

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *K.A. v. Saskatchewan Government Insurance,*
2008 SKAIA 040

Date: 20080731

File: 060 of 2007

BETWEEN

K.A., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Terry Zakreski , for the Appellant
Dale Brown, for the Respondent

Before: **Jane Lancaster, Q.C., Chair**
Carolyn Jones, Commission Member
Al Knippel, 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
June 25, 2008

DECISION

[1] The Appellant appeals the May 24, 2007 decision of Saskatchewan Government Insurance (SGI) which terminated her Income Replacement Benefit (IRB) as of May 31, 2007 on the basis that she was able to return to work on a full time basis.

[2] SGI sent a further letter to the Appellant dated September 19, 2007 indicating that the termination of the IRB was not to take place until October 5, 2007 when the Appellant was to have completed an eight week treatment program. SGI indicated that they would pay the Appellant IRB from May 31, 2007 until the new termination date.

[3] The Appellant has appealed this decision.

FACTS:

[4] The Appellant was injured in a motor vehicle accident which occurred on June 4, 2000. During this time, the Appellant has participated in numerous treatment programs as recommended by medical practitioners, has undergone a number of assessments and was seen by numerous medical specialists as a part of the rehabilitation process.

[5] At the present time, the Appellant testified that she is unable to work at her employment on a full time basis in main part because of the debilitating headaches she has suffered as a result of the whiplash associated disorder she suffered to her cervical spine.

[6] She currently works from 8 a.m. to noon from Monday to Friday. Prior to the decision letter, the insurer “topped up” her income for the remaining 50%.

[7] The Appellant’s IRB was terminated in 2002 and she had appealed that decision and others to the Automobile Injury Appeal Commission (AIAC).

[8] Her appeal was heard on January, 2005 and in a decision dated February 25, 2005, her IRB was reinstated. The issue in that appeal was partly causation as to whether the headaches that the Appellant suffered were caused by the motor vehicle accident. The appeal panel found that although the Appellant had suffered from migraines pre-accident, she was not at pre-accident status. She was unable to return to full time employment

because she is suffering too many migraines to allow her to return to full time basis. The appeal decision stated that it was expected that with an ergonomic assessment and gradual increase in work hours that she would be able to successfully return to full time work on a long term basis.

[9] In addition, the Appellant's request for reimbursement for further medication and massage therapy and rehabilitation was reinstated.

[10] SGI then made further arrangements for medical assessments for the Appellant. She co-operated fully with these assessments.

[11] In April 2006, the Appellant attended for an Independent Medical Assessment with a psychiatric consultant to determine if there were any psychiatric concerns which may be a barrier to her full recovery. The psychiatric medical consultant stated in his report that when he met with the Appellant, her major concerns centered on headache and neck pains. As there did not appear any objective measures or tests pointing to a diagnosis, and he accepted that she was not malingering but was experiencing the headaches as reported, he felt that,

the "surest and swiftest intervention to provide more immediate relief and resolution of [the Appellant's] symptomatology would be obtained via finalizing the present medical-legal issue. Subconsciously, the angst and stress, associated with the litigation process and motivations to prove disability, would be immediately abated. This "pressure relief" would likely lead to an improvement in symptomatology and functioning.... The author otherwise has no specific treatment recommendations at this time."

[12] The Appellant also attended for an Independent Medical Assessment with a medical consultant in April 2006. The medical consultant who also provided evidence at the hearing indicated that he has developed specialization in Whiplash Associated Disorders (WAD) and chronic pain, both conditions usually occurring from motor vehicle accidents.

[13] The Appellant attended on him personally, and in addition he reviewed her very lengthy medical history and medical reports. The Appellant was mostly concerned with the headaches she was experiencing, both migraines and the almost daily headaches associated with neck pain.

[14] In his testimony, the consultant testified that in his view, the type of headaches, both migraine and the occipital headaches are consistent with the injury the Appellant received in her motor vehicle accident.

[15] The consultant was critical of the treatment that the Appellant had received prior to his seeing her in April 2006. In particular, he felt 6 years after the motor vehicle accident, the Appellant should not be relying on narcotic pain killers, massage therapy, or physiotherapy as this focuses on symptoms and not on function.

[16] In his view, as supported by research in treatment of WAD injuries, it was important that patients be active and moving, that they receive extensive education in pain vs harm, that they participate in programs focusing on posture, flexibility, core strength using those muscles which they find the most sore. He indicated that most people will avoid using those sore muscles and so it is important to have a program that teaches them to do so in a safe environment. Otherwise, in his view, by focusing exclusively on providing physiotherapy or massage to the area that had been injured, and by relying on pain medication, these become “crutches” and barriers to a return to pre-accident condition.

[17] The consultant testified that current research in the area of WAD injuries recommend that treatment be provided, not specifically to reduce symptoms, but to challenge the patient physically, increase range of motion, and get the body well. It is the symptoms that bring the patient to the doctor for relief, but the best results for getting someone well and not developing chronic pain is to ensure the physical state of the patient is improved. Once that has happened, whatever is left over, is more likely to be in the psycho-social realm rather than requiring physical therapy in his opinion.

[18] In the Appellant’s case, he recommended that she cease taking pain medication, massage therapy, and to enter into a “proper spinal rehabilitation program that includes posture correction, neck and back mobilization with a focus on exercises the patient is likely to find most sore initially, rather than avoidance of the same. The patient needs to understand that there may be an initial worsening of her conditions as she works through this. The patient should also be provided with customized foot orthotics with both

longitudinal and metatarsal support.” He also recommended that she obtain a proper lumbar support.

[19] The consultant testified that in his opinion, the Appellant had healed from her original soft tissue injuries but because she had not received active therapy of the type he recommended, but mainly passive therapy, she was still experiencing the headaches and chronic neck pain.

[20] The Consultant was concerned that the type of rehabilitation program he was recommending was not available in Saskatchewan. The Appellant’s family doctor spoke to the consultant and the family doctor made arrangements for such a program with a local physiotherapist with whom the family doctor had previously worked. The consultant indicated that on the face of it, it appeared that the program met his requirements.

[21] It is clear that the Appellant participated willingly and hopefully with the recommendations and quit taking any pain medication by September 2006. As she was still suffering from neck pain and headaches, the physiotherapist continued to provide specific focused passive treatment of her neck muscles.

[22] The Appellant indicated that she was still experiencing daily headaches (and still is experiencing headaches as of the time of the hearing) and was not able to return to work full time.

[23] She returned to the medical consultant who testified that in his view, she had not received the rehabilitation program that he had recommended, but the program she had in fact received was once again focusing on passive manipulation of her neck area and not on her global strengthening and fitness.

[24] He recommended that she receive a Functional Abilities Evaluation from a physiotherapist in whom he had confidence.

[25] The insurer made arrangements for such an assessment and again the Appellant was more than willing to participate in this assessment which occurred on February 20, 2007.

[26] The assessment looked at the employment requirements of her current job. The Appellant reported that she did not have any restriction in the ability to perform her work or home making duties. However, after completing her duties, she experiences fatigue.

[27] As a result of this assessment, the physiotherapist made the following recommendations:

“ I recommend that [the Appellant] follow up regularly 2-3 times a day through a basic range of motion exercises for neck and upper back that focus on repetition of the joint motion and on pushing to the joint limit rather as opposed to 1-2 sustained stretches. She needs to challenge her fitness with more aggressive workout sessions. Cardio training should include bursts of speed and effort. Strength workouts focusing on upper body strength, core and lower body need to challenge the muscles to fatigue and the resistance must be progressively increased. Functional pliametric type exercises must be included. This type of exercise is required for performance in sports such as basketball. She may best achieve this with the assistance of a well qualified personal trainer at a local gym. [The Appellant] should return to basketball realizing that initially her participation may be at a modified level. *[The Appellant] is capable of full work requirements and currently manages all activities of daily living* (emphasis added).

[28] As a result, of this assessment, arrangements were made for the Appellant to participate in such a physical exercise program with a personal trainer who consulted on the design of the program with the physiotherapist making the recommendations..

[29] The Appellant took part in the program and after finishing the program, SGI then terminated the top up of her IRB on the basis that she was now capable of full work activities.

[30] The Appellant testified that although she is no longer taking pain medications or receiving other passive treatment such as massage therapy or physiotherapy, she still suffers from daily headaches which prevent her from returning to full time work.

[31] In her testimony, she testified that she has a daily headache and has had several migraines since her exercise program in the fall of 2007, although she acknowledges she feels better physically since getting off the pain medications and the frequency of her migraines has diminished. She testified that she does not know what causes her to have the headaches and it does not seem that any of her work duties precipitate the headaches.

[32] She testified that she works in the morning in her job which is mainly sedentary, interviewing clients, using her computer extensively. Her work is detail oriented and the testimony of her employer confirms that she is a highly valued employee and that if she could work full time, there was ample work for her to do. There is no impediment on the employer's part to her working on a full time basis.

[33] Her current routine is to work mornings from 8:00 a.m. to noon and then to do her home exercise routine or home errands and shopping as her pain and fatigue are such that she is not able to be active during the evening. She indicates that she has indicated to her employer that she can be available occasionally on several days per week and such afternoons are scheduled in advance.

[34] In April and May, 2008, due to the illness of a co-worker, the Appellant worked extensive hours – over 45-50 hours per week for a period of six weeks. In her view and that of her employer, this “stretched her”. She reported that she was not able to do her exercise during this time and this resulted in increased pain and discomfort. She did not take time off during this period of time, nor did it appear that her superior work function suffered. She did not report any long term effects as a result of this increased work time.

ISSUE:

[35] Is the Appellant capable of returning to full time employment?

Relevant Statute Sections:

Automobile Accident Insurance Act

S113(2) An insured is entitled to an income replacement benefit if, as a result of an accident, the insured:

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

ANALYSIS

[36] The Appellant takes the position that she is in the same situation as she was in when the Automobile Injury Appeal Commission in 2005 reviewed her ability to continue her employment and found that she was unable to do so.

[37] In her view, nothing has changed to her condition in the intervening years and months and her headaches which were caused in the motor vehicle accident still persist to such a level that she cannot return to full time employment.

[38] Both parties agree that there is nothing in the work conditions that cause her to experience her headaches.

[39] In her view, she would like to resume some massage therapy which has provided her with some relief and when she is symptom free, she indicates that she will be pleased to advise SGI that she no longer requires their assistance. She has complied with all their requests and during the past 7 years has become increasingly frustrated with her lack of progress.

[40] SGI takes the position that since the 2005 AIAC decision there is now sufficient medical advice that it is now safe for the Appellant to return to work full time albeit with symptoms. They rely on the two independent medical examinations by the consultant as well as the Functional Abilities Assessment that the Appellant does not require further treatment and can return to work on a full time basis.

[41] The Appellant's family physician for the past 15 years testified that in his view the Appellant is highly motivated and has been fully co-operative with any suggestions that may alleviate her condition.

[42] Surprisingly, he indicated that although the Appellant has reported daily headaches and neck pain, the most dominant complaint has been her low pelvic and hip pain. He indicates that this discomfort is exacerbated by sitting at work and she requires breaks to stretch to avoid spasms.

[43] He also indicated that her headaches are a barrier to work.

[44] In his view, since 2005, the frequency of the Appellant's migraines has diminished. His records show three episodes in the past year. She has reported daily occipital headaches. He testified that if he were to advise SGI, he would encourage the continuation of the exercise therapy as a key to managing her symptoms.

[45] He would also recommend continuation of passive focused neck treatment by a physiotherapist he trusts and also that she use breaks and stretches during times of prolonged sitting.

[46] The Functional Abilities Evaluation performed in February 2007 noted that the Appellant indicated the following subjective complaints:

- Overall fatigue and lack of feeling like an athlete.
- Constant dull occipital headache which builds in intensity. She had trouble identifying aggravating factors or a pattern of onset.
- Migraine headaches occurring sporadically maybe 3 times per month or once every 6 weeks.
- Pain between the shoulders.
- Dull left lateral hip and low back usually noted on first rising in the morning.

[47] It is noted that in the medical consultant's report of April 2006, he recommended that the Appellant be provided with orthotics to assist with her daily hip and low back pain and in his later report of March 2007, he reported that the use of the orthotics has greatly reduced the hip pain according to the Appellant.

[48] The Appellant takes the position that as she still suffers from the symptoms of the motor vehicle accident, in particular, the daily occipital headaches; she is not able to return to work full time.

[49] However, when asked if there are days whereby she feels well enough to work full time, does she do so, she indicated that, in her view, it is important that she does her exercise program and she does this on the afternoons she does not work.

[50] Her position as stated in her testimony is that to manage the pain of her headaches and to allow her to work half time, she must commit to use the other half days to her exercise program.

[51] Although her counsel argued strenuously that the Appellant's condition is unchanged since her prior AIAC hearing in January 2005, we disagree.

[52] The Appellant has made some remarkable improvements since that time. She was taking significant pain medication to cope and now she takes specific pain medication only to deal with migraines. Her migraines were frequent and the frequency has diminished such that she has had three migraines in the past year. She had significant back and hip pain such that it was seen as a barrier by her family doctor to full time work. Now, with the use of orthotics she has minimized that discomfort.

[53] In 2005, the Appellant relied significantly on passive treatment such as physiotherapy and massage therapy. She has not had those treatments since 2006 and has relied on an exercise program which she has been involved in since August 2007.

[54] She has indicated that she feels the value of the exercise program such that she now schedules her exercise program for the afternoons she does not work.

[55] The Appellant was asked why she could not schedule her exercise program which is approximately one hour for at least three times per week, before or after she had finished full time work. She indicated that her headaches were worse in the morning and that she found the exercise program very tiring and painful and so would not be able to have the energy to do other tasks of daily living.

[56] There is an important distinction in the fact that in 2005 the Appellant indicated that she was unable physically to work full time because of her conditions caused by the motor vehicle accident and today, she testified that she cannot work full time so that she can schedule the exercise program as maintenance to manage her symptoms.

[57] This distinction was even clearer when the Appellant was able to work for a 6 week period with longer than full time hours without a significant increase in symptoms such that she could not perform her work. She testified she was “stretched” and had an increase in symptoms, which was reduced when she returned to her regular schedule.

[58] We accept that an important component in the Appellant being able to maintain her functionality is participating in an exercise program such as she had been trained to do in fall 2007.

[59] We do not accept that the only way the Appellant could perform her exercise program is to work less than full time. There is no evidence that her work in any way triggers or exacerbates her condition.

[60] We acknowledge that she continues to have the occipital headaches, but we accept the evidence provided that she can functionally perform her employment on a full time basis even with these symptoms.

[61] We accept the evidence of the Functional Abilities Evaluation and the evidence of the medical consultant that she is capable of working at her employment on a full time basis. Further, the test of a person's ability to do pre-injury employment is not whether they can do that work with the same level of ease and comfort with which they did it before the accident.

[62] In our view, the fact that she continues to have symptoms from her motor vehicle accident does not preclude the Appellant from working full time when there is medical evidence that she is functionally capable of so doing. As well as the medical evidence, there is the evidence that for a period of six weeks, she worked more than full time hours without harm.

[63] We therefore conclude that the decision letter of SGI dated September 19, 2007 is upheld.

COSTS:

[64] As we have decided that the September 19, 2007 decision letter of SGI is upheld, we are not prepared to order costs on this matter.

[65] However, counsel for the Appellant had argued that if the Appellant were to be successful in her appeal, the panel should consider awarding costs against SGI in a manner which would indicate that SGI had acted in an inappropriate manner in administering the Appellant's file.

[66] Both parties have filed briefs of law on this issue and we appreciate their guidance.

[67] We do not agree with the Appellant that her file was inappropriately administered by SGI. They have a responsibility under the *Automobile Accident Insurance Act* to assist the Appellant to return to her pre-accident status.

[68] The legislative plan is a rehabilitative model and the position of the Appellant as stated by her counsel to just leave her alone and pay her benefits until she feels she no longer needs them is more like a pension plan than the legislation that SGI must administer.

[69] In reviewing the material, it would appear that frustrating as it may have been at times for the Appellant, the advice of additional medical personnel since the 2005 AIAC decision has been beneficial to her. If she considered her situation in 2005 to 2008, she would have to acknowledge that improvements have occurred and that SGI has funded and supported those recommendations.

Dated at Saskatoon, Saskatchewan, on July 31, 2008.

Jane Lancaster, Q.C., Chair

Carolyn Jones, Commission Member

Al Knippel, Commission Member