

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *L.S. v. Saskatchewan Government  
Insurance, 2006 SKAIA 094*  
**Date:** 20061213  
**File:** 076 of 2005

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**BETWEEN**

**L.S., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**L.S., the Applicant**  
**Rod Rath, for the Respondent**

**Before:** **Barbara Tomkins, Chair**  
**Jeff Scott, Commission Member**  
**Jean MacKay, 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 Regina, Saskatchewan  
November 22, 2006

## DECISION

[1] The Appellant, L.S., was involved in a motor vehicle accident on June 3, 2003. As a result of injuries suffered in the accident, she received benefits under Part VIII of *The Automobile Accident Insurance Act* (“the Act”) until SGI terminated benefits by letter dated April 19, 2005. In that letter, SGI indicated that it had concluded that the Appellant was back to her pre-accident state. The Appellant disputes this conclusion and says that she suffered a permanent injury to her C5/6 disc space in the accident and that SGI’s decision to terminate benefits is wrong. She appealed to the Commission.

### THE DECISION LETTER

[2] In its decision letter dated April 19, 2005, SGI stated that it was of the view that the Appellant was back to her most recent pre-accident state and that, therefore, benefits would be discontinued.

[3] This letter is ambiguous on its face as it is not clear whether SGI intended to terminate only those benefits that the Appellant was then receiving or whether it intended to terminate her claim entirely. We think the use of the word “discontinue” may be significant as, in common English, one does not discontinue something that has not been considered or done. If so, the letter must be taken to apply only to benefits that were being paid at the time.

[4] In any case, we are of the view that the insurer’s decision in a case under Part VIII of *The Automobile Accident Insurance Act* is subject to the same rules of interpretation as any other insurance contract and should be read broadly against the insurer’s interest. In this regard, Justice Sherstobitoff, in *Wawanesa Mutual Insurance Co. v. Hewson*, 2004 SKCA 112 (CanLII), 254 Sask. R. 203, listed certain rules applicable to the interpretation

of insurance contracts, including the rule of *contra proferentem*<sup>1</sup>, and stated, with approval:

The *contra proferentum* rule is defined by Gordon Hilleker in *Liability Insurance in Canada*, at p. 30: [*C*]ontra proferentum, properly applied, is a rule for resolving a conflict between two reasonable but opposing interpretations of the policy wording. In such cases the interpretation to be adopted is that which favours the insured.

[5] That being the case, we have concluded that the April 19, 2005 decision letter relates only to benefits that the Appellant was receiving at that date; these are on-going chiropractic and massage therapy treatments. Our reasons in this decision shall be limited to a consideration of those benefits only. Should the Appellant be or become entitled to other benefits relating to or arising from the June 2003 accident, those shall be administered in the normal course and subject, if appropriate, to subsequent appeals before this Commission.

[6] In the course of the appeal hearing and in many of the documents filed, both parties spoke to a C5-6 subluxation and to the question of whether it was caused by or in the June 2003 accident. In light of our conclusion regarding the limited effect of SGI's decision letter, that matter is not within our jurisdiction at this time. That is, the jurisdiction of this panel is restricted by section 191 to matters in respect of which SGI has given a decision letter. SGI not having given a decision respecting the subluxation, the matter and the question of related benefits, if any, remain with SGI for its determination and decision.

## **JURISDICTION AND STANDARD OF REVIEW**

[7] The Commission derives its jurisdiction from section 191 of *The Automobile Accident Insurance Act*. The section indicates that appeals may be made to the

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<sup>1</sup> *contra proferentem* (often, as in the decision quoted, misspelled “proferentum”) is a Latin expression meaning “against the one bringing forth”.

Commission against SGI decisions made under Part VIII of the *Act*. By section 193(7), the Commission is empowered, upon appeal, to:

- (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.

[8] The Commission's standard of review has been addressed in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In that case, the Court of Appeal concluded that the Commission's appropriate standard of review depends on the nature of the decision under appeal. If an appellant disputes SGI's decision and places SGI's finding of fact in issue and if there is no discretion whether to grant or deny the benefit, the standard of review will be correctness.

[9] In this case, SGI concluded that the Appellant had returned to her most recent pre-accident state. The Appellant put SGI's findings of fact in issue by stating that she requires ongoing long-term chiropractic care in regard to on-going injuries arising from her accident. These are benefits that become payable pursuant to section 112 of the *Act* which reads in part as follows:

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

[10] The payment of benefits under this section involves the exercise of discretion by SGI. That is, the benefits are payable only after SGI, in its discretion, concludes that the particular measure, program or treatment is "necessary or advisable". In that circumstance, the Court in *Allary* concluded, the standard of review would be reasonableness.

[11] However, the Appellant's appeal does not involve the question of whether on-going chiropractic care and massage therapy treatment is necessary or advisable in her circumstances. It involves the consideration of whether those treatments, if necessary or advisable, relate to a disability *caused by the accident*. That is, SGI has concluded that whether the Appellant requires or benefits from on-going chiropractic care or massage

therapy or both, it is not as a result of a disability that was caused by her June 3, 2003 accident. This is a matter, then, to which the standard of correctness applies.

## **FACTS**

[12] The Appellant has a long history of back problems, dating back over 20 years. She was involved in motor vehicle accidents in 1985 and again in 1995. Her back was injured in both accidents and, she testified, she's had problems with her back for 21 years. While she was fully recovered from the injury sustained in the 1985 accident, the Appellant testified that her back was still occasionally symptomatic after the 1995 accident and remained so at the time of the accident that is under consideration in this appeal.

[13] On the afternoon of June 3, 2003, the Appellant was stopped at an intersection when her vehicle was struck from behind by another vehicle. The force of the impact was significant; the Appellant's vehicle was projected across the intersection and onto the grass by a building. Both vehicles were written off as total losses.

[14] The Appellant did not immediately seek medical attention but found that by evening, she was experiencing stiffening and neck pain. She was seen by Dr. Lok that evening and he diagnosed Grade II Whiplash Associated Disorder (WAD) and recommended physiotherapy and massage.

[15] In her Application for Part VIII Benefits, the Appellant identified her neck and shoulders as the areas of most severe injury, but also noted pain along the path of a seatbelt across her front torso and pain down the length of her centre back and across the width of her lower back.

[16] Dr. Moffatt, upon examining the Appellant on June 27, 2003, confirmed what the Appellant had indicated in her Application for Benefits. Tenderness was noted in all of the cervical, thoracic and lumbar aspects of the spine. He recorded Grade II WAD and Grade II low back pain. Dr. Moffatt recommended continued chiropractic treatment and massage therapy.

[17] The Appellant was referred for a secondary assessment which took place in late July 2003. In a report dated July 24, 2003, the assessment team reported objective determinations as follows:

- Slight left-side lumbosacral discomfort on flexion and side flexion;
- Weakness of lower abdominal and hip extensor muscles
- Discomfort on stressing posterior sacroiliac joints
- Tenderness centrally and to various specific points on the lumbar spine and over the sacroiliac joint;
- Slight hypomobility at the L5/S1 joint and in the mid-thoracic spine; and
- Discomfort in the cervical spine with no loss of range of motion.

[18] The assessment team concluded that massage therapy provided relief for “about a day” but that the on-going chiropractic treatment reportedly had good benefit. The Appellant, who had continued working, advised that by the end of a work day, the low back pain increased. Notwithstanding this, she was able to work and to manage activities of daily living.

[19] Considering their objective findings, the Appellant’s advice and applying their expertise, the Secondary Assessment Team recommended:

- Fitness training three times per week for six to eight weeks;
- Continued massage therapy and chiropractic treatment, with the goal of return to pre-accident frequency of about one or two treatments monthly;
- An ergonomic assessment at work; and
- A regular fitness program.

[20] In keeping with these recommendations, The Appellant attended to Courtside Sports Medicine and Rehabilitation Centre and completed a fitness program on October 17, 2003. In its Discharge Report, Courtside reported decreased pain in the neck and hip and decreased stiffness between the shoulder blades. They advised that the Appellant’s posture had improved. Other than suggesting a gym program, Courtside reported no restrictions on the Appellant in regard to normal activities.

[21] By report dated October 28, 2003, Dr. Moffatt reported that the Appellant continued to experience neck and upper back pain, facet irritation and reduced range of motion in certain areas of her back. He opined that the Appellant continued to suffer a Grade II WAD and Grade II lower back. He concluded that her condition had improved

overall but that she suffered occasional flare-ups. These, he recommended, should be treated by chiropractic care on an as needed basis.

[22] In her October 29, 2003 report, massage therapist Ms. Molesky, reported that the Appellant experienced a full range of motion in her lumbar spine and that there was no pain on palpitation. She indicated the Appellant's condition as "improving" to "resolved". Ms. Molesky did note, however, ongoing pain.

[23] A subsequent report from Dr. Moffatt, dated December 17, 2003, again showed significant improvement except when there were flare-ups.

[24] A Tertiary Assessment was conducted by a multi-disciplinary team comprised of a physician, a chiropractor, a physiotherapist, a kinesiologist, an occupational therapist, a nurse and a psychologist. At the assessment, the Appellant reported constant nagging pain in her back between her shoulder blades and intermittent pinching in her buttock. She indicated that her pain was exacerbated by sitting, bending and lying in certain positions.

[25] Objective findings seemed to confirm what the Appellant reported. She had full range of motion in her cervical and thoracolumbar spines and also in both hips but with pulling or pain in some areas with certain motions. There was tenderness on palpitation in her upper to mid-thoracic spine, as well as at the anterior and posterior sixth rib and left superior gluteal regions. The team concluded that the Appellant was not magnifying her symptoms and was realistic about their impact on her work and other daily activities. She was seen as putting forth generally full effort in the course of the testing and in trying to fully recover from her injuries.

[26] In its April 28, 2004 report, the team recommended:

- A jobsite visit;
- A supervised exercise program;
- Weaning from chiropractic and massage treatments from current frequency to pre-accident frequency; and
- Work breaks and exercises.

[27] The Appellant attended the recommended exercise program and its July 12, 2004 discharge report indicated that the Appellant's symptoms had improved in her central upper thoracic spine between the shoulder blades and also in her left hip area. In addition, the Appellant reported that the ergonomic improvements made at her work station made her symptoms less persistent and that she did not become as fatigued at the end of a work day. Continued exercise was recommended.

[28] Dr. Moffatt's report on his August 31, 2004 examination indicated that the Appellant continued to suffer cervical and thoracic Grade II WAD. While reporting that, subject to flare-ups, the Appellant had improved significantly, Dr. Moffatt opined that she should continue spinal manipulation and massage for "as long as it takes".

[29] Dr. Endsinn provided a number of opinions as the Appellant's recovery progressed, only one of which is relevant to the matter under consideration. His March 29, 2005 opinion was given after he received further medical information, including file notes from the Appellant's 1995 motor vehicle accident. On reviewing these, Dr. Endsinn concluded that the Appellant was functionally at her pre-June 2003 accident state and that the on-going treatment she required was for maintenance rather than rehabilitation.

[30] Following and primarily as a result of Dr. Endsinn's March 29, 2005 opinion, SGI terminated the Appellant's benefits. In an April 19, 2005 decision letter, the Personal Injury Representative referred to Dr. Endsinn's reports and specifically the March 29 report where he concluded that the Appellant was back to her most recent pre-accident state. The letter went on, "Effective the date you receive this letter benefits will be discontinued."

[31] A second Secondary Assessment was conducted in July 2005 by a team comprised of a physician, a chiropractor and a physiotherapist. Their careful report dated July 22, 2005, provided a good summary of the Appellant's complaints, a history of her treatment to that date and the team's conclusions and recommendations respecting on-going care.

[32] Subjectively, the Appellant reported a constant paraesthesia and aching pain over the base of her neck. She said the pain was there all the time but increased in severity during what she described as “flare ups”. She also reported intermittent soreness in her low back, upper back and shoulders and in her right upper arm when the right shoulder was particularly painful.

[33] The Appellant advised that her condition would flare every two or three weeks. During a period of flare up, her activities of daily living and work activities were affected but she said she did not change her activities; she carried on despite the pain and discomfort. The Appellant said that a flare up would not go away without chiropractic or massage therapy.

[34] The team observed that the Appellant had full ranges of motion in the shoulder girdle, and in the elbows, wrists and fingers. She had a full gross range of motion in the cervical spine but maintained cervical lordosis with forward flexion and cervical extension. Left cervical rotation was slightly limited as compared to the right. Right thoracic rotation was slightly limited when compared with left rotation. Similarly, she showed mild hypomobility into flexion at certain cervical segments and also, into left rotation and left flexion in the thoracic vertebrae.

[35] The Secondary Assessment Team noted that at the April 2004 tertiary assessment, the Appellant complained of constant aching pain in the upper back and an intermittent pinching pain in the left buttock. She denied headaches, anaesthesia or paraesthesia. However, by the time of this July 2005 secondary assessment, her complaints had changed to include paraesthesia and constant aching at the base of her neck. Her other complaints were substantially unchanged.

[36] At the time of the tertiary assessment, the Appellant was seeing her chiropractor and massage therapist two or three times per month; she continued at about that frequency at the time of the secondary assessment. The team said that this suggested very little change in the frequency of exacerbations and the need for symptom treatment over the 15 months between assessments.

[37] The team concluded:

[The Appellant] appears to have reached her maximum medical recovery. However, it is likely she will continue to experience periodic discomfort related to her accidents. Given these circumstances and her multiple accidents it is believed that she will likely require ongoing supportive care in the foreseeable future. The exact extent of this is difficult to forecast but an average based upon utilization over the past 12-18 months may provide a reasonable estimate for forecasting future costs.

[38] Dr. Moffatt provided a detailed history of his treatment of the Appellant, commencing on September 1, 1988. At that time she complained of upper back, neck and bilateral low back pain, apparently consequent on a vehicle accident in 1985. At that time, she advised that her problems would flare up occasionally and she took treatments as she needed until matters resolved. Between these flare-ups, she was symptom free. The number of treatments from 1988 to 1995 decreased to only four in all of 1994 and three prior to her August 25, 1995 accident. These treatments were to give relief of pain in the cervical spine and upper thoracic spine, and a few for the lower lumbar spine.

[39] After the 1995 accident, the frequency of treatment increased. The Appellant saw Dr. Moffatt seven times that year after August 25. In 1996, there were 30 treatments and fourteen in 1997. The number of treatments continued to decrease until 2002, when the Appellant saw Dr. Moffatt eight times. In 2003, from January until her June 3 accident, she saw Dr. Moffatt only three times.

[40] After the accident, she saw Dr. Moffatt forty-two times before the end of the year. In 2004, she took 31 treatments. She had 14 treatments in 2005 to the date of Dr. Moffatt's August 17 report.

[41] In summary, Dr. Moffatt opined that the Appellant had recurring chronic problems and that the symptoms thereof were relieved by chiropractic treatment. He concluded that the combination of accidents in 1985, 1995 and 2003 had led to the Appellant's chronic back and neck condition. He also noted that she by then had degenerative changes that might stabilize over time or that might ultimately require spinal fusion.

[42] SGI referred the Appellant's case to a chiropractic consultant, Dr. Kitchen, who provided a report on September 21, 2005. In that report, Dr. Kitchen noted the prior conditions and the Appellant's pattern of treatment. He concluded that the treatment has related to primarily the same areas since 1988 and that, in addition, the Appellant has developed degenerative changes between 1995 and 2003. Dr. Kitchen concluded that the Appellant has full functional capacity, though she received treatment for flare-ups that, he said, were caused by activities of daily living. Dr. Kitchen said these flare-ups would be expected for someone with degenerative changes and that they were consistent with the episodes the Appellant experienced prior to the June 2003 accident.

[43] We were fortunate to have both Dr. Moffatt and Dr. Kitchen provide oral evidence at the hearing. While that oral evidence was consistent with that in their written reports, they were able to expand the information, their conclusions and the reasoning behind them. We will refer to information given in oral testimony in the course of our analysis below.

### **CHIROPRACTIC TREATMENT**

[44] The Appellant's circumstances are complicated by the fact that her claim respecting the 1995 vehicle accident was concluded despite the fact, she says, that her injuries relating to that accident had not fully healed and she was not returned to her pre-1995 accident condition. In effect, the Appellant and Dr. Moffatt on her behalf have suggested that her current condition is primarily the result of the cumulative effect of her injuries in both the 1995 accident and the 2003 accident. They suggest that as SGI was the insurer in respect of both accidents, it is unnecessary to distinguish between the injuries suffered in 1995 and those suffered in 2003 as SGI is responsible for both.

[45] The Appellant's argument might be correct but for the specific circumstances of the termination of coverage for her 1995 accident. Briefly, after the 1995 accident, the Appellant claimed and received benefits under Part VIII of the *Act* until March 12, 1997. At that time, SGI was concerned that the Appellant's injuries had not resolved and recommended a secondary assessment. The Appellant was advised that if she did not

attend the assessment, benefits would be terminated. The Appellant declined the assessment and consequently, her claim was concluded. The Appellant did not appeal this decision. While she continued to receive treatment thereafter, the costs of treatment and related expenses were not covered by the insurer.

[46] The Appellant testified that she refused the assessment because she had young children and was expected to spend a week in Saskatoon. She was uncertain whether she could make arrangements for the care of her children over an extended time and, in any event, SGI did not offer financial assistance in this regard. In addition, she advised that there was no avenue of formal appeal at that time.

[47] However, we note that Dr. Moffatt's report indicates that the Appellant advised him that she would not go to the assessment because she had previously had a poor experience with conditioning; presumably, she didn't think it worthwhile.

[48] The matter is complicated further because SGI has misplaced its file respecting the Appellant's 1995 accident and had been able to produce only what it refers to as "the medical file" but not its internal records. We therefore do not have information as to accommodations, if any, that may have been offered the Appellant. We also do not have a copy of SGI's decision letter whereby benefits respecting the 1995 accident were terminated and so do not know the nature of the termination.

[49] However, the reason for, and perhaps nature of, termination have become irrelevant with the passage of time. The fact is that the claim respecting the 1995 accident was concluded in March 1997, the termination was not appealed and therefore, the termination presently stands. As such, unless circumstances change by reason of the provision of new evidence respecting the 1995 accident or otherwise, SGI carries no current responsibility in respect of injuries or their effects arising out of the 1995 motor vehicle accident.

[50] SGI is responsible, under the *Act*, to provide benefits respecting the 2003 accident in accordance with a no-fault scheme of insurance set out in Part VIII of the *Act*. The Supreme Court of Canada, in *Athey v. Leonetti*, [1996] 3 S.C.R. 458, 140 D.L.R. (4<sup>th</sup>)

235, 1996 CanLII 193, said that a defendant [or, in our case, insurer] is liable for any injuries caused or contributed to by the accident but the defendant is not required to put the plaintiff in a better position than she was in prior to the accident. Applying those principles, SGI's obligation to the Appellant is to return her to the condition she was in just prior to the June 2003 accident, including any disability or discomfort resulting from and remaining after the 1995 accident. That is, SGI is responsible for the costs of the Appellant's rehabilitation to return her to the condition she enjoyed on the morning of and before the accident on June 3, 2003.

[51] We are satisfied that the Appellant has reached this point in her recovery. The evidence establishes, in very simple terms, that the Appellant had on-going back and neck problems that benefited from occasional chiropractic treatment prior to the June 2003 accident. She is now shown to have on-going back and neck problems that benefit from occasional chiropractic treatment.

[52] In his August 17, 2005 report, Dr. Moffatt provided a history of his treatment for the Appellant. Throughout 2002 and until the accident in June 2003, his treatments predominantly related to C4, 5 and L5 and occasionally, T4. His comments indicate episodes of acute low back pain and chronic neck pain. In 2005, prior to SGI's decision letter, he reported treatment to C 4, 5 and 6, T4 and 5 and L5. The treatment, therefore, was to the same areas. In his oral testimony at the appeal, Dr. Moffatt confirmed that the treatment the Appellant receives now is the same as what she received prior to the accident in June 2003. Indeed, he positively stated that the Appellant had stabilized to her pre-accident condition.

[53] Dr. Kitchen, a chiropractic consultant for SGI, gave similar evidence. He did not personally examine the Appellant but reviewed available medical records and concluded that by the time of the secondary assessment on July 22, 2005, the Appellant had regained her pre-injury condition. While he conceded that she will continue to require occasional maintenance treatment to remain comfortable, he says that this was required before the June 2003 accident and would have continued notwithstanding that accident.

[54] Most significant, perhaps, is the Appellant's testimony on this point. She stated that her back hurts more now than it did after the 1995 accident but that the pattern of treatment now is similar to what it was prior to the June 2003 accident. She said it probably became so shortly after the decision letter in April 2005, or maybe in the fall of that year.

[55] All of the evidence before us indicates that the Appellant has returned to her pre-accident condition. While she has some residual difficulties - occasional flare-ups that require treatment - she also experienced these prior to the 2003 accident. In these circumstances, SGI had fulfilled its responsibilities respecting chiropractic care resulting from the June 3, 2003 accident.

[56] However, we note that Dr. Kitchen and the Appellant have both given evidence as to the date that they believe pre-accident status was attained. Dr. Kitchen indicated that it was attained by the time of the secondary assessment report on July 22, 2005 and the Appellant has set the date at some time shortly after April 19, 2005 or as late as the fall of that year. We are satisfied to accept Dr. Kitchen's specific date as reasonable. As such, SGI remained responsible for treatment from April 19, 2005 until July 22, 2005 when it was first established that the Appellant had attained her pre-accident status.

### **MESSAGE THERAPY**

[57] In regard to massage therapy, we must decline the Appellant's appeal. The most recent report before us relating to massage therapy is Ms. Molesky's October 29, 2003 report wherein she indicates the Appellant's condition had improved significantly and/or resolved. She further notes that no further appointments are scheduled. There is no evidence before us regarding current recommendations for massage therapy or the benefits that it might secure. Without such evidence, SGI cannot be responsible to fund massage therapy treatment.

### **CONCLUSION**

[58] For the reasons stated above, the Commission has concluded that SGI's decision letter of April 19, 2005 has effect only in relation to benefits that were at that date being provided to the Appellant; these were chiropractic treatment and massage therapy.

[59] The April 19 decision is set aside in so far only as it purports to terminate benefits respecting chiropractic care effective April 19, 2005 and the Commission orders, instead, that the termination shall be effective July 22, 2005.

[60] In respect of massage therapy, the April 19, 2005 decision letter is upheld.

[61] As the Appellant has been partially successful in her appeal, SGI shall reimburse her reasonable costs and her application fee shall be refunded.

**Dated** at Regina, Saskatchewan, on December 13, 2006.

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Barbara Tomkins, Chair

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Jeffrey Scott, Commission Member

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Jean MacKay, Commission Member