

**Automobile Injury Appeal Commission**

**Province of Saskatchewan**

**Citation:** *F.C. v. Saskatchewan Government  
Insurance, 2006 SKAIA 059*  
**Date:** 20061027  
**File:** 122 of 2005

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**BETWEEN**

**F.C., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**F.C., Applicant**  
**Allan McLeod, for the Respondent**

**Before:** **Joy Dobko, Chair**  
**Stephanie Pfefferle, Commission Member**  
**Carol Olson, Commission Member**

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

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Heard at [Saskatoon](#), Saskatchewan  
[April 11, 2006](#)

## DECISION

[1] This is an appeal by the Appellant, F.C., of a decision made by Saskatchewan Government Insurance (“SGI”) dated November 2, 2004 which denied the Appellant entitlement to income replacement benefits during her recovery from a breast reduction surgery and permanent impairment benefits for the scarring which resulted from the breast reduction.

### FACTS:

[2] The Appellant was involved in a motor vehicle accident on January 20, 2004 (the “accident”). She complained of pain in her mid and upper back and her neck. The Appellant was working at the time of her accident as a Nurse Clinician at [the hospital]. The Appellant reported that she continued to work following the accident and up until her breast reduction surgery. She stated she worked shorter hours but more days in a week to make up all of her hours.

[3] The Appellant has a significant pre-motor vehicle accident medical history of neck and back pain which is relevant to this appeal. The Appellant was involved in previous motor vehicle accidents in June 1988 and January 1996 in which she injured her neck and back.

[4] Also, in June 2003, [the Appellant’s family physician] referred the Appellant to [plastic surgeon] for a consultation regarding breast reduction surgery. In October 2003, the plastic surgeon reported:

[The Appellant’s] main complaints are with pain in the upper back between the scapula. It radiates into her neck and shoulders. She has shoulder grooving from her bra strap and she has pain in her breasts with exercise and at rest. She also has problems with proper fitting bras and clothing.

Past history includes an MVA in 1996. She had a VSD repair at the age of six.

[The Appellant] has been seeing a chiropractor lately. In addition to the above symptoms noted, she has tingling and numbness in the ulnar nerve distribution which may be a result of bra straps pressing on the lower branch of the brachial plexus as they exit from the clavicle.

...

I think [the Appellant] would definitely benefit from a breast reduction to alleviate her musculo-skeletal symptoms. We will try and do her more urgently as she has ulnar nerve symptoms in addition to the usual symptoms of breast hypertrophy....

[5] The Appellant completed her Application for Injury Benefits on February 16, 2004. The Appellant reported neck pain and headaches. The Appellant also reported that her previous motor vehicle accidents had left her with “small residual problems requiring 1 session of physio and intermittent chiro and massage”. She further reported receiving maintenance chiropractic and massage therapy on January 8, 2004 for her neck and back. The Appellant presented to the [the chiropractic clinic] on eight occasions between March 31, 2003 and January 8, 2004 for chiropractic treatment. The treatment consisted of spinal manipulation to her cervicothoracic and thoracolumbar junction pain. The Appellant’s neck and back pain was symptomatic prior to the accident and she was receiving treatment for those symptoms.

[6] Following the January 2004 accident she continued to receive almost daily chiropractic treatment from February 2, 2004 until treatment was discontinued on February 13, 2004. In her Application for Injury Benefits, the Appellant also reported receiving physiotherapy from [the physical therapist] in May 2003 for her neck. The physical therapist also treated the Appellant for her injuries after the January 20, 2004 accident. She commenced treatment for those injuries on February 10, 2004. The Appellant attended physiotherapy on February 16, 27, March 1, 3, 8, 15, 17, April 7, 14, 24, 28 and May 3, 2004 during which she received myofascial based treatment. The Appellant continued to report headaches and myofascial tightness and the physical therapist documented reduced range of motion during those visits.

[7] The physical therapist reported that prior to the accident of January 20, 2004, the Appellant continued to experience a chronic history of neck and upper back symptoms related to her previous motor vehicle accidents. The physical therapist also reported that he was aware of a direct biomechanical/myofascial relationship between chronic neck/upper back myofascial pain and excessive muscular strain from weight anteriorly. It was the physical therapist’s opinion that the breast reduction surgery would assist greatly in the Appellant’s recovery.

[8] The Appellant underwent breast reduction surgery on May 6, 2004. The physical therapist reviewed the Appellant on May 13, 2004 and reported that she was doing well with post operative healing issues. He recommended she continue with an exercise based routine for 4-6 weeks following the surgery.

[9] The Appellant's family physician treated the Appellant prior to and following her January 2004 accident. The family physician advised that following the January 20, 2004 accident, the Appellant was experiencing slow recovery despite physiotherapy and active compliance with treatment. Consequently, after a full examination on March 15, 2004, the family physician expedited the Appellant's breast reduction surgery. The Appellant underwent breast reduction surgery on May 6, 2004. The family physician reported that following the breast reduction surgery, the Appellant's back pain, neck pain and headaches resolved almost immediately.

[10] The family physician also appeared by telephone to give evidence at the appeal. She reported that when she examined the Appellant on January 29, 2004 she had extensive spasm in her upper neck and mid back. The family physician reported that the Appellant's recovery was slow so she requested that her breast reduction surgery be expedited. She stated that when she reviewed the Appellant on May 31, 2004 following the breast reduction surgery, the Appellant was a new woman. She also reported the Appellant had full range of motion with two small areas of slight muscle spasm. At her attendance upon the family physician on April 15, 2005, the Appellant reported being pain free following the breast reduction. The family physician did admit that it was her impression that the breast reduction surgery would have taken place in any event; however, in her opinion the accident expedited the surgery. The family physician stated that there was no doubt that the Appellant had pre-existing back pain but the family physician stated there was a significant change in the back pain and the Appellant's ability to recover following the accident. It was the family physician's opinion that recovery from the accident injuries would have been significantly prolonged if the Appellant had not proceeded with the breast reduction surgery when she did. The family physician also reported that the Appellant was not on any medications prior to the accident, however, following the accident she was prescribed Ibuprofen, Codeine and Celebrex.

[11] Dr. Mierau, SGI medical consultant, reviewed the Appellant's medical file to determine her entitlement to income replacement benefits, rehabilitation benefits and scarring relative to the breast reduction surgery. Dr. Mierau reported:

[The Appellant] had cervical, thoracic and lumbar spine pain treated by chiropractic before the MVA of January 20, 2004. The breast reduction surgery and recovery from it is in no way related to MVA related conditions. On April 24, 2004, Mr. Tillbury documented long-standing cervical issues stemming from multiple motor vehicle accidents.

The chiropractors did not send a copy of the chart – rather they sent a synopsis of care. That is not what SGI asked for. I don't think you should pay for the submission from the chiropractors. It is not useful other than to confirm that the customer was treated for many and sundry spine complaints before the MVA.

Similarly [the physical therapist's] letter is not a substitute for a copy of the chart and the chart as present to SGI is illegible. It doesn't contain any objective information regarding treatment visits other than the date. His opinion on the requirement for breast reduction surgery as a treatment for whiplash is irrelevant because the surgery was booked before the MVA.

**Opinion:**

In (*sic*) is my opinion that SGI is not responsible for time away from work, treatment or scarring relative to breast reduction surgery, particularly since the surgery was booked before the MVA.

SGI is not responsible for time spent recovering from breast reduction surgery.

6 weeks is likely an appropriate time to recover from surgery but you may want to get a note from the surgeon to confirm this. During the surgical recovery time I don't think SGI is responsible for anything.

Obtain practitioners reports after the surgeon confirms recovery from surgery and return the file. SGI's responsibility is still not clear except to say that SGI is not responsible for the breast reduction surgery or the sequellae of same.

[12] On October 26, 2004, Dr. Mierau issued a further report to SGI stating that the relief of symptoms following the breast reduction surgery suggested that the chronicity of the symptoms was due to a non-MVA related condition which pre-dated the MVA and was not the result of the MVA. He further stated that in his opinion, the Appellant was not entitled to an income replacement benefit while recovering from surgery or a benefit for scarring as a result of the surgical procedure.

[13] As a result SGI issued a decision letter to the Appellant dated November 2, 2004, denying any funding for income replacement benefits while the Appellant was recovering from breast reduction surgery and also permanent impairment benefits for the scarring. The relevant portion of their decision letter is:

I have received your medical file back from SGI medical consultant who advises as follows:

“The relief of symptoms following breast reduction surgery suggests that the chronicity of the symptoms was due to a non-motor vehicle accident related condition. This condition pre-dated the motor vehicle accident and was not a result of the motor vehicle accident. In my opinion, she is not entitled to an income replacement benefit while recovering from breast reduction surgery or a benefit for scarring as a result of the surgical procedure. More treatment for motor vehicle accident related conditions is not required.”

Based on the opinion of SGI’s medical consultant, it appears that I will be unable to provided funding for income replacement while you are recovering from your surgery or provide you with a permanent impairment benefit for the scarring you received as a result of this procedure.

[14] On June 15, 2005, the physical therapist also provided the following medical report to SGI:

Firstly, the breast reduction surgery is obviously not in my scope of practice but once [the Appellant] brought this plan to my attention, we did discuss this in regards to potential benefits to her ongoing cervico-thoracic complaints. [The family physician] had the surgery date moved ahead with hopes of assisting recovery. I had shared this view as biomechanically, decreasing the effects of the forward positioning of the shoulder girdle can take off considerable tension of the posterior support musculature. This is the tissue that had been giving [the Appellant] the majority of her trouble. Biomechanical analysis supports the connection of the increased strain on this tissue with a forward-head induced posture. [The plastic surgeon], is aware of more formalized research in regards to outcome measures related to this surgery.

Secondly, if there was any speculation that this procedure would effect [the Appellant’s] cervico-thoracic dysfunction, I had no doubt once she completed the procedure on May 5, 2004. She was seen on May 13, 2005 and showed improved cervical range of motion, improved passive mobility testing, decreased tightness and tenderness of the upper fibres of trapezius/levator scapulae musculature was noted as was suboccipital decreased tension and tenderness. This promoted a more relaxed head portion in [the Appellant’s] sitting posture. She was able to discontinue the anti-inflammatory medication almost immediately.

[15] The physical therapist testified by telephone at the appeal. He affirmed that the Appellant was making slow progress with her recovery and that following the breast reduction surgery he saw a dramatic recovery in her accident related injuries.

[16] The Appellant testified at the appeal. She stated that at the time of her accident she had not made a decision regarding whether to proceed with her breast reduction surgery because she was advised by the plastic surgeon that the waiting list was 2 ½ years and she was unsure of the complications surrounding the surgery. She testified that she agreed to go ahead with the surgery despite the risks due to the poor recovery she was experiencing following the January 20, 2004 accident. The Appellant admitted that prior to the January 20, 2004 accident she did have constant mid back pain; however, it did not affect her ability to do her activities of daily living. After the accident she describes severe headaches and mid upper back pain which required medication.

## LEGISLATION AND STANDARD OF REVIEW

[17] The Commission's power on appeal is provided in Subsection 193(7) of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (the "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*.

[18] Recently, the Saskatchewan Court of Appeal addressed the standard of review applicable for appeals to this Commission in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In that case, the Court of Appeal noted that more than one standard of review was indicated by the legislation. The Court of Appeal suggested that the standard of review depends upon whether SGI has discretion to grant or deny the particular benefit claimed. In *Allary*, the claimant was seeking reimbursement of payments for medical and paramedical care as provided under Subsection 163(1) of the *Act*. The Court of Appeal held that because SGI does not have discretion to decide whether to pay the claimant such benefits, the standard of review of SGI's decision is correctness, not unreasonableness. It stated:

[19] There is no discretion on SGI's part with respect to these benefits. The victim is entitled to a benefit for medical and paramedical care, including transportation. The Regulations in effect at the appropriate time impose limits on the amount that will be paid but none of those limitations appear to apply here. For example, s. 43 provides that an expense for which the insurer may be or is required to reimburse a victim pursuant to Division 7 of Part VIII of the Act or this Part is

subject to any limit set out in the Act or these regulations or, where there is no limit as to amount, to an amount that the insurer considers is reasonable. Thus, where there is no discretion to provide a benefit, asking whether the decision was “unreasonable” is not the appropriate standard. The appropriate standard is correctness.

[19] The Court of Appeal concluded that, where an appellant disputes SGI’s decision and places SGI’s findings of fact in issue and there is no discretion whether to grant or deny the benefit, the standard of review is correctness. Specifically, it stated:

[20] Where the facts are placed in issue, as they are here, the appeal commission has an obligation to receive and consider any new evidence submitted by the appellant and, depending on the nature of the hearing which is conducted, to consider as well the evidence received by SGI in making the finding of fact or facts in dispute on the appeal. The appeal commission must determine whether the decision of SGI was erroneous having regard to all the evidence. The factual issue for determination within the case was whether there was a causal link between the benefits claimed and the injuries caused by the accident of September 8, 2001.

[21] Notwithstanding its comments on the appropriate standard of review, the Commission in fact applied the proper standard, i.e. correctness. It conducted a hearing, heard the evidence of the appellant and reviewed the record including certain documentary evidence concerning the issue of causation to determine whether or not there was a causal link between the transportation benefits and mental health benefits claimed and the injury.

[20] In this case, the Appellant has put SGI’s findings of fact in dispute in that SGI concluded that the condition resulting in the breast reduction surgery was not a result of the accident. The Appellant submitted that the surgery was necessary to her recovery. The factual issue for determination is whether there is a causal link between the benefits claimed, specifically income replacement and permanent impairment benefits for scarring, and the injuries caused in the accident.

[21] In the Appellant’s case, the basis upon which SGI provides Part VIII no fault benefits to the Appellant is set out in sections 101(1.1), 113(2) and 152 of *The Automobile Accident Insurance Act*<sup>1</sup> (the “Act”) and Section 14 of *The Personal Injury Benefits Regulations*<sup>2</sup> (the “Regulations”) in force at the time of her on accident January 20, 2004. The relevant sections of the Act are:

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<sup>1</sup> RSS 1978, c. A-35 (2002)

<sup>2</sup> Chapter A-35 Reg 3 (effective January 1, 1995) as amended.

**101(1.1)** This Part applies to any person who sustained bodily injury caused by a motor vehicle arising out of an accident on or after the date that this Part comes into force and who has not provided the insurer with a tort election in the manner prescribed by Part IV.

**113(2)** An insured is entitled to an income replacement benefit if, as a result of an accident, the insured:

- (a) is unable to continue an employment held by the insured at the date of the accident;
- (b) is unable to hold an employment he or she would have held in the first 180-day period following the accident if the accident had not occurred; or
- (c) is deprived of benefits pursuant to the *Employment Insurance Act* (Canada) or any other prescribed benefits to which he or she was entitled at the date of the accident.

**152** Subject to this Division and the regulations, an insured who suffers a permanent impairment because of the accident is entitled to a lump sum benefit for the permanent impairment.

Section 14 of the *Regulations* states:

**14** For the purposes of the Act, an insured is unable to hold employment if a bodily injury that was caused by the accident renders the insured entirely or substantially unable to perform the essential duties of the employment that the insured:

- (a) performed at the date of the accident;
- (b) would have performed but for the accident.

[22] In accordance with Section 101(1.1) of the *Act*, the Appellant must prove that the breast reduction surgery was a result of injuries caused in the accident. There is no entitlement to any benefits under Part VIII unless the bodily injuries are caused by the motor vehicle accident.

[23] If the breast reduction surgery was the result of bodily injuries caused in the accident, then it must be determined what the appropriate standard of review is for the benefits claimed by the Appellant, specifically income replacement benefits and permanent impairment benefits for scarring.

[24] There is no discretion on SGI's part with respect to the benefits in Section 113 and 152 of the *Act*. The wording and intent of Section 113 of the *Act* combined with the wording of Section 14 of the *Regulations* are that the claimant is entitled to an income replacement benefit if she is unable to work because the bodily injury caused in the accident renders her entirely or

substantially unable to perform the essential duties of her employment. Similarly, if the Appellant suffers a permanent impairment because of the accident, she is entitled to a lump sum benefit for that impairment pursuant to Section 152 of the *Act*. Therefore, in accordance with *Allary*, it is our opinion that there is no discretion on SGI's part in providing the above benefits and the Commission must determine whether the decision of SGI was erroneous having regard to all of the evidence.

## ANALYSIS

[25] The Appellant submitted that she should be entitled to income replacement benefits for her breast reduction surgery because the reduction was recommended and prescribed by her physicians to assist in her recovery from accident injuries. She further submitted that SGI is required to pay for work time lost due to accident related injuries. The Appellant submitted that after the accident she no longer had a choice of whether to proceed with the surgery or not. She is claiming income replacement benefits from May 16, 2004 to June 15, 2004 and permanent impairment benefits associated with the scarring resulting from her breast reduction surgery.

[26] Mr. McLeod, legal counsel for SGI, submitted that the Appellant is not entitled to income replacement benefits or permanent impairment benefits as they relate to her breast reduction surgery because the surgery did not occur as a result of bodily injury caused or arising out of the accident. Furthermore, Mr. McLeod submitted that the breast reduction surgery had been recommended to the Appellant to relieve her musculo-skeletal symptoms which pre-existed the accident. Mr. McLeod argued that in order to find that the Appellant's breast reduction surgery was caused by the accident one would have to manipulate the *Act*. He relied upon *Saskatchewan Government Insurance v. Robert Bogdanoff*<sup>3</sup> which stated that "the actual words used, as well as the intent demonstrated, show that this *Act* was not intended as a general insurance scheme for any person with a pre-existing problem who sustained an injury, no matter how small, in an accident within the *Act*". Mr. McLeod further submitted that even if we concluded that the surgery was a direct result of injuries sustained in the accident we would have to apportion the

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<sup>3</sup> 2001 SKCA 35 (leave to appeal to the Supreme Court of Canada dismissed September 13, 2001), 219 Sask. R. 160. The decision reversed in part the decision in *Bogdanoff v. Saskatchewan Government Insurance*, 1999 SKQB 342.

benefits in accordance with what portion of the surgery related to pre-existing injuries and what related to accident injuries.

[27] The facts of this case with respect to causation of the Appellant's injuries are in dispute. The Appellant admitted to back pain prior to the accident. It is clear she was receiving fairly regular chiropractic treatment for her back pain prior to January 20, 2004. She stated that her back pain and headaches were exacerbated by the accident and this is supported by the documented medical examinations, reports and testimony of the family physician. The exacerbation of the Appellant's back pain is not disputed by SGI. The Appellant clearly had a consultation for a breast reduction surgery prior to the accident. There is no dispute that the Appellant experienced immediate relief of her neck and back pain following her surgery. What is disputed by the Appellant is that she was not scheduled for the breast reduction surgery at the time of the accident. Although, she testified that she had not made up her mind about the surgery, both the plastic surgeon and the family physician were of the opinion that she was going to proceed with it in any event and regardless of the accident. It is our opinion also that the Appellant would have proceeded with the breast reduction surgery despite the injuries suffered in the accident. She had a long history of upper back pain complaints and had obtained her consultation with the plastic surgeon following the birth of her third and final child. The family physician advised that the Appellant would not be considered for a breast reduction surgery until she had made a decision that she would not be having any more children. We find that the timing of the consultation with the plastic surgeon supports our findings that: the Appellant was seriously considering breast reduction surgery; was going to proceed with it; and consequently had her name placed on the waiting list prior to her accident. In addition, we note that the plastic surgeon placed her on the more urgent list due to the ulnar nerve symptoms that she was experiencing, which symptoms pre-existed the accident.

[28] We would agree that the Appellant suffered an exacerbation to her neck and back pain as a result of the accident. However, it is important to note that the breast reduction surgery was contemplated prior to the accident in order to relieve pre-existing musculo-skeletal symptoms and ulnar nerve symptoms and we find that the Appellant would have proceeded with the surgery regardless of the injuries sustained in the accident. The Appellant's original position prior to the

accident was symptomatic and remained symptomatic up until her surgery. We would also agree with Dr. Mierau that the dramatic recovery of her symptoms following the surgery would suggest that the symptoms that remained prior to surgery were pre-existing and due to her lengthy ongoing history of neck and back pain.

[29] In our opinion, the fact that we believe the Appellant would have proceeded with the surgery in any event and regardless of her accident in order to relieve a pre-existing history of back and neck pain and ulnar symptoms is critical in this case. Similarly, the immediate relief of symptoms following the surgery strongly suggests that the ongoing symptoms prior to the surgery were no longer related to the exacerbation of her injuries caused by the accident but were related to her ongoing history of neck and back pain. Accordingly, having regard to all of the evidence we find that the ongoing neck and back symptoms prior to the breast reduction surgery were no longer a result of the exacerbation of injuries suffered in the accident and therefore, we conclude that the Appellant's surgery was due to her pre-existing musculoskeletal and ulnar nerve symptoms and not due to injuries suffered or exacerbated in the accident.

[30] In light of our findings on causation, we are of the opinion that the decisions of SGI which deny the Appellant income replacement and permanent impairment benefits are correct. The Appellant's time lost from work to recover from surgery is the result of a pre-existing condition and not accident related injuries and she is therefore not entitled to income replacement benefits for that period of time as the intent of Section 113 is to compensate for time off work due to accident related injuries. Further, the Appellant would have proceeded with the breast reduction surgery regardless of the injuries suffered in the accident, therefore we are unable to conclude that she would be entitled to permanent impairment benefits for scarring resulting from the surgery. The scars are a result of the surgery that was contemplated prior to the accident as a result of pre-existing musculoskeletal and ulnar nerve problems and therefore is not compensable as scars resulting from a surgery related to accident injuries.

[31] Accordingly, the decisions of SGI which denied the Appellant benefits for income replacement and permanent impairment as they related to her breast reduction surgery are upheld.

[32] We have also considered whether the breast reduction surgery could be considered a measure or treatment which was necessary or advisable to contribute to the rehabilitation of the Appellant, to lessen her disability resulting from the accident and/or to facilitate her recovery from the accident as provided in Section 112 of the *Act*. It is our opinion that the Appellant's ongoing symptoms were not related to the exacerbation of symptoms suffered in the accident. Further we find the Appellant would have proceeded with the surgery in any event due to her pre-existing musculoskeletal and ulnar nerve problems and we are unable to conclude that it was necessary to the rehabilitation of her accident related injuries.

### CONCLUSION

[33] The decisions made by Saskatchewan Government Insurance ("SGI") dated November 2, 2004 which denied the Appellant entitlement to income replacement benefits and permanent impairment benefits for breast reduction surgery is upheld.

**Dated** at Saskatoon, Saskatchewan, on October 27, 2006.

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Joy Dobko, Chair

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Stephanie Pfefferle, Commission Member

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Carol Olson, Commission Member