

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *Z.R. v. Saskatchewan Government
Insurance, 2007 SKAIA 085*
Date: 20070723
File: 121 of 2006

BETWEEN

Z.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Z.R., the Applicant
Dale Brown, for the Respondent

Before: **Beverly Cleveland, Chair**
Carol Olson, 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 **Prince Albert**, Saskatchewan
July 4, 2007

DECISION

[1] The Appellant, Z.R., was injured in a vehicle accident on June 26, 1999. He applied for and received benefits under Part VIII – the no fault provisions - of *The Automobile Accident Insurance Act* (“the old Act”¹).

[2] The Appellant recovered fairly quickly from most of his injuries but continued to have significant difficulty with his shoulders and arms that required extensive rehabilitation. Eventually, when no further improvement was anticipated or likely, permanent impairment benefits were considered. SGI concluded that no benefits for permanent impairment were available to the Appellant and they so advised him by letter dated December 7, 2005. That letter also terminated coverage for further chiropractic care.

[3] The Appellant thought both of these decisions were wrong and appealed.

JURISDICTION

[4] The Commission derives its jurisdiction from section 191(1) of the new *Act* which provides as follows:

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 insurer’s written decision; and

(b) if a claimant has requested mediation pursuant to section 190, 60 days after the date [of] the mediator’s written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[5] SGI’s decision letter is dated December 7, 2005 and the Appellant requested that the matters in dispute be mediated. By letter dated September 27, 2006, SGI advised that it had considered the issues but its position was unchanged. SGI requested that the mediation be terminated.

[6] By letter dated October 11, 2006, the mediator confirmed that the mediation was concluded. The Appellant then appealed and his appeal was received by the Commission on

¹ Amendments to the legislation took effect on August 1, 2002 and created, in effect, two acts – the old Act and the new Act. The Appellant’s accident occurred in 2000 and is therefore administered under the old Act.

December 8, 2006. Thus, his appeal was filed within 60 days of the mediator's letter and in accordance with section 191(b). The appeal is properly before us.

FACTS AND FINDINGS

[7] On June 26, 1999 the Appellant was driving on a highway when another vehicle attempted to cross the highway in front of him. The Appellant's truck struck the driver's side of the other vehicle with such impact that, despite the fact the Appellant had slowed and moved to the left lane to avoid the crash, the other vehicle was propelled across three lanes of highway and into the ditch.

[8] The Appellant was taken to hospital and, on June 28, 1999, saw his chiropractor. Dr. Lovell diagnosed cervical whiplash, lumbosacral facet strain and rotator cuff tendonitis. He was cautioned against work that involved bending and lifting his right arm for three to six weeks.

[9] On his Application for Benefits on June 30, 1999, the Appellant showed injuries to his neck, right shoulder, centre back and lower back and across his hips at that level. He indicated that he had two sources of employment – farming and operating a drywall, insulation, eavestrough and siding business – and that his ability to work had been compromised by his injuries.

[10] The Appellant continued to receive chiropractic care and eventually was referred for a secondary assessment. This was done on November 1, 1999 at the Prince Albert Health District by a team comprised of a physician, chiropractor and physiotherapist. In their assessment report, the team recorded essentially full range of motion in the Appellant's neck and back but decreased internal rotation of both shoulders. The team recommended a four-week secondary treatment program, followed by a four week exercise therapy program.

[11] By the time secondary treatment was completed on January 18, 2000, the Appellant had commenced a graduated return to work (GRTW) and no longer complained of back or neck pain. He reported occasional shoulder pain in both shoulders with prolonged overhead

activities and sustained upper extremity postures. His GRTW would have him returned to full duties, full time within about three weeks.

[12] Our decision in this matter relates only to the Appellant's arm and shoulder injuries and, while we are mindful that he continued to complain of other injuries from time to time, our findings of fact below will relate primarily to his arm and shoulder injuries.

[13] The Appellant continued to experience pain in both shoulders, low back pain and disturbed sleep. In November 2000, he was referred for a tertiary assessment at FIT for Active Living (FIT) in Saskatoon.

[14] FIT's assessment report regarding his shoulders indicates that the Appellant reported pain in both shoulders, that the right had been worse than the left but, due to compensating with his left arm, the left shoulder pain was now worse than the right.

[15] The Appellant was found to have mildly limited internal rotation in both shoulders. The range of motion for other shoulder movements was within normal limits, although with pain. Impingement tests were positive and rotator cuff tendons were "quite" tender to palpitation. With regard to the Appellant's shoulders, bilateral impingement syndrome was diagnosed. The team recommended that the Appellant attend a further eight weeks of secondary treatment to decrease pain and inflammation in his shoulders and prevent further damage to his rotator cuffs. It was recommended that the Appellant limit himself to light duties at work during the period of treatment.

[16] A progress report from the Appellant's physiotherapist and exercise therapist dated January 29, 2001 shows that he continued to suffer bilateral impingement and pain with certain tests of movement. However, his shoulder range of motion was full save for a very mild limitation on internal rotation. While essentially full, however, shoulder range of motion was painful beyond certain points.

[17] A second GRTW was proposed but over a longer period of time, given the chronicity of his condition, the nature of his employment and the history of recurrent difficulty after his last GRTW.

[18] The next progress report from the therapists is dated February 19, 2001. Efforts to strengthen the Appellant's shoulder girdles led to intermittent flare-ups of shoulder pain and his shoulders remained quite irritable. Shoulder range of motion was unchanged, though with increased pain at times. Impingement tests remained positive. The GRTW would proceed on March 5, 2001 but again, the therapists emphasized that this should be done over an extended time so that he could continue on rehabilitation at the outset and gradually increase the work/rehabilitation ratio as the GRTW progressed. Even then, they noted, he would not be able to work the significant hours he had worked prior to the accident.

[19] The therapists' March 12, 2001 report confirmed that the Appellant commenced his GRTW on March 5, 2001 as had been scheduled. Immediately, he reported an aggravation of his shoulder pain, right worse than left. Shoulder range of motion remained full with very mild decreases of internal rotation. Impingement tests remained positive bilaterally. In resisted testing of his shoulders, increased pain and weakness were found on external rotation, flexion, scapation and mild irritability and weakness was noted when abduction was tested. The therapists were not optimistic that the Appellant would not experience ongoing difficulty and aggravation in the future.

[20] By report dated March 21, 2001, the Appellant was discharged from tertiary treatment. By this time, his shoulders were quite symptomatic and he had not been able to keep up with the hours scheduled for his GRTW. Active shoulder flexion and abduction were full, with marked pain when elevated above 90 degrees. Internal rotation remained mildly limited and painful. He was discharged to continue his GRTW while being closely monitored by physiotherapy.

[21] By June 13, the physiotherapist reported that the Appellant continued to participate in his GRTW but had not been able to tolerate more than an occasional eight hour shift and an average of four to six hours per shift. Range of motion and resistance testing results were essentially unchanged, with significant pain elicited.

[22] The therapist noted that his shoulder irritability was "augmenting" as he continued to try to manage his regular work duties, even though he was on modified hours and taking

breaks as necessary. She expressed her hope that an upcoming tertiary assessment might lead to a more realistic plan for the Appellant.

[23] The Appellant returned to FIT for reassessment late in June 2001. Their report shows diagnoses of bilateral shoulder pain, low back pain and sleep dysfunction. The medical assessment revealed full range of motion of the shoulders but signs of impingement. Rotator cuff musculature was strong. There was no evidence of instability in the shoulders.

[24] The team felt that the Appellant might have obtained the maximum benefit available from rehabilitation but recommended a further six weeks of physical therapy, if something different than previous treatment could be suggested. If the Appellant did not achieve significant improvement in those six weeks, a six week period of chiropractic manipulation would be provided. If neither was effective to cause a significant difference, the team stated, the Appellant must be considered to have reached maximum medical improvement.

[25] Apparently, the proposed treatment was not significantly helpful. Dr. Lovell, the Appellant's chiropractor, reported on September 17, 2001 that a "chiropractic therapeutic trial on this patient has not resulted in significant functional improvement." He suggested an orthopaedic consultation.

[26] The Appellant saw Dr. Taillon, an orthopaedic surgeon, on February 27, 2002. Dr. Taillon reported his impression that the Appellant was suffering bilateral impingement syndrome and possibly a partial rotator cuff tear. He suggested a cortisone injection as this would relieve pain and might help with diagnosis.

[27] While the Appellant considered that suggestion, he had an MRI and CT scan on March 25, 2002. In the left shoulder, the scans showed degenerative changes in the left acromioclavical joint and some features consistent with impingement. A partial rotator cuff tear was observed. In the right shoulder, the scans showed degenerative changes in the right acromioclavical joint and some features consistent with impingement.

[28] Eventually, after attempting the recommended injections without success and upon reviewing the MRI and CT results, Dr. Taillon concluded that his specialty would not offer the Appellant any relief.

[29] At this juncture, SGI referred the file to its practitioner consultant. Dr. Howlett provided his opinion on October 15, 2002. He said that the Appellant had reached maximum medical improvement and that a residual capacity evaluation (RCE) should be undertaken.

[30] Dr. Howlett noted Dr. Lovell's September 17, 2001 letter where he had stated that chiropractic treatment had not resulted in significant improvement (see paragraph [25] above) and concluded that long-term relief from chiropractic treatment was questionable. However, Dr. Howlett recommended that chiropractic care once or twice monthly pending the RCE would be appropriate.

[31] Dr. Howlett opined that no permanent impairment benefits were available for the Appellant.

[32] Saskatoon City Hospital (SCH) provided its RCE report after examining the Appellant on June 18 and 19, 2003. Summarizing the Appellant's condition and limitations in non-medical terms, SCH reported that the Appellant had difficulty doing overhead activities due to pain and weakness; with his arms at his sides, the Appellant had no symptoms. These symptoms made it impossible for him to manage his work as a drywaller.

[33] SCH evaluated the Appellant's capabilities at a number of activities and compared these to the requirements of a drywaller's work and an insulator's work. It was found that his current physical limitations rendered him unable to manage the work of either occupation. The report states:

On the Functional Capacity Evaluation (FCE) [the Appellant] completed activities that were appropriate for work over an 8-hour day at a medium level. He does not match some of the documented job demands for heavier lifting both for insulating and for drywalling and he does not match job demands for sustained overhead reach.

. . The main limiting factors for [the Appellant] on an ongoing basis as well as during the RCE were shoulder pain, right greater than left. He also experienced

some back pain as well as pain in his right elbow (medial epicondyle), however, these were secondary in nature to his shoulder pain.

[34] Probably in follow-up of Dr. Howlett's earlier opinion regarding on-going chiropractic care, SGI sought Dr. Lovell's comments on the need for on-going care. In a letter dated January 26, 2004, Dr. Lovell stated:

As indicated previously I can not justify chiropractic treatment in terms of correcting the functional impairment in his right glenohumeral joint. Manipulation and acupressure treatment help to relieve his symptoms, however the results are not long term.

[35] Chiropractic care continued and SGI sought Dr. Lovell's opinion as to his recommendations for further treatment or intervention. Dr. Lovell replied on April 11, 2005. he said:

My treatment to reduce nerve irritation and to mobilize the fixated joints will relieve symptoms but not rectify the problem.

[36] A further FCE was undertaken by South Hill Physiotherapy & Fitness Centre (South Hill) on April 25 and 26, 2005. At this time, the Appellant's range of motion was again tested and the results were as follows:

Right Shoulder:

- Flexion: 180 degrees (painful arc at 90 degrees)
- Abduction: 140 degrees
- External rotation: Full
- Internal rotation: 20 degrees

Left Shoulder:

- Flexion: 180 degrees
- Abduction: 180 degrees
- External rotation: Full
- Internal rotation: Full

[37] SGI again referred the Appellant's file to its practitioner consultant. Dr. Howlett provided his report on November 3, 2005. Dr. Howlett indicated that, while the most recent measurements showed some restriction in shoulder range of motion, measurements done in June 2003, February 2002 and June 2001 had shown range within normal limits.

[38] He also commented that most of the symptoms were in the right shoulder which the MRI had shown had degenerative changes but no rotator cuff tear. The MRI had shown a tear to the left rotator cuff and, therefore, one would expect that ongoing symptoms would relate to that shoulder.

[39] Dr. Howlett confirmed his earlier opinion that no benefits for permanent impairment were indicated. Under the regulations, he said, there was no benefit available for a rotator cuff tear. He did not specifically say the reason he thought no benefits should be paid in respect of restricted range of motion.

[40] SGI also obtained an opinion from Dr. Mireau, a chiropractor. Dr. Mireau's November 30 report deals with the questions of whether on-going chiropractic care was indicated for the Appellant. Dr. Mireau noted Dr. Lovell's opinion that chiropractic care would not lead to significant functional improvement, Dr. Howlett's opinion that the Appellant did not have a permanent impairment and that the FCE "did not document a permanent functional restriction". In these circumstances, Dr. Mireau concluded that Chiropractic care was unlikely to improve the Appellant's condition.

[41] Given these opinions, SGI advised the Appellant that no benefits were indicated for permanent impairment and that chiropractic treatment would not be further funded. This information was set out in SGI's decision letter dated December 7, 2005.

[42] At the Appellant's request, South Hill examined him and took shoulder range of motion measurements on June 2, 2006. The results of this examination were:

	<u>Left Side</u>	<u>Right Side</u>
Shoulder abduction	130 degrees	120degrees
Shoulder adduction	30 degrees	30 degrees
Shoulder superior rotation	80 degrees	45 degrees
Shoulder inferior rotation	45 degrees	40 degrees
Shoulder flexion	130 degrees	120 degrees
Shoulder extension	40 degrees	30 degrees
Shoulder external rotation	50 degrees	40 degrees
Shoulder internal rotation	60 degrees	60 degrees

[43] The South Hill report and a further letter from Dr. Lovell were provided to SGI. In his June 6, 2006 letter, Dr. Lovell repeated that chiropractic care would not restore the Appellant's joints to normal function. It did, however, he said, help alleviate his symptoms.

[44] Given the new information, the matter was again submitted to SGI's practitioner consultants, Drs. Howlett and Mireau. In separate opinions dated July 25, 2006 and September 8, 2006, both indicated that their opinions were unchanged.

[45] Dr. Mireau maintained his position and noted that even the Appellant's treating practitioner had indicated that chiropractic care would not improve his condition.

[46] Dr. Howlett noted that there were measurements of shoulder range of motion prior to June 2006 that showed all ranges as normal. By inference perhaps, but without specific comment, he did not accept the June 2006 South Hill measurements. Dr. Howlett remained of the view that the Appellant did not suffer any "collision-related permanent impairment".

[47] By letter dated September 27, 2006, SGI advised the Appellant that its position regarding both permanent impairment and on-going chiropractic care was maintained; benefits would not be payable respecting either. The Appellant appealed.

[48] In anticipation of the appeal, SGI requested that Dr. Howlett further consider the matter and requested his opinion on several specific and pertinent matters. Dr. Howlett's detailed response dated June 5, 2007 clarifies the basis for his prior opinions, as well as answering the questions that had been posed.

[49] Dr. Howlett noted, first, that the Appellant had complained of an injury to his right shoulder – among other injuries – almost from the outset but he had not complained of an injury to his left shoulder at or within a reasonable time after the accident. Nonetheless, the November 1999 report² from the secondary assessment indicated that both shoulders showed a 25% decrease in internal rotation. Thereafter, both shoulders appeared to be symptomatic.

² paragraph [14] above

[50] Dr. Howlett opined that the documentation indicated that, while the Appellant originally had only a right shoulder injury, he was engaged in a kind of work that required extensive above-shoulder work. It was Dr. Howlett's view that the Appellant's employment put him at "extremely high risk" of developing shoulder problems. He did not support the view that the symptoms in the Appellant's left shoulder developed as a consequence of and in compensation for the injury to the right shoulder because the MRI showed degenerative changes in both shoulders and evidence of symmetrical tendon inflammation. He thought these findings were consistent with long-term overuse of the shoulders that most likely predated the vehicle accident. He thought they were more likely a form of repetitive strain injury and that the Appellant might have experienced this kind of shoulder problem even without the accident. He was not satisfied that the on-going symptoms of either shoulder were caused in the accident.

[51] As to range of motion (ROM) measurements, Dr. Howlett noted the following:

Secondary Assessment – November 1999: ROM within normal limits except internal rotation decreased by 25% in both shoulders;

Secondary Initial Report – Mild decrease in internal rotation in both shoulders;

FIT Assessment – ROM within normal limits except mild limitation of internal rotation in both shoulders;

Physiotherapy Progress Report – ROM of the shoulder girdles are full except a very mild decrease of internal rotation in both shoulders;

FIT Reassessment – Full ROM of both shoulders;

Dr. Taillon – February 2002 – Full range of motion of the shoulder but painful in the extremes; and

RCE - June 2003 – Full range motion.

[52] Considering these reports and the fact that the Appellant was reported to have full range of motion in both shoulders in June 2003, Dr. Howlett was unable to explain the decreased range of internal rotation and abduction of the right shoulder that South Hill reported in April 2005. He commented that the degenerative changes observed in the MRI

might explain them. If so, the change would be more in keeping with a repetitive strain injury, not a traumatic cause.

[53] Dr. Howlett then turned to South Hill's June 2006 report showing significant degradation of the range of motion in both shoulders, although a significant improvement in internal rotation measurements. Dr. Howlett said that these measurements were simply inconsistent with previous documented measurements and that, barring an intervening event that might account for the changes, he simply did not accept the June 2006 measurements as valid.

ONUS OF PROOF

[54] In *Collis v. Saskatchewan Government Insurance*³, 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 stated⁴:

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.

[55] This view of onus was quoted and adopted by Justice Matheson in *Job v. Saskatchewan Government Insurance*⁵. The decision was appealed to the Court of Appeal and the matter of onus of proof was among the issues appealed. In that regard, Justice Vancise said⁶:

We are all of the opinion that Mr. Justice Matheson did not err in determining and applying the onus of proof. He found that when an insurer alleges that benefits are no longer payable it has the onus to prove on the balance of probability that the benefits are not payable under the *Act*. While he might have been a little more precise in his choice of language it is clear that he did not reverse the onus. He referred to *Collis v. Saskatchewan Government Insurance*, which clearly finds that the onus shifts to the insurer to prove that benefits are not or are no longer payable.

³ 1998 CanLII 13463, 165 Sask. R. 108

⁴ paragraph [5]

⁵ 2002 SKQB 479 (CanLII)

⁶ 2004 SKCA 164 (CanLII)

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

[57] In this case, it is clear that the Appellant has established that he was disabled as a result of the vehicle accident; indeed, SGI has not suggested otherwise. SGI has paid the Appellant benefits, provided rehabilitative care and accepted responsibility for injuries to both shoulders, including the left rotator cuff tear. Regarding the latter, we note that the tenor of Dr. Howlett’s opinions regarding permanent impairment benefits for the rotator cuff tear were, until June 2007, based entirely in his view that the regulations did not prescribed a benefit for that injury; he did not suggest that it was not compensable for any other reason.

[58] As such, in accordance with both *Collis* and *Job*, the Appellant has met the burden to prove that he was disabled in the vehicle accident and the onus is then shifted to SGI to prove, on a balance of probabilities, that permanent impairment benefits are not payable and that rehabilitation benefits for chiropractic care are no longer payable.

STANDARD OF REVIEW

[59] The Saskatchewan Court of Appeal dealt with the Commission’s standard of review in *Allary v. Saskatchewan Government Insurance*⁷.

[60] In this case, SGI has refused further rehabilitation benefits for on-going and occasional chiropractic care on the basis that “future chiropractic treatment will not contribute to recovery.” In effect, therefore, SGI had concluded that further chiropractic care is neither necessary nor advisable for purposes of section 110 of the old *Act*. The relevant portion of that section reads:

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[.]

⁷ 2006 SKCA 89

[61] In accordance with *Allary* and the Commission's decision in *I.S. v. Saskatchewan Government Insurance*⁸, our standard of review regarding chiropractic care is variable. That is, if a benefit is necessary, the standard of review is correctness, while if the benefit is only advisable, the standard of review is reasonableness.

[62] In regard to permanent impairment benefits, section 154 of the old *Act* says:

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 benefit for the permanent impairment.

[63] Permanent impairment benefits, therefore, are benefits to which an insured is entitled. In accordance with *Allary*, therefore, our standard of review is correctness.

LAW AND ANALYSIS

Causation:

[64] In order to consider other questions that arose during this appeal, it is necessary that we first consider the matter of causation, particularly in regard to the left shoulder injury.

[65] Causation was not raised by SGI's practitioner consultant or any other care provider until Dr. Howlett's opinion dated June 5, 2007. Thus, SGI's current view that the Appellant's shoulder injuries were the result of pre-existing degenerative changes and repetitive strain – not the vehicle accident or its consequences - did not form the basis of the decisions under appeal, being those set out in letters dated December 7, 2005 and September 27, 2006. At the time of those decisions, SGI accepted both shoulder injuries as related to the vehicle accident.

[66] Instead, permanent impairment benefits (PIB) were refused because, at those earlier dates, SGI was of the view that there was no reduced range of motion to compensate and that a rotator cuff tear was not compensable by way of PIB. Both shoulder injuries, including the left shoulder rotator cuff tear, were accepted as vehicle accident related.

⁸ 2006 SKAIA 97

[67] SGI's changed position that PIB were not payable for ROM for two reasons - first, SGI did not accept the South Hill measurements and, second, SGI was not satisfied that the injuries were incurred in or consequent on the vehicle accident - was not put forward until June 5, 2007, less than a month prior to the hearing of this appeal. No decision letter was issued setting forth this conclusion.

[68] This raises an interesting question for the Commission: Is it necessary that the Commission consider the matter of causation at all, as questions relating to causation were not relevant to the specific decisions appealed? Whether necessary or not, SGI had brought the evidence before us and we are entitled to consider it. It seems to us expedient to both parties that we consider and decide the matter at this time.

The Shoulder Injuries:

[69] After the accident, the Appellant complained of an injury to his right shoulder. This injury, among others, was accepted by SGI as accident-related. Over time, the Appellant's left shoulder became irritated and painful. The symptoms in the left shoulder were first noted at the secondary assessment on November 1, 1999 and were diagnosed by FIT a few days later as compensatory and accident-related. This conclusion was accepted or confirmed by all subsequent care providers and the left shoulder injury was accepted by SGI as accident-related throughout the Appellant's rehabilitation.

[70] It was not until June 2007, that SGI indicated any uncertainty about causation of the shoulder injuries. Dr. Howlett concluded that the Appellant likely suffered a right rotator cuff strain in the accident but the bilateral impingement syndrome was more likely a repetitive strain injury, consequent on the Appellant's occupation. He suggested that in light of degenerative changes in both shoulders that were observed on the MRI in March 2002, the Appellant's current symptoms and impairment - if any - were inevitable as the degenerative condition progressed. That is, SGI is of the view that the symptoms and impairment "may" eventually have developed even if the accident had not occurred.

[71] Dr. Howlett expressly disputed the conclusion that the injury to the left shoulder was compensatory for the right shoulder symptoms. Instead, he noted that the Appellant's

occupation put him at an “extremely high risk of developing shoulder problems”. He said that the degenerative changes in the Appellant’s shoulders shown in the MRI were consistent with long-term overuse that probably pre-dated the vehicle accident. It was this, he said, that caused the on-going symptoms and the left rotator cuff tear.

[72] In support of his position, Dr. Howlett noted that the degenerative changes in the Appellant’s shoulders were similar in each shoulder and that they would be aggravated by the nature of the Appellant’s work, involving significant heavy overhead lifting.

[73] We do not disagree with the facts and explanations provided by Dr. Howlett who obviously gave thoughtful consideration to these matters. However, we are not satisfied that the opinions of other care providers can be easily dismissed.

[74] Dr. Howlett suggested that those involved in a patient’s rehabilitative care are not as carefully concerned about matters of causation as is the SGI consultant. Dr. Howlett may be correct about this but we are not prepared to accept that their diagnoses and opinions are given without reasonable consideration; they are, after all, responsible to SGI, as well as their patients. Equally important, they must be concerned with their professional reputations and would not put their diagnoses forward without reasoned thought. In this regard, we note that the care providers specifically designate injuries related to accidents and those that are not; presumably SGI requests this information. It seems unreasonable to reject their conclusions only because one has come to a different conclusion.

[75] Taking all of the opinions into account, we are inclined to accept the view that the Appellant’s left shoulder injury, including the rotator cuff tear, was compensatory to injuries to his right shoulder. There is a common sense attraction to this position in that the Appellant, notwithstanding his right shoulder injury, continued strenuous overhead work after the accident and until he was instructed to stop in the course of his rehabilitation. It is likely that he increased use of his left shoulder so as to relieve weight and stress on his painful right shoulder.

[76] In reaching this conclusion, we have not discounted Dr. Howlett’s observations regarding repetitive strain and the particularly high risk that the Appellant’s work would

cause injury to his shoulders. The MRI confirmed, in fact, that degenerative injury had already occurred to both shoulders; we accept that the degenerative injury was not caused in the vehicle accident. However, the fact that the Appellant had pre-existing degenerative changes in his shoulders does not exclude the conclusion that his shoulders were aggravated or additionally injured, or both, as a result of or consequent on the vehicle accident.

[77] In this regard, we accept the Appellant's evidence that he had not experienced problems or symptoms in either shoulder prior to the vehicle accident. There is no evidence to the contrary and SGI has conceded this fact.

[78] That being the case, the conclusion that the Appellant's symptoms and injuries were the result of pre-existing degenerative changes requires us to conclude that the non-symptomatic degenerative changes became significantly symptomatic at the time of the accident with regard to the right shoulder and within a few months and in the course of intensive rehabilitative therapy for the left but that the development of these symptoms was, nonetheless, unrelated to the vehicle accident and rehabilitation. This conclusion is simply not reasonable.

[79] At minimum, we must conclude that the vehicle accident aggravated or exacerbated the pre-existing degenerative changes. In this regard, SGI has submitted that the development of these symptoms and consequent limitations was likely inevitable, given the nature of the Appellant's work. In effect, SGI has submitted that it should not be required to return, by way of paying benefits, the Appellant to a condition better than he would have had if the accident hadn't happened. SGI says, therefore, that the Appellant would have been a person with symptomatic degenerative injuries to his shoulders and that is what he is now. If so, SGI has submitted, its obligations to the Appellant in respect of his shoulder symptoms have ended.

[80] The difficulty with this argument is that we have not been provided any evidence as to what might reasonably have been anticipated for the Appellant if he had not been injured in the accident. What symptoms would have developed? When and over what period of time? How serious would they have been and what limitations would they have placed upon him? We cannot simply assume that they would have been the same in quality,

quantity, distribution or impact to the injuries he presently suffers. Without evidence in regard to these questions, and keeping in mind that the onus of proof lies with SGI, the conclusion that is urged is simply not available.

[81] Finally, we are aware of and accept SGI's submission that the Appellant's on-going work after the accident likely aggravated the right shoulder injury and contributed to the development of the compensatory left shoulder injury. However, we are also aware of and accept the Appellant's evidence that he stopped working as soon as this was recommended and thereafter followed the instructions of his care providers regarding limited, light duties and fewer hours of work.

[82] SGI is likely correct in suggesting that the Appellant's work activity ought to have been curtailed until he had recovered from his injuries. But this is a conclusion rendered with hindsight. There is no indication that the Appellant was engaged in work at any time that was not recommended or condoned.

[83] Having raised no objection or concern earlier, and having condoned the Appellant's work activities, SGI cannot now complain that he ought to have done differently and that he compromised his recovery. The Appellant might as easily argue that SGI, in condoning his work, compromised his recovery. Neither position is convincing.

[84] For these reasons, we accept that the Appellant's shoulder injuries – bilateral impingement syndrome and left rotator cuff tear – were caused in or directly consequent on his June 26, 1999 vehicle accident.

Range of Motion:

[85] The Appellant has filed range of motion measurements that show restricted movement in both shoulders. Dr. Howlett has rejected the measurements as "not valid".

[86] In reaching his conclusions, Dr. Howlett noted range of motion measurements taken at the RCE in June 2003 showed that the Appellant had full range of motion in both shoulders. However, in its April 2005 measurements, South Hill found limitation in the range of motion of the Appellant's right shoulder. Dr. Howlett said he could not explain the

reduced range of motion in the right shoulder. He said it might possibly be a feature of the progression of the degenerative changes identified previously.

[87] He noted that South Hill's June 2006 measurements were inexplicable to him, considering documented normal range of motions for many years prior. He thought the June 2006 measurements were, therefore, inconsistent with prior documentation and he would not accept them as valid.

[88] We are not clear on what basis SGI purports to simply deny the validity of South Hill's measurements. While those measurements raise questions – some of which were identified by Dr. Howlett – we don't think the fact that they raised questions in and of itself justifies their dismissal.

[89] SGI has the means to resolve or at least consider such questions. It could have required the Appellant to undergo further examinations or even an independent medical examination. At the hearing, either party might have called the physiotherapist who took the measurements or one of the Appellant's care providers who is familiar with his progress. Or both. But the onus of proof cannot be satisfied by evidence simply indicating that the consultant practitioner could not explain the measurements and has rejected them. This is not proof at all.

[90] That being the case, SGI has not proved that the June 2006 South Hill measurements are not valid and we accept them as accurately indicating the degree of motion and restriction thereof at that time. Given the evidence – which neither SGI nor the Appellant dispute – that the Appellant has achieved his maximum medical recovery, we further accept the restricted range of motion as permanent.

Permanent Impairment:

[91] The regulations in force at the time of the Appellant's accident⁹ provide for PIB for loss of range of motion to the shoulder. Specifically, Appendix B, Division 1, Subdivision 1, section 4(c) provides ranges of benefits for partial to complete loss of abduction, front

⁹ Chapter A-35, Reg 3, prior to amendment.

elevation, external rotation, internal rotation, adduction and extension. The Appellant is entitled to all of these for both shoulders where the June 2006 measurements taken by South Hill show a deficit.

[92] In regard to those for which a range of benefits is provided, the percentage to be awarded should be calculated based upon the proportion of range of motion that has been lost. For example, South Hill's measurements show that the Appellant's left shoulder abduction is 130 degrees, whereas normal is 180 degrees. As the Appellant has suffered a 50 degree loss of range of motion out of a normal range of 180 degrees, he has suffered a 5/18 loss. The prescribed range for PIB for loss of abduction is 0.5 – 6%. We think, given this, the Appellant's entitlement would be 5/18 of 5.5% (the difference between the high and low ends of the range), or 1.52%. However, the actual calculations are referred back to SGI's Calculator Unit.

[93] Similar calculations will be required for front elevation and external rotation. For loss of internal rotation, adduction and extension, fixed percentages are provided. The Appellant will be entitled to these in respect of each shoulder where the South Hill June 2006 measurements show reduced range of motion for the relevant plane.

[94] In regard to PIB for the left shoulder rotator cuff tear, SGI has taken the position that as the regulations do not prescribe a permanent impairment percentage for this injury, none can be payable.

[95] A review of the relevant regulations shows that there is an entry at Appendix B, Division 1, Subdivision 1, section 4(a) for "Rupture of the rotator cuff including reduction of muscular strength and atrophy, if applicable: depending on the degree of restriction or movement". Beside that listing, the column that otherwise shows the percentage award is blank. It is for this reason – that no percentage is prescribed – that SGI has taken the position that there is no percentage payable as PIB for a rotator cuff rupture.

[96] We believe that SGI's view is in error. While attractive at first blush, we were not able to find any other impairment that was listed in the regulations – old Act or new – for which no percentage was listed. If there was no PIB intended, it is likely that the injury

would simply have been omitted from the regulations or, at least, that zero percent would have been listed.

[97] In addition, the wording of the provision appears to anticipate an award of PIB for rotator cuff rupture as it clearly contemplates a range of awards in its very wording: “Depending on the degree of restriction of movement”. That wording is inconsistent with an intention to provide no award or zero percentage.

[98] Given all of these considerations, we are satisfied that the only rational explanation for the blank space in the percentage of award column is a simple typographical error. We are satisfied that the drafters intended an award for rotator cuff tear but simply neglected to insert a percentage.

[99] In these circumstances, we turn to section 156(2) of the old *Act*. It states:

156 (a) 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.

[100] While not directly applicable to these circumstances – in the Appellant’s case, the impairment is listed but no percentage given – it would appear that the premise could nonetheless guide us. That is, the section directs SGI, in effect, to consider comparable impairments and their corresponding awards.

[101] In our case, permanent impairment for rotator cuff rupture is provided in the “new” Personal Injury Benefits Regulations¹⁰ that came into effect after the Appellant’s accident. These provide a suitable comparison in our view. Thus, SGI is ordered to pay the Appellant PIB in regard to left shoulder rotator cuff tear in accordance with the new regulations and specifically Appendix B, Division 1, Subdivision 1, section 1.3(c).

Chiropractic Care:

[102] Benefits for chiropractic care were paid to the Appellant pursuant to section 110 of the old *Act* that reads as follows:

¹⁰ Chapter A-35 Reg 3, as amended by Saskatchewan regulations 70/2002, 121/2002 and 48/2004.

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 for the accident[.]

[103] SGI submitted that the Appellant’s ongoing chiropractic care affords him temporary relief of his symptoms only and does not meet any of the purposes set out in section 110. We agree.

[104] In his evidence, the Appellant testified that chiropractic care does not enable him to work when he otherwise would not or to manage his activities of daily living. It simply provides some relief from the discomfort he occasionally feels. The Appellant testified, quite candidly, that he has learned to manage his work so as to avoid or minimize pain and flare-ups by stretching or getting others to help him with certain tasks. This seems to have been effective for him as he said he last saw the chiropractor about a year prior to our hearing.

[105] While we are sympathetic to the Appellant’s desire to obtain occasional chiropractic treatment for relief during periods of flare up, we are also satisfied that chiropractic care for only that purpose, in his case, will not bring him within the restrictive provisions of section 110. SGI’s decision to terminate further chiropractic care is confirmed.

CONCLUSION

[106] SGI’s decision letter of December 7, 2005 and confirmatory letter of September 27, 2006 are confirmed in so far as they terminate chiropractic treatment from and after December 7, 2005.

[107] SGI’s decision letter of December 7, 2005 and confirmatory letter of September 27, 2006 are set aside in so far as they refuse benefits for permanent impairment. Instead, SGI shall pay the Appellant benefits for permanent impairment for:

- Loss of range of motion in both shoulders as measured by South Hill Physiotherapy in June 2006, such benefits to be in accordance with the applicable old *Act* regulations and paragraphs [92] and [93] above;

- Partial rotator cuff tear, in accordance with paragraph [101] above; and
- Pre-judgment interest on all benefits for permanent impairment calculated from and after December 7, 2005.

COSTS

[108] As the Appellant has been successful in his appeal, he is entitled to his reasonable expenses and costs, pursuant and subject to s. 193(11) of the *Act* and s. 96 of the *Personal Injury Benefit Regulations*.

[109] In addition, the Appellant shall have his appeal fee refunded.

Dated at Regina, Saskatchewan, on July 23, 2007.

Beverly Cleveland, Chair

Carol Olson, Commission Member

Barbara Tomkins, Commission Member