

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *Y.T. v. Saskatchewan Government Insurance,*
2007 SKAIA 051
Date: 20060329
File: 089 of 2005

BETWEEN

Y.T., Applicant

and

Saskatchewan Government Insurance, Respondent

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

Before: **Tim Brown, Chair**
Stephanie Pfefferle, Commission Member
Darleen Topp, 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 Prince Albert, Saskatchewan
June 21, 2006

DECISION

[1] The Appellant, Y.T., appeals 3 decision letters from Saskatchewan Government Insurance (SGI) which terminated her benefits pursuant to *The Automobile Accident Insurance Act* (the “Act”).

[2] The Appellant was injured in a motor vehicle accident on March 15, 2005 and applied for benefits on April 13, 2005. As a result of the accident she suffered head, chest and shoulder injuries including a shattered clavicle, a dislocated shoulder, as well as whiplash grade II. She suffered severe headaches as a result of the neck injuries. She was not able to perform her employment, 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 benefits pursuant to Part VIII of the Act.

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

- a) appeal of the April 21, 2005 decision letter of SGI which calculated her benefits for income replacement;
- b) appeal of the May 5, 2005 decision letter of SGI which calculated benefits for living assistance; and
- c) appeal of the June 29, 2005 decision letter of SGI which calculated benefits for living assistance.

[5] The Appellant filed with the Appeal Commission her written reasons for appealing the decisions of SGI which are outlined as follows:

- (a) Income Replacement Benefit – The Appellant advised that in her opinion SGI was in error in computing her income replacement benefit by not taking into

consideration that she was entitled to use her daughter as a spousal equivalent in the tax calculations.

(b) Income Replacement Benefit – The Appellant advised that in her opinion SGI had not accurately calculated her income taking her into consideration her income both from her [catering business], as well as her employment as a bookkeeper and project manager. She advised that her income varied from [amount] per hour to [amount] per hour depending on the contracts and projects that she had been involved with.

(c) Living Assistance – The Appellant advised that she had been unable to drive due to her injuries and as her vehicle had been totaled in the accident, she relied on friends and family to drive her. She advised that she was unaware of the fact that SGI would provide reimbursement for taxi services. She was of the view that the people who drove her should, in addition to the mileage paid for her transportation, also receive what SGI would have paid if she were to have used a taxi as transportation.

(d) Living Assistance – The Appellant advised that as she lives on an acreage she should receive special compensation for yard work, spring cleaning, livestock chores for 4 horses, and farrier services. The Appellant did receive some replacement services, but in particular, the Appellant wanted compensation for spring yard work - \$590, May to September Yard maintenance, fencing and bales - \$1770, spring housecleaning - \$450, and farrier services - \$200.

[6] At the hearing, the Appellant testified that she had been promised employment at the [Rural Municipality] as an administrator and that her income replacement should be calculated on the basis of the promised employment.

LAW AND ANALYSIS

[7] The relevant sections of the *Automobile Accident Insurance Act*, Chapter A-35 are as follows:

Income Replacement Benefits

DIVISION 4

Income Replacement Benefits

Income replacement benefit

113(1) This section does not apply to a student.

(2) An insured is entitled to an income replacement benefit if, as a result of an accident, the insured:

(a) is unable to continue an employment held by the insured at the date of the accident;

(b) is unable to hold an employment he or she would have held in the first 180-day period following the accident if the accident had not occurred; or ...

(3) The insurer shall calculate the income replacement benefit for the employment that the insured is unable to continue on the following basis:

(a) if the insured holds employment in the employ of another, the yearly employment income of the insured calculated on the basis of the income the insured earned or would have earned from all employments the insured held or would have held but for the accident in the first 180-day period after the accident;

(b) subject to the regulations, if the insured holds an employment as a self employed earner, the greater of:

(i) the yearly employment income determined in accordance with the regulations for an employment of the same class as the primary employment the insured held or would have held but for the accident in the first 180-day period after the accident; and

(ii) the yearly employment income the insured earned or would have earned from all his or her employments held at the date of the accident;

or

(c) subject to the regulations, any benefits the insured would have received from the *Employment Insurance Act* (Canada) or any other prescribed benefits in the first 180-day period after the accident.

(4) On and after the 181st day after the accident, an insured is entitled to an income replacement benefit if the insured is unable to hold employment he or she held or would have held but for the accident.

(5) An income replacement benefit pursuant to subsection (4) is to be the greatest of:

(a) an income replacement benefit calculated on the basis of the yearly employment income attributed to the insured in the first 180-day period after the accident;

(b) an income replacement benefit calculated on the basis of the average employment income the insured earned in the two years before the accident as set out in the regulations, including any benefits received pursuant to the *Employment Insurance Act* (Canada), any benefits received under an employment disability plan, and any benefits received pursuant to *The Workers' Compensation Act, 1979* or similar provisions in any other Act, or any legislation of any other jurisdiction, that relate to the compensation of individuals injured in accidents; and ...

The Personal Injury Benefits Regulations C A-35

PART VII

Benefits for Expenses

Reimbursement is subject to Appendices and limits

43 An expense for which the insurer may be or is required to reimburse the

insured pursuant to Division 7 of Part VIII of the Act or this Part is subject to any limit set out in the Act or these regulations or, if there is no limit as to amount, to an amount that the insurer considers is reasonable.

Living assistance benefit under Appendix D

44 Subject to the maximum amount set pursuant to section 156 of the Act, if the insured is unable because of the accident to care for himself or herself or to perform the prescribed basic activities of daily living without assistance and has an expense for living assistance that is not covered pursuant to any other Act, the insurer shall reimburse the insured for the expense in accordance with Appendix D.

Travel, meals and lodging

46 Subject to sections 47 to 54, if the insurer is required to reimburse a person for travel, meals and lodging expenses, the maximum amount the insurer shall reimburse a person for the following expenses is:

- (a) in the case of ambulance costs, the amount billed;
- (b) in the case of travel by automobile, 30 cents per kilometre;

...

Common carrier

49 The insurer shall reimburse the insured for an actual expense incurred by the insured for transportation by a common carrier.

[8] The Commission's jurisdiction to review a decision of SGI is set out in subsection 193(7) of *The Automobile Accident Insurance Act*. The Appeal Commission may:

- (a) set aside, confirm or vary the insurer's decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part.

[9] The Saskatchewan Court of Appeal addressed the standard of review applicable for appeals to this Commission in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In that case, the Court of Appeal noted that more than one standard of review was indicated by the legislation. The Court of Appeal suggested that the standard of review depends upon whether SGI has discretion to grant or deny the particular benefit claimed. The Court of Appeal concluded that, where an appellant disputes SGI's decision and places SGI's findings of fact in issue and there is no discretion whether to grant or deny the benefit, the standard of review is correctness.

[10] The Appellant called two witnesses to support her position regarding income replacement and increased living assistance:

Witness One:

[11] [Witness One] had provided a written letter which was filed in the Appeal Book. In March 2005, Witness One indicated she had a number of contracts for bookkeeping that she would have referred to the Appellant if the Appellant had been able to work. As the Appellant was not available, Witness One kept one of the contracts, and let the other contract go. She had been in discussion with the Appellant in April 2005 and the Appellant had advised her that as she was in considerable pain, she would not be able to give the customer service that was required. She indicated that the contracts would have been ongoing if the customer had been satisfied. The contracts would have paid [amount] per hour.

[12] She testified that she had been in contact with the Appellant about working with her prior to the accident and that the Appellant had advised that the Rural Municipality had offered her a position.

[13] Witness One testified that the work she offered to the Appellant would involve assisting small businesses in their bookkeeping, bringing the books up to date so that the business could be in a position to file income tax, and then keeping the bookkeeping current.

[14] She advised that the Appellant had similar training as she did and was knowledgeable of the computerized programs for bookkeeping. The work was referred to Witness One from a charter accountant and then Witness One either performed the work or found suitable persons like the Appellant to sub-contract the work. She indicated that the Appellant was not only knowledgeable but was a hard worker with a particular strength in assisting customers who were very far behind in their bookkeeping.

[15] The panel accepts the evidence of Witness One that she would have been in a position to offer contract employment to the Appellant in April, 2005 at the rate of [amount] per hour and that the Appellant was unable to accept these contracts due to the injuries suffered in her motor vehicle accident.

[16] What is somewhat unclear in Witness One's testimony is whether before the Appellant's accident, the Appellant was still considering working with Witness one or whether she was committed to the employment at the Rural Municipality.

Witness Two

[17] [Witness Two] testified as the Appellant's pastor's wife who had personal knowledge of the Appellant's situation with regard to the yardwork required on her acreage. She confirmed that the pictures of the acreage accurately represented the Appellant's acreage and as she also resided on an acreage, she knew that there were considerable hours spend to maintain the appearance and to deal with road conditions.

[18] She confirmed that in the spring, it was necessary to cut the lawn, rake, trim trees, and do the physical upkeep of fences and buildings.

[19] In addition, Witness Two advised that she had had a conversation with the Appellant about her various employment options including employment with the Rural Municipality. She was unclear as to whether the conversation concerning the Rural Municipality job occurred before or after the accident but she remembers having a conversation with the Appellant in which the Appellant had indicated that she needed to take her career in different directions.

[20] Witness Two testified that she knew the Appellant for 7 years and knew her to be a "very, very good worker who gives her best as an employee".

The Appellant

[21] The Appellant testified on her own behalf. She advised that she is now employed full time as of July 1, 2006 with [the Church]. She testified that this employment is equivalent in salary and benefits to employment at the Rural Municipality. Until she had obtained this employment she had been in receipt of Employment Insurance Benefits since February 2006, when SGI determined she was fit to return to employment.

[22] Regarding her entitlement to living assistance benefits, the Appellant advised that after her accident, she had been unable to drive as a result of her injuries and as her car had been totalled, she had difficulty going back and forth for her numerous medical and rehabilitative appointments.

[23] She advised that her acreage was 10 miles from [city] and that road conditions were so bad on some occasions that the road was impassable.

[24] The Appellant put in her claim for reimbursement on the basis of the kilometres and SGI reimbursed her on the basis of kilometres. The Appellant testified if she had been aware that SGI would have paid for taxi fare, she would have chosen that option rather than having family and friends transport her. In her view, she should be entitled to receive what it would have cost to have a taxi provide the service in addition to the mileage costs.

[25] In addition, the Appellant provided bills for spring cleaning, as well as payments made for yardwork, fencing and yard maintenance, and farrier services. She advised that she felt that she should be entitled to special consideration in light of the fact she was living on an acreage and, therefore, had special expenses.

[26] With regard to income replacement benefits, the Appellant testified that she had been working as a self-employed person from January 2005 to March 2005 on a short term contract with [a development company]. She had worked for the development company in a salaried position in 2004.

[27] The Appellant took the position that she was entitled to a spousal credit (her daughter as a spousal equivalent) when SGI did their calculations in determining her income replacement.

[28] Counsel for SGI advised that if the Appellant would provide the tax information for 2004 and 2005 verifying that in fact she did claim her daughter as a spousal equivalent, they would make the necessary adjustments to the income replacement. The Appellant indicated to the appeal panel that she would ensure that this information was provided to SGI.

[29] The Appellant also took the position at the hearing, that her income replacement benefit should have been calculated on the basis that she had promised employment to commence at the end of March 2005 and, therefore, her income replacement benefit should have been calculated on that basis. At the hearing, she filed a letter, dated June 16, 2006, from [the Reeve] of the Rural Municipality which advised that the Appellant had been offered the permanent position as Administrator with an annual salary, which exceeded the RMAA salary schedule.

[30] Counsel for SGI took issue with the late filing of this document, stating that all indications had been that the Appellant was self-employed and that at the time of mediation which had been concluded October 28, 2005, she had not put forward that she had promised employment. We note that in the Appellant's material dealing with her appeals, she did not mention that she was disputing the calculation of her income replacement because of her promised employment, but because she would have had the ability to work for Witness one and should have been compensated at [amount] per hour.

[31] We understand SGI's position on this issue. At the hearing, Mr. Wanner, a personal injury representative II, testified that when SGI calculated the Appellant's income replacement benefit, they relied on the information she had provided in her application for benefits, signed April 13, 2005, which was that she was self-employed as the owner of a business and also as a consultant.

[32] Mr. Wanner testified that if they had received the letter that the Appellant tendered at the hearing when income replacement benefits were being calculated, they would have investigated the Appellant's employment options. In his view, the legislation deals with promised employment not potential employment. If he had received the letter from the R.M., SGI would have contacted the Reeve of the Rural Municipality to confirm the following information: that the employment had been accepted by the Appellant; what the salary was to be; and that there was some written indication of the employment, for example, letters of offer and acceptance, or minutes from the Rural Municipality counsel.

[33] The Appellant was of the view that as mediation had been discontinued by SGI, it was not necessary to provide SGI with documents concerning her employment, but to wait

for the hearing of her appeal. She provided no explanation as to why she had not noted this issue in the material she had filed on the appeal.

[34] The Appellant testified that she had applied for the job as administrator of the Rural Municipality, where she resides. She was qualified for this position and had worked as the acting administrator when the retiring administrator had been on a leave of absence. She testified that she had been asked to apply by the councillors and the retiring administrator. She had been advised verbally by the Rural Municipality that she was the only qualified applicant and, therefore, she was the successful candidate. She said that she had accepted the offer with a start date to commence after she had finished her contract with the development company. She was told that this delayed start date was acceptable to the Rural Municipality. She indicated that she had no correspondence with the Rural Municipality confirming an offer of employment, start date or salary. She was of the view that she would be paid according to the salary grid for municipal administrators and equivalent with the retiring administrator.

[35] In addition, the Appellant testified that she had received a telephone call from someone in the Rural Municipality who was aware that she had been injured in a motor vehicle accident, advising that as she was not able to commence her employment, the position would be offered to another. As with the offer of employment, there was no written confirmation of when and how this revocation of employment had occurred. The Appellant indicated that she was in such pain that she could not remember details of the conversation.

[36] The Appellant put forward the argument that she was a self-motivated hard worker who had a number of employment skills. In addition to her business she had been employed in project development which she candidly indicated was her work preference, or she could have worked with Witness One or she was promised employment at the Rural Municipality commencing March 2005.

[37] We accept that the Appellant was an individual with significant employable attributes. The issue that was unclear from the evidence and the documents filed at the hearing was whether the employment at the Rural Municipality was the Appellant's

promised employment or whether it was simply one of several options that the Appellant was contemplating.

[38] We admitted the letter of the Reeve of the Rural Municipality, dated June 16, 2006, but were concerned that it was not detailed enough to be determinative of the issue of promised employment. As a result, Mr. Brown, chair of the appeal panel, with the consent of SGI and the Appellant adjourned the hearing sine die to obtain additional information from the Rural Municipality. Correspondence from a Councillor of the Rural Municipality was received on July 5, 2006, but it was not until the Reeve responded on November 21, 2006, providing confirmation that the Appellant had in fact been offered the employment as an Administrator of the Rural Municipality and that she had accepted the offer with a start date in March 2005 after the completion of her short-term contract. The Reeve also confirmed that there were no written contracts or even a mention in the minutes of the council concerning this employment. Further, he indicated that as a result of the Appellant's injuries, this position was offered to another candidate.

[39] As a result, we are prepared to set aside SGI's decision which calculated the Appellant's income replacement as a self-employed person. We order that SGI calculate the Appellant's income replacement on the basis that she had promised employment which would have commenced April 1, 2005 as an administrator of the Rural Municipality.

Living Assistance

[40] Counsel for SGI submitted that the *Act* and *Regulations*, in particular sections 46 and 49 of the *Regulations*, provide 2 options for compensation for travel – either actual, supported by receipts, or based on mileage. As the Appellant had submitted expenses based on mileage, she could not also claim for what it would have cost if a taxi had been chosen to provide travel. SGI also noted that the Appellant was also being compensated for her inability to drive as part of her living assistance benefit and so she was actually receiving double compensation.

[41] Counsel for SGI submitted that the Appellant was entitled to receive living assistance benefits while she was injured and unable to perform her household tasks. *The*

Personal Injury Regulations provide a grid outlining the tasks and allocating points on the basis of the degree of dependence the claimant has in performing these tasks.

[42] SGI filed a number of reports from the occupational therapist who attended at the Appellant's residence and Mr. Wanner indicated that it was as a result of those occupational therapy reports that the Appellant's living assistance was calculated. The occupational therapist reviewed the Appellant's living situation regularly making adjustments as she became more capable of performing her living assistance tasks.

[43] The Appellant did not take issue with the assessment of the occupational therapist in how the living assistance was calculated or how her dependency was assessed. What she has appealed is that the current grids contained in the Regulations are inadequate in compensating an injured person who lives on acreage and has animals. She felt she should receive additional compensation especially in the areas of yardwork and housecleaning as these tasks were more onerous for her than for someone who has a house in an urban setting.

[44] SGI had agreed at mediation to compensate the Appellant for her expenses regarding spring yard work and to haul and split wood that was necessary to heat the Appellant's home. The only issues left for determination were compensation for a farrier to trim the hooves of her four horses and reimbursement for spring cleaning of her house.

[45] It is the position of SGI that the legislation does not differentiate between urban dwellings and rural dwellings. The Appellant was compensated to the maximum allowed under the grids. As the Appellant had been compensated at 100% for both housecleaning a house in excess of 1500 square feet and yard work, the legislation does not allow for any additional compensation for spring cleaning. We find that SGI is correct in their interpretation of the Regulations and that the Regulations do not permit SGI to make payments in excess of what the legislation permits.

[46] The Appellant also claimed for the services of a farrier as she was unable as a result of her injuries to trim the horses' hooves. Mr. Wanner advised that there is nothing in the

legislation which would allow SGI to provide reimbursement for the care required for the Appellant's horses.

[47] Living assistance benefits are provided for in section 156 of the *Act*:

156(1) Subject to the regulations, if an insured is unable because of the accident to care for himself or herself or to perform the prescribed basic activities of daily living without assistance, the insurer shall pay a living assistance benefit to the insured for expenses related to obtaining assistance.

(2) The insurer shall calculate and reimburse the insured for the living assistance benefit in accordance with the regulations.

(3) The maximum amount of a living assistance benefit is \$947 per week.

Pursuant to section 44 of *The Personal Injury Benefits Regulations, 2002, A-35, Reg 3* (the "*Regulations*"), living assistance benefits are to be reimbursed in accordance with Appendix D. Appendix D prescribes the "Evaluation Grid of Required Functional Activities" completed by the personal injury representative in this case, sets out criteria for assessing the degree of assistance required by each claimant, and contains a list of definitions of the various activities of daily living listed in the grid.

[48] The issue of additional compensation for acreage property and for the care of domestic animals such as the Appellant's horses was considered by the Commission in the case of *U.R. v. Saskatchewan Government Insurance 2006 AIAC 029*. In that case, the Commission decided that the *Regulations* do not differentiate between rural and urban dwellings nor does it provide for compensation for domestic animals such as the Appellant's horses.

[49] We agree with the *U.R.* decision and, therefore, SGI's decision not to compensate for spring cleaning or for farrier work for the Appellant's horses is upheld.

CONCLUSION

[50] The Appellant is entitled to an income replacement benefit on the basis that she had promised employment commencing April 1, 2005 as an administrator at the Rural Municipality.

[51] When the Appellant provides verification that she claimed her daughter as a spousal equivalent on her income tax returns, SGI has undertaken to make the appropriate recalculations of her income replacement benefits.

[52] At the hearing, Counsel for SGI admitted that the initial payment of living assistance benefits was based on an "estimate grid" that was filled out in March 2005. On or about April 8, 2005, the occupational therapist performed a personal and home evaluation and a new grid was prepared, which was dated April 28, 2005. This grid was based on the occupational therapist's report and listed three areas under the heading "completely dependent" whereas the "estimate grid" indicated only one item under the heading "completely dependent". Counsel for SGI undertook to amend the first grid to reflect the three areas of dependency noted on the April grid. Counsel for SGI indicated that this would cause an increase in the amount of the living assistance benefits for the period of approximately March 16 to May 3, 2005.

[53] The decisions of SGI regarding compensation for travel expenses and living assistance are upheld.

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

Dated at Prince Albert, Saskatchewan, on March 29, 2007.

Tim Brown, Chair

Stephanie Pfefferle, Commission Member

Darleen Topp, Commission Member