

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *K.A. v. Saskatchewan Government Insurance,*
2005 SKAIA 013
Date: 20050225
File: 045 of 2004

BETWEEN

K.A., Applicant

and

Saskatchewan Government Insurance, Respondent

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

Before: **Ann Phillips, Chair**
Beverly Cleveland, Commission Member
Joy Dobko, 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 19, 2005

DECISION

[1] This is an appeal by K.A., the Appellant, of several decisions made by Saskatchewan Government Insurance (“SGI”) as follows:

- (1) SGI’s decision dated November 9, 2001 which limited the Appellant’s Income Replacement Benefit (“IRB”) during her secondary assessment to three days per week rather than a full-time IRB (five days per week). This decision was upheld on Application for Review dated March 26, 2002;
- (2) SGI’s decision dated March 21, 2002 with respect to the termination of her IRB as of March 22, 2002. This decision was upheld on Application for Review dated May 28, 2003; and
- (3) SGI’s decision dated May 21, 2002¹ with respect to the termination of funding for further medications.

FACTS:

[2] The Appellant was injured in a motor vehicle accident in Saskatoon, Saskatchewan on June 4, 2000 when the motor vehicle she was operating was struck in the rear driver’s side by another vehicle which failed to yield the right of way. The Appellant’s vehicle was spun around 270 degrees. The Appellant did not report striking her head. Her left elbow struck the door and sustained an abrasion and she also sustained a contusion where the seat belt crossed her chest. The Appellant reported that within minutes she began to experience left elbow, chest, neck and low back pain. She also reported soreness of the legs and of the left hip.

[3] Prior to the motor vehicle accident, from September, 1999 to March, 2000, the Appellant was receiving physiotherapy treatment at Daniels Kimber Physiotherapy Clinic (“Daniels Kimber”) for sharp pains in her groin and low back. She was also receiving chiropractic treatment in December, 1999. X-rays taken of the Appellant’s lumbar spine on March 9, 1998

¹ The appeal of this decision is derived from Robert Stack’s letter dated June 17, 2002. SGI did not initially accept this letter of appeal but the parties came to an agreement that the matter was not statute barred and could be heard on appeal.

showed a spondylolysis at L5-S1 with a very slight spondylolisthesis. There was a slight disc height narrowing at L4-5 but other disc heights were normal. The SI joints were also noted to be normal. On March 24, 2000, the Appellant also had an MRI of her lumbar spine due to back pain and numbness in her legs. The MRI results were:

...
Scan Findings:

A very slight anterolisthesis of L5 relative to S1 is noted and is associated with what appears to be bilateral pars defects on the lateral view.

Alignment, position, signal and height of the vertebral bodies all appear otherwise normal. Some loss of water content at the L4-5 and L5-S1 disc is seen with narrowing of the L5-S1 disc space.

A small to moderate central and right posterolateral disc herniation is present at L5-S1 with a slightly cephalad extruded disc fragment.

A small central disc bulge is present at L4-5. The remaining discs are normal.

The end plates are all normal. The osseous foramina appear freely patent and no paraspinal pathology is evident. The central canal is of normal caliber. The conus appears normal and ends at the T12 level. No abnormality of the filum terminale is appreciated.

IMPRESSION:

1. Grade I spondylolisthesis with probable bilateral lysis at L5-S1.
2. Small central and right posterolateral disc herniation L5-S1.

[4] On June 8, 2000, the Appellant completed her Application for Benefits. The Appellant reported pain in her neck, shoulders, low back, mid back, arms, hands, legs (specifically thighs and calves), feet and headaches. She reported muscle, bone and joint problems, neurological problems and headaches as existing before the accident. She attended to Lakeside Medical immediately following the accident. She was prescribed muscle relaxants and anti-inflammatories. X-rays taken of the cervical spine on June 5, 2000 were normal.

[5] The Appellant reported that at the time of the accident she was a homemaker. She was also studying to obtain her trustee licensure. On April 30, 2000, she commenced a year absence from work to allow time for studying. The trustee examinations were scheduled for June, 2000. The Appellant's former employment was as a Manager/Administrator with [employer one] from December, 1989 to April, 2000. She reported her monthly employment income at the time of the accident was \$3,333. The Appellant testified that she passed her first exam and failed her second exam in June, 2000.

[6] The Appellant also testified that prior to the accident she played senior ladies basketball. She reported no difficulty with walking for two hours or with working full time, nor did she report difficulty with homemaking. The Appellant reported that she developed a back problem in the fall of 1997 which was later determined to be spondylolysis but that this injury did not prevent her from playing basketball. She also admitted to a history of migraines prior to her motor vehicle accident but stated that she had not had any migraines from 1997 to 2000.

[7] On June 12, 2000, the Appellant attended to Daniels Kimber for physiotherapy. Her physiotherapist was Robynne Pochylko. Her diagnosis was “cervical, shoulder, thoracic and hip pain”. The initial assessment report noted co-morbidities as “prior lumbar problems, diagnosed spondylolysis L5 to S1 and disc space narrowing at L4-5. She was seen for physiotherapy in the past”. It also noted functional problems as a decreased ability to tolerate sitting, lifting, sleeping and carrying. The clinical findings were:

...Cervical range of motion is within 90 percent of normal with minimal pain and stiffness elicited. Scapular movements were within normal limits. Glenohumeral movements showed decreased internal rotation on the right with anterior shoulder pain, otherwise movements were generally within normal limits. Lumbar range of motion showed significant limitation for side bending and extension with pain elicited. Leg pain was elicited on performing a squat. Pivots were negative other than general stiffness. Posture shows slight increase in thoracic and lumbar curves. Right scapula shows slight tipping. Otherwise, posture is generally good. Balance tests show good control for Tandem Rhomberg with eyes closed. Muscle strength testing shows decreased wrist extensor and flexor strength with pain elicited in the neck. Straight leg raise is within 70 degrees bilaterally with general stiffness elicited.

[8] Ms. Robin Pochylko, physiotherapist, completed a Practitioner’s Report dated June 25, 2000. Her primary diagnosis was WAD II and LBP II. Ms. Pochylko recommended that the Appellant attend for treatment two to three times per week for modalities, biomechanical treatment, education and instruction of a home exercise program. Ms. Pochylko, in a report dated June 28, 2000, advised SGI that she did see a difference from pre-MVA to post-MVA for symptoms in the lumbar spine. It was her opinion that the Appellant would be able to return to pre-MVA status with therapy and exercises.

[9] On August 3, 2000, Ms. Pochylko examined the Appellant and provided a Practitioner’s Report to SGI. Ms. Pochylko reported that the Appellant’s WAD II was improving and her LBP II was resolving. She diagnosed left shoulder strain. Ms. Pochylko noted that the Appellant had

improved significantly and expected that four more weeks of treatment would see her significantly more improved.

[10] At the request of her employer, the Appellant went back to work in October, 2000 to fill a contract position in [location]. She was working two to four days per week. The Appellant testified that she was flying from [her home] to [location] every Monday. She would work anywhere from two to four days and then fly back home.

[11] On November 28, 2000, the Appellant attended to Saskatoon Musculoskeletal Rehabilitation Center (“SMRC”) for a secondary assessment. The assessment team classified the Appellant’s employment with employer one to be in the light to medium physical demand level of work. The functional testing completed demonstrated that the Appellant had the ability to work in a light to medium demand level. The assessment team reported:

...

7. Clinical Impression

Diagnosis

- Mechanical neck pain, WAD II.
- Cervicogenic headaches.
- Poor scapulothoracic and abdominal strength.
- Mechanical back pain, LBP II. (pre-existing spondylolisthesis and disc bulge at).
- Aggravation of pre-existing mechanical and discogenic back pain.
- Poor abdominal and core strength.
- Intercostal muscular strain at axillary line

Status with respect to return to work or usual activity

- Functional abilities meet the home and job demands except lifting and carrying boxes of paper at work. Increased low back symptoms after sustained sitting and standing.
- Significant reduction in the ability to participate in recreational activities since the motor vehicle accident, including playing basketball.

Non Accident related Conditions

- Migraines aggravated by motor vehicle accident.
- Spondylolisthesis (Grade I)
- L4-5 Disc bulge

[12] The team recommended 8 weeks of secondary treatment, three times per week for a period of two hours per day. The treatment program was to focus on biomechanical care to the neck and upper back, global and regional conditioning, functional conditioning, ergonomic

assessment, testing for aerobic fitness and education. The team also recommended that treatment commence when the Appellant returned to her home in the new year. The treatment conditioning to improve lifting and carrying abilities and tolerance for standing and sitting.

[13] The Appellant's secondary treatment program was postponed until June, 2001 to allow the Appellant to complete her trustee exams. The Appellant commenced secondary treatment at Daniel Kimbers on June 11, 2001. Krista Litzenberger performed the Appellant's secondary treatment at Daniels Kimber. In the Initial Assessment Report the physiotherapist reported that:

It is expected that [the Appellant] should be able to return to her pre-MVA functional status with ongoing residual low back symptoms at the completion of her Secondary Program.

[14] The Appellant reported that she was experiencing three to four migraines per week during her secondary treatment program. The Appellant stated that for the first two hours of her migraines the pain would intensify and then she would eventually vomit. She stated that the neck manipulations done at her secondary treatment programs also started to cause vision problems, difficulty tracking and nausea.

[15] On July 24, 2001, the secondary treatment team produced a progress report. The team noted:

As [the Appellant's] progress with the secondary treatment program has been minimal, it is in the opinion of the secondary treatment team that [the Appellant] will not reach pre-MVA functional status at the eight-week timeframe initially outlined. It is in the opinion of the treatment team that further extension of [the Appellant's] secondary treatment program by approximately three to four weeks would allow the treatment team to address [the Appellant's] biomechanical and functional restrictions. It is also anticipated that [the Appellant] will continue to have ongoing symptoms once discharged from the secondary treatment program and therefore would benefit from various home devices to allow self-management of her ongoing symptoms with recommendation of a job site visit once employment is resumed to ensure proper ergonomic set-up.

[16] In July, 2001, the team reported that the Appellant began to complain of visual disturbances, dizziness and a pulling sensation of her eyes. It was the belief of the secondary treatment team that these symptoms were generated from the neck. On August 28, 2001, the Appellant was examined by Dr. Patel, ophthalmologist. Dr. Patel confirmed that the Appellant's eye exam was entirely normal.

[17] On August 21, 2001, the secondary treatment team requested an extension of the secondary program as the Appellant was making progress but would still not be able to meet job demands at that time. SGI approved the extension. The Appellant's secondary treatment program was extended to September 28, 2001. The Secondary Treatment Discharge Report dated October 2, 2001 reported that although the Appellant had made improvements, she was still unable to meet most of her job demands due to upper quadrant strength, myofascial restrictions and lower quadrant "neurology". Under the heading, "Is further treatment required", the physiotherapist reported:

Yes. [The Appellant] continued to demonstrate significant myofascial restrictions in the upper and lower quadrant with ongoing upper quadrant and specifically cervical spine weakness. As [the Appellant] has still not met job demands and reported difficulty with performing activities of daily living, further functional, global and regional conditions would be beneficial.

[18] On October 24, 2001, Dr. Gore-Hickman examined the Appellant in relation to her complaints of vertigo. It was his opinion that there was a significant temporomandibular joint strain, however, the vertigo was certainly not related to the motor vehicle accident.

[19] On October 17 and 18, 2001, the Appellant attended FIT for Active Living ("FIT") for a tertiary assessment. The following diagnoses were made:

Primary Diagnoses (directly related to the motor vehicle accident):

1. Whiplash associated disorder II (with reported ocular disturbance, myofascial dysfunction and neural tension).
2. Cervicogenic headaches.
3. Thoracic spine and rib joint dysfunction with myofascial irritability.

Secondary Diagnoses (developed over time as a result of primary diagnoses):

1. Temporomandibular joint syndrome.
2. Deconditioning.
3. Adjustment difficulty with anxiety.

Co-Morbid Diagnoses:

1. Low back pain (lumbar disc herniation and Grade I spondylolisthesis), exacerbated by motor vehicle accident, presenting as LBP II.
2. History of cervical cancer, ulcer disease, and migraines.
3. History of migraines.
3. Prior left knee injury requiring surgery.

The assessment team recommended that the Appellant attend tertiary treatment for twelve weeks.

[20] On November 1, 2001, [employer two] offered the Appellant a full-time permanent position of employment at [amount] per hour. The Appellant was unable to accept the offer as she was scheduled to commence tertiary treatment. The Appellant attended tertiary treatment at FIT from November 6, 2001 until January 31, 2002.

[21] On November 9, 2001, SGI wrote to the Appellant and advised her that they would pay her for full day wages for the dates that she attended the secondary treatment program at Daniels Kimber. SGI calculated the amount owing to be [amount] as reimbursement for lost wages from June 11, 2001 to October 18, 2001. The Appellant testified that she was advised that she would be paid a full income replacement benefit back-dated to the time when she was unable to work. On November 19, 2001, the Appellant wrote to SGI requesting an Application for Review. In their Application for Review dated March 26, 2002, SGI upheld the November 9, 2001 decision. **This is the first decision being appealed by the Appellant.**

[22] On November 15, 2001, SGI wrote to the Appellant and advised her that she would be receiving a bi-weekly income replacement benefit of \$1,302.60 based upon a gross yearly employment income of [amount]. The benefit was for the period of November 6 to 19, 2001.

[23] On January 16, 2002, Dr. Gore-Hickman advised SGI that the Appellant's benign positional vertigo was unrelated to the accident.

[24] The Appellant was discharged from FIT on January 31, 2002. The Discharge Report stated that the Appellant had achieved maximum medical improvement by the time of discharge, however, she had not returned to pre-accident level of function. The report stated, under "Limitations":

Client reports two major barriers to return to work, which are uncontrolled nausea and visual problems. She will need to gradually build up sitting tolerance during work activities from a starting point of 3-4 hours. [The Appellant] continues to have TMJ symptoms which are largely muscular in origin. There are myofascial limitations in the neck area which will be affected by fatigue and stress.

[25] The team also reported that the Appellant was capable of working at a medium level. The team recommended that she commence a graduated return to work starting at 12 hours per

week and progressing to full-time within a six week period. They also recommended a three month gym program and additional counseling to assist with her transition back to work and family responsibilities.

[26] The Appellant testified that while she attended FIT she would complete an exercise which involved holding her neck in extension until she felt nauseous and then she would stop and then do it again to try and perform the stretch for a longer period of time. She also reported that they had programs for swaying and head movements. She did not feel she was “cured” at the completion of her program.

[27] The Appellant began her graduated return to work program on February 4, 2002 with employer two. The graduated return to work program was scheduled to run for six weeks and was to be completed on March 24, 2002. The Appellant testified that the return to work intensified her migraines and her headaches due to the amount of time she had to spend looking down.

[28] On February 21, 2002, Dr. Jutras, medical consultant for SGI reviewed the Appellant’s medical file and motor vehicle accident injuries. Dr. Jutras questioned what functional restrictions were leading to the Appellant’s positional intolerances and were preventing her from returning to her full pre-MVA status. Specifically, Dr. Jutras reported:

I am having a lot of trouble understanding this file. It appears to me that she has some soft tissue injuries of her neck and upper thoracic spine and possibly into the TMJ area.

The FIT for Active Living mid conference report of December 2001 indicates she may not reach pre-MVA level of function as she may continue to have difficulties with position tolerance for work.

...Therefore, I am not certain again as to what her functional restrictions are, and if they seem to be related to her perceived visual and balance problems, it does not appear that we have good medical evidence to indicate that these concerns are indeed related to the MVA.

[29] On March 21, 2002, SGI wrote to the Appellant and advised that her income replacement benefits were terminated. SGI advised that it was their position that the Appellant’s Ear Nose and Throat Specialist opined that her vertigo was not related to the accident and it was SGI’s

position that the Appellant's inability to resume full pre-accident activities was due to conditions unrelated to the motor vehicle accident. This decision was upheld on Application for Review dated May 28, 2003. **This is the second decision being appealed by the Appellant.** On April 10, 2002, SGI further reported that the Appellant's income replacement benefit was terminated in accordance with Section 129(1)(c) of *The Automobile Accident Insurance Act*. Section 129(1)(c) states:

129(1) Notwithstanding any other provision of this Division, a victim ceases to be entitled to an income replacement benefit when any of the following occurs:

(c) the victim is able to hold an employment determined for the victim pursuant to section 131;

[30] The Appellant stated that at the end of her program, employer two offered her a position which would compensate her for the hours that she worked. She stated that this allowed her to complete her exercise program in the afternoon or if she suffered from a migraine she could leave work and go home to attend to her migraine. She promised him four hours per day, five days per week.

[31] On May 21, 2002, SGI advised the Appellant that coverage for medications would no longer be funded. The Appellant was afforded no right of appeal in that correspondence. **This is the third decision being appealed by the Appellant.**

[32] The Appellant was seen by Dr. Voll, neurologist, on June 11, 2002. The Appellant's complaints included episodic nausea and occasional vomiting, which is induced by neck movements as well as visual tracking. Dr. Voll believed that the Appellant's symptoms may be vestibular in origin and possibly precipitated by head movements which suggested the possibility of either peripheral vestibular or cervicogenic triggers. He recommended vestibular fatiguing exercises and physiotherapy.

[33] In July, 2002, the Appellant attended upon Robynne Smith for physiotherapy. She reported that the physiotherapy in conjunction with massage therapy by Lina Foster and her exercise program five days a week, she was able to reduce her migraines significantly by August

2002. She reported a significant decrease in the number of migraines until she suffered the blood clot in her leg in November, 2002.

[34] On September 6, 2002, Dr. Jutras reviewed the medical information on the Appellant's file again. He reported:

It appears that [the Appellant] has developed a chronic pain syndrome related to her neck. Her physician has found that medication in the form of Vioxx seems to work very well for her. He also feels that she has a tendency towards stomach problems related to the Vioxx, and to that end, he has her on Pantoloc to prevent stomach problems. Therefore I think, in that her chronic pain syndrome seems to be arising from her neck, which appears to be related to the motor vehicle accident, that this is not an unreasonable approach. I would hope that at some point in time that a more simplified approach could be taken, such as using ordinary Tylenol, which is a lot easier and safer on her system, than a combination of Vioxx and Pantoloc. However, this is a decision best left up to her practicing physician.

I am having a little bit more of a problem regarding her migraines as being directly related to the motor vehicle accident. It is quite clear that she had pre-existing migraines and that since she has had the accident, her migraines have been worse. The best solution would be to find out what the frequency of her migraines were prior to the accident, find out what frequency is post-accident, and the difference between the two, would be what would be related to the accident itself. Then the Imitrex that is being used for migraines could be apportioned according to that ratio.

[35] On September 26, 2002, Ms. Robynne Smith, physiotherapist, prepared a medical report regarding the Appellant's ongoing medical problems. She diagnosed the Appellant with:

1. Cervicogenic dizziness, movement intolerance.
2. Cervicogenic headache and pressure to eyes.
3. Right TMJ dysfunction.
4. Decreased trunk mobility due to myofascial restrictions, right side more than left.

[36] The Appellant developed a popliteal artery embolism in her left lower leg in November, 2002 which further complicated her medical condition. Dr. Haver reported that this caused a great deal of pain for the Appellant, however, she was able to have surgery quickly. Dr. Haver was unable to say whether the vascular event was related to her migraines or her use of Imitrex.

[37] The Appellant's family physician, Dr. Haver, wrote to SGI on December 30, 2002. He reported that the Appellant's migraine frequency was up to three to four times per week as of June, 2001 and had tapered off to about once per week or less as of August, 2002. Dr. Haver also reported that the migraine frequency was much higher after the accident. Dr. Haver also

reported that Dr. Voll recommended that the Appellant discontinue use of Imitrex as it was causing some unusual neurologic and vascular side effects which were worse than the migraines.

[38] The Appellant attributed her improvement in migraines in August, 2002 to her receiving regular massage, physiotherapy and exercise in the summer of 2002. Unfortunately, the popliteal artery embolism forced her to reduce the amount of massage, physiotherapy and exercise that she was receiving after November, 2002 and her headaches increased in frequency.

[39] Dr. Jutras reviewed Dr. Haver's report and recommended that SGI continue to provide and be supportive of the physical therapy treatment as the headaches were responding to the treatment. On January 28, 2003, SGI wrote to the Appellant and advised her that they would continue to fund her physiotherapy and Imitrex.

[40] On December 16, 2003, Dr. Jutras commented on the cause of the Appellant's migraines:

...
I cannot determine from the information provided as to the actual frequency of the migraines prior to and following the accident. This is somewhat complicated by the fact she seems to have other headaches related to the accident (cervicogenic), that seem to be different from the migraines (secondary assessment November 2000).

Thus, I think it is fair to assign a 2/3 (accident) 1/3 (pre-existing) apportionment based on the limited information on hand.

[41] The Appellant reported that in the summer of 2004 she attempted to return to full-time employment to see if she could manage. She stated that she tried from July, 2004 to December, 2004 but was never able to achieve full-time hours. She reported increased migraines as the months passed. She testified that she is currently taking Mercandol for her headaches but that it does not control her migraines.

[42] Dr. Haver testified at the appeal on behalf of the Appellant. Dr. Haver provided a history of his treatment of the Appellant both before and after the accident. Dr. Haver reported a past history of very few migraines which increased in frequency following the accident. He testified that the migraines after the accident were more akin to a classical migraine with a precipitating aura. It was Dr. Haver's opinion that the Appellant's migraines were being triggered by neck movements. He advised that the Appellant reported visual disturbances in the summer of 2001

which were associated with nausea and vomiting and dizziness. When the Appellant did not improve, Dr. Haver considered whether he was missing something in regard to the Appellant's lack of improvement and ongoing problems with headaches so he referred her to Dr. Gore-Hickman for possibly an inner ear problem. Dr. Haver noted that the Appellant's problems with nausea and vomiting, as noted by the FIT team and Daniels Kimber seemed to be triggered by the neck being placed in extension. Dr. Haver reported that in 2002 the Appellant became apprehensive about returning to work as positioning of her neck would often trigger her nausea. Dr. Haver was still concerned that he had missed something in regard to the Appellant's condition so he referred her to Dr. Voll for recurrent episodes of nausea and difficulty tracking. Her neurological exam was normal. By August, 2002, Dr. Haver testified that the Appellant was no longer experiencing dizziness and that her migraines had decreased in frequency. Dr. Haver reported that the Appellant continues to show improvement with her migraines so long as she is exercising and strengthening her neck muscles. In his opinion, Dr. Haver believed that the neck instability and movements trigger the Appellant's migraines which cause the nausea, vomiting and occasional dizziness. His opinion is that there is clearly a cervicogenic component to her headaches. He candidly reported that he would have expected the Appellant to have returned to pre-accident levels and that she is clearly outside the time frame for disruption in the neck. However, he has found her file to be extremely confusing and difficult to assess. He believes that her only hope is to continue with ongoing rehabilitation to strengthen the neck. Dr. Haver reported no pre-accident history of neck pain or problems. Dr. Haver also testified that the Appellant is presently still experiencing migraines at a greater frequency than prior to the accident.

[43] Dr. Haver noted that he always found the Appellant to be consistent in her presentation of injuries and never felt that she displayed a lack of effort in trying to rehabilitate herself.

[44] It is not entirely clear what the cause of the popliteal artery embolism was; however, Dr. Voll, Dr. DuVal and Dr. Jutras are all of the opinion that it is not related to the use of the Imitrex. Dr. Haver questions whether it may be linked to the Appellant's use of Vioxx. It is not necessary for the purposes of this appeal to make any factual findings in regard to the cause of the popliteal artery embolism.

[45] Mr. Brady Ives, personal injury representative III for SGI, appeared at the appeal to give evidence on behalf of SGI. Mr. Ives stated that at the time of the accident the Appellant would have been classified as a non-earner. He testified that SGI began paying the Appellant an income replacement benefit on June 11, 2001 because she began attending secondary treatment at that time. As there is no specific section in the legislation to deal with the Appellant's situation, the income replacement benefit was paid on the basis of a policy created by SGI which would compensate an individual for their attendance at treatment and commuting time. The SGI policy is as follows:

CALCULATION OF IRB FOR MEDICAL APPOINTMENTS BEFORE AUGUST 1, 2002

Pay all customers an IRB for medical appointments, whether or not they have sick leave to cover them. If they do not already have an IRB calculated simply have them show you a pay stub and calculate the hourly wage, paying 90% of Net (gross salary, less income tax, less CPP deduction, less EI deduction) pay for the time lost.

If customer is in graduated return to work plan, but spending part of the day at rehab, pay full IRB less 75% of the reduced income earned – do not pay 90% of net income for hours missed due to rehab.

When paying IRB's for medical appointments, please keep in mind that no IRB is ever payable for the first seven days following an accident – so no payment for medical appointments in this seven day period.

[46] Mr. Ives testified that the Appellant's benefits were extended from treatment time to paying for the full day because she reported that her treatment often triggered headaches and vision problems. He stated that he had no discretion to extend the policy to pay the Appellant for all five days instead of the three days for which she was paid. Mr. Ives pointed out that the policy related to "attendance off work" and this was not the case for the Appellant as she did not have lost employment. He felt that it was appropriate to pay the Appellant for the full day but stressed that there was no legislation addressing this specific issue and he made the payment of income replacement benefits strictly on a policy developed by SGI.

[47] Mr. Ives testified that the personal injury representative would rely upon the consultant's opinions, specifically Dr. Jutras, more than other medical opinions in arriving at their decisions regarding entitlement to benefits.

[48] The Appellant has received the following income replacement benefits from SGI:

Date of SGI Letter	Period of Benefits	Amount of Benefits
November 9, 2001	June 11 – September 28, 2001 October 17 - 18, 2001	\$6,381.76
November 15, 2001	November 6 – 19, 2001	\$1,302.60
November 29, 2001	November 20 – December 3, 2001	\$1,302.60
December 13, 2001	December 4 - 17, 2001 ²	\$1,302.60
December 27, 2001	December 18 - 31, 2001	\$1,302.60
January 11, 2002	January 1 – 14, 2002	\$1,307.46
January 25, 2002	January 15 - 28, 2002	\$1,307.46
February 11, 2002	January 29 – February 11, 2002	\$1,307.46
February 21, 2002	February 12 - 25, 2002	\$1,307.46
March 7, 2002	February 26 – March 11, 2002	\$1,307.46
March 21, 2002	March 12 – 25, 2002	\$1,307.46

LAW AND ANALYSIS:

[49] 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.

[50] The Commission determined in *R.C.*³ 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.⁴

[51] The termination of income replacement benefits was addressed in *Collis v. Saskatchewan Government Insurance* (1998), 165 Sask. R. 108 (Sask. Q.B.). Wimmer J. stated, a p. 112:

[5] ...Cases dealing with disability insurance contracts hold that the insured has the onus of establishing that he or she is disabled within the meaning of the policy and, having done so, the onus shifts to the insurer to prove that benefits are not, or are no longer, payable. Also, the fact that the insurer at one time accepted the claim may weigh the balance in favour of the insured....

[52] Mr. Justice Wimmer continued at paragraph 6:

² Correspondence stated December 18-31, 2001 but this was clearly a typing error and it was for the two weeks prior.

³ *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

⁴ *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.

[6] In my view, Collis has met the onus that is upon him. By accepting his initial claim for income replacement benefits SGI acknowledged that he had suffered a disabling injury. Sibley is clear that had it not been for the 1995 accident, Collis would probably be capable of working as a taxi driver today. Boden, the chiropractor is of the opinion that the injuries sustained in the accident, complicated by the pre-existing spondylitis prevent Collis from working as a taxi driver. The remaining question is whether SGI has met the onus of proving disentitlement to benefits beyond those already provided....

November 9, 2001 Decision Letter/Application for Review dated March 26, 2002

[53] This decision related to the payment of income replacement benefits for only those days which the Appellant attended secondary treatment. SGI refused to pay full income replacement benefits during the period of June 11, 2001 to October 18, 2001 and only compensated the Appellant for the actual days that she attended the secondary treatment program.

[54] The November 9, 2001 decision letter stated:

...
As discussed, it was determined that SGI would agree to pay you a full day wage for the dates that you attended your secondary level rehabilitation program at Daniels Kimber Physiotherapy. According to our billings, you attended 47 days between the period of June 11, 2001 and September 28, 2001. Including the two days you attended your Tertiary Assessment, this works out to 49 days.

Please find enclosed, a cheque issued to you in the amount of \$6,381.76 representing reimbursement of lost wages for the period of June 11, 2001 and October 18, 2001....

[55] The March 26, 2002 Application for Review stated:

...
The income replacement benefit that was considered covered the time frame from June 11, 2001 up to November 5, 2001. Your secondary treatment was concluded on September 28, 2001. You had been scheduled to attend secondary treatment three times a week for approximately two hours per visit. We were unable to locate any documentation confirming that you had been advised that you would be receiving a full income replacement benefit.

On November 2, 2001, you were verbally advised that wage replacement consideration would only be given for the actual hours you attended treatment. The letter sent you on November 9, 2001 confirmed that further consideration had been given and a full days wage replacement would be considered for each day you attended secondary treatment. The basis for extending the time covered resulted from a conversation you had with your Personal Injury Representative's, immediate supervisor Mr. Brady Ives. You had indicated to Mr. Ives that you disagreed with what was being allowed for wage replacement and you had indicated that the treatment you received caused you to have visual disturbances that occasionally lasted all day.

Your income replacement benefit was based on the T4 records that you supplied confirming your past employment history. Your past employment history showed that your annual earnings could be in excess of [amount].

Many things are considered when looking at prospective jobs. Some things taken into consideration are whether a formal written offer exists, does it including wages and hours of work, what is the financial viability of the potential employer, has a replacement been hired, what is the individuals availability and initial intent. In your circumstance consideration could not be given for promised employment.

When any person is required to attend a treatment program which would prevent that person from working, whether or not a job is held, an income replacement benefit can be paid if more than 180 days has elapsed since the date of the accident. This is to compensate for being taken out of the potential work force.

Compensation is for the actual time period that one is in treatment. In your case benefits were extended to include the whole day. We feel that you have been fairly compensated for your wage loss and must concur with the Personal Injury Representative's decision.

[56] The Appellant testified that she was unable to work on the days that she was not in attendance at the program because her headaches and vision problems were often triggered by the treatment she received while in the program and lasted into the days that she had off.

[57] We are satisfied that the Appellant was paid an income replacement benefit from June 11, 2001 to October 18, 2001 pursuant to a policy developed by SGI. We are unable to find any legislation which would entitle her to a full-time income replacement benefit during the time that she attended secondary treatment. The Appellant was not employed at the time that she attended secondary treatment and there is no evidence that she would have been employed had she not been attending secondary treatment. We also do not find enough evidence to support the Appellant's testimony that her headaches and vision problems would last into the days that she was not attending secondary treatment.

[58] SGI's policy is at their discretion. It is not within the provisions of the legislation and therefore the policy decision made by SGI to pay the Appellant an income replacement benefit for three days instead of five is not a misapplication of the legislation. Furthermore, we do not find that the policy as applied by SGI was arbitrary or unreasonable. As a result, we are unable to conclude that SGI's decision is an error in law, or based on erroneous assumptions or unreasonable and the decision of November 9, 2001⁵ is upheld.

⁵ Upheld on Application for Review dated March 26, 2002.

March 21, 2002 Decision Letter/Application for Review dated May 28, 2003

[59] This decision related to the termination of income replacement benefits. The March 21, 2002 decision letter stated:

Please find enclosed, a cheque issued to you in the amount of \$1,307.46 representing your final Income Replacement Benefit (IRB) payment.

This is to advise that your Ear Nose and Throat Specialist is of the opinion that your vertigo was not related to the motor vehicle accident; therefore, it is SGI's position that your inability to resume full pre-accident activities is due to conditions unrelated to your motor vehicle accident. As such, at the completion of your Graduated Return to Work (February 4 – March 22, 2002), SGI will have met its obligation in regards to rehabilitation of your accident-related injuries and our commitment to pay an IRB will now end.

[60] As SGI accepted the Appellant's claim for income replacement benefits, they bear the onus of proving that benefits are no longer payable to the Appellant.⁶

[61] The Appellant submitted that SGI relied upon Dr. Gore-Hickman's report that her vertigo was not related to the motor vehicle accident and terminated her benefits. The Appellant submitted that the vertigo referred to by Dr. Gore-Hickman was transitory and resolving and had nothing to do with her inability to resume full-time employment. The Appellant submitted that her nausea and migraines prevented her from resuming full-time employment.

[62] The Appellant also submitted that SGI relied upon Dr. Jutras's report of February 21, 2002 in terminating benefits. The Appellant submitted that this report should have caused SGI to investigate further into the Appellant's migraines, headaches, chronic pain syndrome and TMJ problem.

[63] SGI submitted that there was nothing on the medical file to preclude the Appellant from returning to her activities of daily living and employment after her graduated return to work was completed.

[64] SGI further submitted that the Appellant's decision to delay treatment until June, 2001 has contributed to her chronic condition and must be taken into account. We are unable to accept the submissions of SGI in this regard because it is our opinion that if SGI was not in agreement

with her postponing treatment until after her exams they could have issued a decision letter terminating benefits for refusal to attend treatment.

[65] SGI terminated the Appellant's benefits following the graduated return to work. The only evidence with respect to the Appellant's progress is her own which was that her migraines increased with the return to work. We find that the Appellant suffered from minimal headaches prior to the motor vehicle accident which did not prevent her from maintaining full-time employment. This is supported by the testimony of Dr. Havers that her migraines were increased in frequency due to the accident.

[66] SGI submitted that the inability to work due to migraines is based upon the subjective evidence of the Appellant. We find that there is plenty of evidence that the Appellant was using prescription medication to control her headaches. Furthermore, Dr. Jutras accepted in his opinion dated January 28, 2003 that the physiotherapy and Imitrex seemed to be controlling her headaches and keeping her more functional.

[67] Furthermore, we are unable to conclude that Dr. Jutras's report of February 21, 2002 made any definitive findings which would support a termination of income replacement benefits. It is our opinion that Dr. Jutras was puzzled by the Appellant's condition and that is not surprising after hearing the testimony of Dr. Havers. Dr. Havers very candidly stated that he would have expected the Appellant to have recovered from her injuries. He testified that it was a very difficult file and the only opinion he could give is that the ongoing migraines and visual problems were triggered by the extension of the Appellant's neck. In his opinion, this arose from her motor vehicle accident.

[68] There are two reports from Dr. Jutras subsequent to the termination of benefits in which he diagnoses the Appellant to have a chronic pain syndrome of her neck which appeared to be related to the motor vehicle accident and he also concludes that the increase in the Appellant's migraines are attributable to the motor vehicle accident. A third report of Dr. Jutras recommended that SGI continue to fund physiotherapy and Imitrex for the Appellant as they appear to be controlling her headaches and keeping her more functional.

⁶ *Job v. Saskatchewan Insurance*, [2002] SKQB 479, upheld on appeal, *Job v. Saskatchewan Government Insurance* [2004] SKCA 164.

[69] Despite the subsequent medical reports of Dr. Jutras, there is no evidence to suggest that SGI reviewed their decision terminating income replacement benefits or investigated further into whether or not the Appellant's limitations at work might be due to her ongoing migraines.

[70] We find the decision of SGI to terminate the Appellant's income replacement benefits to be based on the erroneous assumption that her inability to return to full time employment was due to reasons which were not related to her motor vehicle accident. The discharge report stated that the Appellant was not at her pre-accident status and the team expected that with an ergonomic assessment and a gradual increase in work hours, she would be able to successfully return to work full time on a long-term basis. This was an expectation and not a finding. We find that the Appellant has been unable to resume full-time employment because she is still suffering too many migraines to allow her to return to full-time hours.

[71] SGI submitted that the Commission should apply an apportionment between pre-existing symptoms or conditions and those that arose after the embolism in November 2002. We have considered the medical evidence submitted by both parties which is dated both before and after the decision. It is the opinion of the Commission that once the claimant puts the facts in issue, the Commission is entitled to consider all evidence. The reason for doing so is that SGI is entitled to reconsider any of their decisions in light of new medical evidence presented to them and therefore, given our authority under section 193(7)(b) we have jurisdiction to make any decision that SGI is authorized to make. Furthermore, we do not find any evidence that the pre-existing migraines or low back condition prevented the Appellant from maintaining full-time employment and therefore apportionment based on the facts in this case would not be appropriate. The Appellant's pre-accident condition was one of full-time employment which she has been unable to resume due to accident related injuries. However, we are not prepared to determine the amount of the income replacement benefit after the November, 2002 embolism, as there was insufficient evidence directed to this issue.

[72] The decision of SGI dated March 21, 2002⁷ is set aside. SGI is ordered to assess the Appellant's entitlement to an income replacement benefit from March 22, 2002 forward taking into account the hours worked and inflationary adjustments.

May 21, 2002 Decision Letter

[73] The May 21, 2002 decision terminated funding for further medications. The decision of March 21, 2002 also stated that SGI had met its obligation with regards to the rehabilitation of the Appellant's accident related injuries. It is our position that SGI's decision letter of March 21, 2002 terminated her entitlement to rehabilitation expenses and therefore we have jurisdiction to review that portion of the decision as it relates to rehabilitation expenses. The Appellant submitted expenses for physiotherapy and massage therapy from July, 2002 to the date of the appeal. The Appellant file was re-assessed on January 28, 2003 and a decision was made to fund her Imitrex prescription and physiotherapy. We note that the claim for physiotherapy relates only to 2002 and there is no claim for any physiotherapy in 2003. There is a claim for ongoing massage therapy, a TMJ consult, a gym membership and mileage.

[74] Dr. Haver reported on December 30, 2002, that the Appellant's headaches had been reduced since August, 2002 "due to exercise and ongoing massage" – coordinated by her physiotherapist. Dr. Jutras relied upon this report in preparing his January 28, 2003 in which he opined that since the headaches were responding to physical therapy treatment, funding should be supported for this treatment. The Appellant has claimed physiotherapy and massage in the amount of \$235 and \$1,700 for treatment of her ongoing migraines. It is our opinion, that SGI's decision of January 28, 2003 to fund physiotherapy was intended to address reimbursement of these items. Therefore, we conclude that the Appellant is entitled to reimbursement of these expenses in light of SGI's own decision dated January 28, 2003 and Dr. Jutras' report of the same date.

[75] Even if we are wrong with respect to the intent of the decision of January 28, 2003, we find that the medical evidence supports that the Appellant's headaches, specifically migraines,

⁷ Upheld on Application for Review dated May 28, 2003

are reduced by the provision of these benefits and accordingly find them to be a rehabilitation expense which lessens a disability pursuant to Section 110 of the *Act*

[76] We are concerned about making an order for indefinite and ongoing massage therapy and physiotherapy. The Appellant's treatment providers will, in the future, have to provide comprehensive medical reports with appropriate medical findings which substantiate ongoing supportive treatment to control her migraines and maintain her function.

[77] The Appellant is also entitled to reimbursement for mileage relating to these treatments in accordance with Section 50 of *The Personal Injury Benefits Regulations*. We would also include reimbursement of the gym membership as Dr. Haver and the Appellant reported that her commitment to attending the gym in August, 2002 in conjunction with her physiotherapy and massage therapy had a significant impact on the reduction of her migraines.

[78] The Appellant is not entitled to be reimbursed for mileage to attend the gym. We are unable to provide reimbursement for the Appellant's attendance upon Dr. Medock for a TMJ consultation as there was no evidence given by the Appellant or Dr. Haver that the consultation was a referral made by Dr. Haver and that the consultation could not have been completed in Saskatoon. The report of Dr. Medock was not produced and it is not clear what recommendations for treatment were made in regard to the Appellant's TMJ.

CONCLUSION

[79] SGI's decision dated November 9, 2001 which limited the Appellant's Income Replacement Benefit ("IRB") during her secondary assessment to three days per week rather than a full-time IRB (five days per week) is upheld.

[80] SGI's decision dated March 21, 2002 with respect to the termination of her IRB as of March 22, 2002 is set aside.

[81] SGI's decision dated March 21, 2002 and May 21, 2002 as they relate to the termination of funding for further medications and rehabilitation expenses are set aside.

[82] As the Appellant has been successful in her appeal, she will be entitled to her costs associated with the appeal in accordance with Section 193(11) of *The Automobile Accident Insurance Act*.

[83] Mr. Zakreski is seeking solicitor and client costs. Mr. Zakreski submitted that the \$2,500 cap applies to reasonable expenses under section 193(11) and is not intended to apply to legal costs. He submitted that section 193(12) addresses legal costs and is not subject to the cap.

[84] Mr. Dale Brown, on behalf of SGI, submitted that reasonable expenses has been prescribed in section 96 of *The Personal Injury Benefits Regulations* and does not include reimbursement for legal costs. He submitted that section 193(12) is a taxing provision only and that the legislation does not provide for payment of solicitor and client costs.

[85] At issue is the interpretation to be applied to section 193(11) and 193(12) of *The Automobile Accident Insurance Act* and section 96 of *The Personal Injury Benefits Regulations*.

[86] The Appeal Commission derives their jurisdiction to award legal costs from section 193 of *The Automobile Accident Insurance Act*, being the Act proclaimed in force on January 1, 2002. Section 193(11) of the *Act*, clearly contemplates a claimant being awarded costs if successful on appeal. In our opinion, this provision read in conjunction with section 96 of *The Personal Injury Benefits Regulations* clearly contemplated that a claimant would be entitled to reasonable expenses, including legal costs. There is a cap for reasonable expenses at \$2,500. We do not interpret section 96(2) to include reimbursement for only those expenses prescribed in section 96(2); rather the intent of section 96 is to reimburse a successful claimant for **“all reasonable expenses”** up to the maximum \$2,500. In our opinion, “reasonable expenses” includes legal costs on a party-party basis according to the tariff in the Queen’s Bench Rules. Section 96(2) lists some reasonable expenses contemplated by the legislature but it is not, in our opinion, intended to be a conclusive list of prescribed “reasonable expenses”. The intent of the legislation in our opinion is to reimburse the successful claimant for “all reasonable expenses” up to a prescribed amount. We find SGI’s interpretation of the legislation to be too restrictive of an interpretation and in our opinion, not illustrative of the purpose and intention of the legislation which is to reimburse a successful claimant for their costs. We conclude that the intent and

purpose of section 96 of the *Regulations* was not intended to be as restrictive as SGI would interpret.

[87] We would agree with Mr. Brown that section 193(12) of the *Act* is a taxing provision. We have considered the decision of *Bear v. Saskatchewan Government Insurance*, (2004) SKQB 398 with respect to costs and have relied upon Justice Ryan-Froslic's interpretation of the *Act* which does not imply an award of solicitor/client costs given that section 198(5) of the old *Act* which provided for solicitor/client costs was expressly repealed. Justice Ryan-Froslic provides a brief review of when it is appropriate to award solicitor/client costs. We do not find this to be an exceptional case where solicitor/client costs should be awarded.

[88] Accordingly, the Appellant is entitled to reasonable expenses including her travel expenses, meals, lodging, expert reports of Robynne Smith and Lina Foster⁸ and legal costs on a party-party basis assessed in accordance with Column 3. These reasonable expenses are capped at the maximum amount of \$2,500. The Appellant is also entitled to reimbursement of her appeal fee in accordance with section 86(4) of *The Personal Injury Benefits Regulations*.

Dated at Regina, Saskatchewan, on February 25, 2005.

Ann Phillips, Chair

Beverly Cleveland, Commission Member

Joy Dobko, Commission Member

⁸ Pursuant to Section 169 of *The Automobile Accident Insurance Act* and Section 76(1) of *The Personal Injury Benefits Regulations*.