

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *T.R. v. Saskatchewan Government Insurance,*
2005 SKAIA 005
Date: 20050124
File: 019 of 2004

BETWEEN

T.R., Applicant

and

Saskatchewan Government Insurance, Respondent

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

Before: **Ann Phillips, Chair**
Joy Dobko, Commission Member
Carolyn Jones, 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 16, 2004

DECISION

[1] This is an appeal by T.R., the Appellant, of a decision made by Saskatchewan Government Insurance (“SGI”) dated November 17, 2003 with respect to the assessment of her entitlement to personal and home care benefits.

FACTS:

[2] The Appellant was injured in two motor vehicle accidents, the first being on October 4, 1999 (“first accident”) and the second on August 28, 2002 (“second accident”). The first accident occurred when a City of Saskatoon Transit bus which she was riding on made a sudden stop. The Appellant was standing on the bus holding on to a pole. When the bus came to a stop, the Appellant was unable to keep herself from falling and she fell into one of the cross bars on the bus. She injured her left hip and was diagnosed with traumatic bursitis of her left hip.

[3] The Appellant suffered from ochronosis prior to the first accident. Ochronosis contributes to a severe form of degenerative arthritis. Dr. Markland examined the Appellant on May 21, 1998 and reported:

...

PHYSICAL EXAM:

She is markedly stiffened and there is virtually no movement of her cervical, thoracic or lumbar spine. She has a flexion contracture of the right hip of about ten degrees. She has flexion of both hips is limited (sic) to 80 degrees on the left and 75 degrees on the right.

IMPRESSION:

This lady has severe OCHRANOSIS and she has lost height secondary to the ochranosis, but it is possible she also has osteoporosis. I think it might be very hard to detect which is which. I will see what we can do to arrange a bone density on her.

I don't think she has a malignancy, but she is absolutely convinced that is what is present with her pain all over. I would be more suspicious of FIBROMYALGIA, in addition to the ochranosis.

As you are aware this ochranosis contributes to a very severe form of degenerative arthritis, frequently patient's need multiple joints to be replaced because of the continued build-up of the crystals around the joints.

[4] A bone scan completed on July 16, 1998 confirmed that the Appellant suffered from arthritis in both of her shoulders and both hips.

[5] The Appellant attended to Saskatoon City Hospital on October 4, 1999 following her first accident. X-rays taken of the pelvis and lumbar spine confirmed minor degenerative changes in both hips and total destruction of the disc spaces at all levels with end phase sclerosis present at all levels. The Appellant completed her Application for Benefits on October 6, 1999. The Appellant reported pain in her neck and left shoulder, low back, left hip and left knee. She also reported headaches.

[6] The Appellant had bone density testing completed on October 13, 1999. Dr. Markland reported that the results of the bone density testing were consistent with osteoporosis of the lumbar spine. He recommended that she be placed on bisphosphonate therapy because her bones were so fragile that they would be susceptible to fracture.

[7] As a result of the injuries sustained by the Appellant in the first accident, SGI provided the Appellant with personal care and homecare assistance. The Appellant reported that she was unable to vacuum and that her son had been assisting her with driving her around and completing some of her household duties. SGI calculated the Appellant's entitlement to a personal and homecare assistance benefit to be \$68.94 per week.

[8] On October 29, 1999, the Appellant's primary practitioner, Dr. Kusch completed a Practitioner's Report. Dr. Kusch reported a hematoma to the left hip five inches in diameter and noted that the Appellant was complaining of low back pain and right shoulder pain. His diagnosis was low back pain Grade II.

[9] On November 9, 1999, Dr. Will diagnosed the Appellant to be suffering from traumatic laryngitis. On November 15, 1999, Dr. Kusch provided a medical report regarding the Appellant's injuries from the first accident. Dr. Kusch's diagnosis subsequent to the first accident was hematoma of the Appellant's left hip over the greater trochanter resolving as expected and he identified no fractures. Dr. Kusch noted that the Appellant's back pain although longstanding was certainly exacerbated by the first accident.

[10] Bone imaging scans completed on December 10, 1999 showed transverse zones of increased activity at L2, L3 and L4 which were characteristic of late healing compression

fractures. Dr. Markland confirmed the findings of the bone scan in her report dated January 11, 2000 and recommended repeat radiographs.

[11] On January 3, 2000, Ms. Colleen Hancharuk, an occupational therapist attended to the Appellant's apartment to complete a home assessment. The occupational therapist noted that the Appellant could not bend, do any lifting and had difficulty with transfers and mobility. Ms. Hancharuk concluded that the Appellant's symptoms and level of independence were interrupted by the first accident although it was difficult to determine if it was all related to the first accident or the Appellant's other health problems. The occupational therapist recommended a single step Rubbermaid stool, a Sask Pole to assist in transferring in and out of the tub, a single cane, a low back Obus Forme and seat and a long-handled duster and dust pan.

[12] On January 19, 2000, Dr. Markland reported that the Appellant refused to have further x-rays and therefore she could not determine whether or not the Appellant suffered a compression fracture or if she had just flared up her disc disease.

[13] On March 16 and 17, 2000, the Appellant attended to Saskatoon Musculoskeletal Rehabilitation Center ("SMRC") for a secondary assessment. The assessment team reported:

...

7. Clinical Impression

A. Medical

- [The Appellant] is in the normal healing phase expected of osteoporotic fractures. It will most likely take another 6 months until the pain is at a reasonable level.
- X-rays show evidence of fractures involving L2, L3 and L4. They also show evidence of calcification of the disc space with severe loss at disc space height and sclerosis of both end plates of the vertebrae throughout the entire spine, including the cervical spine. The interdiscal calcification and the abnormalities of the vertebral end plates are all part of the ochronosis. It is impossible to date the compression fractures based on the films alone.

B. Physical

- Low back pain, grade IV (compression fractures at L2, L3 and L4).
- Possible compression fractures in the thoracic spine.

C. Non Accident related Comorbidity

- Ochronosis.
- Degenerative disc disease.
- Osteoporosis.
- Osteo-arthritis.
- Calcium deficiency.

- Healing L5 compression fracture seen on bone scan of July 15th, 1999.

[14] The assessment team recommended a secondary level functionally based rehabilitation program for 12 weeks. The team noted that the Appellant was not a candidate for aggressive conditioning and that program should be focused around education improving function.

[15] On April 17, 2000, Dr. Peloso examined the Appellant with respect to her functional status. Dr. Peloso, originally examined the Appellant as part of the secondary assessment completed in March 2000. He reported that the main issue with respect to the Appellant's ongoing problems was with respect to pain management. Dr. Peloso noted that the Appellant was reluctant and unwilling to try any medicinal treatment to treat her pain. He noted that her pain would be persistent for several months without her cooperation and that it would be difficult to get her to a more functional level.

[16] On April 20, 2000, Dr. Kusch reported that the Appellant suffered a rupture of the right breast prosthesis as a result of the first accident. Dr. Classen examined the Appellant with respect to the ruptured breast implant and concluded that the implant was not ruptured and in his opinion the pain she complained about was more in keeping with a radicular type of pain, possibly related to a spinal injury.

[17] On May 23, 2000, SMRC reported regarding the Appellant's attendance for complaints of persistent back and shoulder pain from her first accident. Dr. Grier reported:

...
As you know, [the Appellant] has been attending SMRC on an intermittent basis with complaints of persistent back and shoulder pain following an injury on a bus. She suffers significant back pain and this limits her ability and willingness to attempt to increase her function. As you know, we have arranged for her to see Dr. Peloso, who recommended a variety of medications in his letter to you dated April 17, 2000.

[The Appellant] has had several sessions with Dr. Larry Shepel, however, Dr. Shepel has been unable to persuade her to try any increase in function. [The Appellant] has erected barriers to any activity which may be of benefit to her. This includes the use of the medication for both pain control and bone density, the use of flexibility exercises and modification of daily activities.

An occupation therapist evaluation recommended a pole in her bath. She found this quite helpful. In addition, she was provided with a feather duster with a long handle. She is not using it. She was provided with a mop to wash her kitchen floor that she is not using, as she cannot wring it out. Finally, she provided (sic) with a cane but finds it difficult to use because it causes shoulder pain.

...In summary, although there are a variety of interventions, which we think could be of help to [the Appellant], she does not appear to be prepared to try any of them. At this time, we are unable to assist the Appellant. We would be happy to have her re-enter the program in the future if she is willing to participate with the recommended interventions.

[18] On June 2, 2000 Dr. Kusch reported that he provided the Appellant with some sample drugs to try to return her to a more active pain-free lifestyle.

[19] On July 7, 2000, Dr. Jutras, medical consultant for SGI, completed a review of the Appellant's injuries from the first accident in order to assess permanent impairment benefits. Dr. Jutras concluded that the Appellant was entitled to 6% permanent whole-body impairment. SGI paid the Appellant \$7,991.52 for permanent impairment benefits arising out of her first accident.

[20] Ms. Hancharuk, occupational therapist, visited the Appellant on October 24, 2000 for a reassessment of homemaking and activities of daily living requirements. Ms. Hancharuk noted that the Appellant appeared to be depressed and was concerned about her isolation in her home. Ms. Hancharuk reported that the Appellant only bathed with supervision and that she sleeps on her chesterfield as she is uncomfortable in her bed. Ms. Hancharuk recommended a long-handled reacher, a long-handled shoe horn, a long-handled dressing stick and a contoured cervical pillow. Ms. Hancharuk reported that the Appellant still required assistance with preparation of her dinner meals, some housekeeping, laundry and grocery shopping.

[21] On November 21, 2000, Dr. Kusch advised SGI that he was unable to provide a percentage of the Appellant's disability which related to her first accident. Dr. Kusch reported:

....Certainly the accident of October 4th, 1999 contributed to her pain and physical limitations. I think perhaps people such as the Saskatoon Musculoskeletal Rehabilitation Centre would be in a better position to state specifically what she is able to do and unable to do as they tested her. As family doctors we don't have those facilities and rely on physiotherapists and occupational therapists for advice and opinion. As such a definite percentage of disability is no easier for me to guesstimate than that given by SGI's advisors. I would support the contention that [the Appellant's] lifestyle has changed dramatically since her accident but as to what degree is accident related versus the usual deterioration with her alkaptonuria requires prognostication beyond my capabilities or those of SGI's specialists.

[22] On March 21, 2001, Ms. Hancharuk concluded her involvement with the Appellant as she was not receptive to any assistance that Ms. Hancharuk could offer.

[23] In April 2001, the Appellant attended to St. Paul's Emergency Department complaining of severe neck pain. X-rays of the cervical spine showed no evidence of disc herniation but did show extensive cervical spondylosis and degenerative disc disease. Dr. Voll opined that she was likely suffering from a C6-7 root compression.

[24] Ms. Hancharuk visited the Appellant on May 23, 2001 for a reassessment of homemaking and activities of daily living requirements. Ms. Hancharuk noted that the Appellant continued to complain of her deterioration in her health which she attributed entirely to the first accident. Ms. Hancharuk noted that the Appellant was adamant in her view and refused to consider her pre-existing condition of ochronosis, osteoarthritis, degenerative disc disease and osteoporosis as contributing to her current difficulties. Ms. Hancharuk completed a Personal and Home Evaluation Form noting that the Appellant required complete assistance with vacuuming, heavy scrubbing and the purchase of groceries. The Appellant also required supervision with bathing.

[25] Upon review of the report from Ms. Hancharuk, SGI reassessed the Appellant's entitlement to personal assistance/homecare benefits. SGI wrote to the Appellant on June 18, 2001 and advised her that her entitlement to benefits for personal and home care assistance had been reduced to \$25 per week.

[26] Around June 2001, the Appellant was unhappy with Dr. Kusch's inability to attribute a disability percentage to the first accident and switched family physicians to Dr. Chernoff. On July 18, 2001, Dr. Chernoff prescribed a soft collar c-spine support for the Appellant's neck. The Appellant testified that SGI has never provided her with a soft collar in accordance with Dr. Chernoff's recommendations.

[27] On December 11, 2001, SGI conducted an Application for Review with respect to their denial of a soft collar and the reduction of the home and personal care benefits. SGI upheld their decision with respect to the denial of a soft collar on the basis that there was no objective evidence to support the need for one. SGI further upheld the reduction in home and personal care benefits based upon the in-home assessment completed by Ms. Hancharuk on May 23, 2001.

[28] Ms. Hancharuk attended to the Appellant's residence on February 15, 2002 to review the Appellant's need for personal and home care. Ms. Hancharuk reported:

...[the Appellant] appeared to have deteriorated since my last visit. She is extremely limited in function, particularly mobility and any tasks or activities involving bending, kneeling or reaching. However, I am not suggesting all of her limitations are MVA related, that is why I offered suggestions in other areas, such as utilizing community therapy services and other adaptive equipment. She continues to be non-compliant with these issues.

Ms. Hancharuk completed a Personal and Home Evaluation Form noting that the Appellant now required partial assistance with bathing, preparation of dinner and her laundry. The Appellant required complete assistance with the activities of housekeeping and purchase of supplies. A follow-up visit was completed on April 17, 2002. Ms. Hancharuk reported no change in the Appellant's activities of daily living status. She provided the Appellant with a helping-hand reacher and recommended that a lightweight fibro-mop and a kitchen assessment be given consideration. SGI completed the Home Assistance and Personal Care Grids and assessed the Appellant's entitlement to personal and home care benefits to remain at \$25 per week.

[29] On August 28, 2002, Dr. Chernoff provided SGI with a medical report. In his opinion, the Appellant's arthritic condition was fairly dramatically aggravated by her first accident and recommended that SGI continue to provide assistance with housekeeping, laundry and grocery shopping.

[30] Unfortunately for the Appellant she was involved in her second accident on August 28, 2002 ("second accident") which further restricted her function. The Appellant was riding a City of Saskatoon Transit Bus when the bus stopped suddenly. The Appellant was thrown from the front seat she was riding in and struck a corner post with her right hip area. X-rays taken the day of the second accident showed no fracture or sign of injury to the Appellant's pelvis/right hip, cervical spine, right shoulder and right knee. Dr. Chernoff prescribed a neck collar and a walker for the Appellant's injuries sustained in the second accident. In her Application for Benefits completed on October 23, 2002, the Appellant reported pain in her right shoulder, right hip, right knee and down her right leg. The Appellant testified that following the second accident, she required assistance with personal and home care on a 24 hour basis.

[31] On September 10, 2002, the Appellant attended upon Dr. Chernoff. Dr. Chernoff reported:

...Your x-ray shows that you have significant arthritis in the entire lumbrosacral spine with fusion of all of the bones. Instead of spaces between the bones your bones are virtually fused together. This is why any type of sprain or strain to your back as on the bus injury will severely aggravate your pain and make you feel unwell for a few weeks to months at a time.

[32] On October 20, 2002, the Appellant attended to the Emergency Department of St. Paul's Hospital complaining of pain in her right hip and shooting pain from her right hip. X-rays taken of the pelvis/right hip, right knee and right foot showed osteoarthritic changes but no other abnormalities. Degenerative changes were present within the thoracic spine.

[33] Dr. Chernoff referred the Appellant to Dr. Wine for pain in her hips, knees and back. The Appellant met with Dr. Wine on October 24, 2002. Dr. Wine diagnosed the Appellant to be suffering from post-traumatic regional myofascial pain syndrome. Dr. Wine recommended opioid analgesia for pain control.

[34] On November 13, 2002, Dr. Chernoff wrote to SGI regarding the Appellant's physical condition following her second accident. Dr. Chernoff reported:

...I am sorry but I have a difficult time answering all the questions in your letter because of the fact that [the Appellant]'s pain has been extremely difficult to analyze. She has gone from taking virtually no narcotic tablets prior to the accident to presently requiring six or eight tablets of Dilaudid 2 mg. every day.

Certainly, her health condition prior to the accident was failing. She has suffered with ochronosis and alkaptonuria over the years as well as having slowly worsening arthritis in her hips and knees.

She is presently waiting to see Dr. Reilly the orthopedic surgeon with regard to her arthritic hips and knees. She is also booked to have a bone scan at the end of November to rule out fractures, cancer and infection in her skeleton.

The soft tissue injury she suffered in the motor vehicle accident of August 28th, 2002 certainly had aggravated her arthritic condition and maximized her pain.

I believe [the Appellant] does need some help with activities of daily living and this is definitely related to her motor vehicle accident injuries that aggravated her pre-existing health problems.

The question you ask in #9 – “what percentage is related to pre-existing conditions and what percentage is MVA – injury related?” it is most difficult to give you a quantitative number. Certainly, at the present time, I doubt that [the Appellant] can do very much of her housework. Therefore, I would suspect that she needs help with grocery shopping, vacuuming and cleaning of her home.

[35] Bone imaging studies completed on November 26, 2002 showed that the Appellant may be suffering from avascular necrosis of her right hip and healing compression fractures at L2 and L4. Dr. Reilly reviewed the Appellant on December 9, 2002. Dr. Reilly opined that the Appellant's primary problem was arthritis of her right hip. He recommended that the Appellant proceed with right total hip arthroplasty. Dr. Reilly reported that x-rays of the cervical spine, right hip, right shoulder and right knee showed no evidence of fracture.

[36] On December 23, 2002, Dr. Taillon, medical consultant for SGI, reviewed the Appellant's medical file. Dr. Taillon noted a substantial increase in the Appellant's symptoms since her second accident and recommended that home assistance be provided until January 2003 and a secondary assessment at SMRC to complete functional testing with respect to activities of daily living and home chores be completed.

[37] Given that the Appellant was involved in two motor vehicle accidents, SGI combined her personal care and/or household benefits. SGI completed a Grid of Required Functional Activities for both the first and second accident. SGI relied upon Dr. Chernoff's and Dr. Taillon's medical reports. SGI determined that the Appellant was entitled to \$33.25 per week for the injuries suffered in the first accident and \$71.25 per week for her injuries suffered in the second accident. On January 20, 2003, SGI wrote to the Appellant and advised her that she would be entitled to \$105.00 per week for assistance with personal care and/or household duties for injuries sustained in both accidents.

[38] On February 6th and 7th, 2003, the Appellant participated in a functional assessment evaluation at SMRC. The assessment team reported:

...
7. Clinical Impression
A. Diagnosis

Accident Related

- Related to the 1999 fall, osteoporotic fracture of L2, L3 and L4 with ongoing pain.
- Depression magnified due to loss of independence.
- Accelerated degeneration of the right hip osteoarthritis precipitating the need for a total hip replacement earlier than it would have been required if she had not been injured.

- There is no doubt that the hip condition has been present for some time. Reports from other doctors mention it in 1998 and 2000. The x-rays of 1999 show early arthritis. She would eventually have required the surgery, likely within the next 2 years probably, even if she had not had the accident.
- However it must be acknowledged that prior to the 28th of August she was able to walk across the road to the bus stop and get on the bus. She would not be able to do that now.
- The injury she describes did not cause the arthritis but may have resulted in considerable increase in pain and stiffness.
- A hip replacement is obviously indicated and it can be expected to relieve much of her pain and stiffness.

Non Accident Related

- Advanced osteoarthritis of both hips and patellofemoral joint of the right knee
- Advanced osteoarthritis of the cervical spine and right glenohumeral joint
- Ochronosis.
- Osteoporosis.
- Depression.
- Cervical spine and upper extremity range of motion within normal limits for age.

B. Status with respect to return to work or usual activity

- Severely restricted ability for ADL. Ability level has reduced from that which was last documented (April 17, 2002)
- Her companion would likely benefit from respite assistance. [The Appellant] has also expressed an interest in Meals on Wheels or homemaking assistance in order to give her companion a break.

The assessment team reported that the Appellant was severely restricted with activities of daily living. They recommended a home assessment following the Appellant's hip replacement booked for February 14, 2003. The assessment team was also of the opinion that the second accident resulted in the Appellant requiring the hip replacement two years earlier than she would have without the accident. They expected that within three months of her hip replacement, the Appellant's level of function would return to that which it was at on April 17, 2002. The Appellant underwent a right hip replacement on February 12, 2003.

[39] On March 20, 2003, Ms. Hancharuk returned to the Appellant's residence to assess her post surgery personal and home making assistance requirements. Ms. Hancharuk reported the Appellant's activities of daily living as follows:

- ...
- Feeding – Independent.
 - Dressing – Independent with loose fitting clothes, with the exception of lower limb dressing. She reported she requires the assistance of her friend to lift her leg to get into her trousers, socks and shoes. She reported she can not lift her leg on her own.

- Hygiene – Independent with toilet seat. She requires assistance with step over transfer to the bath tub. However, she reports she is able to step over completely and bath and shower with one leg in the tub and one leg out. She said this is not satisfactory and she is longing for a bath.
Solution: I have presented options to [the Appellant] in the past, such as recommendation of a bath lift, however she is insistent of bathing in her manner and wanting to be independent without the lift. I will look into other bath seats that could be accommodated to this particular bath tub.
- Meals/Homecare – Is dependent on assistance.
- Laundry/Groceries – Requires assistance.
- Transfers/bed mobility – This is an area where she is complaining due to hip and back pain.
Solution: Recommend looking at a sheepskin or an eggcrate topper that could be accommodated on her chesterfield that could possibly allow her some degree of comfort, although I am cautioned as there have been few solutions that have been acceptable to this client.

Ms. Hancharuk completed a Personal and Home Evaluation Grid. There is no evidence that SGI re-assessed the Appellants entitlement to benefits for personal and home care assistance upon receipt of this occupational report. SGI denied responsibility for the hip replacement and requested that Ms. Hancharuk redo the Grid. If a new Grid was completed it was not entered in evidence.

[40] On April 30, 2003, Dr. Chernoff referred the Appellant to Dr. Shannon for a second opinion regarding her right hip replacement. Dr. Chernoff reported that two subsequent x-rays showed the hip to be in proper alignment. Dr. Shannon was unable to find anything wrong with the hip. A bone scan showed normal distribution about the hip.

[41] On June 9, 2003, Dr. Chernoff reported to SGI that the Appellant was in need of physiotherapy because the second accident aggravated both her hips and lumbar spine. In his opinion, her back was the most significant problem due to her second accident. On June 16, 2003, Dr. Reilly diagnosed the Appellant to be suffering from a trochanteric bursitis in her right hip and injected the site with a local anesthetic.

[42] Ms. Hancharuk reviewed the Appellant's personal and homemaking abilities again on September 3, 2003. Ms. Hancharuk reported the Appellant's activities of daily living as follows:

- ...
Although I feel [the Appellant] has deteriorated since her surgery, there is improvement since my last visit, as there was more independent (sic) in terms of recovery from the surgery.

- Feeding – Independent.
- Dressing – Independent with loose fitting clothes. The client uses a stocking gutter and long-handled shoehorn to put shoes and socks on.
- Hygiene
 - Toilet - Independent.
 - Bathing – [The Appellant] reported she relies on her Home Care worker (care giver) to supervise her when transferring in and out of the tub. We have discussed many options for [the Appellant], such as a bath lift and bath stools have been tried unsuccessfully. Bath stools do not give her the comfort of sitting in the water, which she feels is beneficial and soothing to her. AT this time, she likes to have a warm bath twice a day. She reported she does have this when her Home Care worker is in her suite. She reported the Home Care workers assists (sic) her with transfers in and out of the tub. She does not want to try a bath lift, as suggested during previous visits, as she feels it would damage her tub however I do not feel that would be the case.
- Laundry – Home Care provides this service. [The Appellant] would be independent with light loads or with her personal items.
- Housecleaning – The client reported she cannot vacuum or do any of the heavy household duties at this time. Due to her lack of mobility, I would suggest heavy housework and any type of scrubbing would be difficult and she would require assistance.
- Shopping – [The Appellant] would be independent with small items available to her in terms of utilizing her walker or she would have to rely on delivery service.
- Meals – The client would be independent in her breakfast and small meals, however, she relies on Home Care for the larger or heavier meal. I find this very difficult to assess as I think she could manage some of the meals, although heavier pots and lifting items would certainly be difficult for her. She also reported she has lost her grasp and is not able to cut meat. Again, she was very reluctant to try adaptive aids for this purpose and was quite pleased with the present arrangement in that the worker prepares the evening meal.
- Transfers/Sleeping – The client was provided with raised bed blocks, which are very beneficial for her in aiding an independent transfer. She reported discomfort in her right hip and an inability to sleep undisturbed throughout the night. Previously I recommended an egg crate cushion or topper for her chesterfield, which she uses as her bed.
Solution: Recommend looking at a sheepskin or an eggcrate topper that could be accommodated on her chesterfield that could possibly allow her some degree of comfort, although I am cautioned as there have been few solutions that have been acceptable to this client.

Ms. Hancharuk completed a Personal and Home Evaluation Grid. Ms. Hancharuk noted that the Appellant's difficulties were primarily due to right hip pain and lack of strength.

[43] On September 11, 2003, Dr. Chernoff recommended water therapy for the Appellant to improve her back and leg pain. On October 6, 2003, Dr. Chernoff wrote to SGI with regard to the Appellant's current medical condition and a treatment plan. Dr. Chernoff reported:

...

6. Comorbidities and their impact on her activities of daily living. As mentioned above I believe that her comorbidities are causing her a great deal of her problems with activities of daily living. But, however, as mentioned above the pain in her joints and skeleton was not nearly as severe prior to the MVA of October 1999. **Therefore, as I have concluded above I believe that her comorbidities are causing half of her problems and the MVA is causing the other half.** *(Emphasis added)*

[44] Dr. Chernoff also testified by telephone conference at the appeal. He testified that the Appellant certainly suffered disability as a result of her accidents but that it was very difficult to determine when she would have been in the same medical condition if she had not been in the accidents. In his opinion 50% of her difficulties related to the accidents and 50% were related to her pre-existing conditions of ochronosis, osteoarthritis and osteoporosis.

[45] On October 24, 2003, SGI completed an assessment with respect to the Appellant's entitlement to personal and home care assistance benefits. The Evaluation Grid of Required Functional Activities was assessed as follows:

Activity	Completely Dependent	Partially Dependent			Does not apply	Comments
		a	B	C		
Arising from Bed	6	4	2	1	A	
Dressing/Undressing	4	3	2	1	A	
Bathing/Hygiene	6	3	*2*	1		Assist supervision with transfer
Grooming	2	1	1	1	A	
Toileting	2	1	1	1	A	
Bladder Control	2	1	1	1	A	
Bowel Control	3	2	1	1	A	
Eating/Drinking	3	2	1	1	A	
Taking Medications	1	1	1	1	A	
Mobility/Locomotion	5	4	*3*	2		
Cleaning Up after Meals	1	1	1	*1*		
Preparing Meals						
Breakfast	1	1	1	1	A	
Lunch	2	1	1	1	A	
Supper	2	1	*1*	1		
Laundry	5	4	3	*2*		Unable to do sheets/towels etc.
Light <1500 sq ft	1	1	.5	.5	A	
Housekeeping >1500 sq ft	2	1	.5	.5		
Heavy <1500 sq ft	*2*	1	.5	.5		
Housekeeping >1500 sq ft	3	2	1	.5		
Yardwork/Gardening/Shoveling	2	1	.5	.5	√	
Functional Supervision	8	5	4	3	A	
Purchasing Supplies	3	2	1	*.5*		
Transportation	5	4	3	2	A	
Total						
Maximum	69					

* added to mark the areas where the Appellant was assessed as requiring assistance

$$11.5 \times 646 \div 69 = \$107.66 / \text{week}$$

(written notations)

\$216 Bi/wkly

[46] On October 27, 2003, SGI wrote to the Appellant and advised her that she would receive \$216 every two weeks for her homecare needs. They also advised her that they had combined both files under one file and included all her needs under one file. Upon receipt and review of Dr. Chernoff's medical report of October 6, 2003, SGI wrote to the Appellant and advised that her personal and homecare benefits would be reduced to \$108.00 every two weeks due to Dr. Chernoff's opinion that 50% of her problems related to the motor vehicle accident injuries and 50% related to her co-morbidities.

[47] On February 16, 2004, Dr. Chernoff reported that the Appellant experienced the following problems which were directly attributable to her motor vehicle accidents:

- ...
1. She now has to walk with a cane or a walker.
 2. She loses her balance because she has pain in her legs, hips and lower back.
 3. She can't travel anymore or go on holidays because of her chronic pain.
 4. She had to sell her car because she was unable to drive it because of the pain in the above mentioned areas.
 5. She has severe back pain from her thoracic spine to her pelvic area.
 6. She has severe insomnia because of the above mentioned injuries.
 7. She cannot go shopping and has to have help shopping because of her injuries.
 8. She has a difficult time going to church because she can't sit for a very long time.

Dr. Chernoff recommended that SGI organize a multidisciplinary assessment to determine how debilitated the Appellant has become from both her motor vehicle accidents.

[48] On November 10, 2004, in preparation for the appeal, SGI reviewed the personal and home care benefits being paid to the Appellant. SGI determined that they owed the Appellant a further amount of \$219.03 due to miscalculations in her benefits. The new benefit for personal and home care assistance was assessed to be \$116.00 every two weeks.

[49] The Appellant testified that prior to her accidents she was able to drive her car to shop or to visit her mother in [location]; play piano at seniors' homes and for choir at church and also attend church. The Appellant stated that she can no longer vacuum or do a lot of her housekeeping such as washing windows, ironing clothes, making her bed and cooking her meals. She reported difficulty with doing her hair and knitting or crocheting.

LAW AND ANALYSIS

[50] 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.

[51] The Commission determined in *R.C.*¹ that its discretion under section 193(7) must be exercised in a judicial manner. The discretion will be exercised in favour of the Applicant only if it is demonstrated that the decision of SGI was wrong in law; or based on erroneous assumptions; or at the very least, the decision was unreasonable.²

[52] The decision appealed to the Commission is with respect to the November 17, 2003 decision letter of SGI which reduced the Appellants entitlement to homecare benefits by 50%. The decision letter stated:

On October 27, 2003 I had written you a letter outlining your benefits for homecare needs. Based on the occupational therapist's report, we are paying you \$216.00 every two weeks.

I have now received a report from Dr. Chernoff that states the following: "Comorbidities and their impact on her activities of daily living. As mentioned above I believe that her comorbidities are causing her a great deal of her problems with activities of daily living. But, however, as mentioned above the pain in her joints and skeleton was not nearly as severe prior to the MVA of October 1999. Therefore, as I have concluded above I believe that her comorbidities are causing half of her problems and the MVA is causing the other half."

Therefore, as Dr. Chernoff has stated, 50% of your problems are related to the motor vehicle accident injuries and 50% are related to your comorbidities SGI will now be reducing your homecare needs by 50%. I will now reimburse you \$108.00 every two weeks.

[53] On the basis of the November 17, 2003 decision letter, we have determined that we have jurisdiction to review both the October 27, 2003 assessment of benefits and the reduction of benefits.

¹ *R.C. v. Saskatchewan Government Insurance* 2003 SKA1A 1

² *Belchamber v. Saskatchewan Government Insurance*, [1997] TWL QB 97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB 98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB 98113.

[54] The Appellant raised several other issues which were not within the jurisdiction of the Commission to review, however, Dale Brown, counsel for SGI undertook to review the issues with the personal injury representative. The issues raised by the Appellant were with respect to the cervical collar prescribed by Dr. Chernoff on August 28, 2002 after her second accident and the egg crate topper recommended by Ms. Hancharuk in her occupational reports dated March 20, 2003 and September 3, 2003.

[55] The Appellant also advised that a secondary assessment has never been completed with respect to her second accident. The Appellant was referring to an assessment with respect to her entitlement to permanent impairment benefits, and not with respect to her ability to perform the activities of daily living. Mr. Brown advised the Commission that he would follow up with the personal injury representative and their medical consultants to determine if anything further needed to be assessed with respect to permanent impairment benefits.

[56] SGI submitted that this is a case where the “crumbling skull” rule would apply. SGI submitted that the Appellant had several pre-existing conditions, namely ochronosis, osteoarthritis and osteoporosis which contributed largely to her health problems. SGI submitted that she would have required surgery and/or other medical interventions in the future regardless of her injuries suffered in the accidents. In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada reiterated the “crumbling skull doctrine” as follows:

The so-called “crumbling skull” rule recognizes that the pre-existing condition was inherent in the plaintiff’s “original position”. The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage.³

[57] We agree with SGI’s submissions with respect to the “crumbling skull” doctrine and it is our opinion that SGI is not responsible to provide the Appellant with personal and home care assistance benefits for activities of daily living which she cannot perform as a result of her pre-existing conditions. Dr. Chernoff provided his very difficult subjective medical opinion that

³ *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paragraph 35.

50% of the Appellant's current problems relate to her accidents and 50% relate to her pre-existing conditions. We accept his medical opinion and evidence in that regard.

[58] The Appellant was involved in two motor vehicle accidents. SGI determined her entitlement to benefits for personal and home care assistance for the first accident in accordance with the grids ("old *Act* grids") found in Appendix D of *The Personal Injury Benefits Regulations*⁴ in force at the time of her first accident. In July 2002, the grids ("new *Act* grids") in Appendix D of *The Personal Injury Benefits Regulations*⁵ were revised and implemented by SGI. When the Appellant was involved in her second accident, SGI determined her entitlement to benefits for personal and home care assistance for the both accidents in accordance with the new *Act* grids in force at the time of her second accident. SGI applied the old *Act* grids until May 2002 and applied the new *Act* grids on January 17, 2003. It is our understanding that it is SGI's policy to provide the applicant with the better result between the old *Act* grids and new *Act* grids.⁶

[59] The Appellant's disability increased significantly after her second accident as reported by SMRC in February 2003. A revision of benefits to \$105.00 per week was completed on January 20, 2003; however, the next revision of her benefits by SGI was not completed until October 24, 2003. It is not clear why the Appellant's benefits were not re-assessed following the report from SMRC in February 2003, as it was the opinion of SMRC that the second accident resulted in the Appellant having a severely restricted ability for activities of daily living. In SMRC's medical opinion, the second accident resulted in the Appellant requiring a hip replacement two years earlier than she would have. It is our opinion that the Appellant's benefits should have been reassessed by SGI following the report from SMRC. We note that SMRC reported that she required assistance with dressing, mobility, arising from bed, meal preparation, bathing and that she was no longer driving. None of these items were included in the January 17, 2003 assessment. Ms. Hancharuk also completed an assessment on March 20, 2003 which was never considered by SGI. Although the hip replacement would have been required in the future and was not caused by the second accident, it was required earlier as a result of the second accident.

⁴ The Personal Injury Benefits Regulations, Ch. A-35 Reg 3 (effective January 1, 1995)

⁵ The Personal Injury Benefits Regulations, Ch. A-35 Reg 3 (effective January 1, 1995)

⁶ E.L. v. SGI, 2004 SKAIA 001 at paragraph 71.

[60] The subject of this appeal related to the Grids prepared by SGI on October 24, 2003. The October 24, 2003 assessment is based upon Ms. Hancharuk's assessment of September 3, 2003. As no assessment was completed in February 2003, we have reviewed the validity of the October 24, 2003 grids as they relate to the last Grids prepared for the Appellant which would be the January 17, 2003 assessment. As no assessment was completed by SGI in February 2003, the Appellant would not have had the opportunity to appeal until the October 24, 2003 assessment. The Appellant testified that since her second accident she has required 24 hour assistance. Therefore, we recommend SGI complete a review and re-assessment of the Appellant's entitlement to personal and home care benefits based upon the February 2003 SMRC interdisciplinary assessment report and the March 20, 2003 report of Ms. Hancharuk and pay to the Appellant retroactive benefits from February 7, 2003 to September 3, 2003 to account for her substantially increased disability immediately following the second accident. The increased benefits paid during this time period would be subject to the personal and home care benefits already received for that time period.

[61] With respect to the assessment of the Appellant's ability to perform activities of daily living after September 3, 2003, Ms. Hancharuk testified by way of telephone conference with respect to her assessment completed on September 3, 2003. In her assessment, Ms. Hancharuk noted that the Appellant's difficulties were primarily due to right hip pain and lack of strength. The Appellant also testified with respect to her current difficulties with activities of daily living. Ms. Hancharuk's and the Appellant's evidence is summarized in paragraphs 62 through 74.

[62] Arising from Bed – Ms. Hancharuk testified that as the Appellant sleeps on the chesterfield she assessed her ability to get on and off the chesterfield. Ms. Hancharuk stated that raised blocks were provided following the hip replacement and a Sask Pole was recommended however, the Appellant stated she refused the Sask Pole because it would damage her ceiling. Ms. Hancharuk assessed the Appellant's ability to transfer on and off the chesterfield and found that she was independent with this task. The Appellant advised that she has assistance with this activity but that if she had to, she could arise from the chesterfield on her own, but very slowly. SGI has not assessed any benefit in this regard and we find that to be a fair assessment.

[63] Dressing/Undressing – The Appellant testified that she is unable to pull sweaters on and off and she requires assistance with her trousers and her bra. Ms. Hancharuk testified that the Appellant reported that she was able to dress herself and the fact that she was always dressed suggested that she was independent in this activity. Ms. Hancharuk stated that the Appellant had been provided with a long-handled shoe horn and stocking gutter to assist her with dressing. Ms. Hancharuk stated that the Appellant had less fine motor coordination that may cause her some difficulty with some clothing but she could not specifically recall whether she had discussed difficulties with her bra in particular. SGI has not assessed any benefit in this regard. In light of Ms. Hancharuk's and the Appellant's evidence, it is our opinion that the Appellant may have some difficulties with some clothing therefore we find the Appellant to be partially dependent and would allow for 1 additional point in this regard.

[64] Bathing/Hygiene – The Appellant testified that she is unable to get in and out of the tub without assistance. Ms. Hancharuk assessed this at 50% dependency in her September 2003 assessment. She stated this was a difficult area because she believed the Appellant could be independent however she refuses to have a tub lift installed. The Appellant testified that the one that was recommended would not fit her tub. Ms. Hancharuk recommended a water powered tub lift which would raise and lower by water pressure. She felt that the Appellant was an excellent candidate for a tub lift. SGI found the Appellant to be partially dependent and assessed 2 points for assistance with transfer to and from the tub. We find this to be a fair assessment. We would strongly recommend that the Appellant consider allowing Ms. Hancharuk to initiate the installation of a water powered tub lift which may allow the Appellant to be independent in this activity.

[65] Grooming – The Appellant testified that she is unable to wash her hair and must wear a wig because she cannot raise her arms above her head to do her hair. Ms. Hancharuk testified that the Appellant had always advised she was independent in this regard and that she chose to wear a wig. SGI has not assessed any benefit in this regard and we find that to be a fair assessment.

[66] The Appellant did not report any difficulty with toileting, bladder control, bowel control, eating, drinking or taking medications. SGI has not assessed any benefits with respect to these activities and we find that to be a fair assessment.

[67] Mobility/Locomotion – The Appellant stated that she rarely uses her walker and relies mostly on her cane. She stated that she requires assistance getting on and off the buses. Ms. Hancharuk testified that this related to one's ability to transfer in and out of a vehicle. She assessed this at 50% dependency in her September 2003 assessment. She stated that a claimant would be assessed to be independent if they could walk with the assistance of a cane or a walker. SGI found the Appellant to be partially dependent and assessed 3 points for this activity. We find this to be a fair assessment.

[68] Cleaning up After Meals and Meal Preparation – The Appellant advised that she is able to make light meals, such as sandwiches, eggs, microwaveable food but she is unable to cut meat because she cannot put any pressure on the knife. She is able to assist with drying the dishes but is unable to wash them due to pressure required to scrub the dirty dishes. Ms. Hancharuk testified that she relied on the Appellant's use of her hands in performing other activities. She assessed transferable skills such as reaching cupboards, opening fridge and reaching down low. Ms. Hancharuk recommended some adaptive equipment to assist the Appellant in managing better however this was often met by resistance from the Appellant. Ms. Hancharuk noted that the Appellant would require assistance with lifting or carrying heavy or large roasters. She stated she would require assistance with making supper and assessed this at 50% dependency. Ms. Hancharuk assessed after meal clean-up at 25% dependency. SGI found the Appellant to be partially dependent and assessed 1 point for cleaning up after meals and 1 point for preparing supper. We find this to be a fair assessment.

[69] Laundry – The Appellant testified that she no longer irons her clothes because she is unable to lift the iron. She further stated she cannot get the clothes out of the washer or dryer and is unable to fold clothes because she cannot kneel on the floor. Ms. Hancharuk testified that the Appellant's washer and dryer are very accessible and the Appellant would only have difficulty with pulling out heavy items. She felt that the Appellant would be able to do other

tasks if she paced herself. In her September 2003 assessment she assessed 25% dependency for this activity. SGI found the Appellant to be partially dependent and assessed 2 points for washing sheets and towels. We find this to be a fair assessment.

[70] Housekeeping – The Appellant states she is unable to vacuum and wash the floor. Ms. Hancharuk reported that this area was difficult to assess because many aids were available which would assist the Appellant in being independent in this regard. Again, the Appellant was not receptive to a lot of the aids. Ms. Hancharuk noted that the condominium was always spotless so she assumed the Appellant was managing. We note that since the second accident the Appellant has had a companion living with her who she testified was doing all her cleaning. Ms. Hancharuk assessed Ms. Hancharuk to be independent with respect to light housekeeping and completely dependent with respect to heavy housekeeping. SGI found the Appellant to be completely dependent with regard to heavy housekeeping and assessed 2 points. They have not assessed any benefits with regard to light housekeeping. We accept that the Appellant could be independent with the use of aids and find the assessments with regard to light and heavy housekeeping to be fair.

[71] Yardwork, gardening and shoveling had no application as the Appellant resides in a condominium.

[72] Purchasing Supplies – the Appellant testified that she requires assistance in getting groceries as she is unable to carry the bags of groceries. Ms. Hancharuk testified that the Appellant had the ability to purchase light weight supplies and that she could put most groceries in a basket on her walker. She assessed her at 25% dependency for this activity. SGI found the Appellant to be partially dependent and assessed .5 points for purchasing supplies. We find this to be a fair assessment.

[73] Transportation - The significant difference for the Appellant between the old *Act* grids and the new *Act* grids is with respect to the addition of transportation in the new *Act* grids. SGI produced Guidelines used by personal injury representatives when preparing Living Assistance Grids. Transportation is defined as follows:

...

Transportation – The ability for one to use transportation when necessary. The customer is functionally unable to get on and off public transportation and/or travel in their normal mode of transportation such as driving a car. Note: This category does not include transfers – see Mobility/Locomotion. Also does not include loss of use of vehicle due to damage or loss of driver's license due to driving record or charges.

Completely Dependent – The customer is unable to complete any or can complete only minor tasks associated with transportation. E.g. the customer is dependent on others for assistance in order to get on and off a public bus for physical reasons, - 5 points

Partially Dependent /a – The customer is unable to complete 75% or more of the tasks associated with transportation. – 4 points

Partially Dependent/b – The customer is unable to complete 50% or more of the tasks associated with transportation. E.g./ The customer can enter and exit a bus but for safety reasons requires a companion, and/or is not able to access all locations via public transportation routes, or the customer may be able to drive short distances but cannot drive alone for trips or in downtown traffic without a passenger due to anxiety, or fatigue problems. – 3 points

Partially Dependent/c – The customer is unable to complete 25% or more of the tasks associated with transportation. E.g. this customer may experience problems such as inability to drive at night due to vision problems. – 2 points

[74] We note that The Evaluation Grid of Required Functional Activities prepared by SGI on October 24, 2003 does not provide the Appellant with any benefit regarding her loss of her ability to use her motor vehicle following the first accident. The Appellant testified that she had to sell her car after the first accident because she could no longer tolerate driving. Ms. Hancharuk provided evidence that she had not assessed transportation because the Appellant was no longer driving a vehicle at the time of her second accident. We do note that Ms. Hancharuk reported on January 4, 2000 that the Appellant could no longer drive her vehicle following the first accident because she could not tolerate the sitting and back pain while driving. It was also noted in the March 16th and 17th, 2000 SMRC report that the Appellant was no longer able to drive her car because she could not tolerate the sitting or shoulder checking. Unfortunately the old *Act* grids did not provide for transportation and it was not assessed. Ms. Hancharuk testified that in her opinion 25% of the Appellant's inability to drive a vehicle would be related to her accidents. Relying upon SGI's Guidelines, we would assess 2 points to be added to the Appellant's assessment for personal and home care benefits.

[75] We note that throughout the file, the Appellant has expressed reservation in using aids which would assist her in becoming independent with her activities of daily living. We would

encourage her to use the aids provided by Ms. Hancharuk. We would also strongly encourage the Appellant to consider the installation of a Sask Pole beside her chesterfield, a water powered tub lift and any recommendations of Ms. Hancharuk which may assist the Appellant in returning to sleep in her bed rather than on her chesterfield. Issues of non-compliance may result in a termination of the Appellant's benefits and that would be unfortunate.

[76] Subject to the lack of re-assessment in February 2003, overall, we find SGI's assessment of personal and home care benefits dated October 24, 2003 to be an accurate and fair assessment of the Appellant's ability to perform activities of daily living as of September 3, 2003. We would set aside part of the decision and award an additional 3 points to the original 11.5 points; 1 point for dressing/undressing and 2 points for transportation. Accordingly, the Appellant is entitled to a re-assessment of her personal and home care benefits retroactive to September 3, 2003. We find the reduction by SGI on November 17, 2003 to 50% to account for pre-existing conditions to be reasonable and fair in accordance with Dr. Chernoff's medical report of October 24, 2003.

[77] Mr. Brown, counsel for SGI, submitted that their decision to reduce benefits by 50% for pre-existing conditions should be upheld. In the alternative, Mr. Brown, submitted that the personal and home care benefits should continue at 100% until two years following the hip replacement surgery which would be February 2005 and then be reduced to 50% for pre-existing conditions. In our opinion, it is more appropriate and medically supported to retroactively compensate the Appellant for 100% of the assessed benefits for personal and home care for the period from February 2003 when she was severely restricted in activities of daily living until September 3, 2003 (being the period which an assessment was not completed and should have been). We find the portion of the decision letter of November 17, 2003 which reduced the Appellant's benefits by 50% to account for her pre-existing conditions in accordance with the medical report of Dr. Chernoff, to be fair and reasonable.

[78] The Appellant testified that she pays her companion the \$200 per month that she receives from SGI but it is not enough to compensate him for his 24 hour assistance. We empathize with the Appellant's position, however, her entitlement to personal and home care benefits relates to

her difficulty with activities of daily living as a result of her injuries in the accidents. SGI is not required to pay her additional benefits for pre-existing conditions which are causing 50% of her problems.

CONCLUSION

[79] We recommend that SGI complete a review and re-assessment of the benefits paid to the Appellant for personal and home care assistance between February 7, 2003 to September 3, 2003 as it is clear that the Appellant was severely restricted in her activities of daily living during that time and the assessment done by SGI in January 2003 did not take into account her inability to perform many of her activities of daily living.

[80] The decision of SGI dated November 17, 2003 is partially set aside. SGI is ordered to increase the amount of the Appellant's benefits for personal and home care benefits from 11.5 points to 14.5 points, payable retroactively to September 3, 2003. The decision to reduce the Appellant's benefits by 50% for pre-existing conditions is upheld.

[81] As the Appellant has been partially successful in her appeal, she is entitled to reasonable costs of her appeal including her Appeal fee in accordance with Section 193(11) of *The Automobile Accident Insurance Act* and Section 86(4) and 96 of *The Personal Injury Benefits Regulations*.

Dated at Regina, Saskatchewan, on January 24, 2005.

Ann Phillips, Chair

Joy Dobko, Commission Member

Carolyn Jones, Commission Member