

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *T.S. v. Saskatchewan Government Insurance,*
2007 SKAIA 069
Date: 20070517
File: 092 of 2005

BETWEEN

T.S., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
T.S., Applicant
Joan Eremko, for the Respondent

Before: **Peter Bergbusch, Chair**
Conrad Hnatiuk, Commission Member
Barbara Tomkins, 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 Regina, Saskatchewan
February 20, 2007

DECISION

[1] The Appellant, T.S., was involved in a motor vehicle accident in Edmonton, Alberta on July 3, 2004. As the Appellant was at the time a resident of Saskatchewan, she applied for injury benefits under Part VIII - the no-fault provisions - of *The Automobile Accident Insurance Act* (“the Act”). The Appellant’s claim was accepted and she received various benefits.

[2] By letter dated February 6, 2006, Saskatchewan Government Insurance (“SGI”) advised the Appellant that it had concluded that she had reached maximum medical improvement in regard to her neck and back complaints and that, therefore, no further benefits would be paid in respect of those injuries. SGI also confirmed that it would continue to cover costs associated with “TMJ treatment as indicated in our letter of November 24, 2005.”

[3] The Appellant disagreed with this decision as to both matters: She did not agree that her neck and back complaints were at maximum medical improvement and she did not believe that the TMJ treatment indicated in SGI’s November 24, 2005 letter was adequate. She appealed the decision.

FACTS AND FINDINGS

[4] The Appellant was injured in a vehicle accident on July 3, 2004 in Edmonton when her vehicle was t-boned by another vehicle traveling at about 60 to 70 kilometres per hour. The driver’s door of the vehicle the Appellant was driving was bent and the window shattered. The Appellant was taken to hospital by ambulance.

[5] At hospital, the Appellant is reported to have been tearful and in a lot of distress. She complained of neck and lower back pain and left shoulder pain. The emergency physician prescribed a hard collar, ice, heat and analgesic drugs. The Appellant was discharged.

[6] In her application for benefits dated July 12, 2004, the Appellant indicated injuries to her left shoulder, left neck, lower back and left hip and indicated that the injuries to her neck and lower back were most severe. She described her pain as “10” on a scale of one to ten.

[7] Unattributed clinical notes apparently made by the Appellant’s dentist, Dr. Taskey, show an emergency visit on July 5, 2004 where the Appellant reported a mild bilateral click upon opening her mouth wide. In addition, minor chips were noted on three teeth.¹

[8] An August 18, 2004 entry in those clinical notes indicates that the Appellant reported increasing headaches that were not relieved by Tylenol 3 and an alternate analgesic was recommended. She reported little neck stiffness but “a bit” remaining on the left side. Finally, she reported that her bite did not feel even.

[9] On July 6, 2004, the Appellant was seen by her physician, Dr. Semenjuk, who diagnosed neck and back strain consequent on her vehicle accident. She concluded that the Appellant suffered from Whiplash Associated Disorder (WAD) II, given the restricted range of motion of her cervical spine and palpatory tenderness in all aspects of her cervical, thoracic and lumbar spines. Dr. Semenjuk recommended physiotherapy, massage and medications to rehabilitate and manage the Appellant’s symptoms.

[10] On a July 21 visit to Dr. Semenjuk, the Appellant reported that her pain had lessened but she was still sore from her neck down to her lower back. Dr. Semenjuk’s examination confirmed this. Dr. Semenjuk advised² that she was “still hesitant” to start the Appellant on physiotherapy³ but massage treatment was recommended.

[11] During her August 4, 2004 attendance with Dr. Semenjuk, the Appellant reported that her pain was almost exclusively in her lower back. Dr. Semenjuk recommended that the Appellant continue with massage therapy and stretching exercises that had been previously recommended.

¹ This notation is confirmed by a later report from Dr. Taskey.

² This document summarizes Dr. Semenjuk’s care of the Appellant from July 6, 2004 to March 23, 2005.

³ This is inconsistent with Dr. Semenjuk’s earlier report on July 6 where she recommended physiotherapy. In any event, it appears that at July 21, 2004, the Appellant had not started physiotherapy treatment and it was, at that time, not recommended that she do so.

[12] On August 23, 2004, the Appellant reported that she was better than before but became stiff and sore if she sat for an extended time. At this time, Dr. Semenjuk recommended that the Appellant commence physiotherapy treatment.

[13] At her November 12, 2004 visit, the Appellant reported intermittent stiffness and soreness. She continued with physiotherapy.

[14] On December 23, 2004, the Appellant reported that she had discontinued physiotherapy and massage therapy as insurance would no longer cover their cost. Dr. Semenjuk found that there was no tenderness with palpation and the Appellant's range of motion in her neck and back were normal. Dr. Semenjuk recommended that she continue the home stretching and exercise through her gym.

[15] On March 24, 2005, the Appellant saw Dr. Semenjuk again. On this occasion she reported that she had resumed physiotherapy but thought it was not helping; in fact, she thought her neck and back pain was worsened by the treatment. She said that the physiotherapist was doing manipulations of the spine that caused increased neck pain and numbness down her right arm and leg following treatment. In addition, her headaches were increasing in frequency.

[16] Given this information, Dr. Semenjuk recommended that the Appellant discontinue physiotherapy treatment and, instead, continue on home stretches, hot packs and ice packs.

[17] Coincidental with Dr. Semenjuk's March report, Julian's Fitness and Rehabilitation provided its discharge report. Gerald Julian, the Appellant's physiotherapist, advised that he had treated the Appellant on five occasions from January 28 until March 16. He stated that he discussed his treatment with the Appellant and that she reported generally improving or stable symptoms; he did not record any concerns raised by the Appellant that the treatment was not helpful. Indeed, in her evidence before us, the Appellant stated that she did not advise Julian's of her concerns because she thought he was too busy to talk to her.

[18] The Appellant was then referred for a tertiary assessment at Wascana Rehabilitation Centre ("Wascana"). The assessment, completed on May 2 to 4, 2005 inclusive, was

conducted by a team of health care professionals including a physician, chiropractor, physical therapist, occupational therapist, exercise therapist, psychologist and nurse.

[19] The team diagnosed WAD I-II and Low Back II, plus temporomandibular joint (“TMJ”) dysfunction, and recommended a twelve-week program including physical and exercise therapy, core strengthening, general conditioning and psychological counselling. If the Appellant was unable to participate in the recommended secondary program due to work hours, primary physical and exercise therapies were recommended.

[20] The Appellant chose to undertake the recommended twelve-week program and attended for her assessment at Courtside Sports Medicine and Rehabilitation on June 20, 2005. At that time, the Appellant complained of headaches, problems with her jaw, left-sided neck stiffness, left shoulder and shoulder blade pain, spinal pain, lower back pain and paraesthesia and altered speech following treatment of her neck. The neck and back symptoms were essentially confirmed on examination but found to be generally mild. On the other hand, testing for perception of disability showed the Appellant believed herself to be moderately to severely disabled.

[21] The Appellant was discharged from the secondary program on August 22, 2005 prior to completion because she was moving to Edmonton to continue her post-secondary education. The discharge report recommended she continue her treatment in Edmonton, including six to eight weeks of conditioning and physical therapy for the spinal dysfunction and one or two physiotherapy sessions regarding her TMJ dysfunction.

[22] The Appellant attended LifeMark Physiotherapy in Edmonton on September 14, 2005. LifeMark diagnosed stiffness and derangement of her temporomandibular joint and healed sprains of the Appellant’s cervical, thoracic and lumbar spines and of her sacroiliac joints, all with residual stiffness or reduced muscle support. Ten weeks of physiotherapy – once or twice weekly - was recommended.

[23] The Appellant did not attend for treatment at LifeMark but, instead, attended at Family Physiotherapy. Their assessment, conducted on October 6, 2005, found WAD II and recommended 21 physiotherapy treatments over twelve weeks.

[24] Jeff Weber was the physiotherapist who treated the Appellant at Family Physiotherapy. He provided a report at the conclusion of the Appellant's treatment on November 15, 2005. He noted no overall improvement in the Appellant's condition and opined that he did not believe that she was motivated to recover.

[25] Dr. Semenjuk reported following her November 3, 2005 examination of the Appellant that she complained of on-going neck and jaw pain. The Appellant also complained of mild constant headache, back and neck pain, and some numbness and tingling down her left arm and left foot. Apparently because these symptoms continued despite physiotherapy, acupuncture, home exercises and massage therapy, Dr. Semenjuk referred the Appellant to Dr. Buck, a TMJ specialist, and to Dr. Ashworth, a physical medicine and rehabilitation specialist.

[26] Dr. Buck saw the Appellant on November 17 and provided his conclusions to SGI in a letter dated November 18, 2005. Dr. Buck described the development of myofascial pain dysfunction syndrome ("MPDS") as follows:

In most motor vehicle accidents a whiplash injury to the neck is a very common occurrence. The muscle spasm that occurs has an influence on the muscles of mastication causing pain and spasm in this group. This triggers a response that culminates in a condition known as Myofascial Pain Dysfunction Syndrome.

[27] He opined that the Appellant's symptoms and circumstances were consistent with MPDS caused by a whiplash injury. He constructed a TMJ splint appliance that would enhance the Appellant's healing. It would be adjusted a number of times over the following four months. This recommended treatment, he projected, would require a minimum of twelve months.

[28] Dr. Semenjuk next saw the Appellant on November 22, 2005. At that time, the Appellant was concerned about her back and neck pain and her chronic headaches. Dr. Semenjuk recommended chiropractic treatment for her back but specifically not for her neck. Acupuncture was also discussed.

[29] Apparently consequent on Dr. Semenjuk's recommendation, the Appellant visited Dr. Craig Wing at In-Line Chiropractic and Wellness on November 23, 2005. The

Appellant reported bilateral neck and shoulder pain and tension, as well as bilateral TMJ pain that had not been relieved or improved by physiotherapy between May and November 2005. She further complained of headaches and “discomfort in her thoracolumbar junction, with associated pins and needles sensations in her feet.”

[30] Upon examination, Dr. Wing found limited cervical range of motion and vertebral blockages in her cervical and thoracic spines. Related muscles were painful and hypertonic. He diagnosed chronic, traumatic, moderate cervicothoracic strain/sprain with associated joint dysfunction and chronic, traumatic moderate bilateral TMJ joint dysfunction.

[31] The Appellant, in an e-mail sent to her PIR on December 12, 2005, appeared to be encouraged by her progress under Dr. Wing’s care. She reported that since seeing Dr. Wing, she had fewer headaches and lessened pain in her back. While she still had trouble with her neck, she reported improved range of motion.

[32] By January 9, 2006, Dr. Wing reported, the Appellant had found temporary relief of her symptoms and moderate improvement. He opined that the Appellant had “undergone the worst of her disorder,” barring relapse.

[33] At this juncture, SGI sought an opinion from its medical consultant, Dr. Matthews. In her January 24, 2006 opinion, Dr. Matthews reviewed the Appellant’s reported history and noted that her pattern of recovery was “outside the norm” since physical findings had been minimal and suggested mild injury; such injuries would be expected to improve over time, with or without treatment.

[34] Dr. Matthews noted that the physiotherapist in her initial assessment had concluded that the Appellant’s injuries had healed and there was, therefore, no pathology at the time she entered the program. The program’s purpose was only to address stiffness and deconditioning. That being the case, Dr. Matthews concluded that the Appellant would be expected to reach maximum medical recovery (“MMR”) by the end of her Edmonton rehabilitation and that no further medical treatment was indicated.

[35] Based on Dr. Matthew's opinion, SGI advised the Appellant by letter dated February 6, 2006 that her benefits would be terminated in respect of her back and neck complaints as SGI was satisfied that she had reached maximum medical improvement. The letter confirmed, however, that SGI would continue benefits in respect of TMJ treatment as had been indicated in a letter on November 24, 2005.

[36] Further information respecting the Appellant's condition was provided after the termination of benefits respecting her back and neck. Dr. Esmail, a specialist in orthopaedic medicine, provided a report about his examination and treatment of the Appellant commencing May 27, 2006. He found muscle tightness in the posterior cervical muscle area, TMJ dysfunction and myofascial pain at the base of the Appellant's neck. He injected tender areas with steroids on May 27 and, on June 24, injected therapeutic Botox for the base of her neck. At an appointment on October 7, 2006, the Appellant reported significant but not complete relief of her headaches, TMJ pain and neck pain as a result of the injections.

[37] In addition, the Appellant said she continued to suffer pain in her lower back and had recently been diagnosed with left carpal tunnel syndrome regarding numbness in her left arm. She advised Dr. Esmail that the numbness started a month or two after the accident and had become progressively worse over time.

[38] Dr. Esmail recommended medication and further Botox injections as treatment for the Appellant's neck and lower back symptoms. While these would not cure the condition, he said, they would minimize her discomfort and enable her to participate more easily in activities of daily living. Dr. Esmail indicated that the carpal tunnel condition would require surgical correction.

[39] Dr. Ashworth, a specialist in physical medicine and rehabilitation, examined the Appellant on September 25, 2006 and provided a report respecting her complaint of numbness and tingling in her hands. On this occasion, the Appellant advised that the symptoms had started "several weeks" after the vehicle accident and that they were, at the time of this examination, worse on the left than on the right side.

[40] Dr. Ashworth found the Appellant's neck movements were full and essentially pain-free. Shoulder movements were also full and pain free. He found mild carpal tunnel syndrome on her left side and a "trend toward carpal tunnel on the right." He recommended wrist splints and weight loss.

[41] Dr. Matthews reconsidered the claim after SGI received Dr. Esmail's and Dr. Ashworth's reports. Dr. Matthews opined that Dr. Esmail had not provided objective physical findings that supported further treatment or his view that the Appellant had not reached maximum medical improvement. She noted Dr. Esmail's finding of virtually normal range of movement in the Appellant's neck and a normal neurological examination. His findings regarding the Appellant's lumbar spine were similarly normal aside from minor short-comings in range of motion.

[42] In regard to Dr. Esmail's recommendations for Botox and laser therapy treatment, Dr. Matthews stated that the former has not been shown to be effective and the latter, while shown to be beneficial in some degree, required further and larger studies before becoming an accepted treatment.

[43] Dr. Matthews also commented on Dr. Esmail's diagnosis of carpal tunnel syndrome and its cause. While not disputing the diagnosis, Dr. Matthews suggested that Dr. Esmail's conclusion as to causation was based on the bare fact that the Appellant had reported to him that numbness began in her left arm shortly following the accident and was persistent. Dr. Matthews' review of the file suggested otherwise: she found that the Appellant complained of numbness of both hands and both feet in July 2004 but the symptom was not recorded again until March 2005 when Dr. Semenjuk reported numbness of the right arm and leg. In May 2005, the Appellant reported that her symptoms were intermittent and that either both arms and legs or one arm and one leg might be involved. Her neurological examination at that time was normal.

[44] In addition, Dr. Matthews said, the symptoms reported shortly after the vehicle accident were not consistent with carpal tunnel syndrome: numbness of the entire arm is atypical of carpal tunnel syndrome and numbness of the legs is never associated with the condition. Dr. Matthews formed the opinion, therefore, that the Appellant did not display or

complain of symptoms consistent with carpal tunnel syndrome until September 5, 2006. This and other factors suggested the condition was not caused by the vehicle accident.

[45] SGI therefore declined to provide benefits in respect of Botox injections, laser therapy or the carpal tunnel condition and so advised the Appellant by letter dated January 5, 2007.

JURISDICTION

[46] This Commission derives its jurisdiction to hear and consider appeals from section 191 of the *Act*. The section reads:

191(1) A claimant may appeal a decision of the insurer pursuant to this Part to either the Court of Queen's Bench or the appeal commission within the later of:

- (a) 90 days after the date of the insurer's written decision; and
- (b) if a claimant has requested mediation pursuant to section 190, 60 days after the date the mediator's written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[47] That section therefore sets out the time frames within which appeals may be brought before this Commission. In this case, SGI provided a decision letter dated February 6, 2006 and the Appellant's appeal was filed on February 9, 2006. This is within the 90 day time frame set out in section 191(1)(a) and the Appellant's appeal is properly before us.

[48] In the course of the hearing, the parties discussed the specific issues that are before us in this appeal as follows:

1. Has the Appellant reached maximum medical improvement in respect of neck and back injuries caused in the vehicle accident?
2. If not, what treatment, if any, is necessary or advisable at the present time? In this regard, the following were put forward by the Appellant as recommended and appropriate:
 - massage therapy;
 - laser treatment;
 - Botox treatment;
 - chiropractic care; and
 - psychological counseling and care.

3. What temporomandibular joint (TMJ) dysfunction treatment is continued in light of SGI's decision letter?
4. Was the Appellant's carpal tunnel condition caused in the vehicle accident and was the surgery necessary as a result of the accident?

[49] The Appellant also raised her entitlement to an income replacement benefit ("IRB") in respect of specific periods during her recovery. In the course of her evidence, she provided information that SGI had not previously considered. The parties agreed that IRB would not be adjudicated in this decision and, instead, the Appellant will obtain certain relevant documents and provide them to SGI for its consideration. SGI will then give its decision, in writing, to the Appellant.

STANDARD OF REVIEW

[50] The Saskatchewan Court of Appeal dealt with the Commission's standard of review in *Allary v. Saskatchewan Government Insurance*.⁴ Where SGI does not have discretion to provide a benefit, such as in the case of medical and paramedical care, the appropriate standard of review of SGI's decisions is correctness.⁵ In this case, SGI has refused further rehabilitation benefits regarding the Appellant's neck and back injuries on the basis that the Appellant has reached maximum medical recovery and that further treatment is therefore not indicated. In effect, therefore, SGI had concluded that further rehabilitation was neither necessary nor advisable for the purposes of section 112 of the *Act*. In our view, deciding whether rehabilitation is necessary or advisable involves a measure of discretion on SGI's part. Accordingly, following the reasoning in *Allary*, the standard of review we will apply to SGI's decision on this issue is reasonableness.

[51] SGI has refused to fund treatment for Botox and laser treatment, additionally, because SGI is of the view that they have not been demonstrated to be effective. Again, this is a matter regarding rehabilitation benefits and our standard of review is reasonableness.

⁴ 2006 SKCA 89

⁵ *Ibid.* at paragraph 19.

[52] Finally, SGI has denied coverage for the Appellant's carpal tunnel syndrome on the basis that it was not caused in the vehicle accident. As the Court of Appeal held in *Allary*, the standard of review where causation is in issue is correctness

ONUS OF PROOF

[53] In *Collis v. Saskatchewan Government Insurance*,⁶ the Saskatchewan Court of Queen's Bench considered the question of who held the onus of proof in appeals under the no-fault provisions of the *Act*. Justice Wimmer stated:⁷

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.

[54] The question before us is whether the Appellant has established that she was disabled within the meaning of the "policy." (The policy, for purposes of this decision, is the *Act* itself.) If she has not done so, the matter ends but if she has, the onus will shift to SGI.

[55] In this case, the Appellant was diagnosed with soft tissue injuries and, until February 6, 2006, SGI paid the Appellant benefits related to that diagnosis, including benefits for medications, travel and treatment.

[56] Thus, SGI accepted responsibility for the back and neck injuries that it now suggests have reached maximum medical recovery and for which further treatment is not indicated. In respect of her back and neck injuries, therefore, the Appellant has established that she was disabled for purposes of the *Collis* principle and the onus to prove that she is not or is no longer entitled to benefits in respect of those injuries falls on SGI.

[57] The matter of payment for Botox and laser therapies is consequent on the resolution of the question above. That is, if the Appellant is at maximum medical recovery and further

⁶ 1998 CanLII 13463, 165 Sask. R. 108

⁷ paragraph [5]

treatment is not warranted, the question of the nature of possible appropriate treatment does not arise. As such, the onus of proof lies, concurrently with the preceding issue, on SGI.

[58] In regard to the Appellant's carpal tunnel syndrome, however, the situation is reversed. SGI has denied throughout that this condition was caused by the vehicle accident. As such, the Appellant has not met the pre-condition to shifting the onus of proof; it remains with her.

ANALYSIS

Soft Tissue Injuries – Neck and Back:

[59] With respect to injuries to the Appellant's neck and back, we agree with Dr. Matthews that the pattern of her recovery has been unusual. The Appellant's initial complaints were consistent with and diagnosed as soft tissue injuries to her neck, low back and left shoulder. Dr. Semenjuk, on her July 6, 2004 examination, diagnosed neck and back strain/WAD II.

[60] Over time, the Appellant's condition progressively improved. Dr. Semenjuk reported, on December 23, 2004, that she found no tenderness on palpation and normal range of motion in the Appellant's neck and back. It appeared that the Appellant was close to recovery at that time.

[61] But the Appellant reported increasing symptoms and attended a tertiary assessment in May 2005. At the assessment, the diagnosis was again WAD I-II and LBP II. Twelve weeks of rehabilitative treatment were recommended.

[62] Finally, in January 2006, Dr. Wing reported that the Appellant was "over the worst of it," clearly implying that the condition was improving and not expected to deteriorate.

[63] While it is unclear whether her condition further deteriorated or whether improvement was slowed thereafter, treatment has been recommended for the Appellant's neck and lower back symptoms as recently as Dr. Esmail's report on October 7, 2006. His

recommendations suggest that the Appellant continued to experience discomfort arising from her soft tissue injuries and that further treatment was appropriate.

[64] While we do not dispute Dr. Matthews' opinion that soft tissue injuries are expected to improve over time and that recovery usually occurs in a matter of weeks, the fact is that this is apparently not what happened in the Appellant's case. SGI must deal with claims on the basis, of course, of what occurred and not what was expected to occur.

[65] Dr. Matthews opined, quite correctly, that the findings suggested a mild injury that was reported to have healed, for the most part, at the Appellant's assessment at LifeMark Physiotherapy in September 2005.

[66] But despite the fact that the sprains had healed – if indeed they had – the Appellant continued to report symptoms and continued to receive rehabilitative treatment. Dr. Matthews concluded that the Appellant would reach MMR by the time she completed the ten week course of physiotherapy that LifeMark had recommended.

[67] Upon the Appellant's request, she did not receive physiotherapy treatment at LifeMark and instead, attended at Family Physiotherapy which, on October 6, 2005, recommended twelve weeks of physiotherapy treatment. This would have been concluded at the end of December 2005 but the Appellant was discharged in November due to lack of progress.

[68] Thus, we do not know whether the Appellant would have recovered or reached MMR by the end of that recommended treatment. Given the reason for her early discharge, it appears unlikely.

[69] The resolution of this matter is identical to that regarding the progress of the Appellant's recovery. While one might expect that she would have reached MMR by the end of her recommended physiotherapy, she did not. Indeed, treatment provided by Dr. Wing between November 2005 and January 2006 was reported by both Dr. Wing and the Appellant to have provided temporary relief of her symptoms and moderate improvement. It is implicit in this that she was not at a level of maximum recovery at that time.

[70] Eligibility for benefits cannot be a hypothetical matter dependent upon norms or times of anticipated recovery. Instead, it requires consideration of a claimant's actual condition and actual level of recovery. While we do not disagree that the Appellant might have been *expected* to have reached MMR by the end of the fall 2005 physiotherapy treatment, we are not satisfied that she actually achieved MMR. Further, there is evidence that further treatment is appropriate and indicated.

[71] Although the evidence before us whether the Appellant had reached MMR by November 2005 is not particularly compelling one way or another, we have concluded that SGI has not established, on a balance of probabilities, that she had reached MMR by that date. There is no reason to prefer Dr. Matthews' opinion to those of the physicians, chiropractors, and others who treated the Appellant after November 2005. Because of the inconclusive nature of the medical evidence, and because we cannot say what further treatment may be indicated, further investigation is required.

[72] For these reasons, SGI's decision letter of February 6, 2006 is set aside in so far as it relates to benefits respecting the Appellant's neck and back complaints. At its expense, SGI will arrange an independent medical examination for the Appellant as soon as possible and the Appellant shall attend in accordance with subsection 158(2) of the *Act*. In addition to addressing the points specified in section 75 of *The Personal Injury Benefits Regulations*, the examiner will also address the following questions:

1. From what neck or back injuries or conditions does the Appellant suffer?
2. Of any conditions identified in the answer to question #1, which are related to and caused by the vehicle accident on July 3, 2004?
3. What treatment is recommended and appropriate for each of the injuries identified in the answer to question #2?
4. In the event that the IME finds injuries or conditions caused in the vehicle accident and makes recommendations as to treatment, the examiner shall be asked to consider the effectiveness and advisability of Dr. Esmail's recommendation for Botox injections and laser therapy.

SGI will thereafter provide benefits for and corollary to such treatment as may be recommended by the IME or as is subsequently and reasonably recommended by the Appellant's care providers, if such treatment is necessary or advisable to contribute to her

rehabilitation, to lessen her disability caused by the accident, or to facilitate her recovery from the accident.

Temporomandibular Joint Dysfunction Syndrome:

[73] We are satisfied and SGI does not dispute that the Appellant's TMJ difficulties were caused in the vehicle accident and require treatment. In stating that SGI would continue to provide benefits respecting TMJ treatment as had been set out in its letter of November 24, 2005, some confusion arose.

[74] In respect of TMJ treatment, the letter of November 24, 2005 stated: "we will cover the cost of the TMJ splint therapy." The Appellant has taken this to mean that this allows coverage only for the splint appliance, its placement and adjustment. She has suggested that chiropractic care, massage therapy, Botox injections and laser treatment have been recommended in conjunction with the splint therapy. These, she says, should be funded as appropriate recommended treatments.

[75] In her evidence, Sharon Hoiland for SGI stated that splint therapy can cover treatment beyond the splint appliance itself. However, she testified under cross-examination that SGI generally does not pay for anything other than the splint appliance. Ms. Hoiland also stated that SGI does not believe that further assessment or treatment is required at this time.

[76] SGI's decision appears to be based upon its policies rather than the result of its evaluation of what treatment may be necessary or advisable for the Appellant. For these reasons, the independent medical examination ordered in paragraph [72] above will also consider the nature of the Appellant's TMJ disorder and make recommendations for appropriate treatment. In so doing, the examiner shall be requested to consider the effectiveness and advisability of Dr. Esmail's recommendation for Botox injections and laser therapy.

[77] SGI will thereafter provide benefits for and corollary to such treatment as may be recommended by the IME or as is subsequently and reasonably recommended by the

Appellant's care providers, if such treatment is necessary or advisable to contribute to her rehabilitation, to lessen her disability caused by the accident, or to facilitate her recovery from the accident.

Carpal Tunnel Syndrome:

[78] In documents filed in these proceedings and in her evidence before us, the Appellant first complained of symptoms that might in any manner relate to carpal tunnel syndrome in March 2005 when she advised Dr. Semenjuk that she felt numbness down her right arm and leg following physiotherapy treatment. In November 2005, she is reported to have complained to Dr. Semenjuk of numbness and tingling in her left arm and left foot. Finally, also in November 2005, the Appellant is recorded to have told Dr. Wing that she had "pins and needles sensations" in her feet; Dr. Wing found these symptoms to be associated with discomfort in the Appellant's thorocolumbar junction.

[79] Eventually, the Appellant was found to have mild carpal tunnel syndrome in both wrists, the left being more serious than the right. She had surgery to relieve the condition in her left wrist.

[80] Dr. Esmail concluded that the condition was caused in the vehicle accident. However, his conclusion was based on the Appellant's report that these symptoms had started a month or two after the accident. Dr. Ashworth's conclusion that the Appellant's carpal tunnel condition was caused in the accident was based on her report that the symptoms had started within several weeks of the accident. The record shows that both of these reports were incorrect. The first notation of complaints of left-sided numbness is recorded by Dr. Semenjuk in November 2005, almost 16 months after the accident.

[81] Doctors Ashworth and Esmail did not know that the Appellant's reports regarding numbness and tingling were sporadic and inconsistent, or that they occasionally involved left-sided symptoms and occasionally the right. We have been provided no evidence suggesting that either was aware that the Appellant had had normal neurological

examinations throughout her care before Dr. Ashworth's test yielded contrary results. These facts require us to place little reliance on the opinions of Doctors Ashworth and Esmail in respect of their conclusions as to causation of the Appellant's carpal tunnel condition.

[82] Without a clear association between the vehicle accident and the onset of symptoms, the Appellant has not established that her carpal tunnel condition was caused by or associated with injuries that occurred in her July 3, 2004 vehicle accident. Her claim for benefits in respect of that condition is dismissed.

Psychological Treatment:

[83] At the Appellant's tertiary assessment,⁸ psychological counseling was included among the team's recommendations. Subsequently, the Appellant inquired to Ms. Hoiland about such counseling on occasion and was advised that SGI was prepared to cover related costs. The Appellant asked that SGI recommend a psychologist but Ms. Hoiland advised that she was unable to recommend specific care providers. Instead, she advised the Appellant to obtain a recommendation from her physician or perhaps from the team at Courtside Sport and Fitness.

[84] The Appellant did not obtain a referral and psychological counseling was not provided.

[85] Taking into consideration the Appellant's difficulties recovering from relatively minor injuries, her approach to care providers and SGI, the Appellant's request for such care at the hearing and, especially, the outstanding recommendation from the tertiary assessment, we are satisfied that the independent medical examination ordered above should consider whether the Appellant would benefit from psychological counseling and whether any recommended counseling relates to the Appellant's vehicle accident. SGI will thereafter provide benefits for and corollary to such treatment as may be recommended by the IME or as is subsequently and reasonably recommended by the Appellant's care providers, if such treatment is necessary or advisable to contribute to her rehabilitation, to lessen her disability caused by the accident, or to facilitate her recovery from the accident.

⁸ see paragraphs [18] – [19]

SGI Treatment Policies:

[86] In the course of the hearing, SGI made reference to internal policies that set out treatment that will and will not be considered under Part VIII of the *Act*. Specifically, reference was made to policies regarding massage therapy treatment, temporomandibular dysfunction and the provision of Botox and laser therapies.

[87] In setting the questions for the IME and for purposes of the examiner's report and discretion, it is important that the purpose and application of SGI policy is clearly understood.

[88] In *Re: Rizzos & Rizzos Shoes Ltd.*⁹, the Supreme Court of Canada adopted the following statement by E.A. Driedger in his text *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[89] The Saskatchewan Court of Appeal, in *Re: Ratzlaff Estate v. Ratzlaff*¹⁰ stated:

(1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.

(2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into consideration all relevant indicators of legislative meaning.

(3) In the light of these additional considerations, the courts may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one that the words are reasonably capable of bearing.

[90] Section 112 of the *Act*, which deals with entitlement to rehabilitation benefits states in part:

⁹ [1998] 1 S.C.R. 27

¹⁰ (2002), 217 Sask. R. 284 (C.A.) at para. 23

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[.]

[91] Internal policies respecting rehabilitation benefits, therefore, must be considered against this section.

[92] The leading Saskatchewan case on this issue is *Fairhaven Billiards Inc v. The Saskatchewan (Liquor and Gaming Authority)*.¹¹ In that case, Mr. Justice Tallis wrote (citations omitted):

The authority of a regulator like the Authority to issue non-binding statements or guidelines is well established under our jurisprudence. As a matter of sound administrative practice regulators may, without any specific statutory authority for doing so, issue guidelines and other non-binding statements of policy.

Although policy making undeniably facilitates performance of the Authority’s administrative responsibilities and duties and makes for consistent decision making, such “policy in force” can have no effect if it flies in the face of a contradictory statutory provision or regulations. If the “policy” in question falls under the rubric of a non-mandatory guideline, as argued by the respondent Authority, it may pass muster under the above authorities. But if the “policy” is mandatory it is therefore a governing pronouncement that will have the same effect as a statutory provision. The Authority could only create such if it is empowered to do so by the statute.

[93] Massage therapy, splint therapy, Botox injections and laser therapy are all possible rehabilitation measures for purposes of section 112 and the above-quoted authorities. That being the case, SGI can lawfully set and follow policies regarding treatment that do not conflict with the operative section.

[94] The section contemplates benefits for treatments that are necessary or advisable for the rehabilitation of an insured. It follows, then, that a policy which denies a treatment in every case, including those in which it might be found rehabilitative, would contradict the legislation and be beyond the power of SGI.

[95] In this case, the policy regarding massage therapy sets a maximum number of treatments that will generally be approved. The fact that the policy itself includes a process to be followed when the number is exceeded and the fact that the number was exceeded in

¹¹ (1999), 177 Sask. R. 237

the Appellant's case confirms that SGI does not view the policy as mandatory and that it is treated as a guideline, subject to variance in appropriate cases.

[96] SGI's policies regarding TMJ, Botox injections and laser therapy may not be as flexibly applied. Based on our review of the policies and SGI's evidence and argument, it appears that these policies are firm and do not include provisions for occasional variance.

[97] SGI is cautioned that policy can be lawfully applied as a kind of guideline but not as mandatory. As such, the Appellant was entitled to have her requests for Botox and laser therapy considered on their merits in the context of her particular circumstances.

[98] However, as her circumstances have changed and the recommendation may no longer be appropriate, we have ordered that the IME be structured so as to ensure that the examiner has discretion to consider all treatments and their propriety; while he or she may consider SGI policy, the examiner will not be bound by that policy.

[99] With respect to TMJ, a review of the policy shows that it is not restricted to the provision of the splint and its adjustment as the Appellant understood. It extends to include pharmaceuticals and certain kinds of physical therapy including massage and ultrasound. However, the policy does not include provisions suggesting that it may be varied in appropriate cases.

[100] As with our comments on Botox injections and laser therapy, we caution SGI that the policy must be administered as a guideline only. Again, therefore, we have ordered that the IME be structured so as to ensure that the examiner has discretion to consider all treatment options and their propriety, while being mindful of SGI guidelines.

Miscellaneous:

[101] Among the hearing documents, the Commission reviewed extensive e-mail correspondence between the Appellant and personal injury representatives and supervisors at SGI. In the course of that e-mail correspondence, the Appellant demonstrated a generally demanding and sometimes uncooperative attitude. She frequently attacked the credibility, integrity and professionalism of those at SGI who were attempting to assist her, sometimes

with shocking rudeness. In every case, her criticism was unfounded save one situation where, not surprisingly given almost daily correspondence over a number of years, a PIR failed to immediately recollect something she had said many months earlier. Even then, the Appellant's response was wholly disproportionate to the circumstances.

[102] In the face of this, SGI staff maintained their professionalism and dignity, though not without some element of defensiveness.

[103] Without going into detail, we note that the Appellant's aggressive approach and unreasonable expectations were not helpful in building respectful relationships that might have allowed the resolution of some of the issues now before us.

CONCLUSION

[104] SGI's decision letter dated February 6, 2006 is set aside.

[105] SGI shall arrange and the Appellant shall cooperate in attending an Independent Medical Examination which shall consider and provide a report addressing the following questions:

1. From what back and neck injuries or conditions does the Appellant suffer, if any?
2. Of any conditions identified in the answer to question #1, which are related to and caused by the vehicle accident on July 3, 2004?
3. What treatment is recommended and appropriate for each of the injuries identified in the answer to question #2?
4. In the event that the IME finds injuries or conditions caused in the vehicle accident and makes recommendations as to treatment, what would be the effectiveness and advisability of Botox injections or laser therapy or both?
5. What is the nature of the Appellant's TMJ disorder and what treatment is appropriate to that condition?
6. What would be the effectiveness and advisability of Botox injections or laser therapy or both in the treatment of the TMJ disorder?
7. Would the Appellant benefit from psychological care? If so, does any recommended psychological care relate to the Appellant's vehicle accident?
8. What psychological care is recommended?

[106] SGI will thereafter provide benefits for and corollary to such treatment as may be recommended by the IME or as is subsequently and reasonably recommended by the Appellant's care providers, if such treatment is necessary or advisable to contribute to her rehabilitation, to lessen her disability caused by the accident, or to facilitate her recovery from the accident.

[107] Upon her providing receipts for same, SGI shall reimburse the Appellant for the costs of medication, Botox treatment, laser treatment and chiropractic care that she took after February 6, 2006, if those treatments are considered appropriate by the IME and if they were necessary or advisable to contribute to her rehabilitation, to lessen her disability caused by the accident or to facilitate her recovery from the accident.

COSTS

[108] As the Appellant has been partially successful in her appeal, she shall have her costs in accordance with section 193(11) of the new *Act* and section 96 of the regulations. In addition, she shall be refunded her appeal fee.

Dated at Regina, Saskatchewan, on May 16, 2007.

Peter Bergbusch, Chair

Conrad Hnatiuk, Commission Member

Barbara Tomkins, Commission Member