

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *L.R. v Saskatchewan Government Insurance,*
2006 SKAIA 026

Date: 20060421

File: 107 of 2004

BETWEEN

L.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Peter Abrametz, for the Applicant

Dale Brown, for the Respondent

Before: **Beverley Cleveland, Chair**
Carolyn Jones, Commission Member
Stan Loewen, 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 Prince Albert, Saskatchewan
April 28, 2005

DECISION

This is an appeal by the Appellant, L.R., of a decision made by Saskatchewan Government Insurance (“SGI”) dated April 28, 2004 terminating all benefits effective April 16, 2004 being the date she was discharged from tertiary treatment.

FACTS

[1] The Appellant was injured on November 3, 2003 when the vehicle she was driving was struck on the driver’s side by another vehicle that had failed to stop at a stop sign. The Appellant was taken by ambulance to [the] Hospital in [City], SK where she stayed overnight and was discharged home the next morning wearing a neck collar.

[2] The Appellant felt she was unconscious for an undetermined period of time at the scene of the accident but the emergency room report from the Hospital recorded no “LOC”. The record also showed her subjective complaints as left shoulder, knee, foot pain and tingling in left hand. There was noted tenderness of the reported areas with no obvious fracture of the left shoulder and a bruise on the left knee. X-rays of the cervical spine was “unremarkable”, thoracic and lumbar spine showed “exaggerated lumbar lordosis...”(O)therwise the vertebral alignment and density are unremarkable”. The left shoulder, knee and ankle were “normal”.

[3] She was diagnosed with WAD II; flexion extension injury affecting her neck, back, shoulders, hips and left leg sprain by Dr. Rabuka in his Practitioner’s Report dated November 13, 2003. He wrote in the remarks section of that report “(difficult to ascertain) ?functional pain”. Dr. Rabuka has been the Appellant’s family doctor since the late 1990’s. He testified by telephone and explained his note was a query whether it was physical pain or if she was making it up.

[4] Her pre-accident medical history included gastrectomy (stomach stapling), depression, convulsive disorder, hypothyroidism and lumbar laminectomy. A review of Dr. Rabuka’s clinical notes indicated the Appellant also complained of shoulder, hip and knee problems

(unspecified which side/s), and sleep disturbance before the accident and he noted concern about her use of medications.

[5] Dr. Rabuka described the Appellant to us as being a healthy woman who had some visceral and migraine problems, epilepsy and help with obesity. He felt there were some things that limited her level of functioning prior to the accident (eg. obesity) but said she was able to work. In his November 2003 report, Dr. Rabuka listed the Appellant as having no pre-existing medical conditions. He testified that he interpreted this question as meaning conditions relevant to the injuries she sustained in the accident.

[6] In her Application for Benefits, the Appellant reported no health problems or medical conditions prior to the accident that may affect her recovery and listed the only medication she was taking was Divalprox (sic) for epilepsy. She stated to us that she had no functional limitations prior to the accident other than occasional flare-ups of back pain, for example, after working in the garden for a long time, and that she wasn't using any pain medication.

[7] The Appellant was 47 years old at the date of the accident. She referred to herself as a single mom who worked and raised her two children by herself for twenty years. Starting in 1980 she worked as a hairdresser but back surgery in 1988 necessitated a change of careers. The Appellant went back to school from 1994 to 2000 and received a Certificate in Social Work (1995), Bachelor of Arts in sociology (1996) and a further Certificate (faculty unknown) in psychology (2000) through the extension department at the University of Saskatchewan. She testified her 'specialty' was "deviant behaviour".

[8] She held various jobs in the social work field including the Metis Detox Centre (1994 - 1995), [City] Group Home (2000 – 2001) and the Penitentiary where she did her CSW practicum. In 2001 she quit work to care for her father, who was terminally ill, on a full time basis. After his death the Appellant planned to return to work as a social worker but learned her job at the Group Home had been abolished.

[9] The Appellant was unable to find work in her field and returned to hairdressing at Ultracuts in the spring of 2003. She quit her job at Ultracuts about two weeks before the accident because of a dispute with another worker and because her back was starting to hurt again. The Appellant was unemployed at the date of the accident.

[10] Lisa Topping, physiotherapist, observed in her initial assessment report dated November 13, 2003 that the Appellant was difficult to assess “due to? acuteness of injury and ? pain behaviors”. On November 19, 2003 SGI sent the Appellant a warning letter about her recent missed and cancelled appointments and advised future missed appointments may affect her entitlement to benefits. On December 5, 2003, Ms. Topping stated to Sherry Pelletier, rehabilitation consultant with Innovative Rehabilitation Consultants, who was assisting to coordinate her treatment, that the Appellant was experiencing difficulties, eg. memory, imbalance, slurred speech.

[11] The Appellant needed and received early tertiary intervention. She was assessed at FIT for Active Living at the Saskatoon City Hospital in January 2004. The team reported the Appellant “has not returned to pre-MVA level of function as she had not returned to household tasks and does not demonstrate the ability to match work demands at this time. She continues to have difficulties with pain, low mood, anxiety and disturbed sleep. These limitations and restrictions related to the motor vehicle accident are not felt to be permanent and should improve with active treatment.”

[12] The medical report in the FIT assessment described the Appellant as slow to react and apathetic. “Cranial nerve exam showed pinpoint pupils but reactive...other cranial nerve exam was within normal limits. She has mild pain around the rotator cuff area in the left shoulder. Range of motion of the left shoulder was decreased, especially in abduction and external rotation. On the right side, range of motion was within normal limits...she has mild weakness on the left side especially in hip flexion, knee extension and ankle dorsiflexion. Deep tendon reflexes were 1+ and symmetrical, but in the left knee and bilateral ankles I could not elicit any reflexes. Plantars were downgoing. Sensory examination was within normal limits...”

[13] The assessment team included the rehabilitation consultant, physical therapist, occupational therapist, chiropractor, M.D. (physical medicine and rehabilitation) and psychologist. They felt barriers to recovery included the Appellant's reluctance to engage in counseling for depression, the severity of her depressive symptoms and reliance on medication and non-MVA related co-morbidities. The team recommended a 6 week trial streamed resource program and if she made progress in function and coping it would be extended a further 6 weeks at the tertiary level.

[14] On March 8, 2004, the Appellant advised the FIT rehabilitation coordinator, Vince Salamon, FIT that she had twisted her right knee and/or leg when she jumped off the tailgate of a parked truck. The Appellant testified this was "her fault" and the injury to her right knee was not caused by the accident. She also said she had problems with pain and swelling in her right knee and leg because she used it to compensate for her left knee and leg that were injured in the accident.

[15] A FIT progress report dated March 12, 2004 indicated the Appellant's attendance was good but it was noted she was often late in recent weeks. The Appellant's effort was described as variable from self-limiting to over-extending. The team members contributing to the report included the rehabilitation coordinator, psychosocial staff, physical therapist, occupational therapist and exercise therapist.

[16] It was reported the Appellant stated the program was good and she was getting its full benefit. She rated herself as 1) mood – good improvement (51-75% better); 2) resume walking – low improvement (1-25% better); 3) overall strength – good improvement (51-75% better).

[17] The team felt the Appellant's passenger anxiety was resolved, was less depressed and continuing to progress. It was concluded the Appellant needed to improve her consistency in participation because the last two weeks had not been productive in terms of the physical aspects of the program.

[18] On March 24, 2004, the Appellant was taken by ambulance to Saskatoon City Hospital for what she described as a bacterial infection alleged to be from the FIT swimming pool that caused her potassium to drop to dangerous levels. Dr. Rabuka's clinical notes for March 30, 2004 stated in part "confused potassium. I don't know what is happening here..." There are references in the materials filed to her medication use at the time but no explanation or diagnosis was provided. The Appellant remained in hospital for about one week and returned home for one week before returning to the FIT program.

[19] On April 8, 2004, Ms. Salamon sent the Appellant a warning letter about compliance and attendance in all aspects of programming. Parts of that letter read: "(T)hese concerns were previously discussed with you at your ... meeting on March 12, 2004....You have not fully participated in your program by missing portions of your session and not fully and appropriately completing your activities...In your remaining time with FIT we expect to see improved compliance and complete attendance in all sessions. Please be aware that further absences or participation will result in immediate dismissal."

[20] About the same time, the Appellant talked to Ms. Pelletier about the warning letter she received from Mr. Salamon. Ms. Pelletier reported parts of that conversation and noted the Appellant was "overly emotional" and said she was not late but when she tried to explain this to Mr. Salamon he wouldn't consider her side of things. The Appellant said she was "Vince's minion" and made other occasional remarks that it appeared to us there was clearly some tension between the two of them.

[21] On April 13, 2004 and just before her discharge from FIT, the Appellant participated in functional testing. These results were included in the FIT discharge report. The physical work performance summary indicated that the Appellant was capable of performing physical work at a medium level for an 8-hour day. Also included were the results of muscle strength and endurance assessments.

"Muscular strength and endurance was assessed using the wall squat, military press, and upright row. Improvements in repetitions were noted in the upper body strength of these tests but not in the repetitive wall squats. [The Appellant] reported increased knee pain with the squats. The upper body test increases suggests an increase in muscle strength and endurance. In reviewing the client's training diaries or program log, progressions were noted

in the number of repetitions, sets and weights used. These progressions suggest an increase in muscle strength and endurance.

	Admission	Discharge
Military Press	20 repetitions of 25 lbs	21 repetitions of 25 lbs
Upright Row	28 repetitions of 15 lbs	20 repetitions of 25 lbs
Wall Squat	20 repetitions of ½ squats	14 repetitions of ½ squats
Aerobic Capacity	260 meters	405 meters

Trunk and hip strength testing was completed and found to be in a rating of good/normal, with the exception of trunk rotation and trunk extension, which were rated as fair. Trunk flexion, hip adduction, hip extension and gluteus maximus were rated as poor....”

[22] The report also noted that at the time of discharge, the Appellant continued to report moderate levels of depressive symptoms. She was encouraged to use the techniques learned in therapy to manage her mood and incorporate into her daily life. Also, the benefit of further treatment was discussed but the Appellant wasn’t interested in pursuing it.

[23] The Appellant was discharged from the FIT program on April 16, 2003 being one week earlier than planned because the team felt her behavior would prevent further improvements. The team members participating in the discharge report included the rehabilitation coordinator, physical therapist, occupational therapist, exercise therapist and psychosocial staff (psychologist). They noted her attendance was disrupted by personal illness but that her accident related injuries had resolved and she can work with no functional limitations.

[24] On April 20, 2004, following her discharge from the FIT program, Dr. Rabuka reported the Appellant was unable to work because of the injuries she sustained to her knees in the accident. At the hearing he said she was very unhappy that she was evaluated as being able to go back to work. His opinion she couldn’t work was based on her complaints of significant pain while sitting or standing and stiffness in her knees and hips.

[25] He testified he examined her knee(s) and would have done range of motion, flexion and extension testing before writing the letter but doesn’t have or didn’t record his findings. Dr. Rabuka felt the Appellant should work but when she continued to come back complaining of

pain he concluded she couldn't work. His conclusion was based on her saying she had pain and his examination.

[26] On April 21, 2004 Sherry Pelletier advised SGI that the Appellant had successfully completed the FIT program and the treatment team determined she was fully recovered from her accident related injuries and she may resume all former (pre-mva) activities. She commented the Appellant expressed her gratitude and appreciation for the treatment she received and looked forward to pursuing a home exercise program and walking schedule.

[27] A progress report dated April 22, 2004 by Sherry Pelletier was filed together with several attached notes made by her. Included are her notes about the recent hospitalization of the Appellant on March 24, 2004, the FIT discharge conference on April 15, 2004 and a conversation with the Appellant on April 19, 2004 after she was discharged from FIT.

[28] Ms. Pelletier's report concluded in part that Ms. Choldnuik's "is upset she is no longer receiving any type of benefits from SGI as she continues to experience mva symptoms. She reported to experience pain in both legs, however more pain in her left knee, she has difficulty eating due to hitting her stomach on the steering wheel and her mva injuries are causing her difficulties in sitting and standing. Recommendations included obtaining copies of Dr. Rabuka's clinical notes, referral letters and consultations and ask Dr. Rabuka to advise which current symptoms he feels are related to the accident and to provide objective medical evidence to support his opinion."

[29] Ms. Pelletier's April 22, 2004 report was made (and thus submitted) after the Appellant was discharged from FIT on April 16, 2004. Prior to making her report, Dr. Rabuka provided the Appellant with a written note dated April 21, 2002 indicating that she was not capable of returning to work.

[30] In a letter dated April 26, 2005, Dr. Rabuka said "as long as she remained in this state she will never be able to do the work that she used to do before." At the hearing he explained his comment in this letter about her "struggle with SGI" referred to what (work) she could or couldn't do and his thinking was to get her back doing *any* work.

[31] He clarified it was her *right* knee that required surgery and said that problems with it have compounded since the accident. He also explained the Appellant reported being pinned by or hitting the steering wheel in the accident and this sort of trauma could affect the stapling in her stomach. The Appellant testified it hurt to eat and because no one from FIT said anything about the staples, she is having it checked out.

[32] On April 28, 2004, SGI advised the Appellant by letter of the results of the FIT discharge report, in part, as follows:

“Limitations: [The Appellant] will have some ongoing symptoms but not necessarily mechanically based. She has ongoing pain, swelling and weakness in her right knee from an injury sustained from jumping off the back of a pickup. This is not motor vehicle accident related.

Abilities: [The Appellant] is independent with all former activities. She is able to work at a medium level for an eight hour day. She has increased strength and mobility, decreased symptoms, and improved walking tolerance. She has decreased anxiety and depressive symptoms. **It is noted your current employment is a hairdresser and this is classed as a light level occupation.

Prognosis: the prognosis is good for maintaining her current level of function. This is dependent on her independent follow through with her exercise program and self management strategies.

Recommendations: The overall recommendation is for [the Appellant] to be discharged home to resume all former activities with independent self-management. She will also have Tertiary Outreach follow-up. Supporting recommendations includes participation in a home exercise program.

Rationale: Client has reached maximum medical improvement and pre-motor vehicle level of function. ...”

[33] An injury note by Laurie Brandoline, SGI personal injury representative, stated “Dr. Rabuka called me in response to my letters of April 22 & 28/04. He is in agreement with them and confirmed he believes she would benefit from further psychological intervention. I advised him that FIT attempted to do that, however, they discharged her one week earlier due to her attendance and compliance. Originally they wanted to continue working on the psychological issues but felt her compliance would affect any positive results.”

[34] On May 10, 2004, Dr. Rabuka wrote the Appellant was not capable of returning to work because of injuries to both legs and both knees. He also said in that letter “(I) believe the Appellant’s mental status at present is not stable and this is slowing down her recovery”. Dr. Rabuka testified he believed she was going back into a depressive state and that she was very upset, frustrated, angry and not sleeping.

[35] Dr. Rabuka was referred to the range of motion results stated on the physical therapy discharge report from FIT and recalled the numbers seemed better than he found on his examinations. Dr. Rabuka also commented that he always found she had more pain than was reported by FIT. The FIT team also noted the Appellant’s subjective reporting was highly variable, eg. left shoulder and arm pain – resolved (on discharge). Dr. Rabuka said to us that what the Appellant reported to him was very different.

[36] Dr. Rabuka referred the Appellant to Dr. Kukkadi, orthopedic surgeon. On July 14, 2004 he stated in part:

“...(S)ince then (the accident) her knees have continued to bother her. She had x-rays at the time which did not show any significant abnormality. She continues to have quite significant pain in both her knees which is constant and keeps her awake at night time. Her walking distance is limited to less than two blocks. She denied having any trouble with her knee prior to this injury. The pain is of a dull quality, located globally, particularly anteriorly which is aggravated with walking as well as climbing up and down stairs. She tells me the left knee is the worse of the two. She has had four months of physiotherapy which according to her only made matters worse.....

...(T)he knee alignment looks good. There is o appreciable wasting or deformities. I could not detect any effusion in either of the knees. She was globally tender all around the knee, but more so anteriorly as well as medially on the joint line. She had very limited range of motion, and I could only coax her to move from 0 to 120 (degrees) on both sides with some difficulty. Her ligaments appear to be intact. The McMurray’s test was difficult to perform. The hip and spine examination do not reveal any abnormalities. No neurovascular deficits.

Her x-rays do not show any convincing articular or bony abnormalities.

Clinical Impression: ?Traumatic Chonromalacia patellae, ?RSD

Based on my clinical examination today I could not detect any mechanical problem in her knees, but at this point in time I cannot see a surgical solution to her problem. If (sic) may be worthwhile getting the Pain Clinic involved in he care....”

[37] In a letter to the Appellant's lawyer dated April 26, 2005 made in preparation for this appeal, Dr. Rabuka confirmed his earlier opinion that she was (and is) unable to work and further questioned Ms. Brandoline's above comments. He wrote in part:

"...I believe I have stated this in the past that she is really unable to do work that would encourage her to stand for long period of time doing hair-dressing. It is not possible for her to even sit for that reason.

"...(S)he still has a lot of problems which are being fixed through a period of numerous surgeries and *I am a little concerned about the statement that I had suggested that she need psychiatric intervention. I do not think that the conversation ever occurred with her.* Whether SGI or WCB want to do evaluations that is their business but that is not coming from me. (emphasis added)

"I feel that as long as she is in this state will never be able to do the work that she used to do before. As you know she is being booked for further surgery on her knee, stomach, and for scarring on her body. This will take time as well as the fact that her hips and left knee are still not in normal position as opposed to even the knee that is being looked forward in surgery.

At the present time there is a lot of swelling in both of them...."

[38] The Appellant's husband testified that he knew his wife for about 20 years before they married. He described her as a spontaneous person who had no physical limitations other than occasional back pain. He took leave from his employment so he could attend with his wife during the tertiary programming from the third week until she completed. He recalled that the Appellant was physically in about the same shape when she finished as when she started and described her problems as knees, hips and shoulder as being the major concerns.

[39] The Appellant's daughter also testified. She described her mother as always happy and active before the accident. She recalled no problems with pain or physical restrictions other than with her back. She stated that she saw her mother every other day after she attended at FIT and felt she was worse after treatment and that she needed help to walk up and down stairs. Her recollection was that her mom's pain was mostly in the left leg. The Appellant's daughter confirmed that she does most of the housework for her mom.

POSITION OF THE PARTIES

[40] The Appellant described her current problems as essentially the same as at the date of the accident - both hips, left knee down to the ankle and toes, left shoulder blade area and numbness in the left arm and side and some numbness in the left leg. She also suggested her stomach was also injured in the accident.

[41] There is the marked a difference in what the FIT team concluded and what the Appellant testified was her status when she was discharged and Dr. Rabuka's subsequent opinion that she was no longer able to work.

[42] Mr. Abrametz referred us to the findings reported by the medical doctor who examined the Appellant during the FIT assessment in January 2004:

“...She has mild pain around the rotator cuff area of the left shoulder. Range of motion on the left shoulder was decreased, especially in abduction and external rotation. On the right side, range of motion was within normal limits...”

“In the lower extremities, she had mild weakness on the left side especially in hip flexion, knee extension and ankle dorsiflexion. Deep tendon reflexes were 1+ and symmetrical, but in the left knee and bilateral ankles I could not elicit any reflexes. Plantars were downgoing. Sensory examination was within normal limits...”

[43] He submitted the initial assessment was significant because a medical doctor made very specific findings about weaknesses but no medical doctor participated in the discharge report.

[44] He further argued that Sherry Pelletier's letter dated April 21, 2004 to SGI did not give a balanced picture of the Appellant's status because it excluded relevant information (eg. recent hospitalization) that was included in her progress report completed the following day and may have skewed SGI's decision to terminate benefits.

[45] Mr. Abrametz also noted in Ms. Pelletier's report that the Appellant was discharged one week early from a 10-week program¹ because the team felt her behavior was interfering from her making any further gains. He argued this was contradictory to the FIT team's conclusion that she was at maximum medical improvement, all symptoms resolved and at pre-accident level

of functioning. Mr. Abrametz observed as well there was no mention of the Appellant being in the hospital for two weeks in the FIT discharge report.

[46] He referred us to a table in the FIT discharge report listing her subjective complaints on admission and discharge. Mr. Abrametz questioned the left shoulder and arm pain – “resolved” and said no medical examination was done when she was discharged. He also directed us to the admission comment – “irritable and crying more” and noted that on discharge it was marked – “worse”. He submitted it doesn’t make sense that the Appellant would be crying and irritable if she had improved to where she could resume her pre-accident activities.

[47] Mr. Abrametz also queried the conclusion that the Appellant was capable of performing at a medium level work for an eight-hour day in the functional capacity evaluation because it also stated she was limited by bilateral knee pain, low back pain, and shoulder pain.

[48] Mr. Abrametz argued it may be accurate to say she wasn’t going to get any better and at maximum medical improvement when she was discharged from FIT but the conclusion that she was at her pre-accident level of functioning was inconsistent and not supported by the findings in the report that she continued to be limited by pain particularly in her knees and shoulders.

[49] Mr. Brown replied the FIT discharge report noted that the Appellant will have some ongoing symptoms but not necessarily mechanically based and Dr. Kukkady’s clinical examination did not reveal any mechanical problem in her knees. He argued these reports acknowledged her subjective complaints of pain but concluded there was no mechanical basis for it.

[50] Mr. Brown also pointed to a section titled “Barriers” in the FIT report where it was written “missing nearly two full weeks in program resulted in an inconsistent presentation. She had a tendency to over-exert initially and self-limited later times, with reported increased symptoms...”

¹ Mr. Abrametz also noted the FIT discharge report stated an 11-week program

[51] Mr. Brown submitted SGI's decision was based on the FIT discharge report that the Appellant was at her pre-motor vehicle accident level of functioning and therefore no further benefits were payable. He further submitted causation may also be in issue for any injury that the Appellant now raises as being caused by the accident that was not considered by the tertiary team, eg. damage to her stomach stapling. He also pointed to her depression and the notations in the clinical record of her medication use (eg. "crying out for more medication") as factors we must consider.

LAW AND ANALYSIS

[52] This Commission's jurisdiction to review a decision of SGI is set out in section 193(7) of The Automobile Accident Insurance Act² ("the Act"). The Commission may set aside, confirm, or vary the insurer's decision. In addition, the Commission may make any decision that the insurer is authorized to make pursuant to Part VIII of the Act.

[53] We determined in *R.C. v. SGI*³ that our discretion under s. 197(3) will be exercised in a judicial manner and in favour of an applicant only if it is demonstrated the decision by SGI (to terminate income replacement and treatment benefits) was erroneous, based on erroneous assumptions, or at the very least, the decision was unreasonable.⁴

[54] The statutory standard dealing with rehabilitation is set out in section 112 of the Act:

112(1) In this section, "**rehabilitation**" includes any or all of the following measures, programs, and treatments that the insurer considers necessary or advisable to contribute to the rehabilitation of an insured, to lessen the insured's disability caused by the accident and to facilitate the insured's recovery from the accident: ..."

[55] As well, income benefits may be terminated under section 131 of the new Act as follows:

131(1) notwithstanding any other provision of this Part, an insured ceases to be entitled to a benefit pursuant to this Division when any of the following occurs:

² R.S.S. 1978, c. A-35

³ 2003 SKAIA 1

⁴ see *Belchamber v. Saskatchewan Government Insurance*, [1997] TWL QB97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB 98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB 98113.

(a) the insured is able to hold the last employment that he or she held before receiving a benefit...

[56] Are we satisfied that SGI funded all the treatments that were necessary or advisable to contribute to the Appellant's rehabilitation? Are we satisfied that the Appellant was able to work as a hairdresser?

[57] The Appellant received early tertiary treatment and programming. After nine weeks of treatment, she was discharged one week earlier than scheduled. The FIT team stated the Appellant was at medical maximum improvement and her pre-accident level of functioning but that her behavior was interfering with her making any further gains.

[58] SGI based its decision to terminate her benefits on the FIT discharge report that the Appellant was able to resume her pre-accident level of activities and functionally tested at a medium level work for an 8-hour day. The Court of Appeal confirmed in *Job v. Saskatchewan Government Insurance* that SGI is entitled to accept and rely on the reports of its experts. 5

[59] Ms. Pelletier reported that the Appellant thanked the FIT team for their assistance in her rehabilitation and that she had no concerns about being discharged until learning her benefits would be terminated. On April 21, 2004, just days after being discharged from FIT, Dr. Rabuka stated the Appellant was not capable of doing any work.

[60] When someone does not achieve pain-free status, the issues are whether treatment should end or when to end treatment. This may be particularly so when no mechanical basis for the pain can be found as there is in this case. The statutory standard for rehabilitation doesn't refer to pain, only to "disability", and whereas pain can be disabling, individuals can also function adequately despite pain.

[61] What evidence do we have that the Appellant is disabled by pain? She has not worked since the accident and is depressed. Both the Appellant and Dr. Rabuka testified she was a healthy and active person with no pre-existing problems before the accident. However, she was

⁵ 2004 SKCA 64

being treated for depression before the accident and Dr. Rabuka's clinical notes referred to her as "crying out for more medication" which we cannot ignore.

[62] There is a stark contrast in the evidence in this case. We have the viva voce evidence of the Appellant and Dr. Rabuka that she was disabled by pain and unable to work at any occupation after completing her tertiary program. Dr. Rabuka examined the Appellant's ROM in her shoulders and knees but didn't document his findings. He testified the Appellant reported pain and his findings were always different from what was reported by the FIT team.

[63] We find Dr. Rabuka's characterization of the Appellant before the accident was generous. We find his clinical notes difficult to reconcile with his oral testimony particularly about the Appellant's pre-accident level of fitness. The notes revealed the Appellant was being treated for a variety of ailments including depression, knee and shoulder pain, anxiety, sleep disorder and that Dr. Rabuka was certainly concerned about her medication use before the accident. We accept his opinion that her present mental status is not stable, slowing down her recovery and she is unable to work as a result but to what extent this was caused by or contributed to by the November 3, 2003 motor vehicle accident, we don't know.

[64] On the other hand, we have the reports from the FIT team that concluded she was able to resume her pre-accident activities with some on-going pain. She functionally tested as capable of doing a medium level employment on a full time basis. But, we have questions arising from the FIT discharge reports and unfortunately no one from the FIT team was called to testify.

[65] For example, was there a concern about medication use; why wasn't there a medical report included as part of the discharge report; why was it concluded that missing two weeks (while in hospital and recovering) resulted in an inconsistent effort but yet the Appellant was discharged one week later because (1) she was functioning at her pre-accident level and (2) one week earlier than scheduled because her behavior was preventing her from making further gains in the program.

[66] As well, Ms. Pelletier didn't testify and we wonder why she didn't inform SGI in her letter dated April 21, 2004, reporting the Appellant was fully recovered, about her conversation on April 19 with the Appellant who said she couldn't work or do anything.

[67] Dr. Rabuka did not record his objective measurements of her decreased range(s) of motion but he testified that he conducted these tests and we accept his testimony in this regard. We also acknowledge that he partly based his opinion about the Appellant's inability to work on her subjective complaints but he has been her treating family doctor for a number of years and we accept his opinion that her depression is worsening and she is unable to work at the present time.

[68] SGI has the onus of proof to show on a civil standard that it terminated the Appellant's benefits according to the legislation, specifically, ss. 112(1) and 131(1)(a) of the Act. It relied on the report of its experts and it entitled to do so. However due to the conflicting nature of the information before us and not without some hesitation we prefer the evidence of Dr. Rabuka. We find SGI has not met the burden in this instance and that the Appellant is disabled and unable to work at her former employment at the present time. We are not asked to consider what injuries or to what extent her injuries were caused by or contributed to by the accident.

[69] Because of the different findings of the practitioners in this case, we agree with the comments of counsel for SGI that an independent medical examination may be appropriate.

CONCLUSION

[70] SGI's decision to terminate the Appellant's benefits dated April 28, 2004 is set aside. The Appellant is entitled to her costs on double column 3 according to the tariff in the QB Rules of Court subject to the \$2,500 cap in s. 96(1) of the *Personal Injury Benefit Regulations* and excepting payment for practitioner's reports as set out in s. 169 of the Act and s. 76(1) of the *PIBR*.

Dated at Regina, Saskatchewan, on April 21, 2006.

Beverley Cleveland, Chair

Carolyn Jones, Commission Member

Stan Loewen, Commission Member