

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *N.K. v. Saskatchewan Government  
Insurance, 2008 SKAIA 036*

**Date:** 20080709

**File:** 015 of 2008

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**BETWEEN**

**N.K., Appellant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**N.K., Appellant**  
**Joan Eremko, for the Respondent**

**Before:** **Barbara Tomkins, Chair**  
**Jane Lancaster, Q.C., Commission Member**  
**Jeff 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.**

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Heard at Regina, Saskatchewan  
June 17, 2008

## DECISION

[1] The Appellant appeals the December 10, 2007 decision of Saskatchewan Government Insurance (SGI).

[2] The Appellant was injured in a December 9, 2006 motor vehicle accident. His injuries were diagnosed by his family doctor as a Whiplash Grade 2 of his cervical spine with decreased range of motion and point tenderness.

[3] The Appellant participated in physiotherapy and massage therapy as recommended by his family doctor and at the conclusion of the treatment in February 2007, it appeared to the physiotherapist and massage therapist that there had been improvements to his range of motion and in their view, his condition had been resolved.

[4] Approximately one month after his discharge from treatment, the Appellant returned to his family doctor who recommended to SGI that the Appellant participate in a secondary assessment as he continued to experience pain and decreased range of motion in his neck.

[5] The family doctor again requested a secondary assessment in July 2007 on the basis that the Appellant's condition had plateaued and in his view, the Appellant required additional treatment.

[6] At SGI's request, the Appellant chose the treatment centre for his secondary assessment; it was performed on August 23, 2007.

[7] The recommendations of the secondary assessment were provided to the Appellant, his family doctor, and the personal injury representative (PIR) for SGI.

[8] The assessment report recognized the Appellant's age and took into consideration that the Appellant has cervical osteoarthritis from a previous 1991 motor vehicle accident. The assessment team recommended that the Appellant participate in a six-week treatment program focusing on upper quadrant strengthening and general conditioning.

[9] There was recognition in the assessment that the Appellant had significant apprehension about rehabilitation and its potential impact on his well-being. Because of

this, one of the recommendations was that the Appellant receive education so that he could understand the nature of his difficulties, the principle of hurt versus harm, and reasons why he may still experience discomfort at the end of the rehab process.

[10] In addition, as it appeared that the Appellant had been unhappy when massage therapy had been withdrawn, it was recommended that concurrent with the strengthening and conditioning, the Appellant should receive 4-6 massage therapy treatments for symptomatic relief.

[11] On August 29, 2007, the Appellant spoke to his PIR about the recommendations and he told her that he was not planning to attend for treatment because he was afraid that the therapists “would hurt him.”

[12] The PIR asked him to discuss the recommendations with his family doctor. The PIR’s notes of the August 29, 2007 interview indicate that she told the Appellant that he needed to follow through with his treatment or she “would look at terminating his benefits for non-compliance.”

[13] On August 29, 2007, the PIR sent a letter to the Appellant outlining the recommendations of the secondary assessment and again asked him to meet with his family doctor to discuss the recommendations and advise her of the treatment centre he wanted to attend.

[14] The Appellant did not respond to this letter, although the notes of the PIR indicate that she tried to reach the Appellant by telephone on September 26, 2007.

[15] As a result, the PIR sent a further letter on September 26, 2007 to the Appellant asking him to contact his family doctor within 10 days of the receipt of the letter. The letter included a paragraph setting out the responsibilities of the Appellant to fully and actively participate in all medical and rehabilitation programs. In addition, it stated that if there is a medical reason to explain why the Appellant had not commenced secondary treatment or if he was having difficulty attending the treatment, he was to advise the PIR.

[16] As there was no response from the Appellant, a further letter was sent by the PIR to the Appellant dated November 9, 2007. This letter set out section 183 of the *Automobile Accident Insurance Act (Act)* and stated that SGI may reduce, suspend, or discontinue a person's benefits when a person fails to comply with a treatment plan recommended by medical professionals.

[17] Again, there was no response from the Appellant. On December 10, 2007, the decision letter terminating all benefits for the Appellant was sent. In particular, the Appellant was informed that he was being terminated based on sections 183(e) and (g) which state as follows:

183 The insurer may refuse to pay a benefit to a person or may reduce the amount of the benefit or suspend or terminate the benefit, where the person:

(e) without valid reason, refuses, does not follow or participate in a rehabilitation program recommended by a practitioner and the insurer;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the insurer.

[18] The Appellant wrote to the PIR on February 9, 2008 indicating that in his view his previous 1991 motor vehicle accident had resulted in permanent bone injuries which had been compounded and made worse by the December 9, 2006 motor vehicle accident and that this had affected his ability to manage his life and activities as he had before the 2006 vehicle accident.

[19] He also indicated that his doctor had advised him that as he had a permanent bone injury, there was no treatment, such as chiropractic, physiotherapy, or massage which will cure the bone injury. He mentioned the possibility that he might need surgery which in his view would lead to even more delay and economic loss.

[20] However, the Appellant did not provide any reports or other evidence in support of this information. In fact, SGI filed a May 29, 2008 letter from the Appellant's doctor doctoring which he stated that the Appellant, "somehow has the impression that these treatments (secondary assessment) will aggravate his preexisting cervical spine degeneration. I explained to [him] that further treatment is highly unlikely to aggravate his

current condition and I would strongly suggest he continue with the suggested treatment measures.”

[21] The Appellant’s doctor goes on to state that if the Appellant elected not to go ahead with the recommended treatment, his condition would most likely stay the same or even gradually deteriorate in view of his ongoing cervical spine degeneration.

**ISSUE:**

[22] Did SGI properly exercise its discretion pursuant to section 183 when it terminated the Appellant’s benefits for non-compliance in attending treatment as recommended by the secondary assessment?

**ANALYSIS:**

[23] Section 183 requires that SGI exercise its discretion when faced with behaviours that might meet sections 183(e) and (g). SGI has the options of refusing to pay a benefit, reducing the amount of a benefit, suspending, or terminating the benefit. In this case, SGI terminated all benefits. It does not appear that SGI considered any of these options aside from termination. If so, it failed to properly exercise the discretion as the section requires.

[24] Counsel for SGI called a Personal Injury Representative (PIR) to testify at the hearing. While she was not the PIR at the time of and who made the decision to terminate benefits, this PIR indicated that since the Appellant was only receiving one kind of benefits – those for treatment – termination would be the logical choice. We do not understand or accept the logic of this position. Even if a claimant is receiving only one kind of benefit, that benefit could be suspended pending compliance. The PIR did not explain why this was not considered and why it might not be an appropriate option.

[25] Further, in answer to a question from the panel, the PIR confirmed that the Appellant was receiving at least one other kind of benefit – payment for medical expenses and prescription medications; she did not indicate what impact this fact might have had on SGI’s discretion and decision.

[26] The evidence establishes, therefore, that SGI did not consider the alternatives provided in the sections – reduction or suspension of benefits – and therefore did not properly exercise its discretion in reaching its decision to terminate the Appellant’s benefits in this case.

[27] Further, sections 183(e) and (g) include a proviso. The listed conduct can only lead to the consequence of reduction, termination, or suspension if the refusal is made *without valid reason*. This requires SGI to consider whether the fear that the Appellant expressed to the PIR and to the physiotherapist was a “valid reason” for his refusal to participate.

[28] The Appellant takes the view that further treatment, especially if it involves neck manipulation or adjustment, would leave him in worse condition. He testified that he was influenced by media cases whereby persons have died or been paralyzed during manual treatment. He said that he is very anxious that this could happen to him during treatment. The Appellant has assured us at the hearing that he is willing to participate in a rehabilitation program as long as it does not involve neck manipulation and we take him at his word that he will do so.

[29] We accept that, whether or not his concerns are justified, they are honestly-held.

[30] A letter from the secondary assessment team dated June 2, 2008 confirms that they were aware of the Appellant’s fear of being hurt during treatment. The physiotherapist indicates in his letter that he was aware that the Appellant had a very high degree of misconception about pain and its significance but at the time, he attributed it to the fact that English is the Appellant’s second language. The physiotherapist indicated that, in hindsight, it may be that the Appellant actually held the inappropriate view of pain and the view that it is harmful to persist with activity when painful or that pain always equates to harm. It was for this reason that the physiotherapist had recommended an educational component in the rehabilitation recommended.

[31] The Appellant states he had advised the PIR of this fear. Although he raised his concern to the PIR, he took no steps to find out if in fact he was going to have neck manipulation or adjustment in the treatment recommended. Nor did he discuss with the

assessment centre, his doctor or SGI whether there was an alternative to neck adjustment if, in fact, it was part of the suggested treatment.

[32] In fairness to the Appellant, it appears that none of the PIR, the authors of the secondary assessment report or his family doctor investigated alternatives either. They did not discern that he was not opposed to treatment, but had a fear about a specific treatment mode.

[33] The question for SGI is whether these beliefs, if the basis of a refusal to attend recommended treatment, constitute a valid reason for purposes of section 183. From the evidence tendered, it does not appear that SGI considered this.

[34] The PIR candidly testified that, given the Appellant's specific concerns with respect to the recommended treatment regime, she would have contacted the Appellant's family physician (or, alternatively, SGI's medical consultant and/or the secondary assessment team) to determine whether there was, for example, an alternative treatment regime that would address the Appellant's concerns. It does not appear that any of those inquiries were made in this case.

[35] Counsel for SGI filed an internal policy guideline (updated March 26, 2007) with respect to the administration of section 183. The policy states that SGI may "after giving proper warning, asking for reasons, and *deciding that reasons were not valid*, terminate all benefits, not just rehabilitation benefits or living assistance benefits." (emphasis added)

[36] The policy has been further updated in February 13, 2008 to recognize the insurer's discretion in imposing penalties for non-compliance and setting forth a process for progressive use of suspension and termination of benefits. We acknowledge that the February 13, 2008 policy postdates the decision letter in issue in this appeal.

[37] Both of these policies recognize the obligation of SGI to reasonably exercise its discretion under section 183 before taking steps which could have significant consequences to claimants.

[38] The Appellant was vague as to why he did not answer further letters from SGI and seemed to have the impression that his doctor had been adversely influenced to agree with SGI's position, although it is clear that his relationship with his family doctor was of long standing and continued to the present. In any event, his failure to respond to letters and his belief stated here, while not helpful and possibly instrumental in SGI's decision to terminate, do not affect our conclusion on this matter.

[39] The evidence and information about relevant policies, along with the discretionary wording in section 183, leads us to conclude that SGI did not properly exercise its discretion when it decided to terminate benefits to the Appellant.

### **OTHER MATTERS**

[40] We noted that when the Appellant testified at the hearing, he had a tendency to take arbitrary and firm positions on issues. Those attributes certainly could and probably did make the Appellant a somewhat trying person for the insurer and his caregivers to work with.

[41] When asked by the panel what outcome he wanted from his appeal, it was clear that he held the mistaken view that he was entitled to be compensated as he had been in his 1991 accident. He was interested in compensation for pain and suffering and for other economic loss that might be recovered pursuant to a tort claim. He maintained his outrage that the person in the other vehicle who was at fault for the accident had walked away without, in his view, consequence. He was not accepting of the fact that the legislative intent of Part VIII of the Act was based on a rehabilitative model and was not the tort model.

[42] Although he had been informed by SGI on a number of occasions that if he felt he had suffered economic loss that it was incumbent on him to sue the driver of the other vehicle and that was not part of the benefits he was entitled to receive pursuant to Part VIII of the Act, he had taken no steps to pursue this claim and seemed to take the position that SGI had the responsibility to pay on his assessment of loss.

[43] If the Appellant is of the view that as a result of the motor vehicle accident of December 2, 2006, he has suffered economic loss because he could not work on his invention, he may be able to sue to recover those losses; we are not expressing an opinion on that matter. He has been told on a number of occasions that he should contact SGI if he needs further information as to what is the procedure to follow. This is not within the jurisdiction of this Commission. The Appellant also has been told that the limitation period for a suit is two years from the date of the accident, or December 8, 2008.

[44] SGI is required to follow the *Automobile Accident Insurance Act* and the *Personal Injury Benefits Regulations* in administering claims under Part VIII of the Act. This legislation sets out what SGI may reimburse and what is required from a claimant before SGI can reimburse for medical or rehabilitative items, as well as reimbursement for mileage or travel claims.

[45] If the Appellant wishes to elect to change his insurance coverage from no fault to the tort system, he should do so by contacting his insurer. The change covers any claims for accidents that may happen in the future and not for any claims for accidents that occurred while the Appellant was covered by no fault insurance.

## **CONCLUSION**

[46] The decision letter of December 10, 2007 terminating the benefits of the Appellant is set aside.

## **COSTS**

[47] As the Appellant has been successful in his appeal he is entitled to his reasonable costs capped at \$2500 as governed by the legislation. He is also entitled to be reimbursed for his appeal fee.

**Dated** at Regina, Saskatchewan, on [July 8, 2009](#).

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**Barbara Tomkins**, Chair

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**Jeff Scott**, Commission Member

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**Jane Lancaster, Q.C.**, Commission Member