

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *S.N. v. Saskatchewan Government Insurance,*
2005 SKAIA 009
Date: 20050210
File: 021 of 2003

BETWEEN

S.N., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
S.N., Applicant
Darrell Mack, for the Respondent

Before: **Joy Dobko, Chair**
Bev Cleveland, Commission Member
Darleen Topp, Commission Member

**THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL AND HEALTH
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND
OTHER IDENTIFYING INFORMATION.**

Heard at Saskatoon, Saskatchewan
January 4, 2005

DECISION

[1] This is an appeal by the Appellant, S.N., of a decision made by Saskatchewan Government Insurance (“SGI”) dated December 11, 2002¹. The decision of SGI was to continue to fund six chiropractic treatments per year for a period of three years for supportive care for the Appellant’s hip injury. The decision also terminated income replacement benefits payable to the Appellant as of June 2, 2003.

FACTS:

[2] The Appellant was involved in a motor vehicle accident on March 20, 1999. The Appellant sustained soft tissue injuries to her neck, back and right hip when an impaired driver rear-ended her vehicle. At the time of the accident, she was a full-time physical education teacher at a high school and a part-time aerobics instructor (approximately 5 hours per week).

[3] The Appellant received physiotherapy treatment and massage therapy following her accident. X-ray reports from March 20, 1999, indicated a loss of normal cervical lordosis that was postural in nature. No fracture or soft tissue swelling was visualized. Reports of the pelvis indicated that the bones, joints and visualized soft tissue were within normal limits.

[4] The Appellant attended Saskatoon Musculoskeletal Rehabilitation Center (“SMRC”) for secondary treatment from July 19, 1999 to September 15, 1999. The Secondary Treatment Discharge Report stated:

At the time of her discharge, [the Appellant] had not yet resumed full functional activity. She is encouraged to resume instruction of step aerobics over the next 3 weeks. Also, the nature of her occupation requires spurts of a variety of physical activity. It is recommended that over the next 3 months, [the Appellant] have access for crisis intervention if required during her return to normal activity.

[5] The Appellant was seeing Dr. Paull for crisis intervention following her discharge from SMRC. On November 8th and 9th, 1999, the Appellant attended FIT for Active Living for a tertiary assessment. The assessment team diagnosed the Appellant to be suffering from low back pain, grade II with associated right knee and ankle pain, right hip joint stiffness, whiplash associated disorder I with cervicogenic headaches as a result of the accident. They also queried

whether she had right carpal tunnel syndrome. They recommended that the Appellant attend tertiary treatment for 8-10 weeks. The Appellant was also encouraged to consider weaning of chiropractic and massage therapy services and to increase self-management strategies prior to entering tertiary treatment.

[6] The Appellant had a MRI done of her thoracic and lumbar spine on April 14, 2000 in Calgary, Alberta. The report showed normal MRI of the thoracic spine. The report for the lumbar spine was as follows:

...Impression:

1. The dominant pathology relates to the bilateral L4/5 and L5/S1 apophyseal joint osteoarthritic degenerative disease. Thus unfortunately is somewhat exaggerated by patient motion artifact.
2. Mild, posterior central L3/4 and L4/5 annular tear superimposed upon diffuse posterior annular/disc bulge.

[7] The Appellant participated in tertiary treatment at FIT for Active Living from January 4, 2000 to May 26, 2000. The discharge recommendations were that the Appellant return to full-time teaching with no extracurricular activities and that she discontinue teaching aerobics. They recommended she work out independently 3-4 times per week. The team noted that the Appellant presented with severe decreased right hip and lumbar spine range of motion which required aggressive manipulation, mobilization and stretching to maintain optimal function. The team reported:

Summary of Opinion

[The Appellant] has not obtained maximum medical improvement. She has not attained pre-accident functional status. There are ongoing limitations in position tolerances, strength, and mobility tasks due to ongoing impairment of the upper and lower extremities. It is unclear why [the Appellant] did not progress through tertiary treatment, although lack of a clear diagnosis, no family doctor and inability of [the Appellant] to further restrict her activity level were likely contributory to the end result at discharge.

The FIT team recommended that the Appellant have a tertiary re-assessment in December 2000.

[8] The Appellant underwent a second MRI of her right hip and sacroiliac joints in Calgary, Alberta on November 9, 2000. The MRI report with respect to the right hip was as follows:

¹ This decision is an Application for Review of SGI's decision dated June 3, 2002.

Impression:

1. Features noted on the MRI consistent with a relatively mild, broad-based acetabular femoral impaction fracture with resultant osteochondral sequelae as described.
2. Mild acetabular labrocapsular pathology as described.

The MRI report with respect to the sacroiliac joints was as follows:

Impression:

Features noted are suggestive of a possible healed, subarticular ilial fracture relative to the sacroiliac joint bilaterally.

[9] On January 22, 2001, Dr. Jutras, medical consultant for SGI, reviewed the Appellant's medical information, specifically the MRI which reported a possible healed subarticular ilial fracture and acetabular femoral impaction fracture. Dr. Jutras recommended that a second opinion be retained and that funding for chiropractic treatment continue until the second opinion had been obtained.

[10] The Appellant attended to the Mayo Clinic on June 26, 2001 for an MRI of her right hip. She consulted with Dr. Morrey. On June 28, 2001, Dr. Morrey wrote to SGI and advised of the results of the Appellant's MRI. He reported:

I am enclosing a copy of my clinical notes regarding [the Appellant]. Yesterday the patient had a completely normal, smooth arc of motion while being examined under anesthesia. In addition we did, as noted in the enclosed note, discuss the images with the radiologist who felt that these were completely normal. Thus, in the face of a normal x-ray, normal MRI, normal technetium bone scan and a normal examination under anesthesia, we feel this is a problem of pain management and explained this to her. I recommended that she get in touch with you upon return home so that the pain management consultation and treatment might be instituted. I did explain that the muscular control of the hip is under the influence of the central nervous system, and that the best approach to the current problem was at the central nervous system level. She understood the explanation and was accepting of it.

[11] On September 20, 2001, the Appellant met with Dr. Boyle regarding right arm symptoms, right leg symptoms and an episode of loss of consciousness. Dr. Boyle reported:

IMPRESSION:

1. Right arm pain and apparent numbness. This is likely musculoskeletal in origin. The tenderness through the forearm and positive Finkelstein's maneuver indicates that there may be tenosynovitis or similar condition. I am not able to detect any neurological deficit in the right arm. She may be having early symptoms of complex regional pain syndrome Type I. She does not have obvious trophic or autonomic dysfunction. However she does have considerable pain that arm elicited by movement and pressure.

2. She has pain in the right hip. She has some apparent restriction of the motion of the hip and considerable tenderness over the sacroiliac joint. Again I am not able to detect an actual neurological deficit. She does, however, describe radiation of pain along the distribution of the ilioinguinal nerve. It is not currently present to examination. She has not had any surgical incisions along the distribution of this nerve. Injury can occur with tearing of the external oblique muscle and aponeurosis causing nerve entrapment. L1 radiculopathy is also a possibility. Inguinal neuralgia could potentially occur due to a stretching injury.
3. Episode of loss of consciousness. This was likely a vasovagal episode. It occurred immediately following massage when [the Appellant] had then got up, gone to her care and tried to drive to work. She has no other suspicious episodes. I would anticipate that this was an isolated episode. I think that seizure is highly unlikely. She does not have known cardiac disease or suggestions of cardiac disease to think that this would be the source of origin of the symptoms.

Dr. Boyle requested the background information on the Appellant. She recommended reassessment by a physiatrist, Occupational Therapy and Physiotherapy for her right leg and right arm problems. She suggested that consideration be given to a trial of sympathetic blockade and further imaging along the pathway of the L1 root and ilioinguinal nerve. There was no evidence at the appeal as to whether the Appellant followed up with Dr. Boyle's recommendations.

[12] On November 14, 2001, Dr. Paull reported that the Appellant had developed a knee condition while training for a marathon. In December 2001, SGI determined that they required a Functional Capacity Evaluation to determine if the Appellant had reached maximum medical improvement and if she was capable of performing both her full-time position as a teacher and her part-time position as an aerobics instructor. The Appellant expressed reservation about proceeding with a Functional Capacity Evaluation. On March 11, 2002, SGI reiterated the need for a Functional Capacity Evaluation. SGI stated:

You have advised me that you do not feel you have the capacity to return to your position of aerobics instructor. Dr. Helfrich advised me in a telephone conversation on January 21, 2002 that you did not want to attempt to return to aerobics due to your concern it would cause a flare up of your pain and interfere with your primary employment at [the high school].

We met in December 2001 and again on January 28, 2002. I explained the necessity of a Functional Capacity Evaluation (FCE) to determine if you have the capacity to work part time in any capacity. I forwarded correspondence to you on February 22, 2002, advising that SGI wanted to proceed with scheduling an FCE. You left a voice mail message on March 4, 2002 advising that you were "not prepared to put my body through that" referring to an FCE. You questioned why we cannot rely on the findings of the FCE that was performed at FIT in May 2000. I returned you call leaving a message at your home advising that the findings of FCE's are only valid for six months and therefore, the testing done at FIT is outdated.

I appreciate that choice would be to return to the part time employment of your choice, that being an aerobics instructor. However, if your physical injuries prevent this, we must determine if you

have the capacity to replace that income in any capacity. If functional testing indicates you have the capacity to work your part time hours in a capacity other than what is required of an aerobics instructor, we will offer vocational assistance in replacing that part time income with different employment. If you choose not to consider other part time positions, that is your choice, but SGI will discontinue your income replacement benefit if it can be shown you have the capacity to work those additional hours.

Regarding ongoing passive therapy (chiropractic and massage). Given that your injury occurred almost three years ago, medical research indicates your soft tissue injuries will have healed. At some point in time passive modalities of therapy should be discontinued. Unless there is evidence to indicate passive therapy is somehow contributing to function, funding for passive modalities will not be provided.

[13] Dr. Helfrich advised SGI on March 19, 2002, that in her opinion a Functional Capacity Evaluation may aggravate the Appellant's symptoms. On April 22, 2002, Dr. Helfrich advised SGI that, in her opinion, the Appellant was capable of working part-time, five hours per week in some capacity, not necessarily just as a part-time aerobics instructor. Dr. Helfrich recommended that coverage for chiropractic and massage therapy continue indefinitely because of the physical nature of the Appellant's primary occupation as a physical education teacher. Dr. Helfrich provided no objective physical examination findings to support continued treatment.

[14] On May 7, 2002, Dr. Mierau, medical consultant, reviewed the Appellant's medical file with respect to Dr. Helfrich's recommendation that the Appellant receive ongoing massage and chiropractic care indefinitely. Dr. Mierau concluded that SGI was responsible to fund 6 visits to the chiropractor per year (to be reviewed annually for 3 years). Dr. Mierau concluded the treatment was supportive care for the right hip to allow the Appellant full participation in full time work as a physical education teacher and a part-time job at five hours per week.

[15] On June 3, 2002, SGI wrote to the Appellant and advised her of the results of Dr. Mierau's file review. SGI stated:

With respect to funding of ongoing chiropractic treatment. Our chiropractic consultant is of the opinion that funding should be made available for up to six (6) chiropractic treatments per year for a period of three years. This is meant to address supportive care of your hip injury. This will be reviewed annually.

Regarding the income replacement benefit related to your part time employment. Dr. Helfrich has provided her opinion that you are able to work an additional five (5) hours per week in some capacity other than as an aerobics instructor. Dr. Helfrich's report dated April 22, 2002 is enclosed. SGI will continue to provide funding of your income replacement benefit for period of one (1) year from the date of this correspondence in order for you to seek out alternative part time employment. Should you replace your part time job within that one year time frame, SGI will

reduce your actual part time income by 75% during the one year grace period. Vocational assistance will be made available to you at your request.

[16] On August 2, 2002, the Appellant applied for an Application for Review of the June 3, 2002 decision letter. On December 11, 2002, SGI advised the Appellant that they found the decision of June 3, 2002 to be appropriate and upheld the decision. The Appellant appeals to the Appeals Commission the decision of SGI dated December 11, 2002, namely the Application for Review. The relevant portion of the December 11, 2002 decision is:

...
Individual entitlement to No Fault benefits is determined according to The Automobile Accident Insurance Act and the Personal Injury Benefits Regulations. Pursuant to the provisions of the Legislation, SGI is required to pay all reasonable medical expenses incurred by a customer as a result of his or her accident related injuries. Accordingly, to assist SGI's Personal Injury Representatives in overseeing an individual's recovery and rehabilitation, SGI has in consultation with various health care professionals and under the advice and recommendations of SGI's Medical Consultant, Dr. Flotre, developed a treatment protocol.

This protocol outlines for the Injury Representatives recommended treatments, procedures and a time line to ensure that a customer's injuries are being properly attended. Significantly in developing this protocol, SGI has been advised by the health care professionals that long term reliance on passive treatment is no recommended. Although it is recognized that these types of treatments can provided individuals with short term relief from accident related complaints, they have minimal benefit for long term recovery. Instead individuals are encouraged to pursue a more active regime. To date you client has received 49 massage treatments, 88 chiropractic treatments and 34 physio therapy treatments.

Please note DR. H. Paull's reported dated September 16, 2002 and Dr. Helfrich's report of October 2, 2002 offers no objective medical information for ongoing treatments.

...
Upon reviewing your file it is noted that at the time of the accident [the Appellant] was a full-time physical Education teacher and also worked 5 hours a week as an aerobic instructor. It is also noted that she has returned to her full-time position but is unable to do her part-time employment. Her family physician Dr. Helfrich's report dated April 22, 2002, states:

It is my medical opinion that [the Appellant] is capable of working part-time, 5 hours per week, in some capacity not necessarily just as a part-time aerobic instructor.

According to Section 132 of The Automobile Accident Insurance Act – Determination of employment after second anniversary of accident: 132: Following the second anniversary date of an accident, the insurer may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112 or 113 or determined pursuant to section 131. Please note a determination of employment applies to a person who hold full time employment (Section 112 or 113) or a person who at the time of the accident was a non-earner, part time or temporary earner (Section 131). As [the Appellant] was a full time earner and is capable of working in her employment, this section would not apply to her.

In conclusion and based on the medical information we have on file we remain of the opinion that the decision outlined in the June 3, 2002, correspondence is appropriate and therefore upheld.

[17] The Appellant testified that she receives ongoing chiropractic and massage therapy when she requires it to maintain her level of activity and function. The Appellant also testified that she received approximately nine chiropractic treatments from June 2002 to June 2003. She received one chiropractic treatment from June 2003 to June 2004. As of September 2003, the Appellant stated that she has used her employer benefits for massage up to the maximum \$200.00 per year and paid for two additional treatments out of her own pocket. The Appellant received an income replacement benefit for her part-time employment from March 1999 until June 2003 when it was terminated.

[18] On March 25, 2004, Dr. Potapinski, chiropractor, examined the Appellant with respect to the injury to her right hip. Dr. Potapinski noted that the Appellant had postural disfigurement and advised SGI that he had ordered the Appellant's medical files in order to make a diagnosis and treatment plan. On April 7, 2004, SGI informed Dr. Potapinski that they would provide funding for six chiropractic treatments per year for a period of three years, to address supportive care of the Appellant's hip injury. They further advised Dr. Potapinski that massage therapy would not be funded.

[19] The Appellant testified that as of June 2004 she was able to teach five hours per week of aerobics and admitted that she was close to her pre-accident functional status. She stated that the only way she can maintain that level of function was with ongoing chiropractic and massage therapy.

[20] On July 20, 2004, Dr. Potapinski reported to SGI:

[The Appellant] has recently received treatment from me at this office. I am of the opinion she has suffered what appears to be permanent structural damage to her spine and neuromuscular system as a result of MVA March 20, 1999. I believe she would benefit from ongoing care to alleviate acute episodic pain flare ups. I estimate 12-15 chiropractic treatments per year should be an substantial amount of treatment to keep her symptoms/objective findings in check.

[21] The appeal hearing commenced on July 22, 2004. The Appellant testified that Dr. Potapinski advised her that she had a "subluxed pelvis". As a result of the Appellant's testimony and Dr. Potapinski's report of objective findings in his medical report dated July 20, 2004, it was determined by the Appeal Commission that the hearing should be adjourned to allow Dr.

Potapinski to complete his medical review and provide a diagnosis with respect to the Appellant's right hip injury.

[22] Dr. Potapinski sent a medical report to SGI dated August 26, 2004 with respect to his diagnosis of the Appellant's physical condition. Dr. Potapinski conducted a thorough physical examination of the Appellant on July 27, 2004 and reported:

...
Examination of the lumbar spine reveals moderate movement loss with flexion and left lateral bending. Severe movement loss noted with lumbar extension and right lateral flexion. Severe movement loss also noted with right and left lumbar rotation....

...
Diagnosis: Mechanical right hip pain with aberrant external rotation. Right hip and SI arthropathy secondary to pelvic trauma. Right hip and SI arthropathy secondary to pelvic trauma. Low back pain and right sided leg neuropathy secondary to lumbar discopathy. Possible neurologic compromise of the peripheral and central nervous systems. Mechanical neck pain with nerve root irritation secondary to segmental dysfunction of the cervical spine complicated by spinal rotoscoliosis.

Discussion

It is my belief that [the Appellant] has suffered trauma to her spine and pelvis as a result of MVA which occurred March 20, 1999 which has induced mechanical and neurologic damage to her spine and pelvis/hip. I find it quite interesting that while [the Appellant] was under general anesthesia for her right hip was able to move simply and freely and as Dr. Morrey states there may well be CNS compromise. The fact that she has neurological deficit in the right lower limb suggested this also. This is indicative of possible neurologic damage at either the central or peripheral levels. Nevertheless, this lady has received osseous and articular injuries as observed in her MRI and plain film reports. When one includes her postural evaluation it becomes very evident there is a large structural component to her condition which cannot be overlooked. Her subjective complaints are well supported by overwhelming objective evidence. This lady is unable to perform simple tasks without the presence of pain and understands the fact that she may have this disability for the rest of her life. I believe to my knowledge that these injuries did occur on March 20, 1999, despite the fact she is able to remain quite active, and her subjective complaints are supported by objective findings.

[23] On November 9, 2004, Dr. Mierau reviewed the Appellant's medical information and provided the following medical opinion:

Included in the most recent package of information was a consult from the Mayo clinic. The radiograph of the hip, bone scan and MRI were all normal (specifically there was no flattening of the femoral head).

An examination under anesthesia revealed a completely normal smooth arc of hip motion. The clinical team concluded that this was a problem of pain management rather than pathology at the hip.

The report from the chiropractor documented:

Chronic bilateral hip pain, lower back pain, pain and numbness in the genital and groin region, bilateral knee and foot pain, headaches, dizziness, right hand numbness, swelling of the right hand and foot, inability to flex the knees.

The chiropractor's description of the November 9, 2000 MRI findings relative to the right hip were not confirmed in the MRI performed at the Mayo Clinic. The chiropractor mentioned but did not comment on Dr. Morrey's finding of a completely normal, smooth arc of motion while being examined under general anesthesia.

Opinion:

The tests and examinations performed at the Mayo clinic, including examination under general anesthetic ruled out pathology of the hip. Without a diagnosis of a physical condition treatment with physical modalities such as physiotherapy and/or chiropractic and/or massage is not indicated. Dr. Morrey's reference to the central nervous system does not imply or suggest that a physical modality, such as massage, chiropractic or physiotherapy is indicated to address the central nervous system.

There is no evidence that chiropractic can be used to treat 'central nervous system compromise'.

The supportive care recommended by the consultant was to address the findings of the November 9, 2000 MRI with respect to right hip. A more recent MRI, bone scan and examination under anesthesia documented that the right hip is entirely normal. Therefore, the criteria for supportive care are no longer met.

[24] On December 21, 2004, Dr. Mierau again reviewed the medical reports of Dr. Potapinski and provided a medical opinion outlining the definition of supportive care. He reported:

Supportive care:

A continuation of care/treatment that is provided in the event of permanent restriction or impairment to support continued function and activity. Supportive care is indicated in a case in which there is documented restriction and/or impairment and a deterioration of functional ability has been documented when the care is withdrawn.

The recent information from the Mayo Clinic does not support permanent impairment or restriction for the right hip condition. The opinion provided by me on November 9, 2004 was based on the recommended treatment was pain management strategies directed at the central nervous system.

The chiropractor's letters of July 20, 2004 and August 26, 2004 were reviewed in light of the recent MRI and other test findings from the Mayo Clinic:

...

The clinical note from the Mayo Clinic dated June 28, 2001 documented a lack of a Trendelenburg sign and inconsistent clinical examination findings¹ and normal advanced test results including MRI, bone scan, x-ray and examination under anesthesia. The examination under anesthesia did not confirm a restriction of motion of the hip. Rather the examination under anesthesia demonstrated a normal range of motion of the hip.

The tests at the Mayo clinic do not support the opinion of the chiropractor given on July 20, 2004 of permanent structural damage to the spine and neuromuscular system. Specifically, a repeat MRI performed at the Mayo Clinic did not demonstrate a flattening of the femoral head.

Dr. Morrey in his letter, dated June 28, 2001, to Dr. Helfrich recommended a treatment approach of pain management directed at the central nervous system.

Opinion:

There is no known passive therapy modality to assist with the treatment recommended by Dr. Morrey.

Explanation:

1. It is interesting to note that when the patient was examined under supine extension and adduction were restricted. However, when the tests were performed when she was lying on left side the hip extension was normal as was adduction of the hip.

[25] The appeal was reconvened on January 4, 2005 to hear evidence from Dr. Mierau and Dr. Potapinski regarding the Appellant's right hip injury and their diagnoses and recommendations for ongoing treatment.

[26] Dr. Mierau, medical consultant for SGI, attended at the appeal to give evidence in support of his medical opinions with respect to the Appellant's right hip injury. Dr. Mierau testified regarding the criteria necessary to fund supportive care for an injury. Supportive Care is defined in the Glenerin Guidelines as follows:

Treatment for patients who have reached maximum therapeutic benefit, but who fail to sustain this benefit and progressively deteriorate when there are periodic trials of withdrawal of treatment. Supportive care follows appropriate applications of active and passive care including rehabilitation and lifestyle modifications. It is appropriate when alternative care options, including home based self-care, have been attempted. Supportive care is inappropriate when it interferes with other appropriate primary care or when the risk of supportive care outweighs its benefits, i.e., physician dependence, somatization, illness behavior, or secondary gain.²

Preventative/Maintenance Care is defined as follows:

Any management plan for the purpose of preventing disease, prolonging life, promoting health and enhancing quality the quality of life. The treatment plan is designed to provide for the patient's well-being or for maintaining the optimum state of health.³

[27] Dr. Mierau testified that the difference between supportive care and preventative/maintenance care is that supportive care arises out of therapeutic necessity and preventative/maintenance care is elective or a personal choice on the part of the patient. The criteria for supportive care are a documented permanent restriction or impairment which causes

² Judicial notice is taken of the Clinical Guidelines for Chiropractic Practice in Canada also referred to as the Glenerin Guidelines.

³ Judicial notice is taken of the Clinical Guidelines for Chiropractic Practice in Canada also referred to as the Glenerin Guidelines.

an increase in functional deterioration if treatment is withdrawn. Supportive care is treatment that is necessary to maintain function for a defined medical condition.

[28] Dr. Mierau stated that at the time he recommended six treatments per year, he was not convinced that there was no structural damage to the Appellant's right hip. The medical findings at the Mayo Clinic reported no impairment or permanent restriction and therefore, in Dr. Mierau's opinion, the criteria for supportive care are no longer met. He stated that the notion of permanent structural damage referred to by Dr. Potapinski is not borne out by the objective testing, specifically the MRI done at the Mayo Clinic. In particular, Dr. Mierau noted the inconsistent findings made by Dr. Morrey and Dr. Loback with respect to restricted range of motion of the hip. He stated this inconsistency would be confusing to any orthopedic surgeon and would therefore result in further testing, ie/ the MRI under anesthesia. Dr. Mierau stated that the range of motion of the joint should be equivalent regardless of the Appellant's position. Dr. Mierau explained that the MRI under anesthetic showed the changes were not anatomical or physiological but rather possibly neurological. Dr. Mierau reported that there is no evidence that passive modalities such as massage therapy and chiropractic care can be used to treat central nervous system compromise. It was Dr. Morrey's opinion that the Appellant's problem was one of pain management.

[29] Dr. Mierau testified that he arrived at his previous decision to fund six chiropractic visits per year based upon the fact that the Appellant had received seven treatments in the previous year, one which related to a knee injury. In his opinion, relying upon her past history of treatment, he determined that six treatments would be acceptable as supportive care for the right hip.

[30] Dr. Mierau reviewed the diagnoses of Dr. Potapinski and testified that Dr. Potapinski's opinion and diagnoses did not provide clinical information to support a finding of structural damage. Dr. Mierau stated that the diagnosis of "mechanical right hip pain with aberrant external rotation" was a description and not a diagnosis. Reference to "right hip and SI arthropathy secondary to pelvic trauma" would classify as a diagnosis but it was not born out by the imaging studies done at the Mayo Clinic. Reference to "low back pain and right sided leg neuropathy secondary to lumbar discopathy" was partly a description and partly a diagnosis.

The diagnosis of “lumbar discopathy” was ruled out by the MRI of the spine. Dr. Mierau testified that to make that diagnosis one would expect to see a herniated disc with evidence of nerve root entrapment. Dr. Mierau stated further that there were no objective findings of neurologic compromise to the peripheral nervous system which would be a herniated disc. Neurologic compromise to the central nervous system would arise with a head or spinal cord injury and there were no objective findings in this regard. One would expect to see muscle spasticity of the limbs if there were a spinal cord injury. The reference to “mechanical back pain with nerve root irritation secondary to segmental dysfunction of the cervical spine complicated by spinal rotoscoliosis” is a description. There is no objective evidence of nerve root irritation and there are no clinical signs to support a diagnosis of nerve root irritation.

[31] Dr. Potapinski was unable to provide evidence at the appeal due to a scheduling conflict with the Appellant’s schedule. The Appellant advised the Appeal Commission that it would be acceptable to her for us to rely upon Dr. Potapinski’s written medical report in arriving at our decision.

LAW AND ANALYSIS

[32] 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.

[33] The Commission determined in *R.C.*⁴ 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.⁵

⁴ *R.C. v. Saskatchewan Government Insurance* 2003 SKA1A 1

⁵ *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.

Chiropractic and Massage Therapy Benefits

[34] The Appellant submitted that in order to maintain her high level of function, she requires crisis intervention treatment in the form of ongoing chiropractic and massage therapy treatment.

[35] Daryl Mack, representative for SGI, submitted that there is no medical diagnosis for the Appellant's ongoing right hip problems which supports continued treatment for functional restoration. He further submitted that all objective medical evidence indicates that the right hip is normal. He stated SGI is unable to fund treatment without a definite medical diagnosis and objective medical findings.

[36] We are unable to conclude that Dr. Potapinski has provided a diagnosis with respect to permanent impairment or structural damage that warrants ongoing supportive care for the Appellant's right hip. The evidence of Dr. Mierau is clear that the criteria necessary to fund supportive care are not met in the Appellant's case. The lack of objective findings which document a permanent restriction or impairment prevent the funding of supportive chiropractic care for her right hip injury. The Appellant submitted that she requires the care to maintain her level of function; however, there is no permanent impairment which would identify the need for continued treatment to restore function.

[37] It is our opinion that the care that the Appellant is seeking falls within the category of preventative/maintenance care and is not the responsibility of SGI. It is a personal choice which promotes health and enhances the quality of the Appellant's life. There is no evidence upon which we can rely to conclude that if she does not have treatment, there will be a decline in her ability to function.

[38] We have concluded that SGI's decision to terminate funding for massage therapy and chiropractic care was not an error in law, or based on an erroneous assumption, or unreasonable and the decision is upheld.

Income Replacement Benefits and/or Yoga Training

[39] The Appellant submitted that she wished to retrain as a Yoga instructor to replace her loss of part-time income as an aerobics instructor.

[40] Mr. Daryl Mack, on behalf of SGI, submitted that Dr. Helfrich reported that the Appellant was capable of working five hours per week in some capacity, not just as a part-time aerobic instructor. As a result, their obligation to fund income replacement benefits ceased at the time of receiving Dr. Helfrich's medical opinion. Mr. Mack stated that they provided the Appellant with another year of benefits to allow her to find suitable alternative employment. Mr. Mack advised that the Appellant was receiving a bi-weekly income replacement benefit of \$160.00 as of June 2003 and to his knowledge this benefit was paid as a complete disability from March 1999 to June 2003. He further advised that if they had been aware that the Appellant was working at her part-time employment, in any capacity, then her benefit would have been reduced accordingly. This was clearly set out in the June 3, 2002 correspondence from SGI. The Appellant's income replacement benefit was never reduced to account for the work she was doing. Mr. Mack submitted that the decision to terminate income replacement benefits as of June 2003 should be upheld as the Appellant was capable of working five hours per week in some capacity of part-time employment as of Dr. Helfrich's letter dated April 22, 2002.

[41] The Appellant testified that she resumed teaching aerobics prior to Dr. Helfrich's report dated April 22, 2002. It is not entirely clear when she started teach aerobics again, but she stated that she committed to teaching Tuesday and Thursday mornings during the school year for a total of three hours per week. The Appellant testified that her personal injury representative was aware that she had resumed teaching and never asked her for information regarding her income. The Appellant also reported that by June 2004 she had returned to teaching five hours of aerobics per week.

[42] It is our opinion that the Appellant was no longer entitled to an income replacement benefit once she was capable of working five hours per week, which was her pre-accident status. We note the evidence shows that the Appellant received a full income replacement benefit which should have been reduced once she returned to her part-time employment in any capacity. The

Appellant has clearly been over compensated for her loss of income relating to her part-time employment. We are not going to make any decision with respect to the overpayment because the evidence is not clear as to how that happened, however, we are absolutely convinced that SGI's decision to terminate income replacement benefits as of June 3, 2003 was not an error in law, or based on an erroneous assumption, or unreasonable and the decision is upheld.

CONCLUSION

[43] The decision made by SGI dated June 3, 2002 and upheld on Application for Review dated December 11, 2002 to fund six chiropractic treatments per year for a period of three years for supportive care for the Appellant's hip injury is upheld.

[44] The decision made by SGI dated June 3, 2002 and upheld on Application for Review dated December 11, 2002 terminating income replacement benefits as of June 3, 2003 is upheld.

Dated at Saskatoon, Saskatchewan, on February 10, 2005.

Joy Dobko, Chair

Bev Cleveland, Commission Member

Darleen Topp, Commission Member