

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *R.N. v. Saskatchewan Government Insurance,*
2006 SKAIA 012
Date: March 7, 2006
File: 140 of 2004

BETWEEN

R.N., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
R.N., for the Applicant
Stephen McLellan, for the Respondent

Before: **Jeffrey Scott, Chair**
Carolyn Jones, 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.**

Heard at Regina, Saskatchewan
May 3 and December 2, 2005

DECISION

INTRODUCTION

[1] The Appellant, R.N., appeals from a decision made by Saskatchewan Government Insurance (“SGI”) dated June 21, 2004 (the “Decision Letter”) in which SGI decided that the Appellant did not suffer any injury in a motor vehicle accident on February 16, 2004, and therefore she was not entitled to any benefits under *The Automobile Accident Insurance Act* (the “Act”).

[2] The primary issue in this appeal is whether SGI acted reasonably when it determined that the Appellant was not injured in the accident. However, there are a number of additional issues to determine should we determine that the Appellant was indeed injured in the Accident.

FACTS

[3] On February 16, 2004 the Appellant was a front seat passenger in a [sport utility vehicle] being driven by her husband, R.A., when it was rear-ended by a [car] (the “Accident”). The Accident occurred in [city].

[4] Before the Accident, the Appellant was injured in three car accidents (“Three Prior Accidents”). The Three Prior Accidents occurred in 1989, 1991 and on November 14, 2000.

[5] Due to the injuries that she suffered in the 1989 and 1991 accidents, the Appellant received compensation under the tort system. The injuries that the Appellant suffered in the November 14, 2000 accident resulted in an appeal before the Commission and a Decision (the “Previous Decision”) dated May 20, 2004.¹

THE ISSUES

¹ *R.N. v. Saskatchewan Government Insurance*, 2005 SKAIA 019.

[6] The Decision Letter only addressed the issue of whether the Appellant suffered an injury in the Accident. However, during the hearing the Appellant and Mr. McLellan, lawyer for SGI, each addressed the Commission on the additional issue of the medical services, if any, that she required if the Appellant did suffer an injury in the Accident.

[7] Consequently, the issues in this appeal are:

- (a) Did the Appellant have a relevant pre-existing condition?
- (b) Did the Appellant suffer an injury in the Accident? If yes, what injury?
- (c) If the Appellant did suffer an injury in the Accident, what medical services did she require for the injury that she suffered in the Accident?

POSITION OF THE PARTIES

[8] The Appellant states that she was injured in the Accident. Mr. McLellan does not admit that the Appellant was injured in the Accident. In the alternative, Mr. McLellan asserts that if the Appellant was injured in the Accident then her injuries were only of a very short duration.

[9] The Appellant states that due to the injuries that she suffered in the Accident she medically required a number of medical services. Given his position on whether she suffered an injury in the Accident, Mr. McLellan does not admit that the Appellant required the medical services.

LAW, ANALYSIS AND DISCUSSION OF THE ISSUES

1. Jurisdiction

[10] In reviewing a decision of SGI, the Commission has the same jurisdiction under section 193(7) of the Act that the Court of Queen's Bench previously had under section 198(3) of the Act then in force to:

“set aside or vary the insurer’s decision, or make any decision that the insurer is authorized to make pursuant to this Part”.

[11] The discretion to make decisions must be exercised in a judicial manner. The discretion can only be exercised in favour of the claimant if it is demonstrated that the decision of SGI (i.e. that the Appellant was not injured in the accident) was erroneous or based on erroneous assumptions, or at the very least, the decision was unreasonable.² The Commission will exercise its discretion in the same way.³

2. *Discussion of the Issues*

A. Did the Appellant have a relevant pre-existing condition?

[12] We are all of the view that the Appellant had a relevant pre-existing condition. An April 10, 2003 report from Dr. C. Voll, Neurologist, Saskatoon, Saskatchewan provides a summary of the Appellant’s pre-existing condition. In his report, Dr. Voll states, in part, as follows:

“[The Appellant] has been troubled by persisting neck pain, dating from an initial neck injury in a motor vehicle accident in 1989. Following the initial injury, she had received physiotherapy, and the symptoms had gradually improved, but became exacerbated after a third injury in 2000. At this time, she has continuing neck discomfort, describing a sensation of tightness in the nuchal muscles and, as well, reports intermittent pain radiating through the right scapula spine, and into the right lateral upper arm and dorsal forearm. She complains of altered sensation in the right upper extremity, but she has no definite complaints of numbness or paresthesias. She has no symptoms of cervical myelopathy. She complains of headaches, which are exacerbated by neck movement and, as well, complains of dizziness with neck movement, accompanied by nausea. She has had cervical manipulations performed in Calgary, and her chiropractor has expressed concern regarding possible ligamentous disruption.”

[13] Within his report under the heading “Diagnosis and Management” and further under the sub-heading “Discussion and Recommendations”, Dr. Voll states that the Appellant has:

“...a chronic pain syndrome related to previous cervical injuries”.

² *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB7557; *Donan v. Saskatchewan Government Insurance* [1998] TWL QB98224; *Collis v. Saskatchewan Government Insurance* [1998] TWL QB98113.

³ *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 001.

[14] As noted in Dr. Voll's report, before the Accident the Appellant received chiropractic treatments in Calgary for her pre-existing condition. Her chiropractor is Dr. G. Thomson.

[15] Dr. Thomson testified at the Hearing. Dr. Thomson acknowledged that before the Accident, the Appellant received chiropractic treatments at his office.

[16] A report prepared by Joyce Clark, physiotherapist was filed. Joyce Clark works in Dr. Thomson's office. It is apparent, upon a review of that report, that before the Accident and due to her pre-existing condition the Appellant received physiotherapy treatments from Joyce Clark.

[17] In summary, the Appellant had a significant and relevant pre-existing condition. That pre-existing condition caused her to seek out and receive chiropractic treatments from Dr. Thomson and physiotherapy treatments from Joyce Clark.

B. Did the Appellant suffer an injury in the Accident? If yes, what injury did she suffer?

[18] The Appellant has the burden of proving on the balance of probabilities that she suffered injury which was caused by the Accident. The Appellant testified that due to the Accident she experienced, for example, increased neck pain, numbness, headaches, neck stiffness, right arm pain and right leg pain. She further testified that after the Accident she went home, rested on ice, and took muscle relaxants.

[19] The Appellant's husband testified that due to the Accident the Appellant suffered a worsening of her pre-existing condition. He based his testimony on his observations of his wife as her primary caregiver.

[20] Mr. McLellan filed a report dated June 8, 2004 prepared by A. Carl Shiels, M.Sc., P.Eng., Shiels and Associates Consulting. Mr. Shiels is an engineer.

[21] Mr. Shiels offered two opinions in his report. The first opinion is with respect to the "impact velocity change experienced by the [Appellant] vehicle" when the rear end collision

occurred. The second opinion is with respect to causation. That is to say, given the “velocity change” is it likely that the Appellant suffered an injury?

[22] With respect to his first opinion, Mr. Shiels refers in his report to an interview that he conducted of S.A., the operator of the vehicle that rear ended the [Appellant’s] vehicle. S.A. informed Mr. Shiels that he:

“...believes that his vehicle may have reached a speed of 10km./hr, but not more, before colliding with the [Appellant’s] vehicle. He also believes that he applied the brakes just prior to the collision and may have slowed the vehicle somewhat.”

[23] Mr. Shiels goes on to state in his report:

“When asked how the impact compared to those he had experienced while riding on the ‘Bumper Cars’ at the Regina Exhibition, [S.A.] felt that it would have been about the same or a little less severe. [S.A.] noted that the sound of the collision was much worse”.

[24] Mr. Shiels, at page 4 of his report concluded, in part, as follows:

“3. In light of the fact that [S.A.]’s vehicle showed no evidence of stress or damage whatsoever, it seem (sic) highly unlikely that the Delta-V experienced could have been greater than 10 km/h-a value that is consistent with [S.A.]’s (sic) estimate that he was travelling at no more than 10 km/h at the moment of impact. It is also consistent with [S.A.]’s comparison to his experience in ‘Bumper Cars’ at the Exhibition.”

[25] In response to a question asked of her by a member of the Commission, the Appellant agreed that the impact from the Accident was similar to the impact that one would experience when riding a bumper car at the Exhibition. However, the Appellant went on to state that she would not consider riding a bumper car because of concerns of causing trauma to her self.

[26] During the Hearing, a member of the Commission brought to the attention of Mr. McLellan the judgment of Klebuc, J. in *Smid v. Rooke*.⁴ In the trial of that action, defence counsel had Mr. Shiels qualified as an expert in the “...field of mechanical engineering and to a limited degree in the field of biomechanics, an area of study that deals with the application of

⁴ [1995] TWL QB 95041.

engineering principles to biological material, and specifically with the effect the application of force has on the human body”.

[27] Mr. Shiels offered two opinions in *Smid*. One related to the speed of the defendant’s vehicle at the time of impact. Klebuc, J. accepted the opinion of Mr. Shiels on that issue. The other opinion related to the causation of Ms. Smid’s injury. With respect to the causation opinion, Klebuc, J. had this to say:

“In my opinion Mr. Shiels is not well qualified to give an opinion as to causation of injury in the human spine because of its complexity and his very limited knowledge of human anatomy and neurology. Further, his research appears to be limited to reviewing the McConnell, West and Szabo reports which may have been prepared by researchers having limited knowledge of human anatomy.”

[28] Upon a review of the report that Mr. Shiels prepared for this matter, we note that he footnoted the papers identified by Klebuc, J. in *Smid*. We do acknowledge that in the report that he prepared for this matter, Mr. Shiels footnoted an additional paper that is not referred to by Klebuc, J. in *Smid*.

[29] Mr. McLellan did not call Mr. Shiels to testify. Consequently, we do not know whether Mr. Shiels has upgraded his education, skills and experience since the *Smid* trial.

[30] Given the finding of Klebuc, J. in *Smid*, we conclude that Mr. Shiels is not qualified to offer an opinion on whether the Appellant suffered an injury because of the Accident.

[31] To further determine whether the Appellant suffered an injury in the Accident, we now move to a consideration of the medical services that were provided to the Appellant after the Accident. The first medical attention, for which a document was filed for the appeal, that the Appellant received after the Accident was on February 24, 2004 (8 days after the Accident) when she attended upon the office of Dr. Thomson. Arising out of that visit, Dr. Thomson completed a Practitioner’s Report. It is not clear from the evidence whether the February 24, 2004 appointment was made before the Accident or after the Accident. In other words, was the February 24, 2004 appointment made by the Appellant prior to the Accident to treat her pre-

existing condition or was it made by the Appellant after the Accident for the injury that she suffered in the Accident?

[32] In his Practitioner's Report, under item number 2, Dr. Thomson provided a "Primary diagnosis" of:

"Atlas subluxation complex."

[33] With respect to "Physical findings and investigation (include x-ray results)", Dr. Thomson stated:

"Xrays cervical spine showed a change in the **pattern of misalignment** (emphasis added). Xrays were taken Jan./04" and again Feb. 24/04 just before and just after MVA Feb 16/04. xrays showed a change."

[34] Under the heading "Diagnosis" Dr. Thomson checked off a:

"Grade II" to "Grade III" Whiplash-associated disorder".

[35] Dr. Thomson testified that there was a change in the Appellant's condition before and after the Accident. Dr. Thomson testified, in part, as follows:

"... I work with the cervical spine and the head and the skull and basically putting it back onto the cervical spine correctly, so the most significant sort of objective information I have, which can be argued by a general chiropractor, is I did take x-rays that I had before of the skull and the cervical spine. Prior to the motor vehicle accident I had x-rays of, you know, two years prior. Uh, when I took x-rays after this last motor vehicle accident the actual alignment of the head sitting on the cervical spine had changed significantly. Um, to me with my training that is a significant difference. There was something that happened significant to change how the alignment of the head, uh, is arranged on the cervical spine. So that I guess was – was one of the significant factors in that. Um, other than that I guess – I think of what has happened in this is the need for visitations definitely increased over the – over the period following the motor vehicle accident. Um, to me that wasn't a surprise because there's previous injury to the cervical spine."

[36] Dr. Thomson testified that he did not use palpatory findings to assist him in arriving at any conclusions with respect to the Appellant's condition following the Accident. Upon a review of his Practitioner's Report we do note, however, that Dr. Thomson did check off that there was "Palpatory Tenderness". We do not know whether the "Palpatory Tenderness" was

due to the pre-existing condition. Dr. Thomson stated that palpatory findings are “probably somewhat subjective”.

[37] He went on to testify that the “...only objective things are probably just pure range of motion tests...” When asked if he performed any range of motion tests on the Appellant following the Accident, Dr. Thomson testified that he did not.

[38] In response to a question from a Commission member on why did he not do any range of motion testing of the Appellant Dr. Thomson stated:

“... Again basically I mean that’s the concern with this is that there are not a lot of objective measurements I have done that show, uh, before the accident and after the accident as far as those objective measurements”. Chairperson: “But didn’t you just say that range of motion would be one of the only objective measurements tests that would be available to you as a chiropractor?” A “Right”.

[39] In a further follow-up question by a Commission member on why did he not obtain range of motion testing to bolster his interpretation of the x-ray films, Dr. Thomson replied:

“Mmhmm. Um, that’s just – I basically don’t in this practice. Um, I have been focusing on doing the technique I do and I haven’t been going through a number of other tests, uh, and that would put me in a position where in this case, you know the objective evidence isn’t there and I don’t have a lot of objective evidence either to support, so--. I’m, uh – if there’s other questions we’ll have to set up a time. I’m going to have to leave so I can make the **service**” (emphasis added).

[40] At the beginning of his testimony, Dr. Thomson informed the Commission members that his time was limited since he needed to attend a funeral service.

[41] There is, also, filed a report dated September 9, 2004 prepared by Dr. Thomson. In his report, Dr. Thomson summarizes his findings.

[42] Mr. McLellan did not call rebuttal opinion evidence from a chiropractor to directly respond to the opinion evidence of Dr. Thomson. Consequently, the opinion evidence of Dr. Thomson is not contradicted by a chiropractor.

[43] Mr. McLellan did, however, file two letters prepared by Dr. J. Alport, Medical Director, SGI. Dr. Alport is a Medical Doctor.

[44] Each letter speaks to whether the Appellant suffered an injury in the Accident. Further, in each letter, Dr. Alport offers comment concerning the conclusions reached by Dr. Thomson.

[45] In a letter dated June 18, 2004 addressed to Pat Greenman, Personal Injury Representative, SGI Dr. Alport states, in part, as follows:

“The purpose of this letter is to provide my opinion on the likelihood of the collision that occurred on February 16th causing injury, or aggravation of a pre-existing medical problem. The information available to me is the **accident reconstruction report from Mr. Carl Shiels** (emphasis added), the Application for Benefits, and one Practitioner’s Report from the Chiropractor in Calgary, Dr. Gary Thomson. The report is dated February 25th, nine days after the accident and he had indicated he hadn’t seen her before the accident, but that he was aware that she had pre-existing medical problems. His opinion is that she has a Grade II or Grade III WAD injury (he checked off both on the Practitioner’s Report) and he speculates that the collision could have ‘easily exacerbated pre-existing injuries’.

In the Application for Benefits, [the Appellant] is suggesting her pain level for this injury is rated as 10/10 and she has indicated injuries in most of her body on the ‘pain diagram’. It also suggests she has ‘increased nausea, dizziness and shockiness’.

OPINION: I accept that [the Appellant] (sic) has an ongoing problem with pain in her neck. Having read Carl Shiels (sic) report, I am comfortable in providing my opinion that no significant ‘injury’ could have occurred at the time of this accident (emphasis added). It is ‘possible’ that she could have had a transient increase in symptoms, but it would not be as a result of tissue damage and therefore could not have resulted in increased symptoms of pain for longer than a few days. Certainly, there is no likelihood that she could have developed symptoms in her legs or low back or arms as a result of this minor collision. She could have minor increased symptoms in her neck only.”

[46] Given our finding that Mr. Shiels does not have the required qualifications to offer an opinion on causation and given Dr. Alport’s implicit acceptance of Mr. Shiel’s opinion on causation, we are left with uncertainty as to what weight we should place on Dr. Alport’s overall opinion that “...no significant ‘injury’ could have occurred at the time of this accident”. But for Mr. Shiels’ opinion on causation, what would have been Dr. Alport’s opinion on whether the Appellant suffered an injury in the Accident and, if so, the extent of the injury? Dr. Alport was not called to testify at the Hearing.

[47] In a follow up letter dated September 23, 2004 addressed to Pat Greenman, Dr. Alport stated, in part, as follows:

“Dan Wolbaum asked I could look at this file now...which I just did. I looked at the X-rays and the report from Dr. Thomson dated September 9th, 2004.

I would normally ask one of our chiropractic consultants to review this note (emphasis added), but I know that we have already received an opinion from them on Dr. Thomson’s ‘specialty’ and indeed, we were advised that this practitioner has no credentials or techniques that are any different than other chiropractors, **and so Dr. Thomson’s explanation for the findings on these X-rays cannot be held to any greater level of credibility than any of his colleagues”** (emphasis added).

[48] Dr. Alport then proceeded, in his letter, to provide an opinion concerning the information that SGI had received from Dr. Thomson. Dr. Alport stated in his letter, in part, as follows:

“Dr. Thomson’s suggestion that he can take two X-rays a few months apart, and by measuring subtle differences, is able to comment on the severity of the crash, and the movement of the skull on the cervical bones is not credible to say the least. I think his practice of performing X-rays before and after manipulation could be considered medical negligence (my opinion only!). X-ray’s (sic) are not a benign procedure, they should be done for clinical indications, and they should not be done to assess (or market?) a particular manipulation or treatment. I am very confident that this client could not find a radiologist that would support the theory explained by this practitioner, nor that would provide a similar interpretation of the findings.

My opinion is that this report and the attached films add nothing to the information we already have. I continue to find there is no likelihood that [the Appellant] sustained any significant injury in the collision of 2004. Even with her well documented pre-existing medical condition, the **force applied to her neck in the collision would not have been sufficient to ‘injure’ anything ... she may have been sore for a few days, but nothing beyond that.**” (emphasis added)

[49] As previously stated, Dr. Alport did not testify at the Hearing. We do not know, therefore, the basis for Dr. Alport to assert that Dr. Thomson’s opinion is “...not credible to say the least”. Further, we note the reference in Dr. Alport’s letter to the “force” that was applied to the Appellant’s neck in the Accident. We are assuming that Dr. Alport is again referring to the report by Mr. Shiels and the causation opinion offered by Mr. Shiels. For the reasons previously given, we do not accept that Mr. Shiels has the necessary qualifications to comment on causation.

[50] Dr. Thomson indicated in his Practitioner’s Report that he referred the Appellant to “PT”. We understand “PT” to mean physiotherapy.

[51] An April 30, 2005 report prepared by Joyce Clark was filed. In her report, Ms. Clark states, in part, as follows:

“[The Appellant] was in a fourth MVA on February 16, 2004. She was subsequently seen in the clinic on February 24, 2004. Objectively at that time the myotomes in the right arm were 3+/5 for ALL muscle groups on that side. (Of interest, my notes state on June 16, 2002 that the myotomes in the right arm were 4/5 for all groups). My notes state that she was ‘very tender with some swelling at C6-7-T1, more tender than previously’. She was not treated in that area on that day with manual therapy as she was too irritated. Trigger points in the right hand were related to tension in the right median nerve. Treatment on that day was much gentler than (sic) usual due to the irritated tissues in the CT junction, the trapezius bilaterally, the mid thoracic spine (T4-10) and the low back especially L5S1. ‘Increased muscle tension lumbar paravers ++ right ?left, more than previously’” also noted. A specific region of acute tenderness was also noted on the right costovertebral junction of T4.

...

It is important to note, therefore, that I treat all areas that are restricted within the three days that she attends. From June 6, 2002 until January 8, 2004, it is noted that 3 times I needed to treat L5-S1 (3 times in 17 months). From February 24, 2004 until the last appointment on April 14, 2005 I needed to treat L5-S1 9 times, (9 times in 14 months). This is a 3.8 fold increase in frequency, despite the fact that I was out of the country for three months of that time.

...

Median nerve tension, which impedes shoulder internal rotation and creates pain, had not needed to be treated in the period of time from June 6, 2002 until the time of the 4th MVA. It was being treated regularly during sessions from February 24, 2004 onward.

...

Complaints of headache intensity and of wooziness/clamminess have increased since the February 16, 2004 accident.

...

I have tried to demonstrate some objective changes that I have observed and treated since the accident of February 16, 2004 and outline some of the subjective concerns also. Obviously a fourth accident occurring to someone who was still recovering from three previous accidents would be much more traumatic and debilitating than an individual who experiences an accident from a state of wellness.”

[52] Mr. McLellan did not call a physiotherapist to respond to the report prepared by Joyce Clark. Joyce Clark’s findings and the rationale for the physiotherapy that she provided to the Appellant are consequently not contradicted.

[53] We have not overlooked the receipts that were filed from the Gokavi Acupuncture & Pain Clinic, Saskatoon, Saskatchewan and from Roxanne Senft, South Albert Massage Therapy, Regina, Saskatchewan. No one from those Clinics testified. Nor were any reports from those Clinics filed for the Hearing. Consequently, the receipts from the two Clinics do not assist us in determining whether the Appellant suffered an injury in the Accident.

[54] After considering all of the evidence and in particular the information contained within the physiotherapy report of Joyce Clark, we are all of the view that the Appellant likely suffered an injury in the Accident. Specifically, we are all of the view that the Appellant likely suffered a worsening of her pre-existing condition.

C. Given the Appellant’s relevant pre-existing condition and given the worsening of her pre-existing condition due to the injury that she suffered in the Accident, did the Appellant medically require any medical services for the worsening of her pre-existing condition?

[55] A consideration of this issue requires a consideration of the concepts of the “thin skull” and “crumbling skull” claimant. The Saskatchewan Court of Appeal in *Saskatchewan Government Insurance v. Jessie L. Steinhauer*⁵ recently considered an appeal from a Commission decision in which those two concepts were discussed. Richards, J.A. for the court held:

“[13] The ‘thin skull’ rule makes the tortfeasor liable for injuries caused to the plaintiff even if those injuries are unexpectedly severe due to a pre-existing vulnerability or condition. As indicated in *Athey v. Leonati* at parag. [34] ‘The tortfeasor must take his victim or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff’s losses are more dramatic than they would be for the average person’.

[14] The ‘crumbling skull’ rule was explained by Major, J. in *Athey v. Leonati* at para [35]:

‘The so-called ‘crumbling skull’ rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s ‘original position’. The defendant need not put the plaintiff in a position **better** than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: [References deleted]. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award: [References deleted]. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position’.”⁶

⁵ 2006 SKCA 1.

⁶ paragraphs 13 to 14.

[56] The question of whether the Appellant is a “thin skull” or “crumbling skull” claimant is a question of fact. Further, the consequences that flow from whether the Appellant is a “thin skull” or “crumbling skull” insured are significant. As Richards, J.A. in *Steinhauer* held:

“...in the context of a “crumbling skull” situation, [SGI] would be responsible for only the appropriate proportion of the injury ultimately suffered by the respondent. That was the situation in *Saskatchewan Government Insurance v. Bogdanoff, supra*. In that case, the trial judge determined the accident victim was in the ‘crumbling skull’ category, finding that 60% of his condition was due to a pre-existing condition and 40% was attributable to the accident. In light of that finding, this Court said SGI was responsible for rehabilitation costs only to the extent the injury was caused by the motor vehicle accident, i.e. only to the extent of 40%.”⁷

[57] We are of the view that the Appellant is a “crumbling skull” claimant. Before the Accident, the Appellant had a significant and relevant pre-existing condition. That pre-existing medical condition caused the Appellant discomfort. Due to the pre-existing condition, the Appellant sought out and received chiropractic care from Dr. Thomson and physiotherapy from Joyce Clark. After the Accident, the Appellant continued to receive that care.

[58] Given our finding that the Appellant is a “crumbling skull” claimant, what damage over and above the pre-existing condition did the Appellant suffer as a result of the Accident? That is difficult to assess. However, the testimony of Dr. Thomson and the information contained within the report prepared by Joyce Clark offers some assistance on that issue.

[59] Dr. Thomson testified that before the Accident (due to the pre-existing condition) the Appellant attended at his office for treatment “...about every, you know, two to three months”. He further testified that after the Accident, the Appellant attended more frequently at his office for treatment. Also, Dr. Thomson testified that as of January, 2005 the Appellant was back to her pre-accident state. He based that opinion on his understanding that by January, 2005 the Appellant was attending at his Clinic at the same frequency as before the Accident.

[60] As noted earlier in this Decision, Joyce Clark stated in her report that after the Accident certain locations of the Appellant’s body required an increased level of physiotherapy treatment

⁷ See paragraph 18.

as compared to before the Accident. Further, she reported that some locations that required treatment after the Accident did not require treatment before the Accident.

[61] Several Statements for services rendered at Dr. Thomson's clinic were filed. The Statements identify the physiotherapy (assuming "Physio" means physiotherapy) treatments and the chiropractic adjustment (assuming "Adj" means adjustment) that were provided to the Appellant. Upon a review of those Statements, we note that after the Accident:

- The Appellant did attend on the Clinic on February 24, 25, 26, 2004 and received 5 physiotherapy treatments and 1 adjustment;
- The Appellant did **not** attend on the Clinic in March, 2004;
- The Appellant attended on the Clinic on April 7 and 8, 2004 and received 4 physiotherapy treatments and 1 adjustment;
- The Appellant did **not** attend on the Clinic in May, 2004;
- The Appellant did attend on the Clinic on June 1, 2, 3, 4, 29, and 30, 2004 and received 4 physiotherapy treatments and 3 adjustments;
- The Appellant did **not** attend on the Clinic in July, 2004;
- The Appellant did attend on the Clinic on August 10, 11, and 12, 2004 and received 3 physiotherapy treatments and 1 adjustment;
- The Appellant did attend on the Clinic on September 7, 8, and 9, 2004 and received 3 physiotherapy treatments and 1 adjustment;
- The Appellant did attend on the Clinic on October 5, 6, and 7, 2004 and received 3 physiotherapy treatments;
- The Appellant did attend on the Clinic on November 23, 24, and 25, 2004 and received 3 physiotherapy treatments and 1 adjustment;
- The Appellant did **not** attend on the Clinic in December, 2004;
- The Appellant did attend on the Clinic on January 12, 14, and 26, 2005 and received 2 physiotherapy sessions (assuming "Vis" refers to physiotherapy) and 1 adjustment.

[62] For the period February, 2004 through to and including August, 2004, the Appellant attended at Dr. Thomson's office every second month. That pattern of attendance is similar to her pattern of attendance at his Clinic before the Accident (i.e. "about every...two to three months").

[63] As stated by Major, J. in the excerpt from *Athey v. Leonati* which is quoted in *Steinhauer, supra*, with the "crumbling skull" insured the defendant is "liable for the additional damage but not the pre-existing damage". Given that from February, 2004 through to August, 2004 the Appellant's pattern of attendances at Dr. Thomson's Clinic was similar to her pattern of attendances at his Clinic before the Accident we conclude that after the Accident and due to the injuries that she suffered in the Accident the Appellant did not require medical services over and above the number of services that she required before the Accident. Consequently, SGI is not responsible for the costs that the Appellant incurred when she attended at Dr. Thomson's Clinic during that period of time.

[64] We have not overlooked that beginning in September and continuing through to November, 2004 the Appellant attended on Dr. Thomson's office more regularly (i.e. every month as compared to every second month). We are all of the view that it is reasonable to conclude that it is likely that a worsening of the Appellant's pre-existing condition, due to the Accident, should have been reflected in increased monthly visits to Dr. Thomson's Clinic in the months immediately following the Accident (i.e. February, March, April, May, June, July, and August 2004) and less likely to begin seven to nine months following the Accident (i.e. September and continuing through to November, 2004).

[65] Given the increase of visits to Dr. Thomson's Clinic beginning in September and continuing through to November, 2004 we question whether the Appellant suffered a new injury. If there was a new injury, what were the circumstances leading up to that injury and what was the injury? How did the Appellant's pre-existing condition and her condition after the Accident impact upon the possible new injury? On those points, we note that Dr. Thomson testified as follows:

“What I have found, though, is she’s a lot more susceptible now in any subsequent injury. Um, there was an incident where she – I think it was a kitchen table or a cupboard that she lifted her head up and banged her head, and that, you know, sent her backwards symptomatically for a period of a month or two; so it doesn’t need a lot a (sic) trauma right now to send her to – to symptomatically, you know, send her backwards for a short period of time.

[66] In summary, we are not able to conclude that the increased frequency of visits to Dr. Thomson’s Clinic (monthly as compared to every two to three months) from September through to November, 2004 is likely due to the Accident and the consequent worsening of the Appellant’s pre-existing condition. Therefore, SGI is not responsible for those extra costs.

[67] As previously stated we do not have sufficient information to determine the reason for the services provided to the Appellant from the Gokavi Acupuncture & Pain Clinic and South Albert Massage Therapy Clinic (i.e. were the attendances due to the injury that the Appellant suffered in the Accident?). Further, we do not have sufficient information to determine whether the frequency of the services provided by those two Clinics to the Appellant increased due to the injuries that the Appellant suffered in the Accident.

[68] However, given our finding that the Appellant was injured in the Accident we do direct SGI to determine from the Gokavi Acupuncture & Pain Clinic and the South Albert Massage Therapy Clinic the following:

- (a) Did the Appellant attend at each Clinic for the injuries that she suffered in the Accident (i.e. a worsening of her pre-existing condition)?
- (b) If yes to (1) were the services provided by each Clinic medically required due to the worsening of her pre-existing condition?
- (c) If yes to (1) and (2) did each Clinic provide services to the Appellant over and above the level of service that each Clinic provided to the Appellant before the Accident? If so and if the Appellant incurred extra costs for those services, then SGI will reimburse those extra costs to the Appellant. Without deciding the issue, Section 47(1) of *The Personal Injury Benefits*

Regulations (the “Regulations”) might or might not apply to the services provided by the Gokavi Clinic.

[69] Given our findings concerning the frequency of the Appellant’s attendances at Dr. Thomson’s Clinic after the accident as compared to before the Accident, we do not need to specifically determine whether the medical services offered by Dr. Thomson and Joyce Clark were medically required within the meaning of section 45(1)(b) of the Act. However, Dr. Thomson did testify that the treatment provided by his Clinic were “... quite necessary in [the Appellant’s] recovery...” As previously stated in this Decision, Mr. McLellan did not tender any chiropractic evidence to directly respond to the opinion offered by Dr. Thomson in this appeal.

[70] Mr. McLellan did, however, assert in his closing argument that the services offered by Dr. Thomson were found to be not medically required in the Previous Decision and consequently for this appeal that issue is *res judicata*. Upon a review of the Previous Decision, we are not certain that it stands for the proposition advanced by Mr. McLellan (i.e. Dr. Thomson’s chiropractic services are not medically required). Further, even if it does stand for that proposition we are not certain that the issue is, for this appeal, *res judicata*. However, as previously stated we do not need to determine that issue.

[71] With respect to the physiotherapy services provided by Joyce Clark. Dr. Thomson testified that:

“Joyce is a trained university degreed (sic) physiotherapist and she’s also trained extensively in cranial sacral physiotherapist (sic). Again that’s a specialization, it’s a **technique that is offered out in Saskatchewan, there are people that do it there. Nobody out there does it with the background or the training that Joyce does** (emphasis added) in the sense that she’s, uh she’s got the physiotherapy training and has that – that training along with the cranial sacral training, which again in conjunction with the work I do has been very beneficial to [the Appellant], and she’s not able to receive those treatments out there, uh, with that same quality of care”.

[72] During her testimony, the Appellant acknowledged that cranial therapy is offered in Saskatchewan. However, the Appellant believes that the therapists who offer cranial therapy in Saskatchewan do not have a background and training that matches the background and training of Joyce Clark. Upon a review of Joyce Clark’s report we did not come across any specific

reference to her actually providing cranial therapy to the Appellant. Consequently, we are not certain that the Appellant actually received cranial therapy from Joyce Clark.

[73] If we had concluded that SGI was responsible for the costs that the Appellant incurred for the services that were provided by Joyce Clark, which for the reasons given we do not, and since there are physiotherapists and therapist who offer cranial therapy in Saskatchewan we would have found that section 47(1) of the Regulations applied.

CONCLUSION

[74] The decision by SGI that the Appellant did not suffer an injury in the Accident is set aside. In its place, we find that the Appellant had a significant and relevant pre-existing condition. Further, we find that the Appellant did suffer an injury in the Accident. The injury was a worsening of her pre-existing condition.

[75] Given her pre-existing condition, the Appellant is a “crumbling skull” claimant. After the Accident the Appellant attended upon Dr. Thomson’s Clinic at a frequency that was similar to the frequency at the Clinic before the Accident. In other words, the Appellant did not incur extra costs in Calgary for medical services because of the injury that she suffered in the Accident. Consequently, SGI is not responsible for the costs that the Appellant incurred when she received chiropractic and physiotherapy services in Calgary.

[76] Given our finding that the Appellant did indeed suffer an injury in the Accident, SGI will determine whether the Appellant attended on the Gokavi Acupuncture & Pain Clinic and the South Albert Massage Therapy Clinic for the injury that she suffered in the Accident (i.e. worsening of her pre-existing condition). If she did, then SGI will determine whether the services were medically required for the worsening of her pre-existing condition and whether the Appellant incurred extra costs for the services that she received from those Clinics. Further, and depending on the application of section 51(1) of the Regulation insofar as the Gokavi Clinic is concerned, if the Appellant did incur extra costs from those Clinics then SGI will reimburse the Appellant for those costs.

[77] Due to the success that the Appellant has had with her appeal, she is entitled to reimbursement of her filing fee in the amount of \$75.00. Further, we found that report prepared by Joyce Clark to be helpful in assessing the injury that the Appellant suffered in the Accident (the worsening of her pre-existing condition). Consequently, the Appellant is entitled to reimbursement for any expense associated with Joyce Clark's report subject to section 169 of the Act and section 76 of the Regulations.

Dated at Regina, Saskatchewan, on March 7, 2006.

Jeffrey Scott, Chair

Carolyn Jones, Commission Member

Carol Olson, Commission Member