

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *R.L. v. Saskatchewan Government Insurance,*
2005 SKAIA 066
Date: 20051207
File: 067 of 2004

BETWEEN

R.L., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
R.L. and R.A., for the Applicant
Stephen McLellan, for the Respondent

Before: **Peter Bergbusch, Chair**
Tim Brown, Commission Member
Al Knippel, Commission Member

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

Heard at Regina, Saskatchewan
February 9, 2005

DECISION

INTRODUCTION

[1] The Appellant, R.L., has appealed two decisions by Saskatchewan Government Insurance (“SGI”). In a letter dated February 2, 2004, SGI advised the Appellant that it would provide chiropractic treatments at a rate of no more than three per month for three months, after which SGI would not fund any further treatments. SGI then advised the Appellant in a second decision letter dated July 6, 2004, that SGI would fund a further three months of treatment, at one treatment per month, and that SGI would not consider any further labour replacement benefits after August 2, 2004.

FACTS

[2] On May 7, 2002, the Appellant was injured in a single vehicle rollover accident while traveling along a gravel road. The vehicle was traveling at about 75 kph when it swerved left to avoid a large rock, caught a ridge in the road, went sideways and rolled over into a ditch. The Appellant was seated in the front passenger side and was wearing his seat belt.

[3] The Appellant was taken immediately to hospital in Central Butte, Saskatchewan. He had suffered trauma to his neck and back.

[4] At the time of the motor vehicle accident, the Appellant was employed as a labourer with [employer]. He also operated a [small business] on the side.

[5] There was some evidence of medical conditions predating the motor vehicle accident. In 1997 the Appellant fell off a horse, injuring his back. It is probable that he sustained a compression fracture to his T12 vertebrae, although he was not x-rayed at the time. The Appellant again fell from a horse in 1999, fracturing his left hip. The Appellant’s family doctor referred him for x-rays in August 1999 after the Appellant complained of lower back pain. There appeared to be a pre-existing compression fracture of the T12 vertebrae. The Appellant had one chiropractic treatment in September 1999, and two sessions of massage and

acupuncture. According to the observations of Dr. De Waal, by October 12, 1999 the Appellant was “much improved.” Dr. Abdulmajid Ibrahim, an orthopedic surgeon who saw the Appellant in January 2000, observed that the Appellant had full range of motion of his back, but was experiencing some tenderness in the T12-L1 area. However, no active treatment was required other than some strengthening exercises.

[6] Following the motor vehicle accident in 2002, it was suspected that the Appellant had sustained a fracture of the C4-C5 vertebrae. However, an x-ray showed a chronic disc lesion at the level of C4-C5, but did not indicate an unstable injury. A second x-ray taken at around the same date also showed sclerosis and osteophyte formation on C4 and disc space narrowing between C4-C5, but no prevertebral soft tissue swelling or evidence of instability. It confirmed the compression fracture of the T12 vertebrae.

[7] Dr. Chris Ekong, a neurosurgeon, saw the Appellant on May 8, 2002, the day following the accident. While the Appellant was tender in the upper thoracic region, upon examination there was no neurological abnormality and cervical spine x-rays were normal. Dr. Ekong’s conclusion was that the Appellant had suffered a cervical sprain. In his Application for Injury Benefits, completed on May 10, 2003, the Appellant indicated that the areas where he was experiencing pain were the mid-back region, left shoulder and neck. The most severe pain was in the mid-back area, between the shoulder blades.

[8] The Appellant was examined by his family physician on May 13, 2002. The primary diagnosis recorded on the practitioner’s report was “Trauma Neck (MVA)” and “Trauma (Back)(MVA)(Thoracic)”. The Appellant was complaining of pain and stiffness in his back and neck.

[9] The Appellant was assessed by Innovative Rehabilitation Consultants (“IRC”) on June 4, 2002. On the day of his interview, the Appellant continued to complain of pain in his mid-back area, between his shoulder blades. During the hearing of his appeal, the Appellant identified numerous errors in the Past Medical History recorded by IRC in its initial assessment report. For example, the report stated that the Appellant had attended upon his family practitioner on May 5, 2002, two days before his motor vehicle accident. In fact, Dr. Iverson was the attending

physician on the day of the Appellant's accident, and previously the Appellant had not seen Dr. Iverson (or any other health care provider) since January 30, 2002. Secondly, the IRC report stated that the Appellant said that he had had a consultation with Dr. Ekong "for his pre-existing pain on May 8, 2002." It is obvious; however, that the Appellant was referred by his family doctor to Dr. Ekong for assessment of the injuries the Appellant sustained in the motor vehicle accident. The report also says that the Appellant worked at [employer] from 1980 to 1988; he denies ever having worked there.

[10] The Appellant underwent a second assessment on the same day, June 4, 2002, by Independent Medical Rehabilitation ("IMR"). He considers this report more accurate than that prepared by IRC. The intake assessment report outlined the Appellant's subjective concerns of "constant moderate pain in between his shoulder blades and mild pain on his neck and low back, which is aggravated with prolonged standing." The Appellant had mild to moderate restriction of his range of motion in the cervical and thoracic regions. The IMR consultant concluded that the Appellant had sustained "cervical, thoracic and scapular muscle strain, Grade II, with underlying cervical disc degeneration and compression wedging at T12." A treatment plan including patient education on self-management, manual therapy and conditioning was recommended, with treatment for 3-5 days per week over 4-6 weeks.

[11] The Appellant testified about his dissatisfaction with the treatment program offered by IMR. He said that he was given a short exercise routine, but his complaints about mid-back pain were ignored. Instead, he was often asked about his low back and neck. The Appellant's wife testified that her husband was very frustrated following his visits to IMR.

[12] On June 18, 2002, IMR conducted a Functional Abilities Evaluation of the Appellant. The Appellant was upset that he was not told he would be having an assessment that day. He questioned why he was not put on a heart monitor or his pulse rate was not checked. He strongly disagreed with the accuracy of the time periods set out in the grid on the report and said that the entire assessment took no more than 45 minutes. (IMR also states in a later document that testing lasted 45 minutes, although this is inconsistent with the times recorded in the Functional Abilities Evaluation.) The report says that the Appellant was tested to see whether he could shovel for 15 minutes, and commented that he met his job demands. However, the Appellant

testified that he shoveled a sandbox full of rice for one minute, and rested for one minute. This was repeated twice. He says that he experienced extreme pain in his right buttock, so the physiotherapist pulled his leg up and told him to breathe. He did not appreciate this treatment.

[13] The Appellant also complained that his ability to perform many of the tasks of his job was not assessed by IMR. For example, in his employment he had to jackhammer sodium sulphate buildup for approximately 8 hours per week. He also had to break up sodium sulphate deposits with a sledgehammer, move wheelbarrow loads, and clean out railcars. He said that the “silly tests” he had to complete as part of the Functional Abilities Evaluation had nothing to do with the real world.

[14] On June 18, 2002, IRC prepared an Individual Written Rehabilitation Plan (the “Plan”) for the Appellant. The Plan involved a gradual return to work program, beginning with four hours per day for five days of training in the laboratory, increasing to eight hours per day during the second and third weeks, and then followed by a return to eight hours per day in his regular, labourer duties without restriction. The Appellant would attend IMR twice a week for physical therapy during the three weeks of light duty and the first week of regular duty. The Plan was to have been signed by the Appellant, the SGI personal injury representative, Dr. Iverson, the Appellant’s supervisor, and three members of the IRC team. However, the Appellant did not sign it and was not given a copy. He asked his employer if he could see a copy of the Plan on June 24, but was told that he was not supposed to have a copy. He also asked his personal injury representative to give him a complete copy of everything on his SGI file on June 24, 2002. The Appellant says that he did not even see a copy of the Plan until his doctor showed it to him on June 28.

[15] On June 21 and 28, 2002, the Appellant saw Dr. Mia, a general practitioner in the [medical clinic]. Dr. Mia wrote the Appellant a note indicating that he needed to be excused from work until he could see Dr. Hader, a rehabilitation specialist in Saskatoon.

[16] Although the Appellant did not have a copy of the return to work plan, he was advised orally and then by letter dated July 4, 2002, that, as a result of his failure to attend work on June

24 and rehabilitation on June 26, his benefits had been terminated. He only received a copy of his SGI file, including the return to work plan, on or after July 11, 2002. He was sent a second letter dated July 11, 2002, denying his request for a replacement labour benefit because he had not completed his return to work program or rehabilitation.

[17] Meanwhile, beginning on June 19, 2002, the Appellant had commenced seeing a psychologist, Ken Hardy, with Par Consultants & Counsellors. The psychologist indicates that the Appellant had been taking medication for anxiety and depression around July 1, 2002, but that it was inadequate and did not address the manic phase of the Appellant's bipolar disorder. The circumstances surrounding the Appellant's physical condition and his concerns over his return to work assessments and his insurance claim had exacerbated his condition, "rendering him incapable of functioning mentally, emotionally, and physically." Ken Hardy's letter to SGI, written around October 24, 2002, advised that the Appellant had responded well to his new medication regimen, and concluded:

If approached in a nonconfrontational, understanding manner, [the Appellant] should be become capable of cooperating in an effective RTW program.

[18] On July 2, 2002, a representative of IRC, E.R., and the SGI personal injury representative, I.L., met with Dr. Mia to discuss Dr. Mia's note of June 28, 2002, excusing the Appellant from work. It appears that the purpose of this meeting was to raise doubts with Dr. Mia whether the Appellant had been frank with him about the return to work plan and to provide Dr. Mia with information about the Appellant's pre-accident medical problems. Following the meeting, the IRC representative sent a letter to Dr. Mia to confirm the conversation and asked Dr. Mia to sign and return it. As the Appellant showed during the hearing, the letter contained several errors regarding his pre-accident condition. For example, it stated that he had been referred to Dr. Ekong prior to the motor vehicle accident for his pre-existing conditions. It also suggested that the Appellant had initially complained only of neck pain, and not mid-back pain, after the motor vehicle accident. Both statements were wrong. The impact of this meeting and subsequent letter on the relationship of trust between the Appellant and Dr. Mia must have been very damaging. Unfortunately, the Appellant did not have an opportunity to respond to the comments made to his physician in his absence.

[19] Next, S.R. with IMR wrote what appears to be an unsolicited letter to Dr. Hader, to whom the Appellant had been referred by Dr. Mia. The IMR representative's letter asserted that the Appellant had initially reported only neck pain and only reported back pain later, and that the Appellant had reported on June 20 that his neck pain had resolved. The letter made no mention of the Appellant's continuing mid-back pain. The letter reported that a functional abilities evaluation had determined that the Appellant met all of his measured job demands but one. The letter continued:

[The Appellant] is currently having difficulties with his SGI adjuster and their appointed vocational return to work team. [The Appellant] feels that he is being rushed back to work. On June 20, 2002, [the Appellant] verbally agreed to a return to work plan that started on June 24, 2002. [The Appellant] also indicated that due to his lack of symptoms, further physical therapy would not be required....

[20] Following receipt of this letter from IMR, Dr. Hader advised Dr. Mia that the Department of Physical Medicine & Rehabilitation of Saskatoon City Hospital did not perform functional capacity assessments. However, Dr. Hader went on to repeat a number of statements made in the letter from IMR and concluded that he could not "be of any further assistance to your patient who has had apparently a very good evaluation and recommendations from the Independent Medical Rehabilitation Unit in Moose Jaw." Dr. Hader had not seen a copy of the Functional Abilities Evaluation and could not have been aware of the Appellant's concerns regarding the report. It would seem that Mr. Lemstra's letter had its intended effect.

[21] On August 2, 2002, Dr. Robert Capp examined the Appellant following a referral by Dr. Mia. He concluded that the motor vehicle accident had likely aggravated the Appellant's pre-existing compression injury and caused other problems:

This man has a number of areas of previous damage to his spine, particularly C4-5 and T12. I think this recent accident, while probably not causing any new bony injury, has certainly aggravated his symptoms at the T12 area and also caused some pain in the mid thoracic region and suggestion of a posterior facet dysfunction at L4-5 or L5-S1 on the right.

[22] He recommended further therapy as follows:

My recommendation would be further therapy including a work hardening program and perhaps either chiropractic or massage therapy for the mid thoracic region and T12 region. I would expect that with appropriate treatment and a good work hardening program that he should be able to improve significantly over probably about six weeks and resume his usual activities.

[23] SGI's medical consultant did not disagree with Dr. Capp's suggestion of a work hardening program, although he commented that a gradual return to normal work activity might be just as effective.

[24] Dr. Iverson referred the Appellant to Julian's Fitness & Rehabilitation in Moose Jaw in September 2002, after clarifying with Dr. Capp what he meant by "work hardening."

[25] The Appellant next attended Courtside Sports Medicine and Rehabilitation in October 2002 for assessment. He complained of pain in his lateral thoracic and lumbar regions and said that he would experience pain after standing or sitting for extended periods. If he did not use an armrest, the pain would radiate further down his side and eventually into his front as well. The physiotherapist who examined him noted decreased range of motion of 25-50% in the thoracic region and 20% in the lumbar region. The primary finding was mechanical joint dysfunction, grade II, in the thoracic and lumbar regions, and a course of 12 to 15 sessions of manipulative therapy, coupled with a short conditioning program, was recommended. The report concluded:

[The Appellant] certainly has significant pre-existing dysfunction, including a crush injury to his T12 vertebrae. This however, appears to have been aggravated by his motor vehicle accident, and some treatment is needed to return him to pre-injury functional status.

[26] The personal injury representative and the representative of IRC traveled to [town] to meet with the Appellant's family doctor on October 25, 2002. They discussed the timing of Dr. Iverson's referral of the Appellant to Dr. Ekong. They told Dr. Iverson that the Appellant had told them that the referral happened 2 to 3 days before the accident. They also advised Dr. Iverson that the Appellant had not complied with his return to work program and, according to the personal injury representative, Dr. Iverson said the Appellant had had a "previous RTW with WCB that was complicated."¹ The Appellant denies ever having made a claim for worker's compensation.

[27] On October 29, 2002, the personal injury representative sent a letter to the Appellant's family physician, Dr. Iverson, asking him to advise whether he would recommend a return to

¹ Injury Note dated October 28, 2002, by Bill Elliott.

work program for the Appellant and whether he could report any objective medical findings from the motor vehicle accident that would prevent the Appellant from entering the return to work program. Dr. Iverson responded by letter dated November 4, 2002:

In follow up to our medical review of the above patient, I note the following:

I, Arthur Iverson, M.D., recommend that [the Appellant] could return to a trial of light duty with a supervised graduation of work load starting June 24, 2002.

[28] As the Appellant's wife pointed out in subsequent correspondence with an SGI injury representative, the Appellant had not seen Dr. Iverson from before June 1 until September because Dr. Iverson had been away.

[29] The personal injury representative forwarded a copy of Dr. Iverson's letter to the Appellant, which upset the Appellant and prompted his psychologist to contact SGI on his behalf. On behalf of SGI, Arlene Franko agreed that the personal injury representative would refrain from sending more correspondence to the Appellant until the situation was resolved.

[30] On November 27, the Appellant commenced the treatment program recommended by Courtside Sports Medicine & Rehabilitation.

[31] On December 2, 2002,² the Appellant's benefits were reinstated by SGI following an internal appeal initiated by him. The reason given for reinstatement was that the Appellant had not been given written notice of his responsibilities and the consequences of failing to participate in the return to work program. Despite his success on appeal, the Appellant was upset by the tone of the letter and the suggestion that Dr. Mia's note excusing him from work was not supported by his family physician, Dr. Iverson.

[32] Around this time SGI assigned a new personal injury representative to the Appellant's file. Relations between the Appellant and SGI appear to have improved from this point.

[33] Scott Anderson, a physiotherapist with Courtside Sports Medicine & Rehabilitation, prepared a progress report dated January 2, 2003, which indicated that the Appellant's mobility

² Letter from SGI to the Appellant dated December 2, 2002.

had much improved. He was continuing to attend the clinic three times per week and planned to begin a graduated return to work, over 4 to 6 weeks, beginning on January 20, 2003.

[34] NRCS Inc. was then engaged by SGI to assist with the coordination of the Appellant's rehabilitation. Dana Harbus, a rehabilitation consultant/kinesiologist, recorded her conversation with Mr. Anderson in a letter dated January 20, 2003. It is useful to cite the summary of this conversation in full:

1. You reported that [the Appellant] has responded well to the treatment provided. He presently has a good handle on his physical symptoms. You also reported that he is motivated and there do not appear to be any barriers to a successful return to work at this time. We also discussed his injury related and non-injury related diagnosis, you indicated that [the Appellant] has had prior injury to his cervical and thoracic spine but state that his current symptoms are as a result of injuries sustained in the motor vehicle accident. You noted that his symptoms are related to dysfunction above the sight of his previous compression fracture at T12, you also indicated that [the Appellant] did not report any of his current symptoms prior to the motor vehicle accident. You stated that you feel [the Appellant] is ready to begin a gradual return to work at [employer].

2. We discussed [the Appellant]'s physical job demands associated with his position at [employer] and with his excavating business. You provided a Job Information Worksheet that had been filled out by [the Appellant] earlier that day. I indicated that physical job demand analysis' had been completed on both of [the Appellant] positions. I provided you with copies of the reports for your reference. You reviewed the assessment on [the Appellant]'s position at [employer] which was consistent with the information he had provided. You noted that he currently exceeds the physical lifting/carrying demands of both his positions but felt that the area that may pose difficulties is the repetitive movements involving trunk rotation. The physical job demand analysis' will be reviewed and his work hardening component of his program will be focusing on i9ncreasing his endurance to repetitive activities to prepare him for the return to work. We also briefly discussed [the Appellant]'s return to his [business], you did not feel the duties required from his [business] should pose any difficulties. The goal is to return [the Appellant] to his position at [employer] prior to the start his [business] spring start up.

3. A return to work dated of February 3, 2003 was identified. We felt that this would allow for adequate time to make the necessary arrangements with [the Appellant]'s employer and to allow for specific work hardening prior to the return to work. You also indicated that you would like to continue to treat [the Appellant] during the initial stages of the return work. You felt that [the Appellant] would require specific manipulative treatment during the return to work that has been provided by yourself. Initially he will alternate the days he attends treatment and attends work due to the distance required to travel to attend treatment. We discussed the details of the return to work plan scheduled to start on February 3, 2003 and to have [the Appellant] return to full-time on March 3, 2003. You felt that [the Appellant] would not have any restrictions imposed upon his return and that he should be aware of any activities

requiring repetition. We also discussed if a supernumary return to work would be required, you felt that SGI and myself I indicated that I would contact [the Appellant]'s employer to discuss the return to work plan. A detailed plan will be forwarded to all individuals involved for review. [emphasis added][errors in original]

[35] Scott Anderson reported that by February 27, 2003, the Appellant had successfully completed his return to work in his labourer position with [employer]. The Appellant was responding well to treatment and his “thoracic joint dysfunction” had continued to improve even with his return to work. His physiotherapist recommended continued weekly physiotherapy treatments to the end of March, 2003.

[36] In fact, the Appellant continued having physiotherapy treatments through June, although the frequency of such visits decreased significantly. Scott Anderson recommended that the Appellant should continue further manipulative therapy given the positive results shown to date. He recommended chiropractic treatment for 2 to 3 sessions over the summer months to allow the Appellant to continue to improve his functional abilities within the work environment.

[37] In accordance with this recommendation, the Appellant first saw Dr. G.R. McMaster, a chiropractor, on August 12, 2003. While the Appellant was back at work, he continued to experience recurring discomfort in the lower thoracic area, which he reported to Dr. McMaster. Dr. McMaster proceeded with a course of manipulative therapy in order to maintain the Appellant “at a more acceptable level” on an as-needed basis while he continued to adjust to full-time work. SGI’s chiropractic consultant agreed with a short course of treatment as proposed by Dr. McMaster, on the basis that the Appellant’s motor vehicle accident might have aggravated a pre-existing condition.

[38] By October 2, 2003, Dr. McMaster had treated the Appellant 5 times by spinal manipulation to the thoracolumbar area. Dr. McMaster indicated that the Appellant required a “periodic ‘tune up’ to relieve the build-up of stiffness and low grade irritability” in his back, although he could now go 3 to 4 weeks between sessions.

[39] Although he had eventually returned to his labourer position, the Appellant testified that his employer accommodated him by moving him into the lab whenever possible. There was also

some suggestion in one of the IRC progress reports that the Appellant might be able to remain in the lab technician position permanently following completion of his return to work program. Unfortunately, when the Appellant bid on the position once it was posted, he was not the successful applicant.

[40] The evidence is that the Appellant struggled in his labourer position after he had returned to work. The Appellant's immediate supervisor wrote a letter on April 20, 2004, setting out the changes he had observed in the Appellant after the motor vehicle accident:

In my personal opinion, as his immediate supervisor, [the Appellant] can not shovel without frequent rest periods, prior he could shovel without back pain. Another noticeable difference is when cleaning railcars. Prior he would take a steel bar and open and close gates in the process of cleaning the railcars. After the accident he now picks up waste plastic and lets other employee's [sic] use the bar because of the pain he experiences. [The Appellant] now walks hunched over and appears to have a hard time finding a comfortable position when sitting or standing for a prolonged period.

[41] The Appellant was laid off from his position in May 2004 and had not been recalled as of the date of the hearing of his appeal.

[42] SGI's medical consultant reviewed the Appellant's file again on January 23, 2004. Dr. Kitchen recommended that SGI authorize three further chiropractic treatments over three months as supportive care, and concluded that the Appellant's present aches and pains were related to degenerative changes associated with the pre-existing compression fracture of the T12 vertebrae.

[43] The Appellant's chiropractic sessions continued approximately monthly, according to a clinical note written by Dr. McMaster on May 4, 2004. Dr. McMaster's summary of the Appellant's status at that date was as follows:

“1. [The Appellant] continues to suffer from chronic stiffness and soreness in his lower midback area. He relates this problem, at least in part, to a roll-over incident in May of 2002. Of note, he had previous trauma, with resultant degenerative change, at the T12 level.

2. He functions quite well with his condition. His only limitation is operating a dragline. This is a job that he was able to do prior to his May 2002 accident.

3. He obtains significant symptomatic relief through manipulative therapy of his thoracolumbar region. My notes indicate that the main area of involvement is about T10-11. This is something that Mr. Scott Anderson, during his lengthy involvement in [the Appellant]'s rehabilitation, also noted, emphasizing the fact that the main area of dysfunction was above the previously compressed T12 vertebrae.

4. [The Appellant] is able to go up to one month between treatments. If he goes longer his symptoms intensify. As such, treatment at this stage may be considered supportive in nature, rather than maintenance.

5. On repeated physical examination he has shown no deterioration in his condition. He usually presents with mild limitation on forward flexion and extension. Soreness and stiffness at the T10-11 areas usually remain about the same. Neurological function remains normal.

6. Since periodic treatment maintains his condition at an acceptable level, and that part of this condition is related to the roll-over incident, [the Appellant] requests provision for ongoing treatment.

In summary, I suspect that at least part of [the Appellant]'s recurrent problems is probably related to the roll-over incident. There will be considerable subjective interpretation as to what percentage is due to the most recent event and what percentage is due to pre-existing problems.

A means of resolving this issue may be to allow for a certain number of treatment sessions, and then the file should be closed. This is something that [the Appellant] should discuss with his claims officer, Ms. Yamniuk. [emphasis added]

[44] SGI's medical consultant reviewed Dr. McMaster's letter and proposed that SGI fund an additional 6 monthly chiropractic treatments.

[45] As noted above, the Appellant's rehabilitation benefits and labour replacement benefit were terminated effective August 2, 2004.

[46] Dr. Kitchen, SGI's consultant, provided further comments regarding Dr. McMaster's letter on January 21, 2005. He interpreted the letter to mean that the Appellant would be at pre-accident condition at the conclusion of these treatments. He noted that Dr. McMaster's letter contained few objective findings and inferred that there were none present to report. Dr. McMaster was unable to provide an objective clinical explanation for the client's subjective complaints. Because Dr. McMaster did not provide a treatment plan, with a specific end-date, Dr. Kitchen concluded that the Appellant's aches and pains were not accident-related but, rather, consistent with his age and pre-existing conditions.

[47] Dr. McMaster prepared a response to Dr. Kitchen's letter, which it is useful to quote in full:

[the Appellant] requested that I review a chiropractic consultant report submitted by Dr. R.G. Kitchen on January 21, 2005. Dr. Kitchen took some liberty in interpreting my clinical note of May 4, 2004, misinterpreting some of my observations and opinions regarding [the Appellant]'s conditions. As such, I would like to clarify some of the points.

1. I suggested a means of resolving this case, not his condition, would be to allow for a certain number of treatment sessions, of whatever therapy he chooses or S.G.I. is willing to fund, and then close the case. This does not suggest that [the Appellant] will not experience future symptoms that are probably related in part to his motor vehicle incident. It was just a suggestion to make things more acceptable to a resolution of the file.

2. It was not my intention to provide a lot of objective findings. This does not suggest that there are none. For the record, [the Appellant] consistently shows: mild restriction on trunk movements especially in the lower thoracic region; loss of joint-play in the lower thoracic area; no evidence of neurological compression or irritation; moderately sensitive to moderate pressure over the paraspinal structures in the lower thoracic region; mild difficulty on changing postural positions, while getting up from a chair and turning over on the examination table.

3. The fact that I noted that there was a significant subjective component, as there is with every case of back pain, does not suggest that the aforementioned physical findings do not relate to his complaints.

4. Prior to his mva, most of his complaints were in the lower lumbar region. Following his mva, his complaints were more in the lower thoracic area. This required extensive therapy by Mr. Scott Anderson at his physiotherapy clinic.

In conclusion, [the Appellant] does show some objective signs, which are consistent to his previous mva related injury to the lower thoracic region. Of course, at this stage, his present complaints are a reflection of all of his previous injuries, as well as normal wear and tear. This will require a subjective analysis to proportion what amount due to the mva and what is due to the other factors.

I will also suggest that in all probability he will continue to experience recurring episodes of thoracolumbar pain and stiffness for which he will seek out periodic care to maintain himself at a more acceptable symptomatic and functional status. [emphasis added]

[48] The Appellant also testified about his business. He operated a dragline and a backhoe to clean out weeds and vegetation in dugouts located on farm land. It was less costly to operate the dragline, which also reached further and did a neater job. When he had a lot of work, he would hire someone to operate the backhoe for him while he operated the dragline. He could operate

the dragline for 10 to 12 hours at a time before the motor vehicle accident. However, after the accident, he found that he could no longer tolerate operating his dragline for longer than an hour at a time. It would take him 5 to 6 hours to perform 3 hours of work. The Appellant says that he would experience quite severe pain and would have to take frequent breaks to lie on his back. The Appellant finds it difficult to operate any equipment that does not have arm rests. He obtains relief by supporting himself on arm rests, which he calls “self-traction.” He testified that, while he can work a full shift on his backhoe, he can only operate the dragline for an hour at a time.

LAW AND ARGUMENT

[49] The Commission’s power on appeal is provided in Subsection 193(7) of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35. The 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 Part VIII of the Act.

[50] The Commission must exercise its discretion judicially, and will overturn a decision of SGI only if an applicant establishes that SGI’s decision was erroneous, or based on erroneous assumptions, or was unreasonable.³

[51] According to SGI’s counsel, the only real dispute is whether the 2002 motor vehicle accident is causally related to the Appellant’s current condition. SGI acknowledges that the accident may have aggravated an existing condition, but suggests that it accelerated degenerative changes that would have taken place in any event. He suggested that the Appellant’s pre-existing condition is simply taking its course, and SGI’s only responsibility was for the extent to which the Appellant’s existing problems were exacerbated. He acknowledged that there was not a lot of evidence concerning the Appellant’s pre-accident problems, but argued that, by August 2004, the Appellant had been essentially rehabilitated to the condition that he would have been had the accident not occurred. He suggested that, if the Commission held otherwise, we should

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

at least apportion the loss so that SGI is only responsible to compensate the Appellant to the extent that the motor vehicle accident continues to aggravate his underlying conditions.

[52] The Appellant is seeking reinstatement of the replacement worker benefit to compensate him for hiring a replacement employee in his business. Since he had to hire a second worker from time to time in his business anyway, he acknowledges that he is at most entitled to compensation for a worker needed to perform tasks, such as operating the dragline, that he could do before the motor vehicle accident. He also seeks reinstatement of rehabilitation benefits, since he requires chiropractic treatment about once every 3 to 5 weeks.

[53] In our view, SGI acted unreasonably when it terminated the Appellant's rehabilitation benefits and labour replacement benefit. There was some evidence of pre-existing injuries, particularly a compression fracture of the T12 vertebrae. However, there is only conjecture that these conditions are the current cause of the Appellant's obvious present difficulties. The physiotherapist, Scott Anderson, indicated that the area he was treating was above the site of this fracture. Dr. McMaster reported that the Appellant needed treatment at the T10-T11 area, and that his complaints were in the lower thoracic region rather than the lumbar region. When he was asked to respond to SGI's medical consultant, Dr. McMaster outlined numerous objective findings that support his conclusion that the Appellant continues to suffer from the effects of the motor vehicle accident. This is not a case of subjective complaints unsupported by objective evidence.

[54] The Appellant seeks reimbursement for chiropractic treatment and ongoing payment for such treatments. He is entitled to be compensated for his out-of-pocket costs for such treatments to date. He is also entitled to be reinstated for rehabilitation benefits in the future, to the extent that any treatments he requires were necessitated by the injury to the mid-back region sustained in the motor vehicle accident of 2002.

[55] The Appellant is also entitled to reinstatement of the replacement labour benefit. The amount of such benefit will have to be a matter of further negotiation between the Appellant and SGI, since the Appellant agrees that he is not entitled to be paid this benefit in circumstances where he would have had to hire a second employee anyway.

[56] We have outlined the facts of the Appellant's file in greater detail than might normally be the case. The Appellant and his wife pointed out numerous concerns they had regarding the way the Appellant's file was handled and asked that we consider these matters in our decision. The Appellant had problems at times obtaining information from the rehabilitation consultants retained by SGI and from his personal injury representative. Some actions of the personal injury representative, the IRC representative, and the IMR representative were particularly disturbing as they seemed directed at undermining the Appellant's credibility and relationship with his physicians rather than furthering his rehabilitation. Each of them was careless about the accuracy of the information provided to the Appellant's health care providers. Fortunately, the Appellant's dealings with SGI improved after IRC and IMR were no longer involved in his file and after he had been assigned a new personal injury representative.

CONCLUSION

[57] SGI is ordered to reinstate the Appellant's rehabilitation benefits and replacement labour benefit from August 2, 2004.

[58] SGI shall also reimburse the Appellant for his costs in accordance with Subsection 193(11) of the Act, to a maximum amount of \$2,500 as prescribed by section 96 of *The Personal Injury Benefits Regulations*, A-35 Reg 3.

Dated at Regina, Saskatchewan, on December 7, 2005.

Peter Bergbusch, Chair

Tim Brown, Commission Member

Al Knippel, Commission Member

