

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *C.R. v. Saskatchewan Government
Insurance, 2006 SKAIA 076*
Date: 20061127
File: 165 of 2004

BETWEEN

C.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
William Selnes, for the Applicant
Murray Hinds, for the Respondent

Before: **Joy Dobko, Chair**
Barbara Tomkins, Commission Member
Darleen Topp, Commission Member

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

Heard at Prince Albert, Saskatchewan
September 11 and 12, 2006

DECISION

INTRODUCTION

[1] The Appellant, C.R., was injured in a motor vehicle accident on December 25, 2001. By decision letter dated September 7, 2004, SGI advised that:

. . . it is [the medical consultant's] opinion that any injuries that occurred on December 25, 2001, have long since recovered and are not contributing to any of your ongoing symptoms, therefore effective immediately we will no longer cover the costs of any and all therapy, other expenses associated with attending therapy and your income replacement benefit is terminated.

[2] The Appellant appeals this decision.

PRELIMINARY ISSUE - Exclusion of Witnesses

[3] At the beginning of the hearing, counsel for the Appellant requested an order excluding witnesses, and in particular, Dr. Alport. Dr. Alport had provided reports relevant to the appeal issues and would be called as a witness by SGI. Counsel for SGI argued that he desired Dr. Alport to assist and instruct him in the course of the hearing, particularly in regard to the evidence which would be given by the claimant's physician and chiropractor.

[4] The Commission ruled that Dr. Alport would be excluded for purposes of lay evidence such as the Appellant's but that he could remain as an instructional witness for the testimony of expert witnesses. Similarly, experts for the claimant would be allowed to remain, either in person or by telephone, during Dr. Alport's evidence.

BACKGROUND

[5] The Appellant worked as a special care aide from 1993 to 1994. She held other employment until 1999 when she returned to work as a special care aide. Early in 2001, she gave birth to a child and took maternity leave. She returned to work late in December of 2001. At that time, she held casual positions at two care facilities, one in [town 1] and one at [town 2]. While on her way to work for her fourth or fifth shift after returning from maternity leave, she was involved in a motor vehicle accident.

[6] The Appellant attended to hospital the following day and complained of a sore neck and back. She was given painkillers, referred to physiotherapy and advised to stay off work for seven days.

[7] The Appellant completed an application for benefits under *The Automobile Accident Insurance Act* (“the Act”) on January 8, 2002. The required form lists various body parts and asks the claimant to indicate her pain level for each. Of thirteen parts listed, including lower back and mid-back, the Appellant indicated headaches and pain in her shoulders, hands, neck and arms. Similarly, on a part of the form where the claimant draws the areas of injury on a human figure, the Appellant indicated injury to the neck, shoulders, upper right arm and all of the left arm and hand.

[8] On December 28, she had an initial assessment at Fitzpatrick’s Physical Therapy Clinic. According to notes taken at the time, she complained of neck, shoulder and arm pain.

[9] On December 31, 2001, the Appellant saw her physician, Dr. Kirchgesner. He reported pain in various aspects of the cervical spine but no palpatory tenderness. Given the Appellant’s medical history, including previous neck injuries, Dr. Kirchgesner referred her to a neurosurgeon.

[10] Following two or three treatments at Fitzpatrick’s Physical Therapy Clinic in Prince Albert, the Appellant commenced treatment at the Humboldt Therapy Centre as it was more conveniently located. At her initial Assessment at the Humboldt Clinic on January 2, 2002, the Appellant reported neck pain, and pins and needles down her left arm and fingers. She reported that the right side of her neck was becoming painful. On examination, the physiotherapist noted, among other things, tenderness at C3-C4 and C6-T4 levels of the spine. A treatment plan was developed but deferred, on her physician’s advice, until after the Appellant saw the neurosurgeon.

[11] Dr. Hattingh, a neurosurgeon, reported on February 19, 2002. Her report deals exclusively with injuries to the Appellant’s neck, shoulder, arms and hand. She thought the ulnar nerve at the elbow was likely compressed and ordered further studies regarding this. Dr. Hattingh also indicated that the Appellant “also may have concurrent whiplash.”

[12] By May 29, Dr. Kirchengesner reported pain and limitations in all aspects of the cervical spine. He assessed the Appellant's condition as Grade III Whiplash-associated disorder and recommended a comprehensive assessment report. The Appellant was referred to three specialists.

[13] In the meantime, the Appellant also attended NRCS Inc., a rehabilitation centre. The initial assessment report, dated June 5, 2002, shows that the Appellant's complaints were unchanged; her neck and shoulders were painful and there was numbness and tingling in her right arm and hand. The Appellant advised that on-going massage therapy treatments had helped her to recover from the soft tissue injuries but that there had been no improvement in the numbness and tingling in her left arm, forearm and hand.

[14] Through NRCS Inc., a graduated return to work plan was developed. The Appellant would return to work commencing June 5, 2002, starting with limited hours and progressing to full-time hours on a gradual basis.

[15] On June 20, 2002, 2nd Avenue Physiotherapy Rehabilitation and Fitness Centre reported that the Appellant had discontinued her graduated return to work on the advice of her chiropractor because of lower back pain that had become "worse" in the last two weeks. In addition, complaints respecting neck pain and tingling in the right arm and hand continued. A multi-disciplinary assessment was recommended. The author recommended a supervised exercise program be undertaken pending the multidisciplinary assessment.

[16] Two letters from the Appellant's chiropractor, Dr. Martsinkiw, dated June 24 and July 2, 2002 indicate significant improvement in the Appellant's back.

[17] An NRCS progress report dated July 2, 2002 confirmed that the return to work plan was "on hold" and would remain so until medical clearance was provided. In the meantime, primary and secondary assessments had been arranged, reports reviewed and communications coordinated. Perhaps significantly, there is a notation as follows: "Review of a chart note from the client's physician which indicated that she had lower back pain a few days after the accident."

[18] The Multidisciplinary Assessment Team's report is dated July 12, 2002. The report contains a list titled "Problems Related to Injury" which includes mechanical pain/dysfunction at three spinal regions and the left ulnar mononeuropathy. Under a heading "Problems Likely Related to Injury", the report shows "Development of mechanical low back pain with entering into her graduated return to work program." In addition, the team provides a "Physical Abnormalities List Related to the Present Injury Claim that includes "Mild articular and myofascial findings in the lumbar spine." A list of physical abnormalities unrelated to the injury shows "none". The team is optimistic that the Appellant will fully recover and resume her pre-injury work. Eight weeks of secondary level treatment, preceding a four-week graduated return to work were anticipated.

[19] Second Avenue Physiotherapy Rehabilitation and Fitness Centre participated in the secondary treatment. In its July 31, 2002 Intake Assessment Report, the Centre indicates, as likely related to the work injury, "development of low back pain with entering into her graduated return to work program."

[20] By August 23, 2002, the Appellant's injuries were healing. She reported that she no longer had right arm symptoms and that her low back was 65 to 70% recovered. She was still experiencing problems with neck pain, left arm symptoms and headaches. The objective findings were encouraging.

[21] The Appellant arrived at Second Avenue Physiotherapy in tears on September 12, 2002. She reported that her back had given out that morning as she was taking her infant son out of his car seat. The pain was debilitating. By September 24, 2002, the severe symptoms were resolved. The Appellant reported continued intermittent neck, left upper arm and low back symptoms. She was approved to commence a graduated return to work plan commencing September 26, 2002, working four hours per day.

[22] By October 9, 2002, the Appellant was progressing in the graduated return to work and was by then working six hours per day. She commented that she found the work to be more physically demanding than she remembered and that it was difficult to find a routine including daily work or therapy, as well as usual activities of home care and family life. She was reassured

that this was normal before her body had time to become accustomed to demands that it had not met in some time.

[23] Medically, the lower back pain had become intermittent and she found relief with movement and keeping active. Her neck pain remained constant but was relieved with medication. She reported, however, that her left shoulder and elbow had been aggravated since returning to work. NRCS Inc. was optimistic that she would complete the rehabilitation plan and be discharged by October 31, 2002.

[24] This did not occur. On October 22, the Appellant's physician recommended that she work fewer hours per week or take less strenuous work.

[25] Coincidentally, the Physical Therapy Follow-Up Report of the same date, October 22, indicates that the Appellant found her headaches and neck symptoms to be manageable. She advised that her right arm had been good but the left continued to ache; the pain was not severe, she said, and did not prevent her from doing her regular work duties. But it was there all the time. She stated that her back had been doing well.

[26] Objective findings on that date showed neck flexion and bilateral rotations were full and pain free. Left side flexion elicited tightness in the left arm and the left side of the neck and upper shoulder. All movements of the lower back were full and pain free.

[27] The Appellant was encouraged to continue with her graduated return to work. Dr. Marchildon opined that there were no signs that working according to the plan had caused harm.

[28] Progress Report 4, dated November 21, 2002 confirmed that the Appellant had returned to near full-time hours and had thereby returned to pre-accident duties and hours. A physiotherapist was monitoring her as she increased her hours of work and no signs of harm had been noted.

[29] On November 24, 2002, the Appellant saw Dr. Truchan, a rheumatologist, who formed the impression that the Appellant had developed fibromyalgia. She recommended a gradual return to previous duties, not to reach full-time until the end of December. On January 29, 2003,

Dr. Cenaiko, the Appellant's general practitioner, advised that the Appellant was taking a medication that had a sedative effect and consequently, she should not work more than four hours per shift and a maximum of twenty hours per week.

[30] On March 19, 2003, Dr. Truchan advised that the tentative diagnosis of fibromyalgia had been in error. Certain elevated levels in the Appellant's blood suggested possible underlying inflammatory arthropathy or infectious process. Dr. Truchan recommended further testing to better diagnose the underlying condition and further recommended that the Appellant take leave of absence from work for two months.

[31] NCRS Inc.'s fifth progress report summarizes the challenges by then facing the Appellant. All related to her lower back condition and were listed as follows:

- Dr. Truchan had recommended two months' leave from work.
- The Appellant needed eight hours of uninterrupted sleep. This limited her ability to work evening and morning shifts in her two different jobs, especially considering necessary travel time.
- The Appellant was taking a medication that had a sedative effect. She could not take this before arriving home from work and if she left it until she got home, she could not wake in time for the next morning's shift.

[32] Treatment, unless specifically recommended (such as on-going chiropractic treatments), was suspended pending completion of tests that Dr. Truchan had recommended.

[33] Following some of the testing requested, Dr. Truchan suggested a diagnosis of ankylosing spondylitis.

[34] By July 5, 2003, Dr. Cenaiko, the Appellant's general practitioner, reported that the Appellant's complaints at that time were low back pain and numbness in two fingers of the left hand. He advised that there was definite tenderness in the lumbosacral area and diagnosed arthritis, probably secondary to the injury.

[35] A CT scan was scheduled for October 2003. In the meantime, a return to work plan was developed and approved by the health professionals involved in the Appellant's care. The

Appellant also agreed to the plan. On this basis, she returned to work commencing July 30, 2003 and was working full-time hours within weeks thereafter. She was strictly prohibited from heavy lifting but otherwise without restriction.

[36] By October 9, 2003, it was reported that the Appellant was working between eight and 35 hours per week in shifts as short as three hours or as long as 12 hours. The Appellant continued to attend chiropractic treatment once or twice a week while working to manage her lower back pain. The Appellant was reported to have said that her back symptoms were aggravated by work and that she thought her status was progressively getting worse.

[37] Dr. Truchan had ordered an MRI with a view to determining the nature of the cause of the Appellant's back pain – mechanical or inflammatory. The status quo remained pending the MRI. The Appellant's file was submitted to SGI's medical consultant, Dr. Alport, for his opinion whether an out-of-province MRI should be considered. In reviewing the file for this purpose, Dr. Alport came to the conclusion that it was unlikely the Appellant's back injury was caused by the December 25, 2001 vehicle accident.

[38] The Appellant's in-province MRI was done in May 2004. She saw Dr. Ebenezer, a neurosurgeon in Saskatoon, on July 21, 2004. After reviewing the MRI results, he noted minimal disc bulges and two lumbar levels but noted that they were not causing significant nerve root compression. He recommended continued conservative treatment.

[39] By this time, the Appellant was working hours equivalent to those that she had worked before the accident. However, she had secured work as a cook and in the laundry for most of her hours. She did work some shifts as a special care aide but indicates that this work exacerbated her back pain. (It is important to note that the position she is filling as cook is temporary and there is a very real likelihood that this position will not be available to her after December 2007.)

[40] Testing being complete, the matter was again referred to Dr. Alport for his review and comment. His opinion was unchanged. In his August 30, 2004 report, Dr. Alport provided his opinion that "any injuries that occurred on December 25, 2001 have long since recovered, and are not contributing to any of her ongoing symptoms."

[41] On September 7, 2004, SGI advised the Appellant that, based on their medical consultant's review of the file, SGI had decided to terminate benefits for therapy, expenses associated with therapy and income replacement benefits. It is this decision to terminate that the Appellant has appealed to our Commission.

[42] At the time of this decision and continuing to the date of hearing, the Appellant was fully employed but primarily as a cook and in the laundry. It was the Appellant's position that the back pain remained and that it prevented her from resuming her pre-injury work as a special care aide. As was noted above, it is possible that her current work will not be available after December 2007 and she may be required to resume duties as a special care aide. It is for this reason that the matter remains relevant, notwithstanding her current work status. The Appellant's other injuries are either managed or resolved.

CAUSATION

[43] At the time of hearing, all submissions respecting the Appellant's eligibility or ineligibility focused on her back injury. SGI submitted that the Appellant had not suffered a back injury in the accident at all. In support, SGI reviewed the records and suggested that the Appellant had not reported any injury to her lower back until June 2002, six months after the motor vehicle accident. SGI also noted that there is no record of treatment for a lower back injury until June 2002.

[44] The Appellant, on the other hand, suggested that she had suffered a back injury and had reported it from the outset. She testified that, while the back injury had persisted and worsened, it was not initially particularly significant and was not the focus of her attention or that of those who treated her. She says that over time, it became worse and significantly affected her ability to return to her pre-accident employment.

[45] In *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB98113 at paragraph 5, Justice Wimmer stated:

Cases dealing with disability insurance contracts hold that the insured has the onus of establishing that he or she is disabled within the meaning of the policy and, having done so, the onus shifts to the insurer to prove that benefits are not,

or are no longer, payable. Also, the fact that the insurer at one time accepted the claim may weigh the balance in favour of the insured.

[46] Applying this test, the Appellant has established that she was disabled for purposes of the Act. As such, the onus to establish that benefits are no longer payable falls to SGI.

[47] We are satisfied that SGI has met the onus upon it. A review of the documentary evidence shows that the Appellant reported neck and back pain on December 26, 2001. However, she was not treated in respect of any back pain and there is no further recorded report of a lower back injury from the December 25, 2001 accident until June 9, 2002 when Dr. Martsinkiw's clinical notes indicate mechanical lower back pain. This corresponds closely to reports of other health care professionals involved in her care. The first mention of lower back pain appears in their reports as follows:

- 2nd Avenue Physiotherapy – June 20, 2002
- NCRS Inc. – July 20, 2002
- Multi-Disciplinary Team – July 12, 2002

[48] It is important to note, as well, that all of these reports speak of a low back injury in relation to the Appellant's return to work. While the Appellant testified that she noticed and reported her lower back injury immediately following the accident, she also testified that the pain in her back started in May 2002 and, in reference to her June 2002 return to work, said, "This is when I started having problems with my lower back." We cannot reconcile the Appellant's assertion that she suffered an injury to her lower back in December 2001 with the evidence before us, including these and certain other statements of the Appellant's. Instead, we have concluded that the injury to the Appellant's lower back occurred when she attempted the return to work program arranged for her in June 2002.

[49] In so concluding, we are mindful of certain details in those reports. 2nd Avenue Physiotherapy's June 20 report indicated that the lower back pain had become "worse" in the previous two weeks. This suggests, of course, that it was pre-existing. However, it is also consistent with an injury in early June.

[50] The Multidisciplinary Assessment Team's July 12 report, after twice indicating that the back injury occurred when the Appellant entered the graduated return to work program, nonetheless concludes that it was a problem "likely related to the injury" and was a physical abnormality "related to the present injury claim". On first blush, this is troubling. However, when an injury occurs some months after an accident and clearly not in the course of the accident, the question of the relationship between that subsequent injury and the accident is not a medical question for the multidisciplinary team. It is a matter for SGI, the claimant and, in this case, this Commission. While the team's opinion may be of interest, it is not decisive. Without explanation, the bare conclusion carries little weight.

[51] The NCRS report on July 20 noted that the physician's chart showed a report of lower back pain a few days after the accident. However, our careful review of those notes shows no such entry; as is noted above, the first entry we have found in Dr. Kirchgessner's chart relating to a low back injury is dated June 11, 2002. In it, he notes low back pain and "worked Fri, Sat & Sun"; the quoted notation must be read as relating to the reported injury and therefore, must be taken to mean that the Appellant suffered low back pain after working the three noted shifts.

[52] Dr. Martsinkiw's file is particularly helpful in regard this matter. The Appellant commenced consultation with Dr. Martsinkiw, a chiropractor, on June 9, 2002. His chart notation for that date indicates low back pain. More significant, however, is the Confidential Patient History that the Appellant completed for Dr. Martsinkiw. On the forms the Appellant indicates that her lower back and left shoulder are her major complaints. In answer to the question of what brought the condition on, the Appellant wrote "Don't know". Dr. Martsinkiw's chart note made the same date states "low back pain. No specific incident." These notations are wholly inconsistent with a suggestion that the back pain related to the December 2001 motor vehicle accident.

[53] We note the Appellant's submission that her primary health care providers – chiropractor Dr. Broker and physician Dr. Cenaiko – both of whom examined her and treated her, testified that the accident was a likely cause of the lower back injury. She notes, correctly, that SGI's consultant has never had this opportunity.

[54] However, we note that neither Dr. Broker nor Dr. Cenaiko was treating the Appellant at the time of the accident. She first saw Dr. Cenaiko in January 2003 and Dr. Broker in November 2002. Their reporting, therefore, that she suffered lower back pain immediately following the accident in December 2001 is based solely on her reporting. Indeed, Dr. Broker confirmed that his belief that she had experienced low back pain from the time of the accident was based on information that the Appellant gave him. There is no indication that either of them had reason to or had conducted a full review of the Appellant's complete medical files.

[55] Further, neither attributed the Appellant's current back injury directly to her December 2001 accident; they said that it was likely related to motor vehicle accidents. Dr. Cenaiko spoke of the cumulative effect of vehicle accident injuries and stated that you can't say that the injury, in these circumstances, is a consequence of any particular accident.

[56] This being the case, we do not believe that the evidence of Dr. Broker and Dr. Cenaiko regarding the time of onset of low back symptoms should be given any greater weight than that of the Appellant herself or of any other health care professional involved in her care.

[57] In closing, we should comment on SGI's submission that the Appellant's lower back injury may be related to or an exacerbation of prior injuries. The Appellant was involved in other vehicle accidents in 1990, 1992 and 1993, all of which involved spinal injury including the lower back. She also had a work injury relating to her lower back in about 1992. SGI suggested it may be that the current lower back injury relates in some manner to some or all of these prior injuries. In this regard, we have not found or been referred to significant evidence in support of this submission.

[58] For the interest of the parties, we will advise that had we concluded that the injury was related to the December 2001 accident, we would have also concluded that the obligation on SGI would continue until the Appellant was able to undertake her pre-injury employment as a special care aide. While it may be that years earlier her physician had recommended, in light of previous injuries, that she not undertake such strenuous work, the fact is that she did and that she did the work apparently satisfactorily and without injury or pain for some time before the December 2001 accident. It is not appropriate for SGI to suggest that, for her own good, she

shouldn't have been doing this work and that its obligation is thereby limited to her capability to assume some other less strenuous work.

OBLIGATIONS IN REGARD TO POST-ACCIDENT INJURY

[59] In *Deibert v. Giddings* [2003] S.J. No. 811, 242 Sask. R. 184, 2003 SKQB 533 (CanLII), the plaintiff suffered injuries in a motor vehicle accident. Some months following the accident, Mr. Diebert attended the Canadian Back Institute for a conditioning program, including physiotherapy. He alleged that he was injured in the course of the physiotherapy and that the new injury should be compensable as if it was caused in the vehicle accident. Madam Justice Pritchard held:

It is a well established principle that where a first tortfeasor causes injury which requires the victim to seek medical attention, that tortfeasor also assumes the risks of medical error or misadventure provided that these are reasonably foreseeable and not too remote.

[60] In this case, the Appellant was injured while participating in a graduated return to work program that was recommended and developed as part of her rehabilitation plan. The issues are whether this can be considered "treatment" of a nature that will come within the ambit of the *Deibert v. Giddings* decision and, if so, whether the injury was reasonably foreseeable and not too remote.

[61] SGI has submitted that the Appellant's circumstances will not come within ambit of the decision. SGI points out that the Appellant was not seeking any form of medical attention or medical treatment when she returned to work as a special care aide. Medical attention and medical treatment, SGI submits, necessarily import intervention by a health care provider. In any event, SGI submits that the injury suffered is unrelated to the injuries that the Appellant suffered in the accident and is not a foreseeable consequence of her return to work.

[62] The Appellant submits, to the contrary, that SGI's view of the decision is unnecessarily limited. A graduated return to work will often be indicated for a person injured in an accident, particularly if that work is strenuous. Insured parties often continue treatment concurrent with and even consequent on the return to work. The return to work, she submits, is part of a

treatment program. The Appellant has also taken the position that SGI is incorrect in suggesting that the injury suffered is too remote.

[63] We believe that the principle set out in *Deibert v. Giddings* should be given a reasonable and practical application. In this respect, we agree with the Appellant that a graduated return to work program developed by health care professionals as part of a rehabilitation plan is “treatment” for purposes of the *Deibert* principle.

[64] We turn, then, to the question of foreseeability. We have concluded that the Appellant’s current back injury is not a consequence of the December 25, 2001 vehicle accident and that it is wholly the result of her return to work in June 2002. As such, it is being suggested that SGI might be responsible, under the *Deibert* principle, for an injury incurred in the course of a graduated return to work and that is wholly unrelated to the injuries suffered in the vehicle accident.

[65] Without commenting on whether there can or will be cases where such a finding might be appropriate, we have concluded that this is not one of them. In this case, SGI could be expected to be responsible had the Appellant suffered and exacerbation of a vehicle injury or if she had sustained an injury somehow consequent on one of the vehicle injuries. However, we cannot reasonably extend responsibility to a situation where the new injury is wholly unrelated. If, for example, the Appellant had accidentally slipped and broken her arm, it would be unreasonable to extend responsibility for the broken arm to SGI. It is simply not foreseeable. This is similarly true in respect of the Appellant’s back injury.

ESTOPPEL

[66] Finally, it has been suggested that even though the Appellant’s back injury was not caused by the December 25, 2001 accident, SGI remains responsible to provide benefits in respect of that injury by virtue of the doctrine of estoppel.

[67] SGI had concluded or assumed that the Appellant’s back injury was sustained in the December 2001 vehicle accident and gave benefits on that basis until September 7, 2004. Benefits were terminated when, upon reconsideration, SGI determined that the injury was not

sustained in the vehicle accident at all. For reasons given above, the Commission agrees with SGI's latter conclusion and it is our view that the Appellant suffered an injury at work in June 2002.

[68] It has been argued that, having paid benefits for a period of approximately 15 months, SGI is estopped from discontinuing those benefits now. The Appellant suggests that had SGI denied benefits from the time the back injury was first recorded and compensated, she would have had an opportunity to report the matter to the Workers' Compensation Board and receive compensation on that basis. Given a six-month statutory time limit for filing workers' compensation claims, the Appellant is now precluded from making such a claim. She says her ability to receive on-going compensation has been precluded as a direct result of SGI's inaccurate decision.

[69] The parties have both referred the Commission to *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, 1991 CanLII 58 (S.C.C.) and *Regina Sticks Ltd. v. Saskatchewan Government Insurance* [1993] S.J. No. 363 (Sask. C.A.) as the leading applicable case in this jurisdiction.

[70] Those cases establish first, that the doctrine of estoppel applies to insurance contracts and second, that the elements required to establish estoppel are:

- 1) A clear and unequivocal representation made by words or conduct;
- 2) That is intended to be relied on;
- 3) That is relied upon by action or inaction; and
- 4) That alters the party's position to his or her detriment.

[71] The parties are agreed as to these elements, as is the Commission. We will discuss each individually.

1. Clear and unequivocal representation made by words or conduct:

SGI's decision to pay and the payment of benefits in respect of the Appellant's back injury was clearly a representation that the condition was covered under Part VIII of *The Automobile Accident Insurance Act*. Not only were benefits paid, but SGI sought and obtained on-going medical reports respecting the progress of treatment and their effectiveness; its decisions respecting treatment and rehabilitation were founded on these documents. For example, when the Appellant's health care

providers indicated that she should reduce duties or refrain from working as a result of the condition, SGI acquiesced in those actions.

The decision was both clear and unequivocal. SGI did not at any point before September 2004 suggest to the Appellant that it had any reservations about the causation factor or any other matter. The decision relayed to the Appellant was that the back injury had been accepted and would be and was covered as a motor vehicle injury.

We are satisfied that the circumstances meet the first element necessary to estoppel.

2. That is intended to be relied on:

SGI has suggested that there was no intention that the Appellant should forgo other remedies despite coverage under the Act. The Appellant says, in effect, that this is an unrealistic position. Once SGI had accepted her claim, an application for workers' compensation was precluded.

We agree with the Appellant's submission in this respect. While she could have applied in the literal sense of completing the workers' compensation application forms, there was no possibility that she would receive coverage as long as her claim had been accepted by SGI. There was no purpose in her making that application and no intention by either party that she would. The intention of the parties was that she would continue to receive benefits under Part VIII of the Act for so long as she was eligible to receive them.

3. That is relied upon by action or inaction:

The Appellant injured her back, either in a motor vehicle accident or in a work related incident. She was entitled to apply for disability and rehabilitation benefits under Part VIII of the Act if the former and under the workers' compensation plan if the latter. As a result of SGI's decision and representation that it accepted the injury as related to the vehicle accident, the Appellant did not make an application for workers' compensation benefits in respect of the injury.

There are some uncertainty in relation to this matter. Would the Appellant have applied for workers' compensation benefits? She did not testify directly in respect of this issue. However, we are aware that she had applied for and received workers' compensation benefits in respect of a neck and back injury that she suffered at work when transferring a resident in about 1992. Given this, it is clear that the Appellant was aware of the availability of workers' compensation benefits and it is reasonable to conclude that, had her claim respecting the back injury been rejected by SGI as unrelated to the motor vehicle accident, she would have sought workers' compensation benefits.

4. That alters the party's position to his or her detriment.

The Appellant received a substantial benefit to which she was not entitled when SGI provided coverage relating to her lower back injury from June 2002 until September 2004. Ironically, however, the payment of those benefits created a landscape whereby the Appellant became unable to apply and be considered for alternative benefits that may have provided coverage beyond September 2004. This is a clear detriment to the Appellant.

[72] In *Ryan v. Moore* [2005] S.C.R. 53, 2005 SCC 38 (CanLII) (SCC), Bastarache, J. confirmed that there are six kinds of estoppel: estoppel by representation of fact, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed and estoppel by negligence.

[73] He discussed estoppel by representation and estoppel by convention in detail. He quotes with approval, from Bower's *The Law Relating to Estoppel by Representation* where Bower says:

An estoppel by convention, it is submitted, is an estoppel by representation of fact, a promissory estoppel or a proprietary estoppel, in which the relevant proposition is established, not by representation or promise by one party to another, but by mutual, express or implicit, assent. This form of estoppel is founded, not on a representation made by a representor and believed by a representee, but on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. When the parties have so acted in their relationship upon the agreed assumption that the given state of facts or law is to be accepted between them as true, that it would be unfair on one for the other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is as to a matter of fact, or promissory and/or proprietary.

[74] Following reference to this and other authorities, Justice Bastarache concluded that the following form the basis of the doctrine of estoppel by convention:

- The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
- A party must have conducted itself, i.e. acted, in reliance on such a shared assumption, its actions resulting in a change of its legal position.
- It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[75] Given the discussion above, we do not think it necessary to analyze each of Justice Bastarache's elements of estoppel by convention individually. We are satisfied that an estoppel

by representation, by virtue of the implicit assent of the parties, is an estoppel by convention and that the circumstances of this case so establish such convention. We are also satisfied that, because the passage of time has precluded the Appellant from seeking another and more appropriate remedy via workers' compensation, it would be unfair to allow SGI to resile from the assumption of coverage some fifteen months after it commenced.

[76] In so concluding, we are mindful of SGI's submission that it cannot be expected, by reason of accepting a claim, to be responsible for benefits indefinitely. We agree. When SGI provides coverage under the Act, it is not forever bound by that decision. Decisions respecting liability and coverage are complicated and errors can be made. Also, information gathered as a claim progresses will occasionally suggest an error in a prior decision. We do not believe that SGI is generally forever bound by its decisions; it will make mistakes and is generally entitled to correct them. But SGI must also be responsible for the consequences of its errors.

[77] Each case must be considered individually. In this case, the error persisted for such time that the Appellant's alternatives were irreparably compromised. In those circumstances and in accordance with the law of estoppel, we believe that SGI bears responsibility and must provide on-going benefits to the Appellant as if the shared assumption – that the injuries were caused in the December 2001 accident – was correct.

CONCLUSION

[78] By reason of estoppel and for that reason only, we have concluded that SGI's decision to terminate IRB is wrong and is set aside. SGI shall pay benefits in respect of the back injury as if it occurred during and is a direct consequence of the Appellant's December 2001 motor vehicle accident.

[79] As the Appellant has been successful in her appeal, she shall have reimbursement of her reasonable expenses relating to the appeal in accordance with section 193(11) of *The Automobile Accident Insurance Act* and section 96 of *The Personal Injury Benefits Regulations*. In addition her appeal fee will be refunded in accordance with section 86(4) of the regulations.

Dated at Regina, Saskatchewan, on November 27, 2006.

Joy Dobko, Chair

Barbara Tomkins, Commission Member

Darleen Topp, Commission Member