

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *T.R. v. Saskatchewan Government Insurance*,
2007 SKAIA 108
Date: 20071210
File: 097 of 2006

BETWEEN

T.R., Applicant

and

Saskatchewan Government Insurance, Respondent

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

Before: **Carolyn Jones, Chair**
Marjory Gammel, Commission Member
Jane Lancaster, Q.C., 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
November 19, 2007

DECISION

[1] The Appellant, T.R., has appealed a decision of Saskatchewan Government Insurance (SGI) dated August 25, 2006. This decision dealt with the calculation of benefits that the Appellant was entitled pursuant to the *Automobile Accident Insurance Act* and in particular, the activities for daily living as outlined in the *Personal Injury Benefits Regulations*.

[2] On June 24, 2006, the Appellant had been injured as a passenger on a [City Transit bus]. The bus stopped abruptly and the Appellant hit her knees on a bar from the seat in front of her. Her injuries were bruised knees as well as pain in her right hip and right breast. This was not, unfortunately, an isolated incident, as the Appellant had 2 previous accidents on City Transit buses on October 4, 1999 and also August 28, 2002.

[3] She had appealed a decision made by SGI dated November 17, 2003 with respect to her entitlement to personal and home care benefits. The Automobile Injury Appeal Commission decision of January 24, 2005¹ increased the amount of personal and homecare benefits from 11.5 points to 14.5 points. As well they upheld the decision of SGI that the Appellant's entitlement for benefits was to be reduced by 50% for pre-existing conditions that were not motor vehicle related. (The Appellant's family doctor testified at the current hearing and confirmed his view that the Appellant's present situation is 50% not related to her 3 motor vehicle accidents).

[4] At the time of the Appellant's most recent accident, she was receiving living assistance benefits in the amount based on 14.5 points as set out in the regulations dealing with daily living assistance for physical limitations. The amount was reduced by 50% in line with the decision confirmed by previous appeal panel.

[5] It is worth noting that this decision specifically cautioned the Appellant that if she chose not to avail herself of the living assistance aids as recommended by the occupational therapist which are designed to assist her in her independent living, she ran the risk that she would not be entitled to living assistance benefits for those activities. In particular, the occupational therapist

¹ *T.R. v. Saskatchewan Government Insurance*, 2005 SKAIA064

had recommended the installation of a pole in the bathroom to assist in toileting as well as a grab bar and stool in the bathtub to facilitate the Appellant in safe and independent bathing.

[6] It was also important for this panel to review the decision of the previous panel, as many of the issues that the Appellant brought forward in this appeal were also issues that the Appellant brought forward in this previous appeal.

[7] With regard to the Appellant's June 24, 2006 accident, her family doctor stated "her latest motor vehicle accident has aggravated her arthritic bone and soft tissue muscle pain in both of her legs. She is still able to walk but she has a significant amount of pain in her hips, thighs, knees, and shins that were definitely made worse by the motor vehicle accident of June 24, 2006." He concludes that in his opinion it will take her many months to recover to her pre-accident state because of this injury.

[8] On July 31, 2006, Amanda Berg, occupational therapist, attended at the Appellant's home to do a Functional Assessment of the Home and to make recommendations with regard to the Appellant's ability to do her daily living tasks. She made a number of recommendations and observations of the Appellant's situation both as to what the Appellant reported she could perform pre-accident and post accident and what aids might be of assistance to her.

[9] As a result of her report, Ms. Berg completed the Functional Activities Care Grid A as set out in the regulations. In her opinion, the Appellant's ability to perform daily living activities had improved from the 14.5 points awarded by the panel in the previous decision of January 24, 2005 to 8.5 points. The major changes had to do with the fact that points were awarded in April 12, 2005 for assistance in undressing (1 point), bathing and hygiene (2 points) mobility/locomotion (3 points).

[10] Ms. Berg reported that in discussion the Appellant had indicated that she was independent in the area of undressing, bathing and hygiene and could move around with the use of a cane. The Appellant had been offered some aids in the bathroom but advised that she felt they would 'wreck her bathtub'. It appeared that although she could perform a number of the tasks, she preferred to have her friend assist her.

[11] It was this reduction in the number of points resulting in a reduction in daily living assistance that the Appellant is appealing.

[12] The Commission's jurisdiction to review a decision of SGI is set out in section 193(7) of *The Automobile Accident Insurance Act* (the "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.

[13] The appeal was originally set for hearing on April 25, 2007, however, at that time, counsel for SGI asked the panel for an adjournment. Counsel advised that it appeared from what the Appellant was alleging that her situation had deteriorated dramatically since her latest accident and that it would be of assistance to the panel and to the insurer to have a more up to date medical report. The Appellant was opposed to the delay, even when SGI offered to return the Appellant's living assistance to where it was prior to the August 25, 2006 decision letter (14.5 points) including retroactive payments.

[14] SGI's counsel advised that they wished the Appellant, in deference to her age, to be seen by a gerontologist who could provide information to both the Appellant, her family doctor, and to the insurer as to the best way to deal with the health concerns that the Appellant was raising.

[15] The panel agreed with SGI's request for the adjournment with the reinstatement of benefits and urged the Appellant to co-operate fully with the assessment.

[16] At the recommencement of the hearing, the panel had opportunity to review the Multidisciplinary Report from the Geriatric Program. In addition, at this hearing, the Appellant had made arrangements for her family doctor to testify on her behalf. Her family doctor had received a copy of the report and its recommendations.

[17] It was disappointing to the panel that the Appellant had refused to allow the gerontologist to perform a physical exam although she did co-operate with some of the testing regarding some range of motion. She would not allow her lower extremities to be tested nor allow herself to be further x-rayed. When asked by the panel why she had refused such examination especially when urged to co-operate by the panel, she stated that she did not like "looks of the doctor" and

when pressed further stated that she felt that he would be on SGI's side so was not prepared to co-operate.

[18] The gerontology report makes a number of recommendations which might have been of assistance to the Appellant especially in dealing with the pain of her arthritis. She does not appear to be open to considering those options.

[19] The Appellant states plainly that it is the pain she experiences which limits her ability to do the things that she used to do, but she is not prepared to co-operate with specialists who may be able to offer her some assistance in dealing with that pain or even to allow that expert to identify clearly the limit of her disability.

[20] After the assessment by the geriatric department, SGI did a new evaluation grid of required functional activities and provided the Appellant with a new decision letter dated September 27, 2007 in which the Appellant's functional activities were assessed as 12 out of a possible 66.

[21] By agreement of the parties, the new decision letter was considered by this panel as part of the appeal that the Appellant had made on September 21, 2006. It was determined that it was not necessary that she file a further appeal for the September 27, 2007 decision letter as it all dealt with the same issue of assessment of functional activities. It was a logical extension of SGI's request for further medical information at the date of the original hearing in April 2007.

[22] The major differences between the evaluation grid of September 13, 2007 and Ms. Berg's grid of July 31, 2006 was providing the Appellant an additional .5 point for light housekeeping, an additional point for purchasing supplies, and reinstating 2 points for transportation recognizing that the Appellant uses the Access bus.

[23] At this hearing, the Appellant's family doctor was asked specific questions about the activities and the allocation of points on the September 13, 2007 grid He agreed generally with the assessment except suggested that perhaps the Appellant required an additional point in the area of doing laundry. He provided no evidence as to why he felt this would be required. The

Appellant asked her family doctor no questions although she had asked him to testify on her behalf.

[24] The Appellant sees SGI's responsibility to compensate her for her inability to perform her daily living assistance differently than does SGI. She takes issue with the use of the Evaluation Grid of Required Functional Activities as a basis for determination of compensation. In her view, she can perform very little activities and the reason for this is the motor vehicle accident. She has a friend to whom she pays \$20 per day to perform these tasks such as preparing meals, purchasing supplies, assisting her in personal tasks. In addition, she also pays \$50 per week for a friend to do her laundry and perform some driving tasks for her. As a result, she pays others \$700 per month to perform her daily living tasks. In her view, this is the amount that SGI should pay her to compensate her for the injuries she received in the motor vehicle accident.

[25] When asked by the panel how she viewed the fact that her doctor had indicated that her pre-existing conditions were 50% responsible for her current condition, she advised that she did not accept that assessment and that in her view, the sum of \$700 was very minimal for the 24 hour care she requires.

[26] In her view, SGI and now this panel should ignore the legislative regulations that specifically address the evaluation and assessment of functional daily living² and assess what she sees as the amount she actually expends to assist her in doing these functions.

[27] Her view is somewhat supported by her family doctor who has advocated on her behalf. He wrote to SGI on May 25, 2007: "Also I am amazed at the fact that we are arguing here over \$20.00 per day, i.e. \$600.00 per month. Even if the Appellant lives another 20 years, I do not believe that would cost SGI more than \$12,000.It may be better for your company just to settle with her over this fairly insignificant amount of money over the long term."

² S156 of the Automobile Accident Insurance Act states:

s156 (1) Subject to the regulations, if an insured is unable because of the accident to care for himself or herself or perform the prescribed basic activities of daily living without assistance, the insurer shall pay a living assistance benefit to the insured for the expenses related to obtaining assistance.

[28] Both the Appellant and her family doctor are ignoring the legislation and regulations under which benefits are to be provided to insured persons. They are asking that this panel do the same.

[29] SGI and this panel are required to follow the legislation which governs this benefit. It would be improper and contrary to law for either SGI or this panel to ignore legislation and to substitute our own views or the Appellant's or her doctors as to what the Appellant is entitled to receive. We are not prepared to do so.

[30] We have reviewed the decision of the previous panel and the grid outlining daily living activities, which was completed April 12, 2005, before her third accident. We also reviewed the grid outlining daily activities completed by Ms. Berg just after her third accident, the report of the multidisciplinary report dated July 6, 2007, the testimony of the Appellant and her doctor, as well as the functional activity grid dated September 13, 2007.

[31] In our view, the functional activities grid prepared September 13, 2005 is the most accurate in the view of the Appellant's doctor. She is not entitled to be awarded points for bathing and hygiene when she refuses to use aids that may assist her to be independent. Refusal to consider modifying her bathroom (at SGI's expense) with a grab bar, toilet pole, and bathtub stool is not reasonable.

[32] SGI argued that they recognize that the Appellant is in pain because of her arthritis but that the functional daily living grids are in place to assess insured who cannot do the functional tasks, and not those who have made the decision to have others perform the tasks for them for whatever reason. In addition, the Appellant was urged by this panel to co-operate with the gerontology assessment which would have given all of us valuable information as to her capabilities. It was her decision to refuse to be examined by the gerontologist. It had been our hope that this report would have given us more information to assist SGI in determining her functional abilities.

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

CONCLUSION

[33] Therefore, the Appellant's functional abilities are calculated as per the Evaluation Grid of Required Functional Abilities dated September 13, 2007 with a total of 12 /66 possible points. The maximum amount per week for functional abilities is currently \$708 and the Appellant would be entitled to \$128.73 per week. This amount is reduced by 50% as we confirm that 50% of her difficulties were not motor vehicle related. Therefore, the Appellant would receive \$64.36 per week, \$128.73 bi- weekly.

[34] The decision letter dated September 27, 2007 has been upheld.

[35] There is no order for costs.

Dated at Saskatoon, Saskatchewan, on December 10,2007.

Carolyn Jones, Chair

Marjory Gammel, Commission Member

Jane Lancaster, Q.C., Commission Member