

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *P.U. v. Saskatchewan Government Insurance,*  
2006 SKAIA 003  
**Date:** 20060117  
**File:** 103 of 2004

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**BETWEEN**

**P.U., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**P.U., Applicant**  
**Stephen McLellan, for the Respondent**

**Before:** **Peter Bergbusch, Chair**  
**Conrad Hnatiuk, Commission Member**  
**Carol Olson, Commission Member**

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

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Heard at **Regina**, Saskatchewan  
**March 16, 2005**



## DECISION

[1] The Appellant, P.U., appeals from a decision letter dated May 4, 2004, in which Saskatchewan Government Insurance (“SGI”) affirmed an earlier decision letter dated April 8, 2004. SGI advised the Appellant of its decision to deny coverage for any further benefits on the ground, it appears, that the motor vehicle accident did not cause or contribute to lower back and right leg pain experienced by the Appellant.

### FACTS:

[2] On August 3, 2002, at about 4:30 p.m. the Appellant was traveling on [a Highway], near [town] when her vehicle struck a deer. The deer ran out from behind a round bale of hay and was struck by the front bumper; its body swung around and hit the passenger side of the car. At the time of the collision, the Appellant had been seated in the front passenger seat of the family’s Honda Accord, with her feet on the dashboard.

[3] When the accident occurred, the Appellant had been returning with her family from a holiday in Minot, North Dakota. During the trip, the Appellant had participated in go-carting, miniature golfing, and swimming, all without pain. She describes her pre-accident condition as that of a very healthy [woman in her late thirties]. She was working 5 days a week as a bank teller.

[4] The Appellant testified that the first time she stood up following the accident she felt pain in her lower back. This pain increased during the night and radiated into her right buttock.

[5] The Appellant was treated on August 12 and 18 by a reflexologist, Elizabeth Johnson-Kinvig. She had not been previously treated by Ms. Johnson-Kinvig for any back conditions. the Appellant testified that the reflexologist “lifted her up like a bear hug” and also pushed on some pressure points on her back. She denied that Ms. Johnson-Kinvig twisted her back or massaged it in any way. She felt that her symptoms were unchanged following these visits.

[6] The Appellant's family doctor was not available in August, and instead she saw his locum, Dr. Sengar, on August 19. She reported lower back pain since the motor vehicle accident that had been progressively worsening, but his notes do no record any complaints of leg pain. According to the Appellant, Dr. Sengar told her to "keep an eye on it" and gave her some exercises to do. Anti-inflammatory medication was prescribed. She told him that she had registered to participate as a member of a team in dragon-boat races, and he did not advise her not to take part. She missed several pre-race practices, but did participate in the race on September 2. She testified that she had to stop rowing half-way through the race. The previous year, she had been able to keep up with her husband, who was rowing next to her, through the entire race.

[7] The Appellant reported the accident in a telephone call to an SGI adjuster on August 30, 2002. She said that her lower back was quite painful and she could not lift anything heavy. When sitting on anything hard, she felt a lot of pain in her lower back. She also experienced brief dizzy spells.

[8] By November 29, she continued to suffer from lower back aches. She also reported right leg pain to her family doctor, Dr. Vermeulen. The Appellant says that the pain felt as though her right leg was pushed up into her right buttock. Dr. Vermeulen sent her for x-rays, but there was no sign of a fracture or any significant abnormality.

[9] By her next attendance on December 18, Dr. Vermeulen believed that the Appellant's condition had improved significantly; his diagnosis was Grade I low back pain which could be managed with massage therapy.

[10] Before the motor vehicle accident, the Appellant was a very active gardener. Following the accident, in the fall of 2002, the Appellant testified that she could do very little in the garden. She could not dig up vegetables or carry potatoes from the garden. She limited her activities through the winter months in order to give her back time to heal. However, when she tried to plant a garden in May of the following year, she again experienced lower back pain, with pain also radiating down her right leg. As a result, all physical work in the garden had to be done by someone else.

[11] In July 2003, the Appellant began seeking chiropractic treatment for right-sided low back pain that radiated down her right leg to her mid-calf and right ankle. She advised her chiropractor, Dr. Leskun, at her first visit on July 7 that she had been experiencing this pain for approximately one year. Dr. Leskun observed a moderate loss of lumbar spine range of motion as well as reduced right hip and right leg range of motion. His initial diagnosis was chronic right-sided sciatica secondary to right-sided L4-L5 and L5-S1 nerve root impingement. Dr. Leskun treated the Appellant on eight occasions between July 7 and August 19, 2003, with spinal manipulative therapy and soft tissue therapy and instructed her on applying ice at home and on stretching exercises. He noted that the Appellant's condition worsened between the second and third visits, apparently after the Appellant had done some digging in her vegetable garden and flowerbed. Dr. Leskun was unable to provide an opinion whether the Appellant's involvement in the 2002 motor vehicle accident had caused her low back condition, except to say that the time period of one year reported to him by the Appellant was consistent with this event. The Appellant discontinued chiropractic treatments because she could see no improvement in her condition.

[12] Dr. Vermeulen referred the Appellant for further x-rays on September 17, 2003, after she reported that her low back pain had flared up following gardening activity earlier that summer. She said that pain was radiating down her right leg. However, the radiologist found no significant bone, joint or disc space abnormality of the Appellant's lumbar spine. Dr. Vermeulen also referred the Appellant for a consultation with Dr. Chris Ekong, a neurosurgeon, and for acupuncture treatments.

[13] The Appellant complained of back pain to Dr. Vermeulen again on October 10, 2003.

[14] In October the Appellant began eight weeks of physiotherapy and acupuncture treatments, with Li Mah, a physiotherapist. Physiotherapy consisted of mechanical traction. Li Mah reported that the combination of traction and acupuncture appeared to be the most successful for managing the Appellant's disc protrusion. In response to a question from the SGI personal injury representative, he wrote that it was reasonable to conclude that the Appellant's injuries were related to her motor vehicle accident since she did not experience any of the

symptoms complained of before the accident. The Appellant also indicated that these treatments relieved a lot of the pain she was experiencing.

[15] Dr. Chris Ekong, a neurosurgeon, saw the Appellant on January 5, 2004. In his report, Dr. Ekong records that the Appellant complained of low back pain with right-sided radiculopathy, which had worsened in the previous six months. His examination revealed that the Appellant had moderate restriction of back movement, with reduced right leg range of motion as compared to the left. His impression was a possible right L4-5 disc protrusion.

[16] On January 30, 2004, a C.T. scan of the Appellant's lumbar spine took place. The radiologist, Dr. N. G. Devitt, made the following findings:

At L4-L5 there is mild generalized disc bulging but no focal disc prolapse or spinal stenosis.

At L5-S1 there is a large posterior disc prolapse more marked on the right where it impinges on the S1 root as well as the anterior aspect of the thecal sac.

[17] Dr. Ekong advised the Appellant on February 26, 2004, that treatment of her right L5-S1 disc protrusion depended upon the severity of her symptoms. If she could tolerate her current condition, conservative management was appropriate. However, if the symptoms interfered significantly with her life, then the problem could be corrected with a right L5-S1 discectomy.

[18] The Appellant had a right L5-S1 discectomy on May 7, 2004. She says that her quality of life has improved significantly since the surgery but she still experiences some pain. She continues to see Li Mah for acupuncture treatments, but not as frequently as prior to the surgery.

[19] According to Dr. Vermeulen, the Appellant's family doctor since June 2000, the Appellant had never complained of back pain to him before the motor vehicle accident. Dr. Vermeulen testified that the Appellant having her right foot up on the dashboard at the time of the collision could have caused a hyperflexion of the back. He acknowledged that he saw the Appellant on numerous occasions post-accident when his notes do not record complaints of pain

or discomfort. However, Dr. Sengar's notes of August 19, 2002 and Dr. Vermeulen's notes of November 29 and December 18, 2002, and September 17 and October 10, 2003, do record complaints of back pain. In his opinion, gardening would not likely have caused a disk rupture, unless the Appellant had lifted a barrel of sand or performed some other heavy lifting. Raking or picking up leaves would not be expected to result in a ruptured disk.

[20] The Appellant's husband, testified that the Appellant had only complained to him about back pain on one occasion prior to the motor vehicle accident, and that was just in passing. He stated that the Appellant does most of the laundry and household cleaning. She still finds it difficult to stand at the cupboard for long and appears to have difficulty bending over to pick up the laundry.

[21] The Appellant's sister also testified that her sister had only complained once to her about back pain before the motor vehicle accident, after the Appellant's son had jumped onto her back. After the motor vehicle accident, the Appellant talked about the pain she was experiencing almost every time they talked. The Appellant's sister came to the farm to dig potatoes for her sister after the accident because she could not do it herself. She observed that her sister had trouble getting in and out of a car.

[22] The Appellant had had chiropractic treatments on four occasions prior to the motor vehicle accident, on June 25, 27, 29 and July 4, 2001. She had an acute onset of low back pain after one of her children had jumped on her back. She was diagnosed with an acute lumbar facet joint strain. She did not complain of pain radiating down her legs and was discharged from treatment on July 4 after a complete recovery from these symptoms.

[23] SGI only received an Application for Injury Benefits from the Appellant on January 28, 2004, although it was completed on September 17, 2003. The Appellant's sister mentioned that the Appellant had been preoccupied by health concerns of one of her sons at the time of the motor vehicle accident and this had taken a lot of her energy. The Appellant did not wish to testify about her son's health problem, but indicated that this was partly the reason for her delay in filing an application for benefits for herself.

[24] On March 15, 2004, SGI's chiropractic consultant completed a review of the Appellant's file. The report noted several possible causes of the Appellant's back symptoms other than her motor vehicle accident: treatment by a "lay manipulator" who "realigned" her back; training and competing in a dragon boat race; and gardening in June 2003. The report reviewed some of the medical reports provided to SGI by the Appellant's caregivers, and concluded:

It would appear that chiropractic treatment was tried 1 year following the MVA. This provided no benefit and I do not see the need for providing further chiropractic treatment. The recommendation is for a discectomy at the time when conservative treatment is of no further benefit. This recommendation would appear appropriate. There are however a number of events, in particular gardening which could have been the cause of the leg pain.

[25] SGI's decision letter of April 8, 2004, denied further benefits to the Appellant in reliance upon the reasoning of Dr. Kitchen in his first report. The letter referred to the Appellant's treatment by a "lay manipulator who 'realigned' your back." It noted that she trained and competed in a dragon boat race after the motor vehicle accident. The letter also said that in June, 2003, the Appellant's gardening caused an ache in her back and subsequent ache in her leg. The letter says, "Any one of the above mentioned situations could have resulted in the symptoms described." The letter also mentions that the Appellant delayed in returning an Application for Injury Benefits to SGI.

[26] In a subsequent report, Dr. Kitchen elaborated on his suggestion that gardening could have caused the Appellant's disc herniation, because of the bending and twisting motion involved. Alternate potential causes that he considered included her child jumping on her back and the actions of the lay manipulator.

[27] In a third report, Dr. Kitchen further discussed the possibility that gardening was a possible cause of the Appellant's back complaints:

... It is well documented that gardening often puts people in positions which make them susceptible to lower injuries which can result in radiating leg pain. This activity alone could just as likely have caused an injury, whether she had been in an MVA or not. Especially if it was significant enough to result in leg pain.

[28] Dr. Kitchen also wrote that the Appellant, Li Mah and Dr. Vermeulen had stated that she had never had back pain before the accident. He commented that, “unfortunately at times an individual telling a story only highlights information they deem essential for the practitioner to know,” and that, since the Appellant had not advised them of her 2001 episode of back pain, she might not have brought other episodes of back pain to her caregivers’ attention. There is, however, no evidence that the Appellant suffered from back pain at any time before the accident other than the brief episode in 2001 and the suggestion that she may have omitted to disclose other episodes is pure speculation. Even if the Appellant had not advised her family doctor or her physiotherapist about the four chiropractic treatments she received in 2001 for a lower back injury, she certainly disclosed them to SGI. Furthermore, Dr. Kitchen had earlier reviewed the report of Dr. Leskun, dated February 12, 2004, in which Dr. Leskun outlined this earlier treatment and explained that the Appellant had been discharged in July 2001 after a “complete recovery of he[r] low back symptoms.”

[29] Dr. Kitchen wrote that a lumbar disc herniation could only be confirmed by a CT scan or magnetic resonance imaging, and as neither was performed in 2001 Dr. Leskun could not confirm if a disc herniation had occurred. He then stated that Dr. Leskun’s clinical evidence would indicate that disc herniation was not present pre-accident, but other clinical evidence also suggests that it was not present immediately after the accident since leg pain is first mentioned in Dr. Vermuelen’s clinical notes of November 29. Dr. Kitchen also suggested that the Appellant’s complaints of leg pain following her gardening activities in June 2003 indicate that this activity may have caused the herniation.

## **LAW AND ARGUMENT**

[30] 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.

The standard of review applied by the Commission on such appeals is that it 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.<sup>1</sup> While the correctness of a standard of review that affords a degree of deference to SGI's decisions is currently before the Saskatchewan Court of Appeal, the result in this case would not change even if a standard of review more favourable generally to appellants were followed in this case.

[31] The evidence we heard was that the Appellant was a healthy mother of two at the time of the accident. Apart from one episode of lower back pain treated in the summer of 2001, the Appellant did not suffer from back complaints prior to the motor vehicle accident. After she had recovered from the lower back sprain in 2001, she was able to train and compete as a member of a dragon boat racing team in early September 2001. She was an avid gardener who required little assistance from her husband or others. Immediately before the motor vehicle accident, she had been with her family on a trip and had participated in numerous activities, including swimming, miniature golf, and go-carting, without any restriction.

[32] The Appellant was a passenger in a vehicle traveling at about 100 km/hour when it struck a deer. There was fairly substantial damage to the vehicle. She testified that she experienced lower back pain after the accident the first time she stood up. The pain radiated into her right buttock within a day. The Appellant sought medical treatment within a few weeks of the motor vehicle accident, complaining of lower back pain. This first visit occurred before she attempted to participate in dragon boat racing again. The attending physician who saw her on August 19, 2002, advised her to stay active. Although she did not attend some or all of the practices for the dragon boat race because of her injury, she did attempt to compete in the race. However, she was unable to keep up with her teammates and had to stop paddling mid-way through the race because of the pain she was experiencing.

[33] When she next saw her family physician, in November 29, 2002, she told him that she continued to suffer from lower back pain and was also experiencing right leg pain. An x-ray of her lumbar spine did not disclose any fractures or other abnormality. However, as Dr. Kitchen noted, an x-ray would not show whether she had sustained a disc herniation. Her symptoms had

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<sup>1</sup> *R.C. v. Saskatchewan Government Insurance*, 2003 SKAIA 1.

improved by her next visit on December 18, and her doctor concluded that her condition could be managed conservatively with massage treatments.

[34] The Appellant testified that she reduced her activities over the winter of 2002-2003. However, when she attempted to return to her normal gardening activities, she had a flare-up, which prompted her to see Dr. Leskun, a chiropractor. Chiropractic treatment was not effective, and Dr. Vermeulen referred the Appellant to a neurosurgeon. A C.T. scan of the Appellant's lower back revealed that she had suffered a right disc rupture and eventually a discectomy was performed.

[35] SGI does not take issue with the existence of the Appellant's symptoms or their diagnosis. Instead, SGI takes the position that the motor vehicle accident did not cause the Appellant's disc herniation. In deciding to terminate her benefits, SGI relied upon the first report of Dr. Kitchen, which outlined several other possible causes of the Appellant's back injury.

[36] One suggested alternate cause of the Appellant's back problems was the incident in June 2001 when one of her children jumped onto her back. However, the evidence of the Appellant and her chiropractor is that, after four treatments, she had fully recovered. There is no evidence to suggest that the Appellant suffered a disc herniation as a result of this event. Rather, she appears to have been symptom-free since completing her treatment to the date of the motor vehicle accident. She was able to participate fully in dragon boat races in September 2001 and could keep up with her husband's paddling. She did not complain to her family doctor, her husband or her sister about back aches once she had recovered from this injury.

[37] Dr. Kitchen suggests that another possible cause of the Appellant's back ailment might be the actions of a "lay manipulator" who "realigned" the Appellant's back. This must be a reference to the Appellant's treatment on August 12 and 18 by a reflexologist. The only place where the reflexologist's actions are described this way is in Dr. Vermeulen's clinical notes of November 29, 2002, which read in relevant part:

... Milestone lady realigned her back.

SGI's counsel did not question Dr. Vermeulen about what his note meant or what he understood the reflexologist to have done. The Appellant said that the reflexologist gave her a "bear hug" and pressed on some pressure points, but did not twist her back in any way. She also testified that her back felt no worse or better as a result of these two treatments. The Appellant was not cross-examined. From our review of the file and of the testimony, it is pure conjecture to say that the Appellant sustained a disc herniation during her treatment by the reflexologist.

[38] A further suggested cause of the disc herniation is the Appellant's participation in practices and then competing in dragon boat races on September 2, 2002, about a month after the accident. The Appellant's evidence is that Dr. Sengar advised her to get some exercise in order to recover from her injury and did not discourage her when she told him about the dragon boat race. However, contrary to Dr. Kitchen's assumption, the Appellant missed the practice sessions for the race. During the race, she could not keep up and had to stop paddling half way through the event. In our view, this is consistent with the Appellant's having been injured in the motor vehicle accident and being unable to engage in an activity that she had been able to do the previous year. There is no evidence that the Appellant suffered a disc herniation either training for or competing in the race.

[39] Finally, Dr. Kitchen indicates that the Appellant's gardening activities in the spring of 2003 could have caused her disc herniation. He states in his first report that gardening caused the Appellant's back and leg pain:

... Following the accident she has attended to a lay manipulator who "realigned" her back, she has trained and competed in a dragon boat race and in June, 2003 was gardening which caused an ache in her back and subsequent ache in her leg (clinical notes indicate there was no leg pain initially).  
[emphasis added]

Although there were few written records of leg pain before the Appellant saw a chiropractor in July 2003, Dr. Kitchen does appear to have overlooked Dr. Vermeulen's note dated November 29, 2002, that the Appellant was experiencing pain into her right leg.

[40] We did not have the benefit of Dr. Kitchen's testimony at the hearing, and instead SGI simply relied upon his three reports. The alternate potential causes of the Appellant's disc

herniation are not well explained in these three letters. When we examine each possibility in turn, we are left with the impression that the consultant is simply listing alternate possibilities without considering whether these were likely causes of the disc herniation, with the exception of the Appellant's gardening activities. Even his comments regarding the probability that the Appellant suffered a disc rupture while gardening are general and speculative. The reports do not explain how such an injury could happen or which gardening activities would be most likely to cause injury. For the most part, Dr. Kitchen has simply listed alternate explanations that find some support, however slight, in the file.

[41] Most significantly, Dr. Kitchen did not address whether the Appellant could have suffered a disc herniation as a result of the motor vehicle accident and what the likelihood of this was. He did not consider if the Appellant's right foot being up on the dashboard at the time of the collision could have caused or contributed to a disc rupture. He did accept, however, that "this lady sustained lower back pain at the time of the MVA."

[42] Dr. Vermeulen testified by telephone at the hearing. In his opinion, it is likely that the Appellant sustained a back injury in the motor vehicle accident, especially since her right foot was up on the dashboard at the time of the collision. Contrary to Dr. Kitchen, Dr. Vermeulen doubts that the Appellant could have sustained a ruptured disk as a result of gardening, unless she had put significant strain on her back by, for example, attempting to lift something heavy. Other activity, such as raking leaves, would not likely cause a ruptured disk. Dr. Vermeulen's testimony was helpful to our assessment of the possible causes of the Appellant's disc herniation.

[43] Based upon all of the evidence, we are satisfied on a balance of probabilities that the motor vehicle accident of August 3, 2002, caused the lower back pain and eventual right leg pain suffered by the Appellant and resulted in the L5-S1 disc rupture. The worsening of her back condition following gardening activities in the early summer of 2003 was not, to borrow a phrase from the Supreme Court of Canada, a cause of her disc herniation; rather, it was an effect of the disc herniation. The Appellant had not had any difficulty gardening prior to the accident and, in our view, would not have experienced a flare-up of her back condition in 2003 but for the injuries she sustained in the motor vehicle accident. Based upon the evidence before the

Commission, we have concluded that mere gardening alone did not cause the Appellant to sustain a disc rupture. This event can be likened to the circumstance of the plaintiff in *Athey v. Leonati*, [1996] 3 S.C.R. 458, who experienced back pain after performing stretching exercises as part of his rehabilitation from a motor vehicle accident.

[44] Accordingly, we have concluded that SGI's decision to terminate benefits was unreasonable. The decision was, essentially, that the Appellant had not established that her lower back condition was caused by the motor vehicle accident, and that there were possible alternate causes of her condition. It was not reasonable, in our view, for SGI to have relied upon Dr. Kitchen's opinion as it did not adequately consider whether the motor vehicle accident caused the Appellant's disc herniation or explain how some of the alternate potential causes could have produced this injury. Dr. Kitchen opined that gardening was just as likely to have caused the injury as the motor vehicle accident, but failed to explain this conclusion. As Dr. Vermeulen testified, some heavy gardening activities could cause a disc rupture, but others would be unlikely to do so.

## CONCLUSION

[45] SGI's decision is reversed and SGI is ordered to reinstate the Appellant's benefits. If there is any dispute as to the amount of benefits to which the Appellant is entitled, either SGI or the Appellant may apply to the Commission for further directions.

[46] SGI shall also reimburse the Appellant for her 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 [January 17, 2006](#).

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[Peter Bergbusch](#), Chair

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[Conrad Hnatiuk](#), Commission Member

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[Carol Olson](#), Commission Member