

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *L.R. v. Saskatchewan Government
Insurance, 2006 SKAIA 043*

Date: 20060705

File: 064 of 2004

BETWEEN

L.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

L.R., Applicant

Dale Brown, for the Respondent

Before: **Peter Bergbusch, Chair**
Al Knippel, 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 Saskatoon, Saskatchewan
April 5, 2005

DECISION

[1] The Appellant, L.R., has appealed from a decision of Saskatchewan Government Insurance (“SGI”) dated October 3, 2002, which terminated the income replacement benefits the Appellant had been receiving. SGI’s decision was based upon a review of the Appellant’s file conducted by a medical consultant and a chiropractic consultant.

[2] The Appellant seeks reinstatement of income replacement benefits, a permanent impairment benefit, additional rehabilitation benefits, and reimbursement of expenses incurred to travel to Edmonton, Alberta, for magnetic resonance imaging (“MRI”).

[3] Since his motor vehicle accident in November 1997, the Appellant has suffered from headaches and neck, mid and low back pain. No one disputes that, at the date of the hearing, he continued to suffer from pain, made worse by activity. However, many of the health care providers who have commented on the Appellant’s file disagree over the source and severity of this pain and the appropriate course of treatment. The Appellant believes that his continuing pain symptoms have drastically limited his ability to return to his physically demanding pre-accident workload, while SGI asserts that he was rehabilitated to his pre-accident functional ability by March 1999.

FACTS

[4] On [date] the Appellant was traveling eastward in a pick-up truck along the highway at [City], Saskatchewan. At the intersection a car with two occupants pulled out from a stop sign into the Appellant’s path. The Appellant slammed on his brakes but could not avoid hitting the second vehicle broad-side. The Appellant was wearing his seat belt at the time of the collision. The driver of the second vehicle died as a result of injuries sustained in the accident.

[5] Within minutes of the accident, the Appellant was taken by ambulance to the Hospital. The ambulance attendants' notes record that the Appellant was complaining of a sore right ankle, but no other pain. His family doctor, Dr. James Johnson, diagnosed a right ankle sprain. He indicated in his Practitioner's Report that the Appellant might miss a few days of work as a result of his ankle injury and mental trauma. The prescribed treatment plan for the Appellant's injuries was the use of crutches and a tensor bandage.

[6] At the time of his motor vehicle accident, the Appellant was employed by ["Maintenance Corp."] performing custodial duties, such as dusting, waste disposal, vacuuming carpets and washing and waxing floors, operating heavy-duty cleaning equipment, shoveling snow, yard work, gardening, and boiler maintenance. He was also self-employed as a grain farmer and bought and sold scrap metal. The Appellant's wife testified that before the motor vehicle accident her husband had been a workaholic.

[7] On November 5, the Appellant's wife called the doctor's office to advise that the Appellant was complaining of neck and shoulder pain. The Appellant was seen again on November 13, and muscle strain was diagnosed. X-rays of the Appellant's cervical spine revealed no abnormality.

[8] SGI began paying income replacement benefits to the Appellant on December 15, 1997.

[9] Dr. Johnson next saw the Appellant on February 6, 1998. At this time he diagnosed mid-thoracic back sprain and sprains of both ankles, prescribed physiotherapy and recommended an assessment by a multidisciplinary team. He noted that the Appellant continued to work and to participate in the activities of daily living and that his condition had improved significantly since his last examination. Dr. Johnson did, however, observe palpatory tenderness in the thoracic spine area.

[10] Sometime in January or February the Appellant commenced physiotherapy, attending one session a week for six weeks. The Appellant also had four massage treatments, but found that they did not provide much relief.

[11] On March 3, 1998, the Appellant was seen by Diane Berg, a physiotherapist. She recorded that the Appellant was complaining of tenderness to the left and right of the cervical spine, and diagnosed Grade II whiplash-associated disorder. She recommended a conditioning program to improve the Appellant's functioning. She also remarked that the Appellant had improved significantly and was working and participating in the activities of daily living.

[12] The Appellant was assessed by a Multidisciplinary Musculoskeletal Assessment Team on March 26, 1998. The Appellant was reporting soreness in his upper back and neck which was always present but was "about 75% better overall." On most days he had a mild headache. His right foot would ache at the end of a long day, and the right leg would go numb periodically from the calf downward. He would also experience intermittent left ankle pain, which did not seem to be directly related to his activity level.

[13] The team determined that the Appellant's perceptions of his symptoms reliably matched objective information. They assessed the Appellant's functional abilities as compared to the requirements of his occupations. During spring seeding, the Appellant had to sit for as many as 14 hours a day; the team observed that the Appellant had no difficulty sitting in a standard chair. The Appellant had to kneel, squat or crouch for five minutes at a time while cutting scrap metal; he could do so. He sometimes had to climb six steps carrying 55-lb. seed bags; he was observed climbing without weight and told the team he "does not feel he would have difficulty carrying the seed bags." He also had to have the ability to push and pull at a heavy industrial standard (100 lbs.), but was only able to apply 30-35 lbs. of force. He had to be able to lift at a heavy industrial standard, but could only lift 62.5 lbs. He could carry 72.5 lbs., although his occupations required an ability to carry 100 lb. loads. He could shovel grain without difficulty. Finally, he needed to bend forward to cut metal for 5 minutes at a time, but could only tolerate 1.5 minutes of this activity.

[14] The team concluded that the Appellant was near his pre-accident capacity:

Objective testing suggested that the client is nearly able to return to pre-injury employment at this time as far as physical capacities are concerned. The client's

pre-accident employment rates at a heavy industrial level aerobically. The client currently rates at a medium aerobic level. It is likely the client could not perform his pre-injury job without cardiorespiratory fatigue at this time.

[15] The Appellant required treatment of articular and myofascial concerns in the cervical, thoracic and lumbar spine areas and to both feet. He also needed to participate in a conditioning program.

[16] The Appellant attended Physiotherapy on April 22, 1998, to begin a treatment plan including mobilization, exercises and education. He was also referred for strengthening and aerobic conditioning.

[17] The Appellant was also treated by Dr. William Dean, a chiropractor, beginning on April 16, 1998. Dr. Dean's report of June 30, 1998, diagnosed whiplash associated disorder II, with findings of recurring headaches, segmental upper cervical hypomobility, post joint fixation and myofascial hypertonicity in the upper thoracic area. The recommended course of treatment was manipulation of the upper cervical and thoracic spine on an "as needed" basis. Dr. Dean's report noted that the Appellant's weight training program appeared to be aggravating his pain symptoms.

[18] The Appellant next underwent an assessment by FIT for Active Living on September 28 and 29, 1998. By this time he was attending rehabilitation at Lifetime Fitness five times per week. He continued to report constant neck pain with intermittent headaches, aggravated by working out in the gym and by physically demanding farm work. He also complained of deep intermittent pain between the shoulder blades and intermittent, burning low back pain which was worse on the right side. In addition, he suffered from left ankle pain, poor sleep, and intermittent finger numbness upon waking, after a day of picking rocks on his farm. Upon examination, the Appellant had full range of motion of the cervical, thoracic and lumbar spine, but with mild joint stiffness and some muscle weakness throughout. He was found to be mildly depressed, mainly because he was frustrated with his post-accident limitations, and displayed some symptoms of Post Traumatic Stress Disorder. The team's findings were as follows:

Summary of Opinion

The primary diagnoses are determined to be:

1. WAD I [Grade I whiplash-associated disorder]
2. LBP I [Grade I low back pain]
3. Cervicogenic headaches
4. Non-restorative sleep
5. Thoracic spine stiffness and weakness
6. Depressed mood and some symptoms of anxiety

Secondary diagnosis:

1. Query right carpal tunnel syndrome.

[19] The recommendation was tertiary level treatment, including rehabilitation. In addition, the team recommended that SGI obtain a worksite evaluation of the Appellant's employment with Maintenance Corp. and his scrap metal business, so that his functional abilities could be assessed in relation to his work demands. In functional testing, the Appellant could not perform lifting tasks required for his employment as he described it.

[20] The Appellant attended rehabilitation through FIT for Active Living from November 17, 1998 to March 3, 1999. The discharge report dated March 30, 1999, concluded that the Appellant was capable of meeting his job demands as a custodian and the duties of his scrap metal business. He had "returned to his pre-MVA level of function, although pain continues to be problematic for [the Appellant]." According to the report, the Appellant had numerous barriers to recovery, including that he tended to be focused on his pain symptoms and did not acknowledge the functional improvements achieved during the program. The report noted that the Appellant was hard-working and had continued to work at his Maintenance Corp. job part-time while attending the program. The report recommended that the Appellant attend the gym for three months following discharge and engage in a home exercise program. The report also recommended the purchase of an ice gel pack, theracane (an instrument for self-massage), an exercise mat and a neck exerciser; SGI covered the cost of these items.

[21] On April 7, 1999, SGI sent to the Appellant a letter advising him that, effective March 30, 1999, his income replacement benefits and labour replacement benefits would be terminated. The decision letter relied upon the conclusion of FIT for Active Living that the Appellant was capable of performing the duties required for his employment with

Maintenance Corp. and for his scrap metal business. The letter also indicated that an occupational therapist would follow up with the Appellant regarding his scrap metal business and that Lifetime Fitness would prepare a personalized fitness program for the Appellant in accordance with FIT for Active Living's recommendation.

[22] The Appellant applied for a review of SGI's decision on the basis that he was not substantially able to perform the essential duties of his employment.

[23] Dr. A, a neurologist, examined the Appellant on April 23, 1999, and diagnosed persistent whiplash associated disorder. The Appellant continued to experience neck and shoulder pain, back pain and headaches. His neck pain was exacerbated by operating farm equipment and by lifting. His cervical range of motion was slightly diminished, and Dr. A observed tender points in the cervical and interscapular areas. Dr. A recommended that the Appellant resume taking pain medication (Amitriptyline) and be considered for a chronic pain management program. Dr. A also suggested that the Appellant be retrained for employment having lighter physical demands.

[24] The Appellant's family doctor, Dr. Johnson, wrote a letter to the Appellant's MLA, advising that the Appellant was suffering from "chronic pain post motor accident," could not "handle his scrap metal job due to his pain" and was farming with difficulty. The Appellant also attended upon Dr. R.L. Runge, a chiropractor, on April 29, 1999. Although Dr. Runge had not previously treated the Appellant, he opined that the Appellant was suffering from chronic upper spine dysfunction:

It is my clinical impression that he is experiencing chronic cervico-thoracic joint dysfunction. It is reasonable to suggest that this is a result of a sprain type of cervical injury such as may be seen in a motor vehicle accident. Prognosis for this type of injury particularly once it has become chronic in nature is such that full recovery may not be expected. Improvement can occur over the next several months especially if he were to continue to pursue an active rehabilitative program. However, it is not uncommon to continue to experience some degree of recurrent difficulty with this type of injury, in cases where chronicity has become an issue.

[25] Objective findings included reduced neck range of motion, especially in right rotation and lateral flexion, which were decreased by 25%. Dr. Runge also detected hypomobility on the left at the C2-C3 and T3-T4 joints.

[26] Dr. Johnson referred the Appellant to the Rothbart Pain Management Clinic on May 28, 1999, advising that, since the motor vehicle accident, “[the Appellant] has never fully recovered, as he has continuing neck and upper back pain.”

[27] Colleen Hancharuk, an occupational therapist with Innovative Rehabilitation Consultants, had a visit with the Appellant on June 17, 1999, following his discharge by FIT for Active Living. The Appellant expressed frustration that the rehabilitation program had not resolved his pain symptoms. He said that FIT had assessed his ability to lift and carry objects, but not his ability to do so continuously for several hours. He said that he could not perform these activities for a prolonged period and, accordingly, had not resumed his scrap metal business. The occupational therapist observed that the Appellant was using proper body mechanics to lift objects, but did not evaluate his ability to do so for prolonged periods. The Appellant reported that he could not do all of the tasks required for his farming operation, including picking rocks and cleaning grain bins, and had had to hire replacement labour to assist him with seeding. He said that he could not drive his tractor for more than two hours at a time. The occupational therapist agreed to look into obtaining a hydraulic lift for his trailer and a dolly-type wheelbarrow to assist him with his scrap metal business, and also advised that the Appellant would benefit from a high back air ride seat for his tractor.

[28] The Appellant was seen by Dr. B at the Rothbart Pain Management Clinic in North York, Ontario, on August 23 and 25, 1999. Dr. B is an anesthetist certified by the Royal College of Physicians, with a diploma from the American Academy of Pain Management. Dr. B’s initial consultation report includes a patient history, with information supplied by the Appellant, and records his observations following a physical examination. Neck extension was 80% of normal; right neck rotation was 70%. Cervical zygapophyseal joints (C2-C3, C3-C4, C4-C5, C5-C6) were tender, as were the right greater and lesser occipital nerves and the left greater occipital nerve.

[29] On August 26, 1999, nerve blocks – local injections of anesthetics – were performed at the C2-6 vertebrae and at C2, and a positive result was achieved at the C2 level (pain from a bioccipital headache decreased significantly). The following day, the Appellant had occipital nerve blocks, and his headache pain resolved significantly. As a

result of the positive results, Dr. B recommended occipital denaturation and denervation of the spine at the C2 vertebra. He also suggested that C2 nerve ganglionectomy should be considered. He diagnosed injuries sustained by the Appellant in the 1997 accident as follows:

It is my opinion that [the Appellant] suffered the following injuries:

1. Acceleration/deceleration neck injury.
2. Cervicogenic headache.
3. Lumbar sprain L4-5, L5-S1.
4. Thoracic sprain.
5. Post-traumatic syndrome with problems of memory, concentration, insomnia and mood.
6. Radiculopathy of both arms in the C6 and C7 distribution.
7. Biomechanical disorder of the spine as demonstrated in the x-rays of the neck: "No flexion at the occiput-atlas C2-3 and C6-7, and no extension from the atlas-axis through C3-4 and C6-7. Evidence to support the diagnoses are:
 - i. Positive C2 nerve diagnostic blocks as described, provide objective evidence of neck injury in the C2 nerve distribution.
 - ii. The x-rays of the neck as described with bio mechanics provide objective evidence of joint injuries in the neck because of lack of flexion and extension at some of the joints in the neck which have been described by Porter as evidence of a poor prognosis with neck injury.

[30] The report added that the Appellant had significant disability due to his injuries. Dr. B then wrote to Dr. K. Kumar, a neurologist in Regina, asking him to see the Appellant in order to perform occipital denaturation and denervation of the spine at the C2 vertebra.

[31] In advance of the review scheduled for October 13, 1999, the Appellant's agent forwarded copies of some of Dr. B's correspondence and Dr. A's report to SGI, suggesting that this new information justified reinstatement. SGI's medical consultant, Dr. Murray Flotre, reviewed Dr. A's and Dr. B's reports in October 1999. He accepted that the Appellant was unable to perform his pre-accident occupations, and suggested that SGI provide benefits to the Appellant from the date of the accident to his recovery from the procedure recommended by Dr. B. As a result, SGI reinstated the Appellant's benefits and agreed to reimburse the Appellant for the costs of the medical reports.

[32] SGI also engaged Innovative Rehabilitation Consultants (“IRC”) to monitor the Appellant’s attendance upon Dr. Kumar and his recovery from the procedure and to develop a graduated return to work program for the Appellant. IRC was also to proceed with the purchase and installation of a hydraulic lift for the Appellant’s scrap metal business.

[33] Brian Lymer met with the Appellant and his advocate on October 21, 1999, to reimburse him for his expenses related to his travel to Toronto and his costs of chiropractic treatment since March 30, 1999, and to pay him retroactive income replacement benefits. They agreed that his functional abilities would have to be reassessed and then his income replacement benefits would likely be reduced to reflect his actual functional ability.

[34] SGI also requested a chiropractic report to determine the efficacy of chiropractic treatment while the Appellant waited to undergo the procedure. Upon review, Dr. Dale Mierau recommended that SGI provide funding for the Appellant’s neck treatment once Dr. Dean, the Appellant’s chiropractor, had furnished additional information regarding his findings and proposed treatment plan.

[35] On November 17, 1999, Leanne Julé, a rehabilitation consultant with IRC, conducted an occupational therapy work-site and ergonomic evaluation in respect of the Appellant’s scrap metal business and reviewed his farming duties. Because he could not maintain his scrap metal business, he had taken on additional hours in his Maintenance Corp. position, up to 20 hours per week. Ms. Julé concluded that the Appellant was only able to perform about 10% of the tasks, mainly administrative, related to his scrap metal business, and was capable of performing at least 50% of his farm work.

[36] SGI advised the Appellant by letter dated January 4, 2000, that his biweekly income replacement benefit would be \$242.87. The Appellant subsequently sought a review of SGI’s decision regarding the calculation of his income replacement benefit, and SGI ultimately revised its decision. SGI also approved the purchase of an air ride seat for the Appellant’s tractor.

[37] The Appellant underwent radiofrequency bilateral occipital neurectomy on January 12, 2000. Unfortunately, the Appellant continued to suffer from headaches following the surgery and was understandably disappointed. Since the Appellant continued to experience sensation in the posterior occipital area of the head, Dr. Dean concluded that the surgery had not been successful in severing the C2 nerve and should be redone in two to three months.

[38] Because the Appellant continued to suffer from headaches and disrupted sleep, his chiropractor contacted Dr. B at the Rothbart Pain Management Clinic. Dr. B wanted the Appellant to wait for three months before a further consultation, but intended to refer him to a specialist in Minnesota if his condition did not improve.

[39] The Appellant worked 40 hours per week for five weeks up to February 25, 2000, at his Maintenance Corp. job. As a permanent part-time employee, he worked additional hours because he was filling in for a disabled co-worker.

[40] In March 2000, SGI asked its medical consultant for advice regarding SGI's responsibility to fund additional treatment at the Rothbart Pain Management Clinic.

[41] Meanwhile, the Appellant returned to the Rothbart Pain Management Clinic in April 2000, with continuing complaints of headaches in the occipital region. The Appellant also complained of intermittent mid-back pain, located at the thoracolumbar junction. The Appellant related this pain to his work activity. He also suffered from low back pain, and occasional numbness in the fingers. Dr. B's diagnosis was similar to his August 1999 conclusions, except for the additional diagnoses of lumbar zygapophyseal joint pain and radiculopathy at the C8, not C6 and C7, levels. Dr. B commented that the procedure performed by Dr. Kumar could not have been the full denaturation procedure since it only took 15 to 20 minutes. Dr. B suggested as alternate forms of treatment for the Appellant's headaches the implantation of peripheral nerve stimulators and palliative nerve block injections.

[42] Dr. Murray Flotre completed his file review for SGI on May 2, 2000, and provided his view that the Appellant's cervicogenic headaches resulted from the motor vehicle accident. SGI was, according to him, responsible for funding treatment and

rehabilitation related to this problem. He believed that radiofrequency neurotomy of the greater occipital nerve – the procedure recommended by Dr. B, performed unsuccessfully by Dr. Kumar and recommended again by Dr. Dean – would be an effective treatment for the Appellant’s chronic neck pain and headaches and, if a centre could not be found in Canada to perform the procedure, SGI might have to consider funding the procedure in the United States.

[43] In June 2000, SGI advised the Appellant that he had never completed an application for benefits as required by *The Automobile Accident Insurance Act*, R.S.S. 1978, c.A-35 (the “*Act*”)the *Act* and requested that he do so. It appears that this request created some friction between the Appellant and his personal injury representative. The Appellant provided a completed form to SGI on July 10, 2000.

[44] Dr. J.C. Johnson, the Appellant’s family doctor, wrote to SGI on July 3, 2000, to ask that SGI consider funding a functional work capacity evaluation and travel to Toronto for the implantation of peripheral nerve stimulators.

[45] Dr. Dean also wrote to SGI on July 11, 2000, to raise Dr. B’s recommendation of a neuron stimulator implant and to request a residual capacity evaluation for the Appellant. He urged SGI to have its medical consultant review the file as soon as possible.

[46] The Appellant also wrote to SGI, on August 14, 2000, to express his concern over the increasing dosage of Amitriptyline that he needed to take and its side effects, and to advocate for the nerve implant procedure.

[47] Following a further request by SGI for a file review, Dr. Flotre advised that he had written to three neurosurgeons for advice regarding the benefits and potential problems of peripheral nerve stimulator implants. He was favorably disposed toward a functional capacity evaluation, but not a residual capacity evaluation because the Appellant had not reached maximum medical improvement. SGI’s personal injury representative wrote to the Appellant to make arrangements for a functional capacity evaluation.

[48] In a further report dated September 8, 2000, Dr. Dean provided a progress report for the Appellant. His diagnosis was Grade III whiplash-associated disorder, with mid and lower back strain. He continued to treat the Appellant on an as needed basis for myofascial strain and for headaches. While the Appellant was participating in work activities, Dr. Dean indicated that he developed severe headaches, which were not helped by medication, when over-exerting himself.

[49] In response to Dr. Flotre's inquiry, Dr. F. J. Espinosa, a neurosurgeon with Kingston General Hospital, wrote that it was important to establish the cause of the Appellant's pain. The Appellant might not have responded to the neurotomy because the pain might not be neuropathic; however, if it was, he would probably respond well to a spinal cord stimulator implanted at the C1-C2 level. Dr. D, a neurosurgeon at Toronto Western Hospital, wrote that he could not give advice about an appropriate procedure for the Appellant without seeing him in person. SGI wrote to the Appellant's family doctor asking him to consider referring the Appellant to Dr. D.

[50] The Appellant discussed his farming operations with his personal injury representative, Gayleen Olson, on October 23, 2000. While he needed help during seeding and harvest, he found farming less physically demanding than his other sources of income, as he could pace himself. He found grain shoveling difficult and said that he would like a "bin sweep" to make this task easier. Ms. Olson advised the Appellant that SGI would consider reimbursing the Appellant's expenses for peripheral nerve stimulator implants, but made it clear that SGI was not advocating that the Appellant have this procedure.

[51] SGI also advised the Appellant that it would only fund palliative nerve block injections if they could be performed in Saskatchewan, since they would not permanently resolve his pain complaints but would only provide temporary relief.

[52] In early January 2001, SGI instructed IRC to make travel arrangements for the Appellant to attend an appointment with Dr. D in Toronto, and to coordinate a visit with Dr. B at the same time so that Dr. B could perform palliative nerve blocks for his lower back pain.

[53] Dr. B examined the Appellant on February 12, 2001, and recommended that he be referred to Dr. K. Shellhas for rhizolysis, since he had experienced relief from nerve blocks at the T10, T11, and T12 levels. The next day the Appellant was examined by Dr. D, a neurosurgeon at Toronto Western Hospital, in order to assess whether the Appellant would benefit from a cervical spinal stimulator. Dr. D did not agree with previous diagnoses of a neurological cause for the Appellant's pain symptoms:

We feel that there is not sufficient evidence that this is an underlying neuropathic or neural type of pain. It is more likely upon his description in keeping with that originating in the soft tissues or joints. Thus we feel that stimulation or lesioning of nerve roots including C2, would not be of benefit to him. He was advised to continue non-surgical management of pain, including continued stress counseling as well as other medical modalities. ...

[54] The Appellant was critical of Dr. D, who he claimed saw him for only a few minutes and did not examine him. He also asked his family doctor to send a letter to SGI to correct certain perceived errors or omissions in Dr. D's report.

[55] IRC's next report indicates that The Appellant had increased his work hours with Maintenance Corp. to 50-60 hours per week. The report also remarks that the Appellant was "pain focused" and was looking for a surgical solution for his medical problems.

[56] The Appellant was seen by Dr. N. Cowie at St. Paul's Hospital in Saskatoon on June 6, 2001. Dr. Cowie diagnosed myofascial pain and recommended trigger point injections, because they had provided some relief when performed at the Rothbart Pain Management Clinic, and continued use of pain medications. Dr. Cowie also noted that the Appellant had insisted on recording the interview and commented that pending litigation might be affecting the resolution of the Appellant's pain symptoms.

[57] Dr. B saw the Appellant again at the Rothbart Pain Management Clinic for a further assessment on July 11, 2001. He planned to refer the Appellant for rhizolysis at the right T10, T11 and T12 regions, and also at the lumbar spine if diagnostic blocks at L1-S1 were positive. He recommended a referral to Dr. Shellhas in Minneapolis for rhizolysis if the procedure could not be performed within Canada in a reasonable period of time. Results of diagnostic nerve blocks at L4-L5 and L5-S1 were positive.

[58] A CT-scan of the lumbar spine on June 12, 2001, showed early facet degeneration at L3-L4 and L4-L5, and moderate facet degeneration and hypertrophy at L5-S1.

[59] SGI sought a further review of the Appellant's file by Dr. Flotre. According to the personal injury representative, the Appellant was suspicious of SGI's influence over some of the medical practitioners he had seen:

[The Appellant] and I met in June and he stated that he was not satisfied with Dr. [D's] review/decision or that of the Pain Management Clinic in Saskatoon. He believes there is a plot directed by me on behalf of SGI to adversely influence practitioner's, Dr. [D] and the Pain Management Clinic in particular, which would explain the opinions provided by these offices. [The Appellant] has a perception that he is highly disabled and has a desire to be totally pain free. He continues to work almost full time at his janitorial position and run a productive farming operation. SGI has continued to fund his Income Replacement during these investigations.

[60] Ms. Olson asked Dr. Flotre to consider whether Dr. B's recommendations were appropriate, in light of Dr. D's report. In addition, she asked whether SGI should fund investigations directed at the Appellant's lumbar area.

[61] Dr. Flotre recommended that SGI should fund consultation and treatment by Dr. C in Minneapolis, and that he should look both at the Appellant's neck and lower back. Following this advice, SGI communicated its decision to fund treatment by Dr. Shellhas to the Appellant by letter dated August 28, 2001.

[62] An MRI scan on September 26, 2001, showed evidence of old mid and lower thoracic Scheuerman's disease, a small thoracic tear and disc protrusion at T8-T9 to the right, and a small tear and focal herniation of the T5-T6 disc to the left. Dr. Shellhas commented that these Scheuerman's changes could themselves be a source of pain, although the Appellant did not have any specific complaints at the T5-T6 level. On September 27, 2001, Dr. Shellhas performed a lumbar facet nerve radiofrequency neurotomy procedure (rhizolysis) at four levels on the left side, and three on the right.

[63] As a result of Dr. Shellhas's treatment, the Appellant experienced relief from pain in the low back area. However, according to Dr. B's update report to SGI dated February

4, 2002, the Appellant's symptoms in the mid back area, which was treated by Dr. Shellhas, had worsened. Dr. B advised SGI that the Appellant's continuing pain symptoms restricted his ability to work; he was performing light duties for four hours a day only for Maintenance Corp., and could not do any heavy lifting. Nerve blocks at numerous locations in the cervical, thoracic and lumbar spine had reduced the Appellant's pain symptoms and provided objective evidence of spinal injuries. Dr. B also commented on the MRI report's findings of mid and lower thoracic Scheuerman's disease. In his opinion,

Since the onset of pain symptomatology did not begin until after the MVA of November 4, 1997, it is probable that the thoracic pain is related to the trauma even though Scheuerman's disease could be a predisposing factor.

[64] Dr. B also commented that a neck x-ray taken on August 24, 1999, provided objective evidence of cervical injury with aberrant kinematics, which, according to medical literature, indicated a poor prognosis in cervical whiplash injuries. Dr. B's diagnoses were:

1. Cervical, thoracic and lumbar sprain.
2. Cervical, thoracic and lumbar zygapophyseal joint pain at multiple levels.
3. Disc disease at T9-10: abnormal morphology on discography. T8-9: evidence of disc damage on MRI but unable to do discogram for technical reasons.
4. Occipital cervicogenic headache.

[65] After reviewing various treatment options, Dr. B concluded that further rhizolysis procedures were not worth attempting because of little expectation of improvement. However, there were a number of options for palliative therapy: spinal stimulators; intrathecal morphine; palliative nerve blocks (but Dr. B doubted that skilled personnel were available for this therapy); oral medications; and restricting the Appellant's physical activity. Dr. B recommended that the Appellant be referred to an American centre for the palliation of spinal pain and a trial of Lidoderm patches to relieve neck pain. Dr. B concluded that the Appellant had sustained a permanent partial disability, interfering with his activities of daily living and his work. If the Appellant had any further exacerbation

of his pain symptoms, Dr. B believed that he would be permanently totally disabled. Finally, since the Appellant was asymptomatic before the motor vehicle accident, Dr. B opined that the Appellant's disability was entirely due to the motor vehicle accident.

[66] Dr. William Dean, the Appellant's chiropractor, advised SGI on February 24, 2002, of his conclusion that the Appellant was partially impaired and could no longer perform the amount of physical labour that he had prior to the motor vehicle accident. Dr. Dean had referred the Appellant for another MRI scan of the cervical spine at an Edmonton facility; it showed degenerative changes at the C4-C5, C5-C6, and C6-C7 levels, with mild to moderate foraminal encroachment at these levels.

[67] On March 28, 2002, the Appellant requested a three-month leave of absence for medical reasons from his employer, Maintenance Corp., beginning on April 1. The request was granted on April 11.

[68] On April 16, 2002, the personal injury representative responsible for the Appellant's file advised him that he would be seeking an opinion from SGI's medical consultant regarding the Appellant's entitlement to a permanent impairment benefit.

[69] Tim Szabo referred the Appellant's file to Dr. Flotre, SGI's medical consultant on June 20, 2002. Mr. Szabo's lengthy referral memo reviewed the various, and sometimes inconsistent, recommendations of various health care providers involved in the Appellant's file. He also expressed frustration with the Appellant, which is exemplified by the following passage:

As you are well aware, this is an extremely difficult and unbelievable file and to say the least, [the Appellant] is a very challenging client to deal with. He is aggressive, hostile, and accusatory to each rep he has dealt with and will refute anything medical that he does not like and is not recommended by Dr. Dean and Dr. [B]. He directs his own medical treatment plan, often without notifying SGI of who he has been seeing and where he has gone, and then demands treatment and reimbursement from us immediately after the fact. He has out of proportion pain and unrealistic expectations and continues to seek alternate forms and treatment with no resolution in sight. [The Appellant] has been all over Canada and now into the U.S. and has seen many different care providers and continues to do so.

[70] Mr. Szabo asked SGI's consultant to advise how SGI should decide between the differing treatment plans and medical opinions; what SGI's continuing obligations were; what bearing the Appellant's pre-existing Scheuerman's disease had on his current problems; whether SGI was responsible for the costs of an MRI scan; whether SGI should re-evaluate the Appellant's functional capacity; and whether the Appellant was entitled to receive a permanent impairment benefit.

[71] Dr. Flotre, SGI's medical consultant who had previously provided advice on the Appellant's file, referred Mr. Szabo's questions to another consultant, Dr. John Alport. Dr. Alport prepared an unusually detailed analysis of the history of the Appellant's treatment. He first noted that SGI's file did not contain copies of numerous documents, such as the accident report and the Application for Benefits. Dr. Alport reviewed a series of medical reports dating from November 1997 to the discharge report from tertiary treatment from March 1999, and remarked:

The tertiary treatment discharged [the Appellant] and indicated he matched his job demands. This should not be too surprising as the reports we received after the accident certainly indicated the physical injuries were relatively minor, and he appears to have continued work.

[72] Dr. Alport next commented on reports from Dr. B and Dr. A. Dr. Alport was concerned that SGI's record of the Appellant's consultations with Dr. B was incomplete, and in particular that the file did not include any history or physical and objective findings made by Dr. B. He also raised three specific concerns:

There are some other features of this consult that I would like to point out. It is not my intention to question Dr. [B's] motives, but he has documented some unusual diagnostic possibilities as fact, and I cannot figure out where this has come from, anatomically speaking. He indicates a "radiculopathy of both arms in the C6 and C7 distribution". It is my opinion that no previous practitioner has documented symptoms consistent with radiculopathy with C6 or C7 distribution on either side, and yet Dr. [B] has suggested that they are present, and bilateral! In subsequent reports Dr. [B] seems to have abandoned that diagnosis, and suggests a "C8 radiculopathy" exist [sic]! Another question I would like to ask is how he diagnosed "*post traumatic syndrome*". Is it with the two-page questionnaire we find in the correspondence, or was a more thorough evaluation performed? A third curiosity is that the X-ray reports obtained by Dr. [B] are

reported by Dr. Marshall Deltoff, a chiropractic radiologist. I have no idea of the credentials of Dr. Deltoff, but is [sic] seems unusual to me that a medical practitioner would obtain a chiropractic radiology opinion. While the opinion may be very learned, I have never seen such a relationship. I have also never seen a report so specific, and if need be, in the future, it might be worth getting our chiropractic consultant's opinion of the report, or alternatively have an independent radiologist review the films. [italics in original]

[73] Dr. Alport commented on the lack of objective findings in Dr. A's report and noted that he did not refer to low back symptoms.

[74] Dr. Alport next reviewed Dr. Kumar's report. He questioned whether Dr. B was right to lay the blame for the failure of the denaturation procedure on Dr. Kumar's technique rather than on his own diagnosis.

[75] Dr. Alport identified a difference of opinion among medical consultants who assessed the Appellant. According to Dr. Alport, Dr. B had begun "gradually moving down the spine to the thoracic area, with various injections" and was recommending nerve blocks for low back pain when previous reports had not identified low back pain. Conversely, Dr. D did not think that nerve stimulation implants or lesioning the C2 nerve roots were called for, and Dr. Cowie did not recommend invasive spinal cord stimulation or a neurectomy.

[76] Dr. Alport also criticized Dr. B's report of July 11, 2001, mainly because the focus of concern had shifted from the Appellant's neck to low back and recommendations for extensive treatment were made with few objective findings. Dr. Alport also commented on the incompleteness of SGI's information from Dr. Shellhas, and found his refusal to respond to an inquiry from SGI for his objective findings and diagnosis to be unacceptable. Dr. Alport questioned Dr. B's most recent recommendations for treatment, saying, "All are invasive, some are not available, and some are experimental."

Dr. Alport concluded his review as follows:

To summarize, this gentleman had very little objective findings in the early stages, and there continued to be very few objective signs of significant injury.

His gradual deterioration is unexplainable, and is inconsistent with medical and practical knowledge of soft tissue injury, healing, and spinal injury in general...

[77] He then attributed the Appellant's problems to his perception that he has severe problems, which were reinforced by some of his medical consultants, the Appellant's supposedly suspicious nature and the prospect of litigation.

[78] Dr. Alport recommended that SGI discontinue funding further out-of-province referrals, obtain additional medical records from Dr. B and elsewhere, and review whether the Appellant should be receiving an income replacement benefit. He also advised that the Appellant's pre-existing Scheuerman's Disease was not the cause of the Appellant's present symptoms.

[79] SGI also obtained a consultant's report from a chiropractor, Dr. Dale Mierau. Dr. Mierau concluded that SGI was responsible for the Appellant's neck injuries and cervicogenic headaches, but not his low back condition or left ankle problems. He appeared to believe that the Appellant's low back pain was not related to the motor vehicle accident principally because it was not documented until April 22, 1998. Dr. Mierau concluded that the Appellant had reached maximum medical improvement ("MMI") by the date of his discharge from FIT for Active Living in March 1999. He added that the Appellant might be entitled to supportive biomechanical care of the cervical spine, but that Dr. Dean had not proposed a course of treatment. Dr. Mierau concluded that SGI was not responsible to reimburse the Appellant for the costs related to his MRI in Edmonton.

[80] As a result of the opinions of its two medical consultants, SGI sent the decision letter dated October 3, 2002. According to the decision letter, SGI's consultants had concluded that:

1. SGI is only responsible for the neck condition (i.e. cervicogenic headache) and right ankle, **not** the low back (spinal) condition and left ankle.
2. There is no need for more investigation of motor vehicle accident related conditions. According to FIT for Active Living's Discharge Report of

March 1999, you were fit to resume full functional activities of work and daily living.

3. SGI is not responsible for any new intervention, as you have reached maximum medical improvement.
4. It is not appropriate to reevaluate the work capabilities. It is now nearly five years since the accident. A number of physician's [sic] recommended a return to usual activities.
5. Scheuermann's Disease is a congenital abnormality of the vertebral end plates, usually in the thoracic or upper lumbar spine and not related to your motor vehicle accident related injuries.
6. Discontinue all further out of province referrals. There is no need for further testing. The funding of the MRI is not the responsibility of SGI.

[81] Shortly thereafter, the Appellant applied for a review of this decision.

[82] In a letter dated February 1, 2003, the Appellant disagreed with several aspects of Dr. Mierau's report. First, he took issue with Dr. Mierau's comment that low back pain was his paramount concern, and said that he continued to suffer from headache and neck pain on a weekly basis. He agreed that he had reached MMI but denied that this meant he had recovered from the accident and questioned when SGI believed he had reached MMI. He also appeared to question FIT for Active Living's conclusion that he was functionally recovered, since he experienced pain when he returned to farming activities and attempted to resume his scrap metal business.

[83] The Appellant took exception to many aspects of Dr. Alport's report. For example, the Appellant responded that Dr. A's report had not referred to low back pain because the Appellant was seen by Dr. A only in respect of his neck pain and headaches. He disputed Dr. Alport's criticism of Dr. B and others, and denied that Dr. B had failed to do an examination or take down his medical history. He pointed out an error made by Dr. Alport in quoting from a report of Dr. Dean ("recovering headaches", "hypermobility," instead of "recurring headaches" and "hypomobility" in the original). The Appellant also questioned the assertion that he has a "personality disorder."

[84] At a review hearing on February 19, 2003, the Appellant was accompanied by Dr. Dean. SGI upheld its earlier decision, on the basis that the Appellant had “not presented any objective medical evidence” to contradict the opinions of SGI’s consultants.

[85] In September 2003, the Appellant provided additional medical evidence to SGI for consideration. A psychological report prepared by Dr. Christopher Turner reported, among other things, that the Appellant’s personality assessment inventory results “suggested a ruminative preoccupation with physical functioning and health matters.” Dr. Margaret Truchan, a rheumatologist, recorded an impression of soft tissue rheumatism/fibromyalgia, based upon findings of diffuse pain upon palpation. The Appellant argued that his motor vehicle accident caused the fibromyalgia condition and prevented him from working full-time. Finally, the Appellant submitted the results of a gastroscopy.

LAW AND ARGUMENT

[86] The Commission’s power on appeal is provided in Subsection 193(7) of the *Act*, 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*.

[87] 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.¹ 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.

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

[88] In this case, the burden of proof rests with SGI to prove that benefits are no longer payable.²

1. Expert Testimony

[89] In addition to many medical, chiropractic and other reports filed by the parties, which we have referred to extensively above, the Commission had the benefit of testimony of Dr. Dean and Dr. Alport.

[90] Dr. Dean, the Appellant's chiropractor, has practiced for approximately ten years, and treated the Appellant over a hundred times during a five-year period following the motor vehicle accident. He testified at the hearing that an MRI of the Appellant's cervical spine, performed in February 2002, revealed degenerative changes at several levels of the Appellant's cervical spine that he described, in layman's terms, as "arthritis." He suggested that the degree of disc degeneration in the Appellant's cervical spine was more consistent with blunt trauma at some point rather than gradual wear and tear. He discussed the presence of annular tears in some of the affected discs, particularly at the C6-C7 level, but stated that he was just inferring their existence from the MRI report. Dr. Dean acknowledged that a person with the degenerative changes demonstrated in the MRI report could have no pain, although he thought it was unlikely. He explained that he had encouraged the Appellant to seek treatment at the Rothbart Pain Management Clinic, after consultations with other professionals had failed to resolve the Appellant's problems.

[91] Dr. Alport was called as a witness by SGI. He graduated from the College of Medicine in Saskatoon in 1978 and practiced family medicine until 2003. Beginning in 1997 he began consulting with SGI, and now practices exclusively in the area of occupational medicine, providing consulting to a number of companies. In 2004 he was named SGI's medical director, replacing Dr. Flotre. Dr. Alport testified that he usually puts the most weight on the medical reports created shortly after an accident, since the

² *Job v. Saskatchewan Government Insurance* (2004), 257 Sask. R. 85 (C.A.).

days closest in time to the accident are usually the worst. In his opinion, the Appellant's case was not very complicated to begin with nor were the injuries very serious. He appears to blame a number of the physicians who treated the Appellant for taking a relatively minor diagnosis of whiplash-associated disorder I and low back pain I and making it complicated. He was very critical, in particular, of Dr. B, who saw the Appellant at the Rothbart Pain Management Clinic. He suspected that the Appellant's advocate referred him to Dr. B which for him called into question Dr. B's credibility. The patient history recorded by Dr. B was, according to Dr. Alport, woefully inadequate. He criticized Dr. B for performing nerve blocks at several levels of the Appellant's cervical spine at the same time, arguing that this technique could not have isolated the particular area causing him pain. He wondered whether Dr. B, Dr. C, Dr. Johnson and Dr. Dean were all having trouble settling on a diagnosis for the Appellant, since they began treating his thoracic and lumbar spine as well. He was especially critical of Dr. B's diagnosis of bilateral C6-7 radiculopathy in one report, and C8 radiculopathy in the next, especially since Dr. B did not immediately order an MRI to determine whether the Appellant was, in fact, suffering from a pinched nerve. He referred to Dr. B as a "charlatan" and said that Dr. C and Dr. B "took him [the Appellant] for a ride ..."

[92] Dr. Alport also criticized the diagnosis of Dr. A, a neurologist, because he relied upon the Appellant's subjective pain complaints and did not take into account the rehabilitation program that the Appellant had just completed. Contrary to Dr. Dean, Dr. Alport suggested that the degeneration of the Appellant's cervical spine identified in the February 2002 MRI was more likely the result of wear and tear, not a specific trauma. However, even if it had been caused by the accident, the Appellant had had "all the treatment that is reasonable and he recovered to the point where he was fully functional ..."

[93] Dr. Alport acknowledged that the Appellant's complaints of pain were credible and that he might have diminished endurance, but stated that he was nevertheless able to function well.

We did not place much weight on the opinions of either Dr. Dean or Dr. Alport on the issue of the cause of the degenerative changes in the Appellant's neck, as neither is

qualified to provide such evidence and it seemed that both were simply advancing alternate, plausible explanations for how this damage might have occurred. Like Dr. Alport, we also had difficulty understanding how Dr. B arrived at his varying diagnoses. Dr. Alport commented in his written opinion that the information from Dr. B was incomplete, but SGI did not, apparently, subsequently obtain a complete copy of Dr. B's file. We were impressed with Dr. Flotre's efforts to arrange a consultation for the Appellant with a neurosurgeon experienced in implanting nerve stimulators, and wondered why Dr. Alport could not have shown similar initiative. We found Dr. Alport's testimony compelling at times, but some of his criticism, such as Dr. B's possible failure to record a complete history for the Appellant, might have been answered by a complete copy of Dr. B's file. Dr. Alport was too ready, in our view, to make strong statements about the competence of other health care providers when he had not followed up on any of the gaps in the documentation.

[94] We disagree, as well, with Dr. Alport's conclusion, which is based upon the FIT discharge report, that the Appellant had been functionally rehabilitated by March 1999. For the reasons we set out below, there was substantial evidence in 1999 that the Appellant was not able to function at his pre-accident level.

2. Causation

[95] SGI has taken the position that it is responsible only for the injuries to the Appellant's neck and right ankle and his headaches:

1. SGI is only responsible for the neck condition (i.e. cervicogenic headache) and right ankle, **not** the low back (spinal) condition and left ankle.³

Both Dr. Alport and Dr. Mierau were of the view that SGI was not responsible for any of the Appellant's medical conditions other than his cervical problems and his right ankle injury.

³ C3.

[96] Dr. Mierau offered no explanation for his conclusion, although from the chronology in his report it may be that he thought the Appellant's complaints of low back pain were not close enough in time to the accident to have been caused by it. We give no weight to Dr. Mierau's opinion regarding SGI's responsibility for the Appellant's left ankle injury since it is outside his expertise.

[97] Dr. Alport also believed that the Appellant's low back complaints were too removed from the accident date to have been connected with it. He opined that the deterioration in the Appellant's condition was "unexplainable, and is inconsistent with medical and practical knowledge of soft tissue injury, healing, and spinal injury in general." As noted above, Dr. Alport placed the most weight on the earliest medical reports following the Appellant's accident, and questioned the decisions of almost everyone from the FIT assessment team to Dr. B and Dr. C. In his testimony, Dr. Alport did not refer to any medical studies or other supporting opinion for his strongly-held view that the worst few days after an injury are usually the first days after the injury. As a general proposition, this may be sensible, but that does not mean that it applies in every case or that it applies in the Appellant's case.

[98] Dr. Alport suggested that the Appellant might have had a previous history of back pain, and that his previous medical records should be reviewed. However, we heard no evidence of any pre-existing condition apart from the diagnosis of Sheuermann's Disease, which both Dr. Alport and Dr. Mierau confirmed could not be the cause of his back pain.

[99] No one has suggested that the Appellant could not have suffered mid and lower back injuries as a result of the forces involved in the accident. Dr. Alport acknowledges that the Appellant was involved in a significant accident.

[100] The Appellant reported that his left ankle started to hurt about a month after the accident, when he returned to work. The first multidisciplinary team that assessed him suggested that this pain was "likely secondary to excessive weight bearing during the recovery from his R forefoot strain." We accept this explanation and hold that SGI is responsible for the left ankle injury sustained by the Appellant.

[101] By February 2, 1998, three months post-accident, the Appellant had been diagnosed with a mid-thoracic sprain by his family physician, and subsequently there are numerous reports of mid-back pain as well as neck pain. The Appellant had no history of mid back problems preceding the motor vehicle accident. On a balance of probabilities, we are satisfied that this injury was also related to the motor vehicle accident.

3. Income Replacement Benefits

[102] SGI's decision letter of October 3, 2002, sets out a summary of the conclusions of Dr. Alport and Dr. Mierau, who had provided consultants' reports to SGI. Three of the six listed points appear to relate, possibly, to SGI's decision to terminate income replacement benefits:

1. SGI is only responsible for the neck condition (i.e. cervicogenic headache) and right ankle, **not** the low back (spinal) condition and left ankle.
2. There is no need for more investigation of motor vehicle accident related conditions. According to FIT for Active Living's Discharge Report of March 1999, you were fit to resume full functional activities of work and daily living.
3. SGI is not responsible for any new intervention, as you have reached maximum medical improvement.

[103] While Dr. Alport had recommended that SGI review the Appellant's entitlement to further income replacement benefits, the three points in SGI's decision appear to be drawn more directly from Dr. Mierau's report.

[104] Dr. Mierau's opinion was that the Appellant had been fit to resume all activities as of the date of his discharge from the FIT for Active Living program, in March 1999. He wrote:

In my opinion, there is no need for more investigation of MVA related conditions. The claimant has reached MMI. He was discharged from FIT in March 1999 fit to resume full functional activities of work and daily living.

...

SGI is not responsible to cover any new interventions because the claimant has reached MMI.

...

It is not appropriate to reevaluate the work capabilities. It is now nearly 5 years since the crash. There were a number of physician's [sic], including Dr. Johnson who recommended a return to usual activities. SGI should use data and opinions collected earlier, closer to the date of loss. The claimant was discharged from the FIT program in March 1999 as functionally recovered.

[105] If Dr. Mierau's opinion is correct, then the Appellant's entitlement to an income replacement benefit ceased effective March 1999, because he was "able to hold the employment that he ... held at the time of the accident" (subs. 129(1)(a) of the *Act*).

[106] One of the Appellant's criticisms of the FIT for Active Living discharge report was that his ability to perform certain tasks, such as lifting or carrying objects of different weights, over prolonged periods was not evaluated. In other words, while he does not disagree that he could, for example, lift 68 lbs. from floor to waist at the date of discharge from the program, he says that he could not do this many times during a day without "paying for it" with headaches and back pain. We cannot determine, from reviewing the discharge report and attachments, if the assessors measured the Appellant's endurance in relation to the functional requirements of his occupations. Certainly, the Exercise Therapy Discharge Report suggests that the Appellant progressed in his strengthening program, increasing the number of repetitions, sets and weights used for strength exercises. The summary of assessment results also concludes that the Appellant's endurance had improved:

[The Appellant's] improved fitness status will benefit him in a number of ways. His improved global muscular strength and endurance will allow him to complete heavier tasks for longer periods of time before muscular fatigue occurs. [The Appellant's] improved trunk stability also means that he will be able to stabilize his trunk more effectively during functional, recreational, and activities of daily living. This will be necessary if [the Appellant] is going to be able to utilize proper body mechanics during these activities. This improved strength, along with the use of proper body mechanics, decreases the risk of injury to [the Appellant's] low back. It will also allow him to sustain postures for longer periods of time. [The Appellant's] improved aerobic fitness indicates that his body is now more efficient in delivering oxygen to the working muscles. This suggests that [the Appellant] will be able to sustain the physical strains placed on his body for longer periods of time before fatigue occurs. It also indicates that [the Appellant's] recovery time once fatigue does occur will be shorter, thus increasing his productivity.

[107] The Appellant expressed his concerns about the conclusions of the FIT discharge report to the occupational therapist who visited him on his farm on June 17, 1999:

... [the Appellant] explained when he was assessed in terms of lifting, and carrying, the assessment was in reference to lifting and carrying an object as opposed to having not been assessed after continuous lifting and carrying, in particular, after several hours. He said he can lift that weight initially, but he cannot after a prolonged period, as a result, he reported he has not resumed his scrap metal business. I inquired as to why he could not resume in terms of shorter periods and shorter loads. He explained that financially, it was not profitable for him to go to attain a load of smaller quantities as it would not pay for his cost of gas, etc. ... Again, I reviewed and had him demonstrate lifting of objects. [The Appellant] is using the correct posture and the correct body mechanics but I did not assess this after a prolonged period of lifting. [The Appellant] stated that is when he has back spasms, back pain, increased headaches and cervical pain.

[108] We have no reason to doubt the Appellant's explanation that his functional capacity was never assessed in relation to the actual requirements of his occupations. No witness was called from FIT for Active Living to contradict the Appellant's assertion in this regard.

[109] In any event, the Appellant had already challenged SGI's adoption of the conclusions in the FIT discharge report once before. SGI terminated his income replacement benefits on April 7, 1999 in reliance upon the FIT for Active Living discharge report. He had applied for a review of this decision, arguing that he was not substantially able to perform the essential duties of his employment.

[110] The review hearing did not take place on October 13, 1999 because SGI reconsidered its decision in light of new medical evidence supplied by the Appellant, and reinstated his income replacement benefits. Before reaching this decision, SGI had its medical consultant, Dr. Flotre, review new information provided on the Appellant's behalf, consisting of two reports authored by Dr. B and one by Dr. A. On the basis of this information, Dr. Flotre was satisfied that the Appellant could not fulfill his pre-accident work responsibilities:

... from the information provided by Dr. [A], neurologist, and Dr [B], pain specialist, I would agree that [the Appellant] was probably not able to carry out tasks which involved excessive movement of his neck and shoulders. I would therefore agree that he was/is at this time probably unable to perform his pre-accident work.

[111] While Dr. Flotre, apparently, accepted the findings and diagnoses of Dr. A and Dr. B, Dr. Alport was sharply critical of them when he reviewed the same reports almost three years later. At any rate, as a result of SGI's acceptance of this new information in October 1999, the Appellant's review of SGI's decision did not take place.

[112] It appears to us that SGI's decision in October 1999, that the Appellant was **not** capable of performing his pre-accident work, was correct. This was certainly the view held by his treating chiropractor, Dr. Dean, on May 17, 1999. Dr. Runge, another chiropractor who examined the Appellant on April 29, 1999, concluded that the Appellant was suffering from "chronic cervico-thoracic joint dysfunction." As noted above, Dr. B, a pain specialist, and Dr. A, a neurologist, also believed in mid-1999 that the Appellant could not perform his pre-accident work.

[113] Another physician agreed that the Appellant was not functionally rehabilitated in the spring of 1999. In his consultant's report, Dr. Mierau referred to three reports authored by Dr. Johnson, dated November 4 and 13, 1997 and February 22, 1998. It is accurate that, **at those dates**, Dr. Johnson was counselling a return to usual activities. However, Dr. Johnson's view on April 29, 1999, a month after FIT's discharge report, was quite different:

Currently his condition is that of chronic pain post motor accident. It is his perspective that he is unable to handle his scrap metal job due to his pain and I concur with this. He is also farming with much difficulty.

[114] This letter was addressed to the Appellant's MLA, and we have no reason to believe that Dr. Mierau had an opportunity to review this letter at the time of his report.

[115] While we might have hesitated to rely upon Dr. B's opinion alone, having in mind some of Dr. Alport's comments, we are not prepared to discount the views of all of the health professionals who examined the Appellant.

[116] The Appellant's continuing functional deficit was also confirmed by a report of IRC dated November 17, 1999. Following an evaluation of the Appellant's scrap metal business and farming operations, an occupational therapist concluded that **he could only fulfill about 10% of the tasks of his scrap metal business and 50% of his farm work.**

[117] Upon reviewing all of the medical investigations undergone by the Appellant since his income replacement benefit was reinstated in October 1999, we are satisfied that none of the evidence demonstrates that the Appellant "is able to hold the employment that he ... held at the time of the accident" (subs. 129(1)(a)). There is certainly disagreement among medical professionals regarding the source of the Appellant's pain symptoms, but no one who examined the Appellant seems to have doubted that he continued to suffer from his injuries. In arriving at this finding, we have reviewed in detail the written reports of Dr. Dean, Dr. B, Dr. Johnson, Dr. D, and Dr. Cowie after October 1999, which are summarized above.

[118] In addition, the Appellant's ability to perform his pre-accident work was never reassessed. Although SGI wrote to the Appellant in September 2000 about a functional capacity evaluation for some reason this did not take place. Therefore, we do not agree with Dr. Mierau's advice to SGI in August 2002 that there was no need to re-evaluate the Appellant's work capacities. Under the circumstances, we direct SGI to reinstate the Appellant's income replacement benefits from the date of termination to the present, with interest. We further direct SGI to make arrangements for the Appellant to attend a functional capacity evaluation. Such an evaluation should assess the Appellant's present capacities against the requirements of the three distinct occupations he held before the motor vehicle accident: farmer, operator of a scrap metal business, and custodian employed by Maintenance Corp. In addition, the evaluation should assess the Appellant's endurance in relation to the tasks involved in each of these occupations.

[119] Mr. Brown argued that the Appellant was asking, in effect, to have his income topped up by an income replacement benefit for the rest of his life. However, nothing in this decision will restrict SGI from following the determination process outlined at ss. 131 to 134 of the *Act*.

4. Permanent Impairment Benefit

[120] The Appellant seeks a permanent impairment benefit pursuant to Division 6 of Part VIII of the *Act*. He relies principally upon Dr. B's statement in a letter dated February 4, 2002, that he was permanently, partially disabled, and would be permanently totally disabled if he suffered a further aggravation of his pain symptoms.

[121] SGI argued that the decision letter under appeal does not contain a decision about the Appellant's entitlement to a permanent impairment benefit, but Mr. Brown also said that SGI is not objecting to the Commission's jurisdiction on this issue. However, we doubt that the parties can confer jurisdiction on the Commission by agreement, in the absence of a decision letter.⁴

[122] In any event, we do not think that the best approach is for the Commission, in the first instance, to make a determination regarding the Appellant's entitlement to a permanent impairment benefit. His case is a complex one, requiring an analysis of the differing diagnoses of his condition, as well as consideration of a number of questions, such as those outlined by Madam Justice Jackson in *Saskatchewan Government Insurance v. Chernoff*.⁵ The assessment of the Appellant's entitlement will require SGI to consider, first, whether the Appellant has sustained one of the injuries listed in Appendix B, Subdivision 3 of the Regulations, and, if not, whether he has suffered a permanent impairment compensable pursuant to subs. 156(2) of the *Act*. If the Appellant is not satisfied with SGI's decision, he will be entitled to appeal his entitlement to a permanent impairment benefit at that point.

⁴ *E.I. v. Saskatchewan Government Insurance*, 2005 SKAIA 052 (Order regarding preliminary issue).

⁵ 2004 SKCA 166, at paragraph 8.

[123] The assessment of a permanent impairment benefit will likely be assisted by the preparation of a Functional Capacity Evaluation.

[124] Accordingly, we refer the matter of the Appellant's entitlement to a permanent impairment benefit back to SGI for a determination of this issue.

5. Rehabilitation Benefits

[125] SGI concluded that the Appellant was not entitled to any further rehabilitation benefits because he had reached maximum medical improvement. This finding also followed Dr. Mierau's opinion, which, as we noted above, concluded that the Appellant had reached MMI at the date of discharge from the FIT for Active Living program. In other words, SGI held in October 2002 that the Appellant had not been entitled to further rehabilitation benefits or other benefits after March 1999.

[126] However, Dr. Flotre advised SGI in August 2000 that the Appellant had not yet reached MMI. We accept that the Appellant had not reach MMI by the date of his discharge from the FIT for Active Living program, for the reasons we have explained above.

[127] There certainly remains considerable disagreement about the cause of the Appellant's continuing pain symptoms, whether it is neuropathic, or myofascial, or something else. We are not in a position to resolve the discrepancy between, for example, Dr. D's or Dr. B's opinions on the matter. Further treatment may be medically advisable or necessary to assist the Appellant, but it is not clear to us from the evidence what further treatment he is seeking or what his health care providers recommend.

[128] In light of our finding that the Appellant has not reached MMI, we simply set aside SGI's decision to terminate the Appellant's rehabilitation benefits.

[129] We do not wish to create unrealistic expectations as a result of this order. SGI is not required to fund treatment unless it is necessary or advisable to contribute to the Appellant's rehabilitation, to lessen his disability, or to facilitate his recovery.⁶ The

⁶ Subs. 110(2) of the Act.

Appellant would like to be restored to his pre-accident health and pain level, but this may not be possible.

6. Reimbursement of costs related to MRI in Edmonton

[130] SGI denied responsibility for the costs of the MRI in Edmonton, including the Appellant's travel expenses:

6. Discontinue all further out of province referrals. There is no need for further testing. The funding of the MRI is not the responsibility of SGI.

[131] The reason for this denial, it appears, is that SGI had determined that the Appellant had reached MMI in March 1999 and that, accordingly, the MRI was not "medically necessary"⁷ for his recovery from the injuries sustained in the motor vehicle accident.

[132] As noted above, we do not agree that the Appellant's recovery was complete by March 1999. Dr. Dean, the Appellant's chiropractor, referred him for the MRI, which took images of the Appellant's cervical spine. Dr. Dean testified that the facility in Edmonton is the only place to which he can refer patients for an MRI. He ordered the MRI because he was concerned that something had been missed, given that the Appellant was still complaining of recurring neck stiffness. Dr. Alport's view was that the MRI was not medically necessary. He argued that the degenerative disc changes revealed by the MRI do not explain the Appellant's pain symptoms and, if one of his discs has an annular tear, this cannot be treated anyway. Even if Dr. Alport is right, he has reviewed the MRI report and is assessing its usefulness with the benefit of hindsight. We have no reason to disagree with Dr. Dean that it was medically necessary to refer the Appellant for the MRI. In addition, since there is no disagreement that SGI is responsible for the Appellant's neck condition, it follows that SGI is responsible to reimburse the Appellant's reasonable expenses in connection with the cost of the MRI and travel to Edmonton.

⁷ *The Personal Injury Benefits Regulations*, c. A-35, Reg 3, s. 49.

CONCLUSION

[133] For the foregoing reasons, the decision letter of October 3, 2002 is set aside, and income replacement and rehabilitation benefits are reinstated. SGI is directed to arrange for a functional capacity evaluation to determine the Appellant's present ability as compared to the requirements of his occupations. SGI is further directed to consider and render a decision regarding the Appellant's entitlement to a permanent impairment benefit. Finally, SGI will reimburse the Appellant for any reasonable costs he incurred, including travel expenses, for the MRI in Edmonton.

[134] SGI will also pay to the Appellant interest on reinstated income replacement benefits and reimbursed costs, in accordance with s. 102 of the *Act*.

[135] As the Appellant was successful on appeal, SGI shall also reimburse him for his costs in accordance with subs. 193(11) of the *Act*, to a maximum amount of \$2,500 as prescribed by s. 96 of the *Regulations*.

Dated at Saskatoon, Saskatchewan, on July 05, 2006.

Peter Bergbusch, Chair

Al Knippel, Commission Member

Carol Olson, Commission Member