy meant that this preferred form of treatment was not available for some time. Instead, SGI paid for 10 massage treatments and a month pass to the local pool as recommended by her family physician, until she could be referred for physiotherapy.

[9] In the meantime, as the Appellant had been asking for assistance in managing home tasks, SGI referred her extensive medical file to its medical consultant for his opinion.

[10] Dr Endsin referred to the long standing fibromyalgia, and documented degenerative osteoarthritis in her neck, C5, C6, C7, her left knee and her right hip, and some reference to degenerative changes in the lumbar spine in 1997. He also had determined that the accident was not severe.<sup>1</sup>.

“Given the statement of claim regarding the severity of the motor vehicle accident, my expectation would be that there would be mild exacerbation of neck and shoulder symptoms. I would expect this to be a problem for a period of three to six weeks following which it is my expectation that the symptoms after that time would likely be relating to her existing fibromyalgia rather than due to a WAD issue.

“I do not think that the injury sustained as a consequence of the MVA would be significant enough to require homecare or personal care expenses. The requirement for such care would be more likely related to her fibromyalgia and her underlying osteoarthritis rather than injuries sustained in the motor vehicle accident of the above date [January 7, 2004]”.

[11] On March 18, 2004, SGI wrote to request the Appellant to attend for a physiotherapy assessment on March 25, but said that in view of Dr. Endsin’s opinion that her current symptoms were due to pre-existing conditions, SGI would not fund further treatment or related expenses. SGI expected the Appellant to participate in the assessment but would not fund further rehabilitation benefits or expenses.

[12] The physiotherapist reported on the assessment: “There does appear to be some mechanical based symptoms on subjective inquiry... [the Appellant] presents with decreased [illegible] mobility [illegible]. I instructed her in an ex. program that would mobilize bilat. [jts?] but want to see her again to ck her technique & possibly get more spec.” She mentioned that it might be helpful to mobilize specific joints, with the Appellant then maintaining a home exercise program.

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<sup>1</sup> This was based on “the statement of claim”, which we assume to be the Application for Injury Benefits, and especially the portion that reads: “...my bumper was smashed in and cracked across the top”. It could also have included another document, completed by SGI, that noted: “was rearended in town – car was drivable. Both came here right after the accident. No damage to her 3<sup>rd</sup>’s car. Insured has put in a claim.”

[13] This very modest recommendation was turned down, despite recommendations from the physiotherapist and the Appellant.

[14] We note that the Appellant may not have been very enthusiastic about physiotherapy. Her family physician wrote:

“...This lady has been extensively seen in the past with multiple symptoms of pain in her joints and muscles. As I have told many patients in the past the best treatment for fibromyalgia is not to be inactive but to try and follow an exercise program as much as they are able...

“...I feel that we should try, even though she doesn't wish this, to emphasize that physical therapy would be of benefit to her. I feel that Weyburn Physical Therapy Department would have a lot to offer her in the future.”

[15] In June 2004, the Appellant did get some physiotherapy, although not from SGI. The physiotherapist's report in October to her family physician described her as “extremely compliant” and finding some relief with TENS, pool therapy and her home program with respect to her neck range of motion and strength, which was then within normal limits. However she had had “minimal improvement” with her recurrent and severe headaches, although they were decreasing in intensity (to 5/10) and frequency.<sup>2</sup>

[16] Over the next year, she was assessed by three neurologists for her headaches. One thought she had chronic tension headaches “secondary to post traumatic stress”, prescribed medication, and suggested massage therapy, a psychiatric evaluation and anti-depressants. The second found her neurologically intact, but thought her current symptoms might be due to an exacerbation of fibromyalgia “with some added on effect of her previous car accidents. Her post concussion symptoms should resolve over the next month...”<sup>3</sup> The third, Dr. Nair, saw her following the first hearing, and after a referral from her chiropractor, Dr. Peeace.

[17] He stated:

“Whiplash injury can give rise to a varying degree of pain and the duration very often depends upon many factors, not all of them dependent upon the degree of trauma. She has multiple trauma on the background of fibromyalgia ---- There seems to be augmentation rather than modification of pain, ---- seems to be a

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<sup>2</sup> Since her Application for Benefits had described them as 8/10, we wonder if the improvement may have been more than “minimal”, but we accept the physiotherapist's assessment on this point.

<sup>3</sup> We are left in doubt as to the reason for this opinion.

total upgrading of the pain transmission system resulting in amplified pain. This will explain the persistent pain with what would be considered minor trauma.”

[18] Although he found no pathology, Dr. Nair did think it worthwhile to investigate further with an MRI of the cervical spine and posterior fossa, and a referral to a neurosurgeon to consider the possibility of a deep brain implant or spinal stimulation “for people who have such suffering when most of the pain is due to aggravation of fibromyalgia.” (It would not be a routine MRI because of the metallic hip replacement.)

[19] Dr. Endsinn reviewed the Appellant’s file and the new information from Dr. Nair on January 12, 2006. He concluded: “This motor vehicle accident did not cause her chronic pain and is not the cause for chronic pain symptoms past the expected time period.” He noted that in 1997, she had had a major flare up of symptoms simply by driving from Estevan to Regina and back for a medical appointment.

[20] A CT Scan report by a radiologist stated...”Degenerative disc disease throughout the cervical spine, greatest at the C5–6 and C 6–7 levels where there is evidence to suggest central canal narrowing, as well as foraminal narrowing, particularly at the C 5–6 level. In light of these findings, I would suggest further evaluation of the spine with MRI”.

[21] On February 24, 2006, Dr. Endsinn again reviewed the Appellant’s file and concluded: “There is no evidence that these degenerative changes developed as a consequence of the motor vehicle accident of the above date ---- it does not appear the forces were significant enough to cause any of the anatomical changes outlined, nor would they be sufficient to exacerbate pre-existing changes ---- an opinion from an accident reconstructionist may be useful ---“ Dr. Endsinn goes on to say ---“because the contentious issue is whether the motor vehicle accident accelerated the degenerative process, there should be clear objective evidence that the accident did accelerate the degenerative process.”

[22] The Appellant testified to her long history of medical problems. She acknowledges pre-existing condition but believes the MVA of January 7, 2004 has exacerbated her condition and that the rehabilitation provided has not returned her to pre-MVA status.

[23] The first hearing on July 28, 2005 was adjourned to expedite the referral to Dr. Nair.

[24] The second hearing on May 24, 2006 considered the additional information from Dr. Nair and Dr. Peace.

## LAW

[25] Part VIII of *The Automobile Accident Insurance Act* (AAIA) Division 3, Section 110 (1) addresses the issue of rehabilitation --- “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.”<sup>4</sup>

## STANDARD OF REVIEW

[26] In *George Allary v. Saskatchewan Government Insurance*,<sup>5</sup> 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 claimant 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]).

[27] 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”.

[28] 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*.<sup>6</sup> 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.

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<sup>4</sup> *The Automobile Accident Insurance Act*, Part VIII, Division 3, Subsection 110 (1)

<sup>5</sup> 2006 SKCA 89.

<sup>6</sup> *Gerald Job v. Saskatchewan Government Insurance*, 2004 SKCA 164.

## ANALYSIS

[29] The issue is whether or not the Appellant's condition was worsened by the MVA and have the measures taken restored her to what her pre-MVA status would be.

[30] We do not disagree too much with Dr. Endsins analysis upon which the decision was said to be based, but rather what SGI did not do before they obtained it, and what they did and did not do afterwards. They did not fund living assistance benefits in the early stages when these might actually have been of some assistance. (We did not hear much evidence as to any specific activities for which living assistance benefits might be provided, and we assume that whatever initial needs she may have had were resolved fairly quickly.) More importantly, SGI did not inquire if the symptoms had abated to the level of the pre-existing fibromyalgia and osteoarthritic condition. While SGI's injury representative had previously arranged for a physiotherapy assessment, with massage therapy until she could be seen, SGI did not wait to see what the physiotherapist recommended.

[31] We find this position unreasonable, and SGI's decision wrong in law. It is not based on any assessment at all of her current condition. It ignored her current condition. Dr. Endsins opinion describes the normal course of events: it provides a standard against which the Appellant's actual condition could be measured. We do not consider his opinion as authority to terminate all treatment based purely on length of time since the accident. It is not an excuse for SGI to provide no treatment at all.

[32] What SGI *should* have done was what her injury representative advised the Appellant in January: "I explained to [the Appellant] that because of the health conditions she has, SGI would commit to funding treatment for her current symptoms until it was established that she had plateaued or was back to where she was prior to the mva." This was not done.

[33] In fact, Dr. Endsins later expressed the views that "One would therefore expect that this inflammatory change would resolve within the time period that I opined in my previous memo. If one were more generous, one might extend that to a twelve-week period rather than a six-week period." and "...we would at best expect that the motor vehicle would have exacerbated her symptoms for a six to eight week period and perhaps generously up to twelve weeks." We can

and do conclude from this that the period for recovery varies. We do not know if Dr. Endsins was aware that no physiotherapy was provided, or whether he expected the symptoms would simply go away of their own accord in the time(s) he estimated.

[34] Everyone concedes the accident worsened the Appellant's condition, although how and to what extent is a matter for medical dispute. The Appellant says that her real problem is her new and severe headaches (although neck pain is also a complaint), but SGI has never specifically addressed the headache issue. The headaches may result from cervical spine issues, as the neck pain almost certainly does, but they may be instead simply a form of tension headache. The Appellant has denied pre-existing migraines. We do not know if anything came of the referral to the neurosurgeon.

## DECISION

[35] We have said we do not disagree with Dr. Endsins that the injuries from a relatively minor impact would *usually* resolve within a relatively short time. We also understand Dr. Nair's point that there can be an augmentation of pain: "a total upgrading of the pain transmission system".

[36] By virtue of this accident, the Appellant is not entitled to a lifetime of treatment, and particularly for passive modalities such as massage therapy. Nevertheless, she was denied timely treatment for no good reason, and despite recommendations that she have it. **For this reason, we set aside SGI's decision.**

[37] The Appellant's request for reimbursement of expenses related to physiotherapy, massage, chiropractic, travel and medication are reasonable and we allow them to the date of the hearing. The expense documentation may be reviewed by SGI in the usual way, but on the assumption that the treatment provided was necessary or advisable and related to the MVA.

[38] If the Appellant establishes, through appropriate medical reports, that the headaches or other conditions from which she suffers were caused by the accident, and that there is a form of treatment that is necessary or advisable to manage this condition (or conditions) appropriately, she should submit them to SGI for review in the usual way.

**COSTS**

[39] As the Appellant has been successful in her appeal, she will be reimbursed for reasonable expenses in accordance with section 193(11) of the *Act* and section 96(1) of the *Personal Injury Benefits Regulations*, to a maximum of \$2,500.00. If she incurred any expenses for medical or chiropractic reports, she is entitled to these as well, in accordance with section 169 of the *Act*, limited to \$286 under section 76(1) of the *Personal Injury Benefits Regulations*. The Appellant's appeal fee will be refunded.

**Dated** at Regina, Saskatchewan, on March 13, 2007.

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Ann Phillips, Q.C., Chair

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Conrad Hnatiuk, Commission Member