

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *W.S. v. Saskatchewan Government Insurance,*
2006 SKAIA 044

Date: 20060706

File: 021 of 2005

BETWEEN

W.S., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

W.S., Applicant

Allan McLeod, for the Respondent

Before: **Bev Cleveland, Chair**
Joy Dobko, Commission Member
Al Knippel, Commission Member

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

Heard at Saskatoon, Saskatchewan
October 12, 2005

DECISION

[1] This is an appeal by the Appellant, W.S., of a decision made by Saskatchewan Government Insurance dated December 8, 2004 with respect to the calculation of her home care/living assistance benefits¹ (“living assistance benefits”). A second decision letter dated November 25, 2004 which reduced the amount of childcare benefits from \$10 to \$5 is also the subject of this appeal.

PRELIMINARY MATTERS:

[2] The parties have acknowledged that there was miscommunication between them with respect to the childcare benefits that would be paid to the Appellant while attending medical appointments. On November 25, 2004, SGI issued a decision letter which reduced the amount of childcare benefits while attending medical appointments from \$10.00 per hour to \$5.00 per hour. The Appellant was under the impression that all of her childcare costs were included within the living assistance benefits also being paid to her. SGI explained that the Appellant is entitled to childcare benefits for all attending medical appointments², in addition to the living assistance benefits that she is currently receiving. It was agreed that the Appellant would submit a claim for childcare expenses for all attended medical appointments for which she had not previously submitted a claim between November 25, 2004 and the date when she terminated her physiotherapy. The reduced amount of \$5 from \$10 per hour for the cost of child care is still being appealed.

[3] Accordingly, this appeal addressed the following issues:

- a) Whether the amount paid for living assistance benefits, namely, light housekeeping, heavy housekeeping, yard work/gardening/shoveling and purchasing supplies was calculated appropriately with respect to Appendix D of the Living Assistance Grids;

¹ In 1995, these benefits were called personal and home care assistance benefits pursuant to section 158 of *The Automobile Accident Insurance Act*. In 2002, the name was changed to “living assistance” pursuant to section 156 of *The Automobile Accident Insurance Act*.

² This includes, but is not limited to, her attendance at physiotherapy.

- b) Whether the reduction in hourly rate for childcare from \$10.00 to \$5.00 per hour was reasonable;

[4] We note that in the Appellant's Notice of Appeal filed on February 14, 2005, she does not refer to the specific decision letter being appealed but disputes the outcome of the "Care Grid" and the amount of funding provided for housekeeping, childcare, yard care and snow removal. The reduction of childcare costs was clearly put before this Commission by the Appellant as a subject of appeal. The Appellant filed her Notice of Appeal within 90 days of the November 25, 2004 and December 8, 2004 decision letters and we conclude that we have jurisdiction to review both decisions. SGI agreed the issues set out in paragraph [3] are the subject of this appeal and raises no argument on the jurisdiction of this Commission to hear the appeal dealing with both decision letters.

FACTS:

[5] The Appellant was involved in a motor vehicle accident on September 21, 1999, when another vehicle backed into her vehicle pinning her between her car door and the car frame. The Appellant reported left shoulder pain and a laceration to her scalp. The Appellant was admitted to hospital from September 21, 1999 to September 23, 1999.

[6] On September 26, 1999, the Appellant completed her Application for Benefits. She reported injuries to her neck and shoulders, mid and low back, arms, face, abdomen, chest and groin. She also reported headaches.

[7] The Appellant later reported a torn rotator cuff which was accepted by SGI to be caused as a result of the motor vehicle accident. It is this injury which causes the majority of the Appellant's difficulties with household and yard duties.

[8] On June 27, 2002, Ms. Impey, occupational therapist, completed a home assessment with respect to the Appellant's ability to complete home duties. The summary and recommendations were as follows:

[The Appellant] is independent with all self care activities including arising from bed, dressing/undressing, bathing/hygiene, grooming, toileting (including bladder/bowel control), eating/drinking, taking medications, and functional mobility.

She needs minimal assistance for clean up after meals (i.e. to move portable dishwasher). She is independent with all meal prep. Minimal assistance is recommended for laundry (i.e. to carry some of the loads on the stairs). She has a ~ 1100 sq. ft. house and would benefit from weekly assistance for washing floors, vacuuming, changing bed/crib linens, and cleaning up the bathroom. (The person providing assistance could also help move the portable dishwasher and carry laundry on the stairs as needed). Estimated time required = 2 hours per week.

[The Appellant] needs help with grocery shopping. Biweekly assistance is recommended for large shopping trips – i.e. the person providing the assistance should attend the grocery store with [the Appellant] to help with the tasks that aggravate her shoulder. Estimated time required = additional 2 hours every second week.

[The Appellant] is dependent on assistance for yard care, which her husband is completing. She does not require functional supervision. She is independent with transportation

[9] The Appellant underwent shoulder surgery on July 31, 2002. On July 25, 2002, Ms. Impey completed another home assessment to assess the Appellant's need for living assistance following her surgery. As a result, SGI determined that the Appellant required partial assistance with preparation of meals and complete assistance with light housecleaning, heavy housekeeping, laundry and purchasing of supplies. SGI also determined that she required partial assistance with dressing, undressing and eating. SGI determined in accordance with the ("old Act grids") found in Appendix D of *The Personal Injury Benefits Regulations*³ that the Appellant was entitled to a weekly benefit of \$241.26. At that time, SGI was not paying the living assistance benefit directly to the claimant. It was their policy to simply pay the care providers directly, in this case, We Care, which they did.

[10] On February 7, 2003, Ms. Impey completed a follow-up homecare assessment. She determined that the Appellant still required assistance with bedding, sweeping and washing floors, vacuuming and cleaning the bathtub.

[11] The Appellant attended for a tertiary assessment on June 23 and 24, 2003 at FIT for Active Living. The Appellant reported left shoulder and arm pain, left elbow pain/numbness into forearm and hand, low and mid back pain and sleep disturbance. The FIT team reported:

³ *The Personal Injury Benefits Regulations*, Ch. A-35 Reg 3 (effective January 1, 1995)

Functionally, [the Appellant] is independent with self-care. She receives assistance approximately once a week with heavy housecleaning. In addition, she receives child care assistance....

[12] On April 21, 2004, Ms. Impey completed another home assessment to determine the Appellant's ongoing need for personal, home and child care assistance. Her summary and recommendations were:

- (a) [The Appellant] has remained independent with all personal care, meal preparation and clean up, laundry, purchasing supplies, and driving. She continues to need assistance with light and heavy housekeeping, and for yard work.
- (b) On previous assessments, assistance twice weekly for two hours was recommended for housekeeping. However [the Appellant] found that she could manage with services from We Care once per week for two hours because [her husband] would provide the remaining help around the house, as well as do the majority of the yard work. This situation has now changed, and the following is recommended:
 - i. Continued assistance with light and heavy housekeeping. Estimated time is 4 hours per week (i.e. twice weekly x 2 hours); to be provided by We Care.
 - ii. Assistance with yard work.
 - iii. Continued assistance for child care during physio, gym, shopping, and errands. Estimated time is 4 to 8 hours per week given current level of physio; should the number of physiotherapy sessions per week increase in the future, an increase in child care might be required.

[13] In response to these recommendations, SGI sent the Appellant a decision letter dated April 21, 2004 as follows:

As per our recent telephone conversation I understand that your situation around the home has changed. In consideration of this I have asked Ms. Winkler Impey to once again visit with you. That visit is now complete and she has forwarded her report to me. SGI provides benefits for you if you need assistance with personal care and/or household duties. I have completed a review of your needs, and based on this review, I will authorize the following changes to your file:

- i. Continued assistance with light and heavy housekeeping. Estimated time is 4 hours per week (i.e. twice weekly x 2 hours per); to be provided by We Care.
- ii. Assistance with yard work.
- iii. Continued assistance for child care during physio, gym, shopping, and errands. At present this would provide 4 to 8 hours per week. Should the number of physiotherapy sessions per week increase in the future, an increase in child care might be required.

[14] The Appellant testified that at that time of this decision letter she continued to receive homecare from We Care twice per week for a period of two hours each time. The Appellant's

personal injury representative until November 2004 was Mr. Kim Sollosy. In November 2004, the Appellant's file was transferred to another personal injury representative, Ms. Ellen Sagh.

[15] Ms. Sagh testified that she completed a review of the file which resulted in significant changes to the Appellant's benefits. Ms. Sagh also testified that the Appellant's file had been flagged as an overpayment file and it was her duty to review the file and correct the errors. Ms. Sagh testified that at the time she took over the file in November 2004, the last grids⁴ completed on the file were in 2002.

[16] On November 25, 2004, SGI sent the Appellant a decision letter with respect to childcare expenses. **This decision letter is one of the issues on appeal.** The relevant portion of the decision letter was as follows:

Your file has been reviewed with respect to ongoing expenses for child care. If you are receiving medical care for injuries sustained in the motor vehicle accident, SGI will reimburse the reasonable cost of caring for your children while you are at the medical appointment.

The review of your file indicates you have been requesting reimbursement for child care at a rate of \$10.00 per hour. In our experience this is not a reasonable fee for child care. It is also noted that you are submitting for child care for reasons other than attending medical appointments.

Effective the date of this correspondence, SGI will reimburse your child care at a rate of \$5.00 per hour during medical appointments only.

[17] Another home assessment was completed on November 30, 2004. Ms. Impey's summary and recommendations were as follows:

Light Housekeeping – [The Appellant] still cannot perform any tasks that require repetitive left shoulder movements, exerting a force with left arm (e.g. pulling or pushing down), or lifting with the left hand. As a result she continues to need help for sweeping floors due to the repetitive nature. She still needs help for changing bed linens due to the strength required. She can, however, complete light floor cleaning with a "Swiffer" mop, make beds, and complete general tidying using her right hand.

Heavy Housekeeping – [The Appellant] has a canister style vacuum and reported she can vacuum in small amounts with her right arm although she reported pain between her scapulae and in her low back with this task. She continues to need assistance with washing floors due to her left shoulder – we have evaluated aids in the past including a scrub brush with a short handle and a mop but these were unsuccessful. She is able to clean the bathroom sink, counter, mirror, and toilet bowl with her right hand but still not the bathtub due to her left shoulder. She cannot lean on

⁴ Refers to the Grids found in Appendix D of *The Personal Injury Benefits Regulations*

her left arm to clean the tub from a kneeling position, and using a tub scrub (which we tried in the past) is a bilateral task.

Yard Work – [The Appellant] requires assistance for most of the yard work such as raking leaves, mowing the lawn, and shoveling snow in the wintertime due to her left shoulder. On previous assessment she was able to do some light tasks such as watering with a hose, planting bedding plants in very small amounts, and cleaning up after the dogs.

Purchasing Supplies/Errands – [The Appellant] has remained independent with purchasing supplies and running errands. She continues to manage grocery shopping using adaptive techniques such as using her right hand for handling groceries, pulling the cart instead of pushing it, and carrying groceries into the house in small amounts. She is able to shop with her older daughter who can walk along. She is also able to take her younger daughter on shorter shopping trips, but does not bring her on longer ones (which is about twice monthly). She reported this is because her [age deleted] cannot walk along the entire time, and although she can manage to lift her into the cart with her right arm only, [the Appellant] is unable to lift her daughter back out of the shopping cart, as it would require the use of both arms.

[18] The Appellant testified that she did not disagree with the evaluation of her abilities in the reports of Ms. Impey, however, she did state that she did not agree with the calculation of benefits as the amount of the benefit was not meeting her needs as assessed by the occupational therapist.

[19] As a consequence of the home assessment completed on November 30, 2004, Ms. Sagh completed the Evaluation Grid of Required Functional Activities. It was completed as follows:

Activity	Completely Dependent	Partially Dependent			Does not apply	Comments
		a	b	c		
Arising from Bed	6	4	2	1	A	= Independent
Dressing/Undressing	4	3	2	1	A	
Bathing/Hygiene	6	3	2	1	A	
Grooming	2	1	1	1	A	
Toileting	2	1	1	1	A	
Bladder Control	2	1	1	1	A	
Bowel Control	3	2	1	1	A	
Eating/Drinking	3	2	1	1	A	
Taking Medications	1	1	1	1	A	
Mobility/Locomotion	5	4	3	2	A	
Cleaning Up after Meals	1	1	1	1	A	
Preparing Meals						
Breakfast	1	1	1	1	A	
Lunch	2	1	1	1	A	
Supper	2	1	1	1		
Laundry	5	4	3	2	A	
Light <1500 sq ft	1	1	*.5*	.5		
Housekeeping >1500 sq ft	2	1	.5	.5		

Heavy <1500 sq ft	2	*1*	.5	.5		
Housekeeping >1500 sq ft	3	2	1	.5		
Yardwork/Gardening/Shoveling	2	*1*	.5	.5		
Functional Supervision	8	5	4	3	A	
Purchasing Supplies	3	2	1	*.5*		*minimal assistance due to lifting child while shopping
Transportation	5	4	3	2	A	
Total	3					
Maximum	68					

* denotes portion of grid circled by personal injury representative

[20] It is important to note that the above was completed on December 7, 2004. Ms. Sagh testified that an additional .5 was added for purchasing supplies because SGI recognized that the Appellant needed assistance with longer grocery trips twice a month. Ms. Sagh advised that there was no provision under the legislation which would allow the Appellant to submit her claim for childcare for those longer grocery trips where she would have to leave her youngest daughter with a babysitter. Ms. Sagh stated that this was a way to provide the Appellant with \$6 per week for childcare costs while the Appellant completed her grocery shopping. Ms. Sagh clearly stated that this provision in the living assistance benefits was not intended to deal with the Appellant's child care costs for attending medical appointments.

[21] Ms. Sagh also testified that she had a conversation with Ms. Impey regarding the Appellant's need for yard care assistance. Ms. Sagh acknowledged that according to Ms. Impey, the Appellant was 95% dependent on others for assistance with her yard work. Ms. Sagh advised that because yard work and shoveling were paid out throughout the year, that SGI would not pay for one time services such as spring clean-up.

[22] The Appellant's living assistance benefit was calculated at \$31 per week. Ms. Sagh assessed partial dependence(b) for light housekeeping, partial dependence(a) for heavy housekeeping and yard work and partial dependence(c) for purchasing supplies.

[23] On December 8, 2004, SGI sent correspondence to the Appellant advising that her benefits had been reduced to \$31 per week. It is this letter which is also the subject of this appeal. The decision letter stated:

Your benefits for assistance with household duties have been reduced based on the recent Occupational Therapy Report provided by Michelle Impey. As your recovery progresses these benefits will continue to be reviewed. Based on the latest review, you will be reimbursed \$31.00 per week. Please note that following our telephone conversation of Dec.7, 2004; minimal assistance due to lifting child while shopping as per the report recommendations is provided on the evaluation grid enclosed.

This benefit will be paid directly to you. Please make your own arrangements to receive the assistance you need. As you will now receive this benefit directly, the services of We Care Home Health Services, and any yard care provider will no longer be paid directly from our office effective the date of this letter.

[24] The Appellant testified that while her file was being handled by Mr. Kim Sollosy that all of her benefits were paid directly to We Care and Gibson's Lawn Care. This is clearly supported by the evidence. Ms. Sagh testified that SGI had changed their policy with respect to directly paying the care providers and that she advised the Appellant of the change and that the benefits would now be paid directly to her and she would have to make all her own arrangements. This change is noted in the December 8, 2004 decision letter. At the same time the letter was sent, Ms. Sagh cancelled We Care.

[25] At the time that Ms. Sagh took over the file, the Appellant reported that she was receiving We Care services twice per week for two hours each time. She had been receiving the services of We Care for seven years. When Ms. Sagh took over the file, We Care was cancelled and the benefits were paid directly to the Appellant. The Appellant reported that the \$31 per week was not enough to pay for the living assistance she required and that the cancellation of We Care without any time to replace those services was terribly upsetting and turned her life upside down. She also reported that her needs were always met while Mr. Sollosy managed her file.

[26] The Appellant testified that when Mr. Sollosy was handling her file, she received \$8 per hour for childcare and after her second child was born, Mr. Sollosy increased the amount to \$10 per hour for two children. She stated that she and Mr. Sollosy agreed upon the above amounts for family members because We Care charged \$15 per hour for babysitting. The Appellant stated that sometimes SGI would pay the childcare cheque directly to her family member which was providing the service or to We Care if they provided the babysitting service. The Appellant reported that the money she received from SGI for childcare went directly to paying her babysitters. We accept her evidence in this regard.

[27] The Appellant stated that she no longer submitted childcare expenses once the living assistance benefit started being paid to her directly by SGI⁵. She testified that she currently pays at least \$6/hour for teenage babysitters. The Appellant acknowledged that SGI increased her living assistance benefit by an additional \$6 per week to assist her with childcare costs while she completed her longer grocery shopping trips. The Appellant admitted that is what she was currently paying her babysitters for childcare.

[28] Ms. Sagh testified that her decision to reduce the Appellant's allowance for child care from \$10 to \$5 was due to the fact that the Appellant's file had been flagged as an overpayment file. She also stated that SGI had no specific guideline or policy with respect to the amount to be paid for child care and that generally the personal injury representatives were paying between \$4 per hour and minimum wage.

[29] When Ms. Sagh took over the file, the Appellant was advised that the changes to her benefits were the result of mistakes that had been made on her file and that it had been handled incorrectly. Mr. Sollosy also testified at the appeal. Mr. Sollosy acknowledged that he now realizes that he made errors on the Appellant's file but at the time that he was administering the file, he believed that he was administering the benefits properly. He acknowledged that the care grids should have been completed more frequently. He also acknowledged that he did not complete the grids when the request for yard work came in and that he simply paid the bills by the providers as they were submitted. It was these significant changes to the handling of her file which the Appellant did not understand and questioned SGI about.

[30] The Appellant stated that her current housekeeper cleans once a week for three hours and she pays her \$10 per hour. She stated that she changes the bedding, vacuums, mops the hardwood floor, cleans the bathtub, washes the floor, mops the lower level and cleans the shower in the lower level.

[31] With leave of the Commission, following the conclusion of the appeal, SGI submitted "Guidelines" given to personal injury representatives when completing the Living Assistance

⁵ Which we now know to be due to a misunderstanding between the Appellant and SGI which the parties have agreed to reassess upon the submission of a claim for childcare costs for attending medical appointments by the Appellant.

Grids. This information was concurrently provided to Ms. McEwen and she was entitled to comment on it. Mr. McLeod, solicitor for SGI, advised by way of correspondence to the Commission dated October 24, 2005, that the Appellant should have been classified as completely dependent, rather than partially dependent, column (a), of the grids as it related to her ability to do yard work because she was 95% dependent upon outside assistance.

[32] Ms. Sagh testified that completely dependent meant 99% unable to do the required task. However, according to the Guidelines, an individual is considered to be completely dependent if they fall within a range of 100% to 90% dependent upon outside assistance. The difference in the grid between completely dependent and partially dependent, column (a), for “gardening/shoveling/yard work” is 1 point. Based on the information provided post-hearing, the Appellant is entitled to the additional 1 point.

LAW AND ANALYSIS

[33] The Commission’s jurisdiction to review a decision of SGI is set out in section 193(7) of the *Automobile Accident Insurance Act* (the new “Act”) which came into force on August 1, 2002. The Appeal 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 this Part.

[34] The Commission determined in *R.C.*⁶ that its discretion under section 193(7) must be exercised in a judicial manner. The discretion will be exercised in favour of the Applicant only if it is demonstrated that the decision of SGI was wrong in law; or based on erroneous assumptions; or at the very least, the decision was unreasonable.⁷

⁶ *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

⁷ *Belchamber v. Saskatchewan Government Insurance*, [1997] TWL QB 97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB 98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB 98113.

THE GRIDS FOR PERSONAL AND HOME CARE ASSISTANCE⁸:

[35] In order to determine the Appellant's entitlement to living assistance benefits it is necessary to first understand the way the legislation and regulations required SGI to reimburse these costs under the old *Act* and *Regulations*,⁹ and then under the new *Act* and *Regulations*.¹⁰

Old Act**Benefits for personal assistance expenses**

158(1) Subject to the Regulations, if a victim is unable because of an accident to care for himself or herself or to perform the essential activities of everyday life without assistance the insurer may pay a benefit to reimburse the victim for expenses related to personal home assistance.

(2) The maximum amount of a benefit pursuant to this section is \$550 per week.¹¹

Old Regulations**Reimbursement of personal home assistance under Appendix D**

44 Subject to the maximum amount set pursuant to section 158 of the *Act*, where a victim incurs an expense for personal home assistance that is not covered pursuant to any other *Act* and provides the insurer with receipts for that expense, the insurer shall reimburse the victim for the expense in accordance with Appendix D.

New Act**Benefits for living assistance expenses**

156(1) Subject to the regulations, if an insured is unable because of the accident to care for himself or herself or to perform the prescribed basic activities of daily living without assistance, the insurer shall pay a living assistance benefit to the insured for expenses related to obtaining assistance.

(2) The insurer shall calculate and reimburse the insured for the living assistance benefit in accordance with the regulations.

(3) The maximum amount of a living assistance benefit is \$947 per week.¹²

New Regulations**Living assistance benefit under Appendix D**

44 Subject to the maximum amount set pursuant to section 156 of the *Act*, if the insured is unable because of the accident to care for himself or herself or to perform the prescribed basic activities of daily living without assistance and has an expense for living assistance that is not covered pursuant to any other *Act*, the insurer shall reimburse the victim for the expense in accordance with Appendix D.

⁸ The law and analysis provided under this section has been taken in part from *E.L. v. Saskatchewan Government Insurance*, 2004 SKAIA 001.

⁹ Part VIII of *The Automobile Accident Insurance Act* and *The Personal Injury Benefits Regulations* in force from 1995 to August 1, 2002.

¹⁰ Part VIII of *The Automobile Accident Insurance Act* and *The Personal Injury Benefits Regulations* in force from August 1, 2002.

¹¹ This benefit (and others) are indexed to the Consumer Price Index annually on January 1: section 188(3) of the old *Act*.

¹² This benefit (and others) are indexed to the Consumer Price Index annually on January 1: section 185(2) of the new *Act*.

[36] As can be seen, the legislation and regulations above have not changed significantly, except for the maximum weekly amount. The big difference is in Appendix D. Appendix D (old and new *Regulations*) provides instructions on how to determine if the person requires assistance or not, when the requirement is not applicable, definitions of the terminology used, and “evaluation grids” (“Grids”) to compute points. The Grids are usually completed by an SGI personal injury representative, based on a home site evaluation by others, such as an occupational therapist.

[37] Firstly, in Appendix D, under the old *Regulations*, there were three Grids, and under the new *Regulations* there are two. The personal care (bathing, bowel and bladder control, dressing and undressing, etc.) and household activities (meal preparation, light and heavy housekeeping) which were dealt with in Grids A and B in Appendix D under the old *Act* and *Regulations*, are now combined in Appendix D in the new *Regulations*: Grid A, with a maximum of 66 or 68 points (depending on size of house), as opposed to 51 points in Appendix D for old *Regulations* Grids A and B combined. Under the old *Act* and *Regulations*, the amount scored out of 51 points was converted to a percentage on the “Chart of Qualifying Personal Care Expenses at Home” and then the percentage was applied to the weekly maximum of \$550.

[38] Secondly, in Appendix D, under the old *Regulations*, Grid C factored in the need for supervision of a claimant due to neurological or psychological after effects. If, for example, a person needed supervision of some kind because of problems with memory, temporal or spatial orientation, communication or self-control, or other aspects of higher cerebral functions, old Appendix D awarded points up to a maximum of 3, which was then converted into a percentage of the weekly maximum of \$550. If an individual scored a maximum of 3 points in any of the categories individually or combined, they were entitled to 100% of the weekly maximum of \$550.

[39] Thirdly, in Appendix D under the old *Regulations* a determination was made as to whether there was a need for particular supervision for four hours or less per day or more than four hours, which again translated into a percentage of 24% or 47%, again applied to the maximum \$550 per week.

[40] Finally, on the last page of Appendix D, a “Summary” was to be completed in which an individual’s points/percentages and corresponding portion of the maximum weekly amount of \$550 calculated for each Grid were totaled together to allow the maximum amount of the weekly benefit to be paid; however, under no circumstances were the totals from all categories found in Appendix D to exceed the maximum weekly amount of \$550.

[41] Under the new *Act* and *Regulations*, in Appendix B, new Grid B deals with cognitive activities, on a scale of 70 points. These activities are attention/memory, behaviour, communication, financial management, planning and organizing activities, and safety concerns.

[42] Appendix D under the old and new *Regulations* are set out as schedules to this decision.

How the Process was Applied under the old Act

[43] To illustrate how the process for personal care expenses is applied under the old *Act*, a person *completely* dependent on assistance for all of the aspects of personal care would be rated at 24 out of 24 possible points on Grid A. Similarly, a person completely dependent on assistance for activities of daily living, including meal preparation, light housekeeping, house cleaning, laundry and purchase of supplies, would be scored at 27 of out a maximum of 27 points on Grid B. When the two grid scores are totalled, from a minimum of 0 to a maximum of 51, a “Chart of Qualifying Personal Care Expenses at Home” relates the number of points to a “percentage”, and this percentage is applied to the \$550 per week available under section 158(2) of the *Act*, and then indexed to the Consumer Price Index under section 188(3).

How the Process is Applied under the new Act

[44] Under the new *Act*, a person *completely* dependent on assistance for all required functional activities would be rated at 68 out of 68 possible points on Grid A. A person completely independent for such activities in terms of physical ability, but with a brain injury rendering him constantly in need of supervision because of attention and memory deficits, problems initiating and completing activities, and who continually required supervision and reminders to take medication would be rated at $5 + 6 + 6 + 1 = 18$ out of 68 or 70.

The conversion of points to a percentage has been done away as has the “Summary” found in Appendix D of the old *Regulations*. The benefits are still indexed to the Consumer Price Index under section 185(2) of the new *Act*. What is not clear is whether the weekly maximum of \$947 under the new *Act* and *Regulations* is to be applied to each Grid A and B or whether the points from both Grids are to be combined and then multiplied by \$947. The new *Act* and *Regulations* are silent with respect to this calculation.

[45] The Appellant was involved in a motor vehicle accident on September 21, 1999. Mr. Sollosy, on behalf of SGI, determined her entitlement to benefits for personal and home care assistance in accordance with the Grids (“old Act grids”) found in Appendix D of the old *Regulations*¹³ in force at the time of her accident. This determination was made on July 29, 2002 and Mr. Sollosy continued to pay benefits directly to the care providers but did not complete any new grids as he was required to do from time to time.

[46] As previously noted, effective August 1, 2002 the old *Act* and *Regulations* were amended. On August 31, 2002, the Grids (“new Act grids”) in Appendix D of the new *Regulations*¹⁴ were revised and implemented by SGI. When Ms. Sagh reviewed the file in November 2004, she determined the Appellant’s entitlement to benefits for living assistance benefits in accordance with the new *Act* grids. It is our understanding where there is a difference between the old *Act* grids and the new *Act* grids, it is SGI’s policy to provide the claimant with the better result of the two grids.¹⁵

[47] The provisions of *The Automobile Accident Insurance Act* which are relevant to this appeal are set out in paragraph [35].

[48] In addition, the provisions of Appendix D of the new *Regulations* which are relevant to the new *Act* grids are:

Living Assistance

¹³ *The Personal Injury Benefits Regulations*, Ch. A-35 Reg 3 (effective January 1, 1995)

¹⁴ *The Personal Injury Benefits Regulations*, Ch. A-35 Reg 3 (effective August, 2002)

¹⁵ *E.L. v. SGI*, 2004 SKAIA 001 at paragraph 71.

1. For the purposes of Appendix D:
 - (i) **“gardening”** means the ability of the insured to plant, maintain and harvest domestic gardens;
 - (k) **“heavy housekeeping”** means the ability of the insured to carry out major household duties such as vacuuming, washing floors and cleaning appliances and bathrooms, and includes cleaning windows, walls, ceilings, curtains and carpets;
 - (m) **“light housekeeping”** means the ability of the insured to perform light household duties such as sweeping, dusting, making beds, wiping counters and tables and maintaining general tidiness;
 - (p) **“purchasing supplies”** means the ability of the insured to purchase the necessary supplies for the home including groceries, clothes, hardware, equipment, etc.;
 - (q) **“shoveling”** means the ability of the insured to shovel snow;
 - (u) **“yard work”** means the ability of the insured to carry out lawn and tree care

Living Assistance Benefits

[49] The Appellant submitted that the living assistance benefits currently received from SGI are not sufficient to cover the cost of her weekly housecleaning. An issue arose with respect to whether the benefit for housekeeping had been assessed at the correct square footage for the house. The Appellant testified that her home is 1200 square feet on the first level and 800 square feet on the lower level. The occupational therapist assessed the home at 1100 square feet. Ms. Sagh undertook to review the size of the home.

[50] SGI submitted that the care grids were completed in accordance with the occupational therapists report of the Appellant’s abilities and are therefore completed properly and accurately reflect her entitlement to living assistance benefits. Following the appeal, SGI acknowledged the yard work benefit should be increased.

[51] The first issue before this Commission with respect to living assistance benefits is whether or not the calculation of the Appellant’s benefits for light housekeeping, heavy housekeeping, yard work and purchasing supplies is correct. Our jurisdiction relates to a review of the calculation of the benefit and to determine if the grids are correctly completed. SGI

submitted that in the year 2004, the maximum payable for functional personal assistance is \$665.00. In order to calculate the Appellant's benefit, her total score would be out of 66 on the Evaluation Grid outlined above in paragraph [19], subject to the determination made surrounding the square footage of her home.

[52] SGI has classified the Appellant to be partially dependent, column (b), with respect to the tasks of light housekeeping. According to the Guidelines an individual is considered to be partially dependent, column (b), with respect to light housekeeping if the customer is unable to complete more than 25% of the tasks. The example used in the Guidelines is if the customer is able to complete all tasks except making of beds and sweeping. The occupational therapist concluded that the Appellant would still need assistance with these tasks but could complete light floor cleaning and general tidying.

[53] The Appellant testified that she accepted the findings in the occupational report but disagreed with the amounts. Accordingly, upon review of the *Regulations* and the Guidelines, we are satisfied that SGI's assessment of benefits with respect to light housekeeping is correct.

[54] SGI has classified the Appellant to be partially dependent, column (a), with respect to the tasks of heavy housekeeping based on Ms. Impey's report. According to the Guidelines an individual is considered to be partially dependent, column (a) with respect to heavy housekeeping if the customer is unable to complete 75% or more of the tasks associated with heavy housekeeping activities. The example used in the Guidelines is if the customer is unable to complete all tasks except waist level cleaning of appliances, bathroom, windows etc.

[55] The occupational therapist concluded that the Appellant would still need assistance with most heavy housekeeping tasks but that she could complete vacuuming in small amounts and cleaning the bathroom sink, counter, mirror, and toilet bowl with her right arm. The Appellant did not object to the findings in the occupational report.

[56] Accordingly, upon reviewing the occupational report, the *Regulations* and the Guidelines we are satisfied that SGI's assessment of benefits with respect to heavy housekeeping is correct.

[57] Our findings and decisions with respect to the light and heavy housekeeping are based on the square footage of the home being less than 1500 square feet. If the home is more than 1500 square feet, the Appellant would be entitled to an increase of 1 point (from 1 to 2) for partially dependent, column (a). She would not however be entitled to an increased benefit for light housekeeping for partially dependent, column (b), as there is no point variation due to area size – both are calculated at 0.5 points each. Ms. Sagh has undertaken to review the square footage of the Appellant's home. If it is determined the home is more than 1500 square feet, SGI is directed to recalculate the grids accordingly.

[58] With respect to yard work, Mr. McLeod has acknowledged that the occupational therapist reported that the Appellant required assistance with 95% of her yard work and accordingly her benefit should be increased to one of complete dependence versus partial dependence, column (a), in accordance with the Guidelines.

[59] As noted in paragraph [32], the Appellant is entitled to an additional 1 point in her total benefits for yard work because of SGI's original error in determining the level of assistance between partially dependent, column (a), and completely dependent. SGI acknowledged this mistake after the appeal but, for purposes of the appeal, we direct SGI to recalculate the grids accordingly.

[60] With respect to the issue of purchasing supplies, SGI has provided the Appellant with a benefit under this category to assist her with childcare costs while she attends her longer grocery trips twice monthly. SGI has assessed the benefit as \$6 per hour for two hours twice a month. This would provide the Appellant with two hours of babysitting twice a month while she shopped. Ms. Sagh testified that she was attempting to provide the Appellant with assistance for child care while doing her grocery shopping under this section because there was no other provision in the legislation to allow childcare costs for this purpose. Accordingly, upon reviewing the occupational report we find this to be an appropriate assessment of benefits to provide the Appellant with assistance for her difficulties with respect to purchasing supplies. We find that SGI's assessment of benefits with respect to purchasing supplies is reasonable and consistent with the information provided by Ms. Impey.

[61] Accordingly, the Appellant would be entitled to a total of 4 points out of 66 on the Evaluation Grid, subject to the disagreement over the square footage of the home. SGI is directed to recalculate the grids accordingly and provide the Appellant with the increased benefits.

[62] We do note SGI's correspondence dated December 17, 2004 which stated that the 2004 amount for functional assistance was \$665.00. It was not clear to us how they arrived at this breakdown where the maximum weekly amount provided under Section 156 of the new *Act* is \$947 per week.

[63] The Commission requested further information from SGI regarding why they did not apply the new amount of \$947 per week when they applied the new *Act* grids to the Appellant's situation. Additional correspondence supplied by SGI was as follows:

The maximum amount of the benefit payable for a living assistance benefit to an injured person without any cognitive dysfunction associated with the accident effective as of January 1, 2006 was \$694 per week. This amount represents the original amount established in section 158(1) of The Act in 1995 as adjusted by the Consumer Price Index.

In August, 2002, the total limit for living assistance benefits was increased to \$947.00 per week as provided in section 156(3) of The Act. The increase was based on a recommendation from SGI to the Personal Injury Protection Plan Review Committee in April of 2000 in a document entitled "Personal Injury Protection Plan Review".

The following recommendation is taken from that document:

Recommendation 2 – Personal Care Grids:

Section 158; Regulation 44; Appendix D

The maximum allowed for care benefits is \$595/week based on the number of points allotted within four grids: Personal care, home care, supervision and particular supervision (e.g., supervising a blind person until they start to function on their own). The personal care grids do not provide adequate assistance for catastrophic brain injuries. In addition, point allocation is not always fair and the grids do not cover some common assistance requirements. A committee, including health care workers has recommended that these grids be changed.

Example:

A person who suffers a brain injury and required daily supervision (in addition to personal and home care assistance) is not sufficiently compensated by the grids. Using the grids, a person who requires assistance with dinner presentation is allowed 11 points, whereas a person who requires assistance with laundry is allowed one point. These point allocations are unfair. In addition there is no provision for snow removal or lawn and garden care.

Recommendation:

Revise the grids for personal and home care, allowing for such items as snow removal and lawn and garden care, and allocating points fairly. Condense the activities into two grids – one for physical care and one for mental care. Allow extra compensation for mental care, at half the benefits allowed for physical care (this would effectively increase the care limits for those catastrophically injured.)

SGI acted on this recommendation in implementing the 2002 revisions to both The Act and the Regulations. The \$550/week limit in 1995 had been increased by the Consumer Price Index each year until 2002 to reach the amount of \$631 per week. The recommendation was to the effect that extra compensation be allowed for mental care at *half the benefits allowed for physical care*. As a result the limit was increased in 2002 to add another one-half or an additional \$316 to the maximum benefit payable to cover the mental care grid. As a result the total benefit payable pursuant to Section 156 of The Act is \$947 as adjusted by any increases pursuant to the Consumer Price Index.

The apportionment of the benefit in that fashion was not specifically set out in the regulations when the amendments were made to The Act and to the Regulations, but a correction is in the planning stages and should be implemented in the near future. SGI has been apportioning the benefit in that fashion in accordance with the recommendation that prompted the increase in the amount of the benefit.

SGI's policy since the change in 2002 is to apply the new regulations to claims that predated those changes to those claims where the new regulations will supply a higher benefit. If the old regulations would have supplied a higher benefit the old regulations would be applied.

[64] Mr. McLeod legal counsel for SGI, submitted that the policy used for the administration of living assistance benefits since August of 2002 provides the greatest benefit to the individual claimants. SGI submitted that the benefit provided by Section 156 of the new *Act* contemplates both a physical and a cognitive component. Therefore, he submitted, if both grids were combined for the purposes of calculating the benefit payable to the claimant, that benefit would be calculated out of a total of 138 points rather than 66 points. Mr. McLeod further submitted that even though the maximum benefit payable pursuant to Section 156 of the new *Act* has been increased by one half, the fact that the number of possible points available has in effect doubled would mean that the end result would be that the claimant would receive a lesser benefit.

[65] The Commission provided the Appellant with an opportunity to respond to SGI's additional evidence and argument but a response was not received.

[66] The issue facing the Commission in this decision is whether the amount of \$665 used by SGI in accordance with their policy used since August 2002 to calculate living assistance benefits is correct in law. Section 156 of the new *Act* replaced Section 158 of the old *Act*. The maximum amount payable per week under the old act was \$550 which is adjusted annually for

consumer price index. The maximum amount payable under the new Act is \$947 per week; adjusted annually for consumer price index.

[67] We do have some concerns regarding SGI's policy, however, we are cognizant of the fact that the Appellant's accident and date of application for benefits occurred prior to the enactment of the new *Act* and *Regulations* which came into force in August 2002¹⁶ and therefore her entitlement to personal and home care assistance is governed by the old *Act* and *Regulations*. In accordance with the old *Act* and *Regulations*, the maximum amount payable at the time of her accident was \$550 per week and adjusted annually for consumer price index raises the amount to \$665 as of January 1, 2004. Therefore, we find SGI's decision to apply the maximum amount of \$665 per week reasonable and correct in law in the case before us due to the date of the Appellant's accident and application for benefits.

[68] SGI also used the new *Act* grids to provide the Appellant with a greater benefit because the old *Act* grids did not provide for shoveling and yard care. If SGI had calculated the Appellant's entitlement to benefits under the old *Act* grids, the Appellant would not have received a benefit as of December 2004 when SGI issued their decision letter. Therefore, we also find SGI's policy in applying new Act grids where it is more beneficial to the claimant to be reasonable in the Appellant's case.

[69] The interpretation of the maximum weekly amount of \$947 found in Section 158 of the new *Act* and its application to Appendix D of the new *Regulations* and how it is to be applied to Grid A and Grid B will be properly considered and decided in the context of a post August 2002 motor vehicle accident. This is not one of the issues before this Commission on this appeal. We recognize that there is an ambiguity in the legislation as to whether or not the \$947 is intended to be applied to Grid A and B individually, to both Grids combined or whether the \$947 should be applied as SGI does so in their post August 2002 policy relying upon the recommendations of the Review Committee. The intention of the legislature and the application of the maximum weekly amount of \$947 to the living assistance benefit is ambiguous; however, it is more appropriately addressed under the appropriate fact situation, being a post August 2002 accident.

Child Care Costs

[70] The second issue before this Commission is whether or not the reduction from \$10 per hour for childcare to \$5 per hour is reasonable. The Appellant submitted that SGI had paid \$10 per hour for two children for five years while Ms. Sollosy had her file. She argued that it was unfair and unreasonable to cut the cost of her child care in half after paying it for five years.

[71] SGI submitted that \$5 per hour is reasonable for childcare. SGI submitted that although paying \$10 per hour for five years may have constituted representations which could prevent SGI from changing their position by way of estoppel, it was submitted that the Appellant did not alter her position to her detriment based upon those representations.

[72] The Appellant acknowledged that she was able to find teenage babysitters for \$6 per hour. She did not present any evidence that she had committed to one sitter at \$10 per hour upon which we could make a finding that she altered her position to her detriment.

[73] What is of great concern to us is that Ms. Sagh advised that SGI does not have a policy with respect to the amount to pay for child care. Every personal injury representative has the discretion to make payments generally ranging from \$4 per hour to minimum wage. It was within Mr. Sollosy's discretion to pay \$10 per hour for childcare costs for two children despite that amount may now be considered unreasonable in SGI's view.

[74] We find it disturbing that another personal injury representative can take over a file and reduce these payments in half simply because it has been flagged as an overpayment file. We empathize with the Appellant as to how upsetting it must have been and how difficult it would be to advise her babysitters that SGI would no longer pay \$10 per hour. Despite the reduction to \$5 per hour for (general) child care costs, SGI assessed Ms. Ewan's benefit for child care costs for purchasing supplies on longer shopping trips was the equivalent of \$6 per hour for two hours, twice a month.

¹⁶ Section 101 of the new *Act* and *Regulations* states that Part VIII under the new *Act* will only apply to accidents that occur on or after August 2002.

[75] We think it was unreasonable for SGI to reduce the amount of the childcare benefit being paid to the Appellant from \$10 to \$5 per hour because of the length of time it was paid and that it was a discretionary decision within the authority of the personal injury representative. However, in light of the fact that the Appellant admitted that she is able to find babysitting for \$6 per hour we are prepared to make the reduction from \$10 to \$6 per hour.

[76] Because the Appellant is able to find childcare for \$6 per hour and SGI has assessed the benefit under her living assistance to be \$6 per hour, we find that the decision of SGI to pay \$5 per hour for childcare is unreasonable. Accordingly, the decision of SGI to reduce the Appellant's child care costs from \$10 to \$5 is set aside. SGI is ordered to reimburse the Appellant at \$6 per hour for childcare retroactive to the November 25, 2004 decision letter.

[77] However, in the event that the Appellant is unable to find a babysitter for \$6 per hour while she is attending medical appointments, it is our opinion that due to the history on the file and the admission by Ms. Sagh that SGI has no policy or guideline with respect to the amount to be paid for childcare, it is strongly recommended that SGI consider reimbursing the Appellant for future childcare costs up to minimum wage if she submits a claim for that amount.

CONCLUSION

[78] We want to note that the Appellant was very upset about the cancellation of her living assistance services (We Care) before she had time to arrange new services and the very significant reduction of her child care costs. She felt that the transfer of the file between the personal injury representatives could have been handled better by SGI. We share the Appellant's concerns particularly because it was not due to her conduct that the file was overpaid for many years.

[79] SGI should have made a better effort not to unreasonably disrupt the Appellant's life when it was discovered that errors or overpayments had been made and their correction would reduce the amount of benefits she had been receiving for a considerable period of time. The Appellant made it clear that she felt there was very little explanation given to her regarding the

changes and perhaps more importantly in her view, time to adjust and make alternate arrangements.

[80] Communication between SGI and any claimant is essential when these types of problems arise and it may be reasonable in these circumstances to allow a short transitional period before benefits are significantly changed or reduced.

[81] The decision of SGI dated December 8, 2004 is partially set aside. SGI is ordered to increase the amount of the Appellant's benefits for living assistance benefits from 3 points to 4 points to compensate the Appellant for being in the completely dependent category for yard work. The portion of the living assistance benefits relating to light and heavy housekeeping is upheld subject to Ms. Sagh's review of the square footage of the Appellant's home. The portion of the living assistance benefits relating to purchasing supplies is upheld. The Appellant is entitled to be reimbursed retroactively to December 8, 2004, if SGI has not already done so with respect to the yard work.

[82] The decision of SGI dated November 25, 2004 as it relates to childcare costs is set aside. The Appellant is entitled to receive \$6 per hour for childcare for attendance at medical appointments retroactive to November 25, 2004. We are also making a recommendation that SGI consider reimbursing the Appellant for future childcare costs up to minimum wage if she submits a claim for that amount because she is unable to find childcare for \$6 per hour.

[83] As the Appellant has been partially successful in her appeal, she is entitled to reasonable costs of her appeal including her Appeal fee in accordance with Section 193(11) of *The Automobile Accident Insurance Act* and Section 86(4) and 96 of *The Personal Injury Benefits Regulations*.

Dated at Regina, Saskatchewan, on July 6, 2006.

Beverly Cleveland, Chair

Joy Dobko, Commission Member

Al Knippel, Commission Member