

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *Z.R. v. Saskatchewan Government Insurance,*
2007 SKAIA 080

Date: 20070711

File: 001 of 2005

BETWEEN

Z.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Dave MacKay, for the Applicant

Jane Watson, for the Respondent

Before: **Beverly Cleveland, Chair**
Peter Bergbush, Commission Member
Al Knippel, Commission Member

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

Heard at Regina, Saskatchewan
August 3, 2005 and April 24, 2007

DECISION

Introduction

[1] The Appellant, Z.R., has appealed a series of letters from Saskatchewan Government Insurance (“SGI”) sent to him in November 2004, concerning his entitlement to benefits under Part VIII of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (the “Act”). The Appellant disagrees with SGI’s decision denying him an increased permanent impairment benefit following a second operation on his neck and with a decision awarding him a permanent impairment benefit for scarring to his elbow. He further disputes a decision by SGI to cover only 50% of his medication costs after November 9, 2004. He takes issue with SGI’s decision to reduce his income replacement benefit on the one-year anniversary of SGI’s determination of an employment that he is capable of performing. Finally, he contests a decision by SGI to limit its coverage for future costs of treatment to 50% of the total costs of such treatment.

Summary of facts

[2] The Appellant has an extremely lengthy history of treatment following his motor vehicle accident, and many documents were filed in evidence at his appeal. While we have reviewed in detail all of the evidence filed, we will not refer to all of it in the summary of facts which follows.

[3] On September 7, 1996, the vehicle in which the Appellant was traveling northward collided at highway speed with another vehicle. The Appellant’s vehicle was crossing the junction between [two Highways], when the second vehicle, which was traveling west on [one Highway], failed to stop for a stop sign. The front of the Appellant’s vehicle struck the driver’s side of the second vehicle. The driver of the second vehicle was killed in the accident. The Appellant and his passenger sustained serious injuries.

[4] The Appellant was taken by ambulance to the Plains Health Centre in Regina. He reported immediate pain in his left shoulder and hand. An x-ray revealed that he had a fracture of the fourth metacarpal. The Appellant’s left hand was placed in a cast, which was removed on October 27.

[5] Dr. D.H. Clarke, who examined the Appellant on September 9, diagnosed whiplash-associated disorder, grade II, and reported that the Appellant had reported pain at the cervical spine area.

[6] In his application for benefits completed on September 12, 1996, the Appellant indicated that he was experiencing left bruises, shoulder, knee and neck bruising and pain.

[7] The Appellant returned to work on October 29, 1996, initially performing only light duties. The Appellant had been employed since 1991 at [a bakery] as a Dough Person and was required to lift heavy items, including boxes weighing 15-40 kg. He was supposed to return to his regular duties on November 11. However, the Appellant says that his fellow employees provided him with a lot of assistance to complete his work requirements because he could not manage them all himself.

[8] The Appellant continued to experience discomfort in his left hand, for which he sought treatment.

[9] In a May 13, 1997 report to SGI, Dr. Clarke indicated that the Appellant was suffering from neck sprain. However, this condition was gradually improving and the Appellant could continue to work. Dr. Clarke recommended that the Appellant exercise to stretch his neck and left wrist.

[10] In mid August 1997, the Appellant injured his lower back while bending over at work. A claim was made for benefits to the Workers' Compensation Board on August 15, 1997. An x-ray of the Appellant's lumbar spine revealed the presence of osteophytes at several levels. This was interpreted as mild degenerative disc disease.

[11] A practitioner's report dated August 27, 1997, by Dr. Clarke indicated that the Appellant was unable to work due to low back pain. Notes of his chiropractor, Dr. Brent Kloczko, dated September 2, 1997, also state that the Appellant suffered from low back pain aggravated by work. Initially the Appellant's main complaint was low back pain, as well as lesser pain in his neck and left shoulder. The Appellant told Dr. Kloczko that he had not had these problems prior to the motor vehicle accident. By October 1997 the Appellant's

treatments included cervical manipulations, as the Appellant was experiencing neck pain and headaches. The Appellant's low back responded well to chiropractic treatment, and by November 1997 treatment was only on an as needed basis. At some point during the fall the Appellant returned to work, although the file does not indicate when.

[12] On September 24, 1997, the Workers' Compensation Board rejected his claim for benefits on the basis that his low back difficulties were, in their view, related to the motor vehicle accident of September 7, 1996.

[13] A note of his physiotherapist dated October 23, 1997, indicated that the Appellant was making good gains, but raised concerns about the possible presence of C7 radiculopathy.

[14] A radiologist's report dated February 6, 1998 notes a congenital fusion of the C1 and C2 segments and mild disc degeneration at C5-6. Another x-ray, this time of his lumbar spine, on March 12, 1998, indicated mild degenerative spondylosis.

[15] The Appellant injured his lower back again on March 12, 1998, while lifting a 20 kg bag at work. He missed work for several weeks, until returning to light duties on April 13.

[16] On May 5, 1998, the Appellant saw Dr. Bachynski, who noted the Appellant's continuing complaints of neck pain. The Appellant's family physician referred him to Dr. Buwembo, a neurosurgeon, on July 10, 1998.

[17] In August, Dr. Hatfield wrote a note indicating that the Appellant was having ongoing neck spasms related to shoulder girdle problems as a result of his motor vehicle accident. Dr. Hatfield stated that the Appellant had made a claim to the Workers' Compensation Board for benefits related to a lower back injury. He added that the Appellant would benefit from chiropractic treatment and massage.

[18] On September 19, 1998, the Appellant saw Dr. Buwembo. Dr. Buwembo noted that the Appellant was having weekly chiropractic treatment and massage therapy twice a week, which provided temporary relief. Dr. Buwembo observed decreased neck range of motion,

but as cervical and lumbar x-rays were normal he diagnosed cervical and lumbar myofascial syndrome. Dr. Buwembo recommended physiotherapy treatment.

[19] The Appellant began attending physiotherapy 2 to 3 times per week at Welsh & Associates in September 1998. In reporting to Dr. Buwembo, the physiotherapist raised concerns about possible impingement of the left C7 nerve root.

[20] The Appellant saw Dr. Buwembo again on December 8. Dr. Buwembo recorded that the Appellant had left arm pain, possible C6-7 disc herniation causing C7 radiculopathy with left triceps weakness and a depressed left triceps reflex. There are reports of other investigations in December related to the Appellant's left arm pain.

[21] The Appellant had a cervical and lumbar myelogram and spinal CT scan done on February 8, 1999. The report stated:

Congenital fusion of upper cervical segments possibly with fusion to the skull base. I suspect this has resulted in excess mobility and degenerative change developing at the first definable disc space C3-C4. There is impingement on the left side of the spinal cord and left nerve root at this level. Bilateral nerve root impingement is demonstrated at C6-C7. The abnormality at C3-C4 is primarily due to bony osteophytes. At C6-C7 the abnormality is primarily due to bilateral disc bulge.

[22] In a March 12, 1999 note, SGI's medical consultant, Dr. Flotre, opined that SGI was responsible for the Appellant's neck difficulties, but not his low back problems.

[23] On March 25, 1999, Dr. Buwembo wrote that the CT scan had confirmed severe cervical stenosis at C3-4, mainly due to osteophytes, with significant displacement of the spinal cord from left to right. Marked narrowing of the foramina at C6-7 was also noted. Surgery was recommended.

[24] In April and May 1999, Dr. Buwembo and Dr. Hatfield offered differing opinions to SGI regarding the appropriateness of proceeding with a tertiary assessment. Dr. Hatfield did not believe such an assessment would be helpful, as the Appellant was awaiting surgery for his left arm. He also reported a diagnosis of whiplash-associated disorder, grade III.

[25] As at May 12, 1999, the Appellant continued to work for his pre-accident employer, but his employment duties had been substantially modified. He did not lift heavy bags of flour and performed more supervision.

[26] On July 15, 1999, Dr. Buwembo performed an anterior cervical discectomy and C3-4 and C6-7 interbody fusion at two levels.¹

[27] In a brief letter dated July 30, 1999, another SGI medical consultant, Dr. J.F. Alexander, provided an opinion that the Appellant's low back pain was not related to the motor vehicle accident.

[28] On September 20, 1999, Dr. Buwembo examined the Appellant again. The Appellant continued to have left shoulder blade discomfort and neck stiffness. Dr. Buwembo advised the Appellant to commence rehabilitation and conditioning, and observed that the Appellant was not fit to return to physically demanding work. Shortly thereafter the Appellant began a conditioning program with Regina Sports and Physiotherapy.

[29] In October 1999, the Appellant's employer took the position that the Appellant would need to be able to perform all of his duties in order to return to work.

[30] In an opinion dated November 9, 1999, Dr. Flotre advised SGI that there was inadequate information to connect the Appellant's low back concerns to the motor vehicle accident.

[31] Dr. Buwembo saw the Appellant again on December 3, 1999. While the Appellant continued to show improvement from his surgery, he was not yet fit to return to work and was to continue rehabilitation.

[32] In February 2000, following a referral by Dr. Hatfield, the Appellant attended the Rothbart Pain Management Clinic in Toronto. Dr. Gale diagnosed, among other things, "Radiculopathy left leg at L4" and "Radiculopathy left arm C6-7." Diagnostic facet blocks were performed at C3-6, L3-4, L4-5 and L5-S1, with positive results.

¹ There is some doubt that the two fusions were in fact performed at the correct levels.

[33] A report from Welsh & Associates dated May 1, 2000, suggested that the Appellant's rehabilitation regarding his upper quadrant had plateaued and he had decreased range of motion due to his neck surgery. However, the Appellant had made slow but steady gains in exercise therapy. The Appellant would require a maintenance program for life to sustain his recovery and would never be able to return to his pre-injury employment.

[34] The Appellant underwent a tertiary assessment at the Wascana Rehabilitation Centre Functional Rehabilitation Program on June 13, 14 and 15, 2000. The assessment team made the following diagnoses:

Injury Related:

1. Post operative C3-4, C6-7 cervical fusion.
2. Apparently positive response to facet injection (test done open rather than blind with controls).
3. Fracture fourth right metacarpal – resolved.
4. Chronic pain syndrome.

Non-injury Related:

1. History of multiple previous injuries.
2. Congenital fusion C1-3 with secondary osteoarthritis at C3-4 and C6-7.
3. Low Back II since accident.

Among other things, the tertiary assessment recommended that diagnostic imaging of the cervical spine should take place on an expedited basis, followed by treatment in a multidisciplinary facility, including pain management counselling for chronic pain syndrome.

[35] On June 21, 2000, the Appellant had an MRI which showed, among other things, significant impingement of the nerve root and cord at C3-4. The tertiary assessment team recommended urgent surgical intervention. As a result of this recommendation, the Appellant was seen again by Dr. Buwembo on August 12, 2000, but nothing was decided because Dr. Buwembo had not yet seen the MRI films. Eventually Dr. Buwembo recommended an anterior discectomy and osteophyctectomy at C3-4 and interbody fusion with a bone graft and plate.

[36] On August 15, 2000, the Appellant was discharged by Regina Sport and Physiotherapy. He had not been attending physiotherapy since May 5, because he was awaiting further surgery.

[37] On May 21, 2001, the Appellant had the planned surgery, consisting of C3-4 anterior discectomy, osteophyctectomy, and fusion. He was discharged on June 1, 2001. By late August, the Appellant reported that his symptoms were gradually improving and he was walking and lifting light weights. Dr. Buwembo remained concerned about symptoms of right ulnar neuropathy.

[38] At SGI's direction, the Appellant submitted to an independent medical examination by a neurosurgeon, Dr. Michael Hunter, on October 13, 2001. Dr. Hunter's findings are summarized in detail below.

[39] Following a further attendance upon Dr. Buwembo on February 29, 2002, the Appellant had another MRI scan of his cervical spine on April 16. Upon review in May, Dr. Buwembo still had no explanation for the Appellant's right sided arm symptoms.

[40] A residual capacity evaluation conducted on November 4, 5, and 6, 2002 by Wascana Rehabilitation Centre raised concerns about a possible upper motor neuron lesion and concluded that further investigation of possible basilar invagination was required, and the Appellant had not reached maximum medical improvement.

[41] Part of the residual capacity evaluation included an assessment of the Appellant's functional capacity. The physiotherapist who conducted this evaluation reported physical findings consistent with severely limited cervical range of motion, signs of right sided cervical nerve plexus tethering, objective signs of upper motor lesion affecting the right lower extremity, and dizziness related to exertion. The Appellant did not meet his pre-injury job demands, although he met all of the requirements for light level work and some of the requirement for medium level work.

[42] By January 2003, SGI appears to have begun investigating whether the Appellant could be retrained and find sedentary employment. In March 2003, SGI instructed IRC

(Innovative Rehabilitation Consultants) to meet with the Appellant and to prepare a transferable skills analysis and labour market survey. IRC developed the following occupational alternatives for the Appellant, based upon his vocational profile and taking into account his functional limitations: technical sales representative, industrial supplies sales representative, food product sales representative, and security services sales consultant.²

[43] SGI advised the Appellant by letter dated July 30, 2003 (the “2003 Letter”)³ that his determined employment was a “Food Product Sales Representative” and outlined some of the duties of this position. The letter explained how the Appellant’s determined employment income of [amount], resulting in a biweekly benefit of [amount], had been calculated. SGI advised the Appellant that, in one year’s time, the amount of this determined employment income or his actual earnings, whichever was greater, would be deducted from his then current income replacement benefit, which at that time was [amount] biweekly. During the intervening year, 75% of any income earned by the Appellant would be deducted from his income benefit replacement. The 2003 Letter also included standard paragraphs outlining the Appellant’s right of appeal, right to request mediation, and so on.

[44] On August 25, 2003, the Appellant underwent surgery to address compression of the ulnar nerve at the right elbow. Later in the fall of 2003 he participated in pain management sessions at Wascana Rehabilitation Centre.

[45] In October 2003 the Appellant found employment as a “commissionaire,”⁴ providing basic security at the airport and provincial government buildings. In May 2004 he accepted a full-time position at [store].

[46] Welsh & Associates discharged the Appellant from physiotherapy on November 25, 2003. They had provided 205 treatments to the Appellant since September 1998. Their discharge report indicated that the Appellant

...has permanent functional restrictions due to decreased cervical ROM with cervical fusions and ulnar nerve transposition. This limits his ability to lift with a restriction set at 25lbs.

² IRC Transferable Skills Analysis and Labour Market Survey dated June 4, 2003.

³ Letter dated July 30, 2003, from SGI to the Appellant.

⁴ Letter from SGI to the Appellant dated January 8, 2004.

[47] The Appellant had a general decrease in upper body strength as he was limited in the amount of exercise he could do. The reason given for his discharge was that he had plateaued in his rehabilitation. While the Appellant was very motivated to return to work, he would never be able to return to his pre-accident employment. It was indicated that massage therapy would be an indefinite requirement to maintain his present status.

[48] In a memo dated March 10, 2004, a physical therapy consultant with SGI disagreed with the recommendation that the Appellant receive massage therapy as an indefinite treatment, because “[r]esearch has shown that reliance on ongoing passive treatment may lead to a worse prognosis.” The consultant recommended that massage be limited to 15 treatments over the next 6 months. However, Karen Toffan, the physiotherapist who treated the Appellant from September 22, 1998, testified that massage therapy was essential for pain management and maintenance of the Appellant’s ability to function. Pain management, she said, was needed to maintain his range of motion. She added that other methods of pain management, such as relaxation techniques and stretching, had been tried. In addition, she believed that the Appellant had become too reliant on medications to manage pain. She stated that the Appellant would continue to require massage therapy, but she could not comment on the frequency of treatment that might be required.

[49] One year later following the 2003 Letter, SGI sent the Appellant a further decision letter (one of the decisions in issue in this appeal), which reads, in relevant part, as follows:

...As you are aware, the end of your one (1) year grace period was July 30, 2004, as outlined in my July 30, 2003 letter. Effective July 30, 2004 your income replacement benefit will be reduced by the greater of 100% of your actual income earned or by 100% of the Residual Employment of [amount], whichever is the greater. (please refer to your copy of Version 25)

In my October 20, 2004 letter I had referred to Section 131 (1)(e) which refers to *Termination of Benefits*, and when this would occur. Please note this is incorrect. The correct section is Section 129 (1)(e) of the Legislation that applies to your claim, which reads the same.

The last income replacement benefit paid was up to and including July 24, 2004. Please refer to Version 28 attached. This version calculates employment earnings for the period of July 25, 2004 to July 30, 2004, which falls within the 1 year grace period. The total amount payable for that period is [amount].

Effective July 31, 2004, SGI will deduct the greater of the yearly annual income of [amount] as listed under Version 25, or your actual income, annualized, if greater than [amount]. Based on the six (6) paystubs provided, your earnings annualized, are less than [amount] of the residual employment, therefore payment will be based on Version 25 of each bi-weekly

period or 5.55 bi-weeklies for the period of July 31, 2004 to October 16, 2004. That is 5.55 bi-weeklies x [amount]=[amount] payable under the Act and 5.55 bi-weeklies x [amount]=[amount] payable under the Policy. I have processed payment today in the total amount of [amount]. This cheque will be mailed directly to you from Head Office.

Please continue to submit each paystub upon receipt from [store] for our review.

Please advise me, as soon as possible, if there is any change in your employment status, since this will affect your income benefit. [Emphasis added]

[50] The foregoing is not a complete listing of all of the medical investigations undertaken in relation to the Appellant's various ailments.

JURISDICTION AND STANDARD OF REVIEW

[51] The Commission's jurisdiction to review a decision of SGI is set out in subs. 193(7) of the *Act*. The Commission may set aside, confirm or vary the insurer's decision. In addition, the Commission may make any decision that the insurer is authorized to make pursuant to Part VIII of the *Act*.

[52] Recently, the Saskatchewan Court of Appeal addressed the standard of review applicable to appeals to this Commission: *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In that case, the claimant had put SGI's findings of fact in issue and the Commission had held a hearing pursuant to subs. 193(6) of the *Act*. The Court of Appeal observed that more than one standard of review was indicated by the legislation:

[14] A reading of the relevant statutory provisions would indicate that there is more than one standard of review potentially applicable to a review of a decision of SGI. Here, we are concerned only with determining the appropriate standard of review on an appeal where the appellant places the facts in issue.

[53] In *Allary*, the Court of Appeal concluded that, where an appellant places SGI's findings of fact in issue, the standard of review is correctness:

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

[21] Notwithstanding its comments on the appropriate standard of review, the Commission in fact applied the proper standard, i.e. correctness. It conducted a hearing, heard the evidence of the appellant and reviewed the record including certain documentary

evidence concerning the issue of causation to determine whether or not there was a causal link between the transportation benefits and mental health benefits claimed and the injury.

[54] Insofar as the Appellant has placed SGI's findings of fact in issue, the Commission will apply the standard articulated in *Allary*. We comment on the applicable standard of review in relation to particular issues raised by the appellant below.

LAW AND ANALYSIS

Income Replacement Benefit

[55] In an earlier decision, we concluded that the Commission does not have the jurisdiction to consider the Appellant's challenge to the decision determining the employment of "Food Product Sales Representative" for him. The issue we decided was whether, in an appeal from a decision reducing an insured's income replacement benefit on the one-year anniversary of the decision determining an employment for that insured, the insured is able to contest SGI's earlier decision that he or she is capable of holding the determined employment. We held that we could only review whether SGI erred in its letter dated November 2, 2004 (the "2004 Letter"), which reduced the Appellant's income replacement decision on the one-year anniversary of the 2003 Letter. In addition, we asked counsel for the parties to address whether subs. 139(1) applies to the Appellant's situation, so that SGI is authorized to reduce the Appellant's income replacement benefit by an amount equal to the annual income of his determined employment.

[56] The relevant provisions are as follows:

129(1) Notwithstanding any other provision of this Division, a victim ceases to be entitled to an income replacement benefit when any of the following occurs:

...

(d) one year has expired from the day the victim is able to hold an employment determined for the victim pursuant to section 132 or 133;

(e) the victim holds an employment from which the gross yearly employment income is equal to or greater than the gross yearly employment income on which [sic] victim's income replacement benefit is calculated; ...

(2) Notwithstanding clause (1)(d), if a victim falls within the circumstances described in subsection 139(1), the victim's income replacement benefit is to be reduced pursuant to section 139 and is not to be terminated pursuant to subsection (1). ...

132 Following the second anniversary date of the accident, the insurer may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112 or 113 or determined pursuant to section 131.

134(1) In determining an employment pursuant to section 132 or 133, the insurer shall consider the following factors:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved pursuant to this Part;
- (c) whether the employment is available in the region of Saskatchewan in which the victim resides;
- (d) the employment that the victim is able to hold:
 - (i) on a regular and full-time basis; or
 - (ii) if it would not be possible for the insured to hold employment on a regular and full-time basis, on a part-time basis;
- (e) any other prescribed factors. ...

139(1) Subject to the other provisions of this Division, the insurer shall reduce a victim's income replacement benefit pursuant to subsection (2) if:

- (a) the victim is able to hold an employment determined for the victim pursuant to section 132 or 133; and
- (b) because of bodily injuries caused by an automobile arising out of an accident, the victim earns a gross yearly employment income from the employment that is less than the gross yearly employment income used by the insurer to compute the income replacement benefit that the victim was receiving before the employment was determined pursuant to section 132 or 133.

(2) The insurer shall reduce the victim's income replacement benefit pursuant to subsection (1) by an amount calculated in accordance with the following formula:

$$\text{RIRB} = \text{FIRB} - \text{NI}$$

where:

- RIRB is the reduced income replacement benefit;
- FIRB is the former income replacement benefit the victim was receiving at the time the employment was determined pursuant to section 132 or 133; and
- NI is the net income that the victim earns or could earn from the employment determined pursuant to section 132 or 133.

[Emphasis added]

[57] These are the provisions of the *Act* in force at the time of the Appellant's motor vehicle accident (the "*Old Act*").⁵

[58] In a brief filed on his behalf, the Appellant argues that subs. 139(1) does not apply to him, since he does not hold the employment determined for him by SGI (Food Sales Representative). He further argues that subs. 129(1)(d) does not apply to him, because upon the one-year anniversary of SGI's decision to determine an employment for him the Appellant was incapable of holding that employment. Finally, the Appellant argues that SGI may reduce his income replacement benefit, but only by the amount of his actual earnings as a [store] employee, pursuant to s. 140 of the *Old Act*.

[59] SGI concedes that its decision letter reducing the Appellant's income replacement benefit should have referred to subs. 129(1)(d) rather than subs. 129(1)(e). Subsection 129(1)(d) provides that a claimant is no longer entitled to an income replacement benefit on the one-year anniversary of the decision to determine an employment for him or her. However, SGI submits that the Appellant's circumstances fall within the parameters of the exception to subs. 129(1)(d), set out in subs. 129(2) and s. 139. SGI argues that subss. 139(1) and (2) permit it to deduct from a claimant's income replacement benefit either the income he or she earned from the determined employment or that he or she could have earned by holding this employment.

[60] We have concluded that the Appellant's submission is untenable. As we indicated in our earlier decision regarding the scope of our jurisdiction, the Appellant is precluded from challenging SGI's decision that he is capable of performing the duties of his determined employment. The reason is that he did not appeal SGI's decision letter on this issue within the time period prescribed in the *Act*. As we stated at paragraph 13 of those reasons,

[13] When SGI sends an insured a decision letter that complies with Section 189, advising an insured that a certain employment has been determined for him or her, the time for the claimant to contest the insurer's decision has arrived. If the insured claims not to have the functional ability to perform the selected employment or denies its suitability in other respects, he or she must appeal that decision or request mediation within the time frames prescribed in the *Act*. A subsequent letter, on the one-year anniversary of the decision determining an employment for the claimant, advising the insured that his or her

⁵ *An Act to Amend The Automobile Accident Insurance Act*, S.S. 1994, c. 34, s. 18, amending *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35.

income replacement benefit has been reduced does not revive the right to seek a review of the earlier decision.

[61] In determining an employment for a claimant, SGI is required to consider, among other things, the claimant's ability to perform the duties of the employment and the availability of the employment within a certain distance of the claimant's residence. If the claimant does not successfully challenge SGI's decision in accordance with the statutory scheme, it is taken as a given that the claimant could obtain and perform this employment. We are not saying that we agree that SGI's decision that the Appellant could perform the determined employment was correct; indeed, we have serious doubts in that regard. However, we do not have jurisdiction to review the earlier decision. Accordingly, the best the Appellant can hope for is that his circumstances fall within the exception in subs. 129(2); otherwise, since one year had elapsed since the date of SGI's earlier decision, his entitlement to any income replacement benefit would have ended.

[62] Subsection 129(2), which is cited in full above, only applies to a claimant who "falls within the circumstances described in subsection 139(1)..." On the face of it, the Appellant does not fall within these circumstances because he does not hold "the employment," which can only refer to the determined employment. Having regard for the ordinary meaning of these words, SGI is not authorized to reduce the Appellant's original income replacement benefit by the deemed gross yearly earned income of his determined employment, and could simply terminate his income replacement benefit entirely because, pursuant to subs. 129(1)(d), he is not entitled to one.

[63] While this is a literal interpretation of these provisions, SGI is urging a different interpretation on us, one more favorable, in fact, to claimants. SGI states that the interpretation we have just outlined would be "grossly unfair to those who chose employment other than the determined employment." SGI argues that the Commission should read subs. 139(1) having regard for subs. 139(2), which sets out the formula to be applied when SGI reduces a claimant's income replacement benefit. The formula provides that a claimant's "reduced income replacement benefit" is the difference between his or her "former income replacement benefit" and "NI," which is defined as "the net income that the

victim earns or could earn from the employment determined pursuant to section 132 or 133.” [our emphasis]

[64] In effect, SGI is suggesting that we should read the word “earns” in subs. 139(1)(b) to mean “earns or could earn,” the words used expressly in subs. 139(2). Subs. 139(1)(b) should therefore be read as follows:

139(1) Subject to the other provisions of this Division, the insurer shall reduce a victim’s income replacement benefit pursuant to subsection (2) if:

...

(b) because of bodily injuries caused by an automobile arising out of an accident, the victim earns or could earn a gross yearly employment income from the employment that is less than the gross yearly employment income used by the insurer to compute the income replacement benefit that the victim was receiving before the employment was determined pursuant to section 132 or 133.

We must consider whether there is a basis for us to depart from the ordinary meaning of the word, “earns,” in order to give effect to the proposed interpretation.

[65] There is much authority for adopting a more expansive interpretation of statutory language in order to ensure that the legislative purpose is fully realized.⁶ Such an interpretation can be used, for example, to resolve a conflict among provisions within a statute.⁷ Subsections 139(1)(b) and 139(2) are inconsistent, in that subs. 139(1)(b) refers to the income a claimant earns from the determined employment, while the formula in subs. 139(2) provides for the deduction of the net income that the claimant earns or could earn from the determined employment. These provisions cannot be reconciled unless the word “earn” in subs. 139(1)(b) is read expansively to include income that the claimant could earn.

[66] The purpose of subs. 129(2) and s. 139 is to provide a mechanism in certain circumstances for reducing, but not terminating, the income replacement benefit of a claimant on the one-year anniversary of SGI’s decision determining a particular employment for that claimant. We doubt that the Legislature intended that a claimant would lose entitlement to any income replacement benefit if he or she did not earn income from the employment determined for him or her. We agree with SGI that this would result in

⁶ See R. Sullivan, *Driedger on the Construction of Statutes*, 3d. ed. (1994, Butterworths), at p. 73ff.

⁷ *Ibid.* at p. 77; and see *B.C. v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 at pp. 31-2.

significant unfairness to many claimants who choose other employment. We also agree that, in such circumstances, a fairer result would be for SGI to reduce a claimant's benefit by the amount he or she actually earns or could earn from the determined employment.

[67] In our previous decision, we noted that subs. 139(1) has been replaced by a new provision that resolves the discrepancy identified above. Subsection 135(1) in the *New Act*⁸ allows SGI to reduce an insured's income replacement benefit if one year has expired since an employment was determined for the insured. The insured's income replacement benefit is reduced by the greater of his actual earnings or the gross yearly employment income of the determined employment. This reinforces our view of the purpose of these provisions and that, as a result of a legislative oversight, subs. 139(1)(b) does not include the words, "or could earn."

[68] For the foregoing reasons, we accept SGI's interpretation of subs. 139(1)(b) and its application of this provision to the Appellant's case. SGI's decision to reduce the Appellant's income replacement benefit by the net income of the determined employment is confirmed.

Permanent Impairment Benefit

[69] The Appellant disagrees with SGI's two decisions concerning the amount of his entitlement to a permanent impairment benefit.

[70] The provisions in the *Old Act* governing awards of a permanent impairment benefit relevant to this case are as follows:

153 In this Division, 'permanent impairment' includes a permanent anatomical or physiological deficit, a permanent disfigurement, a permanent acquired brain injury or any other permanent impairment prescribed in the regulations.

154 Subject to this Division and the regulations, a victim who suffers a permanent impairment because of an accident is entitled to a lump sum for the permanent impairment.

...

156(1) The insurer shall evaluate a victim's permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

⁸ *The Automobile Accident Insurance Amendment Act, 2002*, S.S. 2002, c. 44.

(2) If a victim's permanent impairment is not listed on the prescribed schedule of permanent impairments, the insurer shall determine a percentage for the permanent impairment using the prescribed schedule as a guide.

157(1) Subject to subsection (2), the insurer shall calculate the lump sum benefit for a permanent impairment payable pursuant to this Division in accordance with the following formula:

$$\text{LSBPI} = \$125,000 \times P$$

Where:

LSBPI is the lump sum benefit for the permanent impairment; and

P is the percentage determined pursuant to section 156.

(2) The minimum amount of a lump sum benefit for a permanent impairment pursuant to this Division is \$500 and the maximum amount is \$125,000.

[71] SGI's medical consultants have prepared several assessments of the Appellant's entitlement to a permanent impairment benefit. In an opinion dated May 25, 1997, Dr. Murray Flotre reviewed information indicating that the Appellant had sustained an 8% reduction in flexion and extension of his left wrist. Each of these deficits, he determined, is assigned a 0.2% permanent whole body impairment rating under the regulations, resulting in a combined impairment rating of 0.4%.

[72] Following the Appellant's surgery on July 15, 1999, Dr. Flotre conducted a further review of the Appellant's entitlement. Each discectomy at C3-4 and C6-7, resulting in a fusion at both levels, has an impairment rating of 8%, for a combined rating of 16%. In addition, the Appellant was entitled to a permanent impairment rating for the scar left by the surgery. The surface area of the scar was 2.6 cm², and resulted, Dr. Flotre concluded, in a permanent impairment rating of 4.6%. Adding 16%, 4.6%, and 0.4% resulted in a total permanent impairment rating of 21%.

[73] We assume that SGI paid to the Appellant a permanent impairment benefit based upon this 21% impairment rating shortly following Dr. Flotre's second review of October 3, 2000, but no evidence to this effect was filed.

[74] Dr. John Alport, another SGI medical consultant, was asked to review the Appellant's entitlement to a further permanent impairment benefit in 2004. Dr. Alport had

the benefit of Dr. Hunter's Independent Medical Evaluation. As will be discussed more fully below, Dr. Hunter observed a discrepancy in the identification of the Appellant's cervical levels. Dr. Hunter concluded that the Appellant had had fusions performed at the C4-5 and C7-T1 levels, although pathology existed at the C3-4 and C6-7 levels. Dr. Alport commented that SGI would have to consider whether a permanent impairment benefit would be payable if discectomies are eventually performed at the C3-4 and C6-7 levels, since the Appellant has already been paid for the consequences of two fusions. As this further surgery has not taken place and may not, we will leave this question for another day.

[75] In a second opinion, Dr. Alport opined that SGI is not responsible to pay to the Appellant an additional permanent impairment benefit for the second surgery to fuse the C7 and T1 vertebrae, since the Appellant had already been paid a benefit for the first, apparently unsuccessful fusion at this level. He explained as follows:

The general principle of permanent impairment award is that it is the injury that is compensated, and not the treatment. There is no provision in our regulations, nor is there in the American Medical Association Guides to Permanent Impairment to provide a second permanent impairment for fusion of a level that wa[s] already awarded for being fused. It would be inappropriate for me to repeat the same award he has already received.

It would also be inappropriate for me to offer to provide a permanent impairment award for a level that has not yet been fused (i.e. C6-7 level) when evidence proves that this level has not yet been fused. What I am saying is, just because it took two surgical procedures to fuse the C7-T1 level, this does not entitle him to two separate permanent impairment awards.

[76] Dr. Alport also considered whether the Appellant was entitled to a supplementary impairment benefit related to the enlargement of the surgical scar from the second surgery. The scar measured 3.6 cm² after the second surgery, which, Dr. Alport noted, would result in a 3.6% impairment rating. However, in his view the Appellant had already been overcompensated for the neck scar. When Dr. Flotre had originally calculated a 4.6% impairment rating for the scar, he had determined an amount both for "change in form and symmetry" and for the "surface area of the scar." Under the regulations, these amounts are combined only if a scar is on the claimant's face; otherwise, the claimant is awarded the higher amount only.⁹ Because the Appellant had already been awarded a benefit based upon a 4.6% rating for the original surgical scar, and the scar after the second surgery only entitled the Appellant to a 3.6% rating, no additional amount was payable to the Appellant.

[77] Finally, Dr. Alport considered whether the Appellant should be paid a permanent impairment benefit for his right elbow surgery. In his view, no benefit was payable for the results of the surgery since it was a success and the Appellant's ulnar nerve function was not affected. However, the resultant surgical scar, having a surface area of 2.3 cm², resulted in a permanent impairment rating of 1.15%.

[78] As a result of these opinions, SGI paid to the Appellant an additional permanent impairment benefit of 1.15% related to the elbow scar, but nothing for his second fusion surgery at C7-T1.

[79] We accept the correctness of SGI's analysis related to the claimant's entitlement to permanent impairment benefits and see no basis to set aside or vary these decisions.

Apportionment and Coverage of Future Costs

[80] Finally, the Appellant has appealed decision letters regarding the apportionment of his medication expenses and "any further costs" related to his medical condition. One decision letter, dated November 2, 2004, advised that SGI would only continue to cover 50% of the Appellant's medication costs on the ground that his present medical condition is not entirely attributable to the motor vehicle accident. The second informed him that SGI would only cover 50% of any future costs of treatment related to the Appellant's condition.

[81] The specific benefits to which these decisions relate are found at ss. 110 and 163 of the *Old Act*:

110(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 a victim, to lessen the victim's disability caused by an accident and to facilitate the victim's recovery from the accident:

- (a) physical and acquired brain injury programs and treatment;
- (b) occupational and vocational training and programs;
- (c) alterations to a victim's residence;
- (d) modification or purchase of a vehicle for a victim;
- (e) purchase of special equipment for a victim;
- (f) any additional measure, program or treatment prescribed in the regulations.

⁹ *The Personal Injury Benefit Regulations*, c. A-35 Reg 3, Appendix B, Division 3.

(2) Subject to the regulations, the insurer may take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury and to facilitate the victim's recovery from an accident.

...

163(1) Subject to the regulations, a victim is entitled to a benefit to reimburse the victim for paying for any of the following items:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
- (b) the purchase of prostheses or orthopaedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) any other prescribed expenses.

[82] This Commission has identified different standards of review applicable to our review of SGI's decisions made pursuant to these sections.¹⁰ Under s. 110, SGI has discretion in determining what measures, programs and treatments are "necessary"¹¹ or "advisable" to contribute to the claimant's rehabilitation; however, s. 163 does not contain similar language. SGI's decisions related to rehabilitation need only be reasonable, but must be correct in the case of reimbursement of medical and other expenses.

[83] SGI relies upon the advice of its medical consultant, Dr. John Alport, in concluding that it is only responsible to cover 50% of the Appellant's medication costs and other costs of treatment.

Dr. Alport's Opinions

[84] From the outset of his involvement in the Appellant's file, Dr. Alport raised the possibility of apportioning responsibility for the claimant's medical condition between pre-existing conditions and injuries sustained in the motor vehicle accident. He referred to the Appellant as a "crumbling skull," an expression referring to a particular "doctrine" of legal causation:

[The Appellant] was obviously involved in a fairly severe motor vehicle accident. The medical documentation for the two years following the accident doesn't indicate much in the

¹⁰ See *I.S. v. SGI*, 2006 SKAIA 097, paras. 5-19, and *T.S. v. SGI*, 2007 SKAIA 069, para. 50. These decisions both hold that SGI has discretion regarding some kinds of benefits and that review of such decisions is for reasonableness. The decisions do not appear to agree on the extent to which SGI has discretion to provide rehabilitation benefits.

¹¹ The Commission's decisions conflict on this point.

way of neck problems. He was born with congenital fusion, involving from the skull to C1, and also C2 and 3 seem fused. Certainly the congenital abnormalities predispose him to degenerative changes, regardless of any motor vehicle accident, but it is certainly possible that the motor vehicle accident hastened the development of his neck problems. The significant osteophytes that were at least partially, and perhaps mostly, responsible for the impingement would not have been caused by the motor vehicle accident – it takes much longer than two or three years to develop these significant changes. Therefore, we have a case of a “crumbling skull”, and SGI has accepted some responsibility for the neck problems he has. ...

[85] He reviewed the Appellant’s post-accident surgeries, and then said that he had “a strong suspicion that a lot of his problems were predestined, and not related to the motor vehicle accident.” Dr. Alport indicated that more information was required about the Appellant’s ability to perform his employment duties following the accident.

[86] In a later opinion, Dr. Alport commented upon an occupational therapy report regarding the Appellant’s job duties:

... Unfortunately, that report indicates that the job was quite physically demanding, and I believe I am correct when I state that he was able to perform this job a full two years after the motor vehicle accident before he finally became disabled. Generally degenerative conditions progress, whereas injuries are worse shortly after the accident and improve.

It will certainly be difficult to attribute all of his neck problems to the motor vehicle accident given the fact that he could perform a physically demanding job so long after the accident...

Dr. Alport suggested that an independent medical evaluator should be asked what proportion of the Appellant’s neck problem was attributable to the motor vehicle accident rather than to congenital conditions.

[87] Shortly thereafter, Dr. Alport repeated his recommendation that SGI should proceed to apportion its responsibility for the Appellant’s current and future disability. To do so, in his view, an independent evaluation by a neurosurgeon was required in order to provide “an unbiased determination of how much, or what proportion the motor vehicle accident contributed to this gentleman’s current problems.”

Independent Medical Evaluation of Dr. Michael Hunter

[88] Dr. Michael Hunter performed an independent medical evaluation of the Appellant on October 31, 2001. He is a certified specialist in neurosurgery and had practiced that specialty for 30 years. He is also a clinical professor of neurosurgery in the Department of

Clinical Neurosciences, Faculty of Medicine, University of Calgary. Dr. Hunter appears to have conducted an extensive review of the Appellant's medical records, including records of claims made for worker's compensation between 1974 and 1999. Dr. Hunter also interviewed and examined the Appellant.

[89] Dr. Hunter relied upon historical information provided by the Appellant or found in the records he reviewed. He noted that the Appellant had apparently been free of difficulties prior to the date of the motor vehicle accident on September 7, 1996. The Appellant was aware of neck pain immediately after the accident. He eventually returned to his full duties at work, but advised Dr. Hunter that, "through all this time, he was having low back, neck, and left shoulder difficulties." The first reference to low back pain in the Appellant's medical records dated from August 1997, when he attended upon Dr. Hatfield complaining of back pain related to a lifting incident at work. Dr. Hunter reviewed the Appellant's history of physiotherapy and of surgical interventions to his neck.

[90] Upon examination of the Appellant's cervical spine, Dr. Hunter observed significant limitations of movement in all directions. In addition, the Appellant was tender throughout the cervical musculature, which appeared to be soft tissue in nature. He also complained of tenderness at about the L4-5 level of the lumbar spine, and had 80% range of motion with regard to lumbar extension, right and left lateral bending and rotation.

[91] Dr. Hunter noted that congenital anomalies in the Appellant's cervical spine had resulted in discrepancies among the various medical records regarding the numbering and identification of affected vertebral levels. After thoroughly describing the confusing differences among radiological reports, he concluded that the Appellant's surgeries had likely been undertaken at the wrong levels:

Given this series of films, it is my impression that the operative procedures undertaken have not been directed to the levels of pre-operative demonstrated pathology. In each case it would appear that the surgical activity was one level below the level demonstrated on pre-operative investigations.

[92] Dr. Hunter concluded that the Appellant suffers low back pain related to mild multiple level degenerative disease. Based upon the available history, the aggravating factor

that caused this chronic situation was most likely a work-related lifting injury in August 1997.

[93] Dr. Hunter next concluded that the Appellant's cervical spine difficulties were caused by the motor vehicle accident, and it is worthwhile to reproduce at length his reasons in this regard:

2. Cervical spine. [The Appellant] unquestionably has a rather complex congenital malformation of the upper portion of his cervical spine. It has been detailed in the body of the report however, basically consists of fusion of the C1 vertebra to the base of his skull and then congenital fusion of the second and third vertebrae to produce a C2-3 block vertebra. This situation does lead to abnormal stresses and strains in the region of the upper cervical spine and I believe has led to the development of degenerative changes at the C3-4 level which has subsequently led on to the spinal stenosis described at C3-4 level on various investigations.

The available documentation that does speak of headache, neck pain, and shoulder difficulties shortly following the motor vehicle accident and it is my interpretation that his cervical spine difficulty was made symptomatic by the injury in question.

The findings of degenerative disease at C6-7 are more in keeping with spontaneous degeneration rather than secondary to congenital anomalies many levels higher in the cervical spine.

There is relatively good evidence that he did suffer from difficulties, post injury, at the C6-7 level with a C7 nerve root problem resultant in arm pain.

It is therefore my opinion that the motor vehicle accident did aggravate his cervical spine situation and did result in the subsequent development of symptoms from both the C3-4 and C6-7 levels.

[94] Dr. Hunter then commented on some post-operative difficulties suffered by the Appellant, including difficulty swallowing and symptoms compatible with right ulnar neuropathy, and stated that these "must be accepted as part of the picture as they were resultant upon the surgical procedure."

[95] He continued:

I do not believe the congenital anomalies in this man's cervical spine (or the acquired degenerative disease at C6-7) are primarily responsible for his symptomatology. It is well known that one can live for many years (or a lifetime) without requiring surgical treatment for disorders of this nature. It is my feeling that the motor vehicle accident in question produced stresses that resulted in the development of the symptoms in these anatomical areas.

[96] Dr. Hunter believed it was unlikely that the Appellant would return to his physically demanding occupation and suggested that he "will find limited employment in the future" even though he appeared motivated.

[97] From the materials filed it does not appear that SGI or its medical consultants identified any factual errors or mistaken assumptions in Dr. Hunter's report, or asked him to reconsider his opinion in light of additional information.

Dr. Alport's Post IME Opinions

[98] Dr. Alport forwarded a copy of Dr. Hunter's report to SGI's legal department. While he said that SGI had significant responsibility for the Appellant's symptoms, he also alluded to the possibility of claims for medical malpractice and workers' compensation. He added that "[t]his is clearly a case of a crumbling skull, although that doesn't come across clearly in the report."

[99] Next, on October 21, 2004 Dr. Alport provided an opinion regarding future coverage for the cost of medication:

... It is clear that this man is taking Tylenol with Codeine and likely Lorazepam as a result of his neck pain. I have explained that his neck pain is probably caused by a number of things. It is absolutely certain to me that his current neck pains are not entirely attributable directly to the motor vehicle collision. His pre-existing congenital abnormality and arthritic process is contributing a fairly significant portion of his ongoing symptoms. I fully expect that his arthritic process is progressive. I think that the apparent medical misadventure also has to bear some responsibility for his ongoing symptoms. I think it is essential that any decision about the future should take this into consideration. I am going to recommend that SGI consider an apportionment for ongoing decisions. ...

I know that some of my earlier reports suggest that my opinion was, (and still is) that there was very little relationship between his neck problems, and the motor vehicle collision. SGI obtained an IME from Dr. Hunter, and accepted his opinion that most of his problems were related to the motor vehicle collision.

I would suggest that SGI consider an apportionment of 50% which I feel is very generous given the medical information available to me. It is important to realize that this, by no means, suggests that [the Appellant] doesn't have significant and serious neck problems. I have suggesting [sic] a decision such as this be made because I understand that SGI has responsibility only for disability and injuries caused by motor vehicle collision. I am not convinced at all that this is the situation in [the Appellant's] case. [underlining in original]

[100] SGI cited portions of this passage in the decision letters of November 2 and 8, 2004, in which it advised the Appellant that it would only cover 50% of the costs of medication and of further treatment.

Other Opinions Regarding Causation

[101] Dr. Kloczko, the chiropractor who treated the Appellant, advised SGI in an opinion dated June 24, 1999, that he could not relate the Appellant's symptoms definitely to the motor vehicle accident as he had only begun treating him a year after the event. He offered that the Appellant's injuries "were consistent with those expected in the type of accident he was involved in."

The Crumbling Skull Doctrine

[102] According to SGI, the Appellant is a "crumbling skull" claimant whose enduring symptoms are caused, at least in part, by degenerative changes to his cervical spine rather than trauma suffered during the motor vehicle accident. In *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 473-4, Mr. Justice Major explained succinctly the "thin skull" and "crumbling skull" doctrines:

The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position. [Emphasis added]

The Saskatchewan Court of Appeal has held that these principles of causation apply to claims for benefits under Part VIII of the *Act*: *Saskatchewan Government Insurance v. Steinhauer*, 2006 SKCA 1.

[103] Causation will be shown if the Appellant would not have suffered from his neck and low back difficulties “but for” the accident or if the accident contributed materially to these conditions. Adapting the analysis outlined by Mr. Justice Major in *Athey*, the ramifications for this appeal are as follows:

- a) If the condition would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.
- b) If it was necessary to have both the accident and a predisposition to the condition for the condition to occur, then causation is proven, since the condition would not have occurred but for the accident. Even if the accident played only a minor role, SGI would be fully liable because the accident was still a necessary contributing cause.
- c) If the accident alone could have been a sufficient cause, and the pre-existing condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the condition. It would have to be determined, on a balance of probabilities, whether the motor vehicle accident materially contributed to the condition.

Determination Regarding Causation

[104] Dr. Hunter provided a thorough and compelling report to SGI following his independent medical examination of the Appellant. In his report, he concluded that the Appellant’s low back symptoms were not caused by the motor vehicle accident, observing that the medical records showed that he first complained of low back pain following a work-related lifting injury in August, 1997. We accept his reasons and conclude that SGI has no responsibility for the costs of treatment, medications, or rehabilitation related to the low back condition. This is supported by many if not all of the opinions filed in evidence.

[105] However, Dr. Hunter was quite clear that the Appellant's neck injuries were most likely caused by the motor vehicle accident. Although the Appellant had pre-existing congenital deformities and disc degeneration, Dr. Hunter noted that the Appellant was asymptomatic before the motor vehicle accident and that it is possible to "live for many years (or a lifetime) without requiring surgical treatment for disorders of this nature." Dr. Hunter ascribed the development of neck symptoms to the motor vehicle accident. He does not suggest anywhere in his report that the Appellant would likely have developed symptoms at his cervical spine at some point in the future even if the accident had not occurred.

[106] Dr. Hunter is an experienced neurosurgeon who was selected by SGI to perform the independent medical evaluation. His report is persuasive and clear. He appears to have reviewed all of the relevant medical information and had an opportunity to examine the Appellant. We have no hesitation in accepting all of his conclusions.

[107] Dr. Alport jumped immediately to the conclusion that the Appellant is a "crumbling skull" claimant, and held onto this view despite Dr. Hunter's report. As a medical consultant, Dr. Alport has no expertise in determining whether a particular legal doctrine of causation applies to a claimant. In passing along Dr. Hunter's report, Dr. Alport repeated his view that this is "clearly a case of a crumbling skull, although that doesn't come across clearly in the report." From our reading of the report, Dr. Hunter does not provide any basis for such a conclusion. Dr. Alport's opinion became, if anything, more definite after the IME. He wrote in October 2004 that it was "absolutely certain to me that his current neck pains are not entirely attributable directly to the motor vehicle collision." Dr. Alport did not explain in any of his reports what made him so certain. He did not consider why the Appellant was asymptomatic before the motor vehicle accident. He did not discuss the likely progression of the Appellant's neck problems if he had not been involved in the motor vehicle accident. He did not attempt to explain why SGI should accept his opinion over that of Dr. Hunter or point out errors in Dr. Hunter's conclusions.

[108] We find Dr. Alport's opinions regarding causation in this case unpersuasive. It is not even clear to us that his advice to SGI took the form of medical, as opposed to legal, opinion.

[109] SGI's decision that it would only fund 50% of the Appellant's costs of medication and of further treatment is, insofar as it relates to his neck difficulties, post-operative difficulties and symptomatology for right ulnar neuropathy, incorrect and unreasonable. To the extent that the decision applies to treatment for the Appellant's low back problems, the decision is confirmed, but otherwise it is set aside.

Coverage for Massage Treatments

[110] At the time of the hearing, SGI had not issued a specific decision respecting the amount of further funding, if any, that would be provided for massage treatments. Consequently, although we heard evidence that the Appellant will continue to require such treatments to maintain his conditioning and level of function, we do not have jurisdiction to make a decision in this regard.

CONCLUSION

[111] For the reasons set out above, the following decision letters are confirmed:

Two decision letters dated November 2, 2004, addressing the Appellant's entitlement to permanent impairment benefits;

A decision letter dated November 2, 2004, reducing the Appellant's income replacement benefit.

[112] The following decision letters are set aside:

A decision letter dated November 2, 2004, wherein SGI indicated that it would cover only 50% of the Appellant's medication costs after November 9, 2004;

A decision letter dated November 8, 2004, where SGI purported to limit its coverage for future costs of treatment to 50% of the total costs of such treatment;

except to the extent that they relate to treatment for the Appellant's low back condition.

[113] Upon receipt of satisfactory invoices or other documentation, SGI is directed to reimburse to the Appellant his medication and treatment costs incurred since the date of the decision letters that have been set aside, with interest.

[114] As he has been partly successful in his appeal, the Appellant is entitled to have his costs and expenses reimbursed in accordance with the provisions of the *Act* and the Regulations, to a maximum of \$2500. In addition, he shall be refunded his appeal fee.

Dated at Regina, Saskatchewan, on July 11, 2007.

Beverly Cleveland, Chair

Peter Bergbusch, Commission Member

Al Knippel, Commission Member