

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *C.V. v. Saskatchewan Government Insurance,*
2007 SKAIA 087
Date: 20070723
File: 107 of 2005

BETWEEN

C.V., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

David MacKay, for the Applicant

James Garden, for the Respondent

Before: **Beverly Cleveland, Chair**
Conrad Hnatiuk, Commission Member
Barbara Tomkins, Commission Member

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

Heard at Regina, Saskatchewan
June 18 and 19, 2007

DECISION

[1] The Appellant, C.V., was injured in two motor vehicle accidents - on September 14, 2002 and December 18, 2002. He applied for and received benefits under the no fault provisions set out in Part VIII of *The Automobile Accident Insurance Act* (“the Act”). Eventually, by letter dated February 2, 2004, Saskatchewan Government Insurance advised that because the Appellant was substantially able to perform the essential duties of his employment, benefits for income replacement would be terminated.

[2] The Appellant did not agree that he was able to perform the essential duties of his employment and requested that the matter be mediated. Mediation was unsuccessful and was terminated by letter dated June 30, 2005.

[3] The Appellant appealed to the Commission.

JURISDICTION

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

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

(a) 90 days after the date of the insurer’s written decision; and

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

[5] That section therefore sets out the time frames within which appeals may be brought before this Commission. Barring exceptional circumstances, the Commission is without jurisdiction to consider appeals brought outside these time frames.¹

[6] In fact, SGI provided three letters that, in the course of the hearing, the parties agreed were decision letters for purposes of the Appellant’s claim. The first is the letter of February 2, 2004 decision referred to above.

¹ *Mintzler v. Saskatchewan Government Insurance* 2001 SKCA 54 (CanLII)

[7] After the mediation had concluded, SGI sent a letter confirming that mediation had been closed and that its decision remained unchanged. This is the second decision letter and is dated July 5, 2005.

[8] Eventually, the Appellant had surgery on January 12, 2006 and SGI paid him income replacement benefits on a without prejudice basis from that date until May 5, 2006. After the surgery, the Appellant received an independent medical examination.

[9] Based on the results of the independent medical examination, SGI advised in a letter dated June 13, 2005 that “the injuries you are claiming are not motor vehicle accident related” and that, therefore, no further income replacement benefits – without prejudice or otherwise – would be paid. This is SGI’s third decision letter.

[10] The parties have agreed that these three letters – February 2, 2004, July 5, 2005 and June 13, 2006 - advise as to independent decisions and that all are properly before the Commission and within its jurisdiction. This is because each of the two subsequent letters were written after SGI considered further information and each arose from and is consequential on the decision appealed, being that set out in SGI’s February 2, 2004 letter.

[11] The Commission accepts this position and its jurisdiction.

FACTS AND FINDINGS

[12] The Appellant was involved in a vehicle accident on September 14, 2002 when the vehicle he was driving was struck in an intersection. The Appellant testified that he could see that the impact was going to occur and turned his vehicle to avoid it, while braking hard. He braced his body.

[13] The Appellant did not notice any injury at the scene but by evening of that day, his neck, shoulders and lower back became sore. He attended his family doctor on September 16.

[14] The Appellant’s diagnosis was complicated by the fact that he had been involved in three prior vehicle accidents, in 1987 or 1988, 1996 and 1998 and that he was still

receiving rehabilitative treatment from the most recent of these at the time of the current accident. That accident involved injury to the Appellant's neck and shoulder area and his lower back. He still received occasional chiropractic treatment for flare-ups in those areas, most recently in February 2002. He said his low back injury had healed and he had no problems in that area at the time of the September 2002 accident.

[15] Dr. Chapple diagnosed Whiplash Associated Disorder (WAD) II and Low Back Pain (LBP) II. In the course of examination, she found that the Appellant's neck and back were restricted and that there was tenderness in his neck and back muscles. She also noted that the Appellant suffered headaches.

[16] Dr. Chapple referred the Appellant to a neurosurgeon and recommended that he attend physiotherapy and take analgesics. She also recommended that the Appellant refrain from work for three to six weeks.

[17] In his Application for Benefits, completed on September 20, 2004, the Appellant indicated injuries to his head, neck, across both shoulders and down his arms to the top of his hands, the centre of his spine from neck to lower back with particular pain in the central lower back and down the front and back of his right leg.

[18] On November 11, Dr. Chapple advised that the Appellant required physiotherapy, massage therapy and chiropractic treatment. She recommended that he have two hours each day off work in order to obtain the necessary treatment.

[19] A physiotherapist, who examined the Appellant on November 21, 2002, diagnosed lumbar and cervical strain and noted WAD I and LBP I. Dr. Chapple, however, consequent on her November 28 examination of the Appellant, indicated WAD II and LBP I. At about this time, the Appellant was referred for a secondary assessment at Maximum Potential Rehab Inc. ("Maximum").

[20] That assessment was done on December 2, 2002 by a team comprised of a physician, chiropractor and physiotherapist. While Dr. Chapple had indicated that the Appellant's main problem was his neck, the Appellant advised Maximum that his most

significant problem was low back pain that radiated down both legs – to the thigh in the left leg but to the calf and even occasionally toes in the right leg. He described a pain in the area of the right sacroiliac that was like a knot. The Appellant said his neck had been “pretty good” and was improving with physiotherapy.

[21] Maximum diagnosed WAD II with a history of prior vehicle accident injuries. In this regard, the Appellant had reported that he had been receiving physiotherapy treatment regarding a problem with pain that radiated into his right arm and that this condition had been present since the 1998 accident. He also said that he experienced headaches, neck spasms and mild upper back and shoulder pain from the September accident but that he had also suffered these symptoms since the 1998 accident. With respect to the prior injuries, Maximum stated that the differentiation between injury from the most recent accident and those prior was best left to the Appellant’s care providers.

[22] As to “new” injuries, Maximum diagnosed LBP II with sacroiliac joint involvement and bilateral radiation into the lower limbs, right more than left. A course of augmented primary treatment was recommended, including exercise and conditioning therapy. While physiotherapy, chiropractic care and massage therapy would continue, these would decrease in frequency over an eight to twelve week period. The Appellant was also encouraged to adopt a more active lifestyle.

[23] The Appellant was referred to CBI Physiotherapy and Rehabilitation Centre (“CBI”) for his enhanced primary rehabilitation program. However, participation in that program was deferred as the Appellant had developed additional symptoms (not relevant to the issues and considerations before us) that CBI thought ought to be investigated before the program began.

[24] In the meantime, the Appellant was involved in another accident while en route to a physiotherapy session on December 18, 2002. At that time, the Appellant’s vehicle was struck from behind with what he described as minor impact. When he got out to examine the damage, the other driver started driving away and toward the Appellant. The Appellant testified that he pushed off against and away from the vehicle with his right leg and rolled along the hood and then “twirled” along the side of the vehicle, which then left the scene.

He said his right leg was quite painful immediately and that the referred right leg pain he had complained of since the September accident was aggravated. He said the pain was not different, just worse. He visited his chiropractor in this regard the following day.

[25] The Appellant visited a neurosurgeon, Dr. Ekong, on January 20, 2003 as had been scheduled prior to the second accident. Dr. Ekong found that the Appellant's back movement was slightly impaired, as was the range of movement in his neck. He arranged an MRI of the cervical and lumbar spines but did not anticipate disc protrusion.

[26] The MRI was done on February 7, 2003. The MRI report found no evidence of disc protrusion or central/neural foraminal stenosis in the cervical spine. While there may have been slight bulging at the C5-6 level, it was found not to cause compression of neural structures. Otherwise, the MRI of the cervical spine found nothing abnormal.

[27] As to the lumbar spine, the MRI showed mild osteoarthritis in the posterior facets at L4-5 and L5-S1. Otherwise, there was no evidence of a disc protrusion or central/neural foraminal stenosis at any level and no abnormal findings.

[28] Following receipt of these results, Dr. Ekong provided further information to SGI's adjuster in a letter dated February 24, 2003. He said it was his opinion that the Appellant's symptoms were consistent with chronic lumbar and cervical sprain but he had ordered the MRI to rule out disc protrusion. He noted that since the MRI showed "no specific disc protrusion", he recommended conservative measures only and suggested that the Appellant could gradually increase his activities to their normal levels.

[29] As to the degenerative changes, Dr. Ekong said they were consistent with normal wear and tear. However, he said that if the low back symptoms had developed after the September 2002 accident, then it is "conceivable that the two accidents likely exacerbated the pre-existing condition".

[30] After a further visit to Dr. Ekong on February 24, 2003, Dr. Ekong reported that the Appellant still had some neck discomfort and low back pain when he did strenuous activities but had few symptoms when sedentary. Dr. Ekong noted that the current MRI

showed some degenerative changes but “no significant disc protrusion”. He recommended continued conservative measures and increased activities, including employment.

[31] However, Dr. Resnik, a family physician, did not agree. He noted that the Appellant was attending physiotherapy and exercise therapy three days a week and chiropractic, acupuncture and massage therapy on three other days. He reported that the Appellant was unable to sit for prolonged periods; it appears this was due to the radiating pain in his right leg. Dr. Resnik opined that the Appellant was unfit for work while attending such extensive rehabilitation and provided a note recommending he be off work during the month of March until he next saw Dr. Chapple. This time off work was subsequently extended to April 11, 2003.

[32] By report dated April 7, 2003, the Appellant was discharged from the CBI program. While he was not recovered, he was provided with a home conditioning program and encouraged to make appropriate lifestyle changes. An ergonomic assessment of his work station was recommended. He was noted to have improved significantly. His diagnosis, however, remained at WAD II and LBP II. Perhaps most important, the report indicated that the Appellant had an abnormal neurological examination as they found L5-S1 distribution to his leg and foot and a sensory deficit in the leg. Paraesthesia was also found.

[33] Apparently the Appellant’s physician did not agree with his returning to work as he provided a Certificate of Illness recommending that the Appellant be away from work until April 28, 2003. On that date, Dr. Chapple extended the absence to July 7, 2003.

[34] The Appellant underwent a tertiary assessment on April 15-17, 2003 at Wascana Rehabilitation Centre (“Wascana”). In this case, the team who assessed his condition consisted of a physician, physical therapist, occupational therapist, exercise therapist, psychologist and a nurse. As is stated in the assessment report, “[t]he purpose of this tertiary assessment is to review the medical management to date, confirm diagnosis, assess the client’s current status and provide appropriate ongoing treatment recommendations and management.”

[35] The tertiary team diagnosed WAD II that had resolved, notwithstanding reported on-going symptoms and without explanation. The team diagnosed ongoing LBP II with sacroiliac dysfunction. Test results did not show that the Appellant was magnifying his symptoms; however, many significant barriers to his recovery were identified. Indeed, no strengths to aid recovery were found. Given these circumstances, the team recommended an extremely intensive ten to twelve week program, including “all of the components that a tertiary program can provide”.

[36] Wascana provided regular progress reports. By the time of its July 3 report, the Appellant reported that his neck was not a concern. The report deals primarily, therefore, with his sacroiliac/leg symptoms. He was giving good effort in the program and virtually all functional abilities had improved. However, his tolerance for continuous sitting – a significant job demand – was reported at only 13 minutes, little improved. The team intended to put particular focus on rehabilitation to improve this tolerance.

[37] On July 16, 2003, a graduated return to work plan (GRTW) was proposed. According to this plan, the Appellant would work two hours each day in the last week of July and progress by weeks to full time days during the week of August 25. Due to a concern raised and an inability to reach resolution due to physician unavailability, the Appellant actually remained working four hours each day until the week of September 15. By the week of September 29, 2003, he was working eight hours days and was expected to return to full time hours and full duties the following week.

[38] In the meantime, Dr. Chapple had referred the Appellant to another neurosurgeon to further investigate his hip and right leg symptoms. He saw Dr. Shawush on August 26, 2003. In his report, Dr. Shawush stated that the Appellant’s neck pain had resolved but that he continued to experience low back pain and symptoms in his right leg. However, Dr. Shawush found no significant neurological findings. He concluded: “There is no clear indication of radiculopathy in today’s assessment.”

[39] Given this, the Appellant was discharged from the tertiary program on September 19, 2003. In the Discharge Report, Wascana reported that the Appellant’s LBP II with sacroiliac dysfunction was improving but not resolved. Instead, he had been

provided exercises and strategies that relieved – though did not eliminate – his hip and leg symptoms.

[40] Apparently the GRTW did not progress as anticipated. In this regard we note a letter to Dr. Chapple from the Co-ordinating Therapist at Wascana dated October 23, 2003 wherein she states that they were planning at that time to move the Appellant to seven hours per day during the week of October 27.

[41] Dr. Chapple recommended that the GRTW not progress as planned. She said that the Appellant's low back pain continued to be troublesome if he sat more than 4 to 6 hours per day. She noted possible neurological deficits that had been noted in testing over the previous year, including reduced pin prick sensation and increased temperature over the right leg and foot, and a slight wasting of a muscle in that foot. In addition, she said that the Appellant was receiving conditioning therapy daily after working for six hours; she felt that this equated to an eight hour day and thought this was adequate pending further neurological investigation.

[42] Two members of the tertiary team at Wascana thought Dr. Chapple's position might in fact jeopardize the Appellant's return to work. They said that the conditioning therapy was not part of a program but simply the kind of exercise that was generally recommended to maintain back fitness and general health. It was not usually considered a part of a person's work time. They recommended that the GRTW progress from six and seven hour days in early December to fulltime hours during the week of December 22, 2003.

[43] Dr. Chapple did not agree and noted that the Appellant was attending physiotherapy and a chiropractor, three times per week each.

[44] The Appellant was discharged from his GRTW program on December 24, 2003.

[45] Dr. Shawush examined the Appellant again on December 30, 2003. He advised that the neurological exam was unchanged and that nerve conduction and EMG studies of the Appellant's right leg showed no evidence of neuropathy or radiculopathy; he thought the

pain was probably mechanical in origin. He specifically stated that he did not believe further investigation was necessary.

[46] In these circumstances, SGI sent the first letter. It stated SGI's understanding that the Appellant had completed rehabilitation and was able to substantially perform the essential duties of his pre-accident employment. On this basis, SGI advised, income replacement benefits (IRB) would be concluded. While the letter left blank the effective date of termination, the letter requested that the Appellant provide a copy of his pay stub for the January 11 to 24, 2004 pay period; presumably, therefore, IRB would be concluded no later than January 24.

[47] The Appellant disagreed with SGI's decision and requested that the matter be mediated between SGI and himself. By letter dated June 30, 2005, the mediator advised that the mediation was concluded. As matters at issue had not been resolved, the Appellant appealed to the Commission pursuant to section 191(1)(b).

[48] By late March 2004, the Appellant had again stopped working. In evidence, he said that his leg pain prevented him from continuing, that he was exhausted by the end of the day and having trouble sleeping. Dr. Chapple supported his decision and provided a letter dated April 7, 2004 in this regard. She advised that after returning to work, the Appellant redeveloped his lower back pain, with radiation into his right leg. She said the pain was exacerbated by stress and work. Further, she indicated that he had discontinued one of his medications but had resumed it that day on her recommendation.

[49] Possibly in light of the pending appeal, SGI requested a review by a practitioner consultant as to whether the evidence established that the Appellant should reasonably have been expected to return to work in February 2004. Based on a review of reports, notes and documents to and including October 22, 2004 but not including the orthopaedic surgeon's report, Dr. Endsin provided his opinion on November 3, 2005. He concluded that, although the Appellant continued to have "problems with pain", there was nothing in the information he reviewed that suggested he was unable to return to work by February 2004, when SGI terminated his IRB.

[50] While Dr. Endsins' review was pending, the Appellant continued to seek medical attention and advice. On September 21, 2005, he saw an orthopaedic surgeon. The surgeon reported that the Appellant at that time complained of cervical pain that occasionally led to symptoms in his right arm and down into his right thumb and index finger. The orthopaedic surgeon described these as "radicular" symptoms. The orthopaedic surgeon found reduced range of motion in both the cervical and lumbar spines but other testing failed to show a particular position that caused the radiculopathy. He did say, however, that the Appellant's history described a clear C6 distribution. With regard to the Appellant's back, the orthopaedic surgeon suggested epidural steroid injections, pending a new MRI.

[51] That MRI, taken October 14, 2005, showed no evidence of disc protrusion in either the cervical or lumbar spine. The orthopaedic surgeon, as he noted in a November 9, 2005 letter to Dr. Chapple, found this surprising as he thought the Appellant demonstrated a clinical picture of right L5 radiculopathy. He wondered whether the disc might be bulging when the Appellant was upright but not when he was laying down, as he would be for the MRI. He proposed that the Appellant have an L5 root block.

[52] The root block test confirmed, in the orthopaedic surgeon's opinion, that the Appellant had nerve compression at L5; he recommended a laminectomy to relieve the compression. The Appellant agreed to this surgery. It was scheduled for January 12, 2006.

[53] The Appellant advised SGI of the orthopaedic surgeon's diagnosis and his upcoming surgery. SGI sought further information but agreed, on a without prejudice basis, to pay the Appellant IRB from the date of the surgery until reports were obtained and a reasoned decision on continued IRB could be made.

[54] In his operative record made on January 12, 2006, the orthopaedic surgeon noted that after exploring the L5 nerve root from its origin to its exit, it was found to be free of disc compression. He also noted that that he covered the dura "when I was satisfied with the degree of decompression". His pre- and post-operative diagnoses were identical: Right L5 radiculopathy.

[55] SGI again referred the file for review by a practitioner consultant; while not specifically stated, the context of her conclusions suggests the consultant was asked to consider whether the Appellant's surgery could or should be attributed to the vehicle accident. Dr. Matthews provided her report on February 20, 2006. In reviewing the history of the claim, Dr. Matthews recorded that the first clinical report of pain down the legs occurred at the secondary assessment of December 2, 2002 and that no investigation or test thereafter indicated any neurological cause for this pain. Further, she was not satisfied that the pre-surgical indications – including those reported by the orthopaedic surgeon – supported surgical intervention. She recommended that SGI require an Independent Medical Examination (IME), if it was not comfortable accepting the surgery and its consequences as compensable. SGI acted on this recommendation and the Appellant agreed.

[56] An IME is conducted by a health care provider with expertise in the kind of injury and treatment at issue. The IME practitioner reviews all relevant written reports regarding the claimant's injury and personally examines the claimant. In this case, Dr. William Crooks, an orthopaedic surgeon in Calgary, Alberta, conducted the IME examination on March 30, 2006 and provided his report thereon dated April 7.

[57] Dr. Crooks recounted the Appellant's history, including numerous vehicle accidents where his symptoms were treated conservatively and, after prolonged rehabilitation – particularly in regard to the 1988 accident – became chronic and recurring. Each subsequent accident caused a recurrence of acute neck symptoms. Dr. Crooks then related the circumstances of each of the Appellant's 2002 accidents and, after a brief summary of the Appellant's complaints, conclusions of various health practitioners and his treatment and rehabilitation, including the surgery. Of interest in this part of the report, Dr. Crooks stated:

[The Appellant] states that since the surgery there has been little if any change in his symptomatology with continued pain in the lower back, right buttock and a rather persistent numbness in the right great toe.

[58] Dr. Crooks concluded that no further rehabilitative treatment in the nature of physical therapy or chiropractic care would be of benefit to the Appellant, although home exercises were essential to establish strengthened posture and improved range of motion.

[59] Dr. Crooks further indicated that a poor response to the surgical intervention might have been expected as there was little objective evidence to warrant the surgery. He said that the surgical findings were “obviously inconclusive” and that it was basically an exploratory surgery. Dr. Crooks felt the surgery was of no benefit to the Appellant. Later he stated that, in the course of the surgery, no definite pathology was encountered and that the Appellant’s failure to improve suggested the surgery was likely unwarranted.

[60] He concluded:

On the basis of his history and medical file, multiple injuries have been musculoligamentous in nature with incomplete resolution of symptoms in spite of more than adequate conservative treatment. The patient does not seem to appreciate the emotional factors aggravating his symptoms and delaying his recovery and further counseling in this regard may be of benefit to him.

[61] Dr. Crooks also recommended mild pain medication and perhaps a mild sleeping pill as helpful to the Appellant in the short term.

[62] After receipt of this report, SGI again referred the matter to its practitioner consultant. Dr. Matthews agreed with her understanding of Dr. Crook’s conclusion that the surgery was not indicated and likely unwarranted. Taking the equation in reverse, she concluded that if no pathology was found in the surgery, there was no medical diagnosis that indicated the surgery and therefore no medical diagnosis that could be attributed to the accident.

[63] Dr. Matthews also noted parts of Dr. Crook’s report that she thought confusing. In particular, at the end of his report he had concluded that the Appellant’s spine symptoms were musculoligamentous strains secondary to vehicle accidents but elsewhere in the report, he had indicated a number of other factors that might have affected the Appellant’s symptoms. She suggested that this be clarified.

[64] Based on Dr. Crooks' and Dr. Matthews' reports, SGI advised the Appellant by letter dated June 13, 2006 that the injuries he was then claiming were not accident-related and that the without prejudice payment of IRB that had been discontinued effective May 5, 2006 would not be reinstated.

[65] Following this, SGI sought to clarify the matters that Dr. Matthews had identified. In two letters dated December 18, 2006 and June 19, 2007, Dr. Crooks clarified his conclusions. In the first letter, he stated:

1. In view of the fact the symptoms were present prior to September 14, 2002, in my opinion these pre-existing symptoms were simply aggravated by the accident but were not caused by the accident;
2. In my opinion emotional factors are magnifying the symptomatology as expressed by the claimant.

[66] In the second letter, Dr. Crooks indicated that he had been asked to identify complaints of low back pain prior to the vehicle accidents in September and December 2002. While not stated, it appears SGI sought to understand the basis of Dr. Crooks earlier statement that the symptoms pre-existed the first 2002 accident. Dr. Crooks identified references to low back pain in a July 5 and 6, 1999 tertiary report regarding the 1998 accident. He also found reference to stiffness and soreness in the Appellant's low back in a doctor's notes on August 8, 2000 but no indication whether or when these resolved. Finally, he found that the Appellant had reported on his application for benefits after the September 2002 accident that he had suffered an injury to his lower back in either or both of his 1998 and 1998 accidents that had not fully recovered.

[67] With this evidence, which will be supplemented by oral evidence in the discussion below, the matter was put to the Commission.

ANALYSIS

[68] The issues before us relate, therefore, to the Appellant's entitlement to benefits from January 25, 2004 when his benefits for IRB were terminated until June 19, 2006 when he returned to work following his surgery. There is no evidence that the Appellant

requested, received or was refused any benefits after June 19, 2006. If he did, that is a matter at issue between the parties and is not before us in this appeal.

[69] The evidence has established that the Appellant was involved in two vehicle accidents in the fall of 2002 – on September 14 and December 18. It is troubling that none of the care providers except Dr. Crooks made significant - if any - mention of the second accident, any new or aggravated injuries it caused or any impact it may have had on the Appellant's injuries from his first 2002 accident and on his recovery. Indeed, there is no indication in the documentation provided that SGI, while aware of the accident, established a second claim file in that regard. One has the impression that it was considered insignificant while Dr. Crooks, in his oral evidence, suggested it may have caused more significant injuries than the first accident. The approach to the second accident was dismissive and we hope not indicative of SGI's attitude to the Appellant's claims.

[70] Shortly after the first accident, the Appellant sought medical attention claiming an injury to his neck, back and shoulders. Shortly thereafter, by the time of his application for benefits signed on September 20, 2002, the Appellant complained of low back pain radiating into his both legs. He has maintained this complaint consistently from that date.

[71] While it is clear, and the Appellant did not deny, that he had been involved in prior accidents or incidents where he suffered back injuries, there is no indication of a back complaint involving pain radiating into the legs at any prior time. Our examination of prior medical records that were filed does not show a similar complaint, nor has SGI identified any such record.

[72] In this regard we are mindful of Dr. Crooks' June 19, 2007 letter and the indications of prior low back pain that he identified. Similarly, we have considered the doctor's notation from April 1994 that Dr. Matthews identified. However, while all of these indicate low back pain or stiffness, none appear to include the additional complaints of pain from the low back into the Appellant's legs. With one exception, there is no indication that the Appellant did not recover from the earlier complaints or, in reverse, that he continued to suffer the identified low back injuries at the time of the September 2002 accident. The

Appellant testified that he did not and, given the evidence, we have no basis or reason to disbelieve him.

[73] The exception is the Appellant's statement on his application for benefits that he suffered a low back injury, among others, in his 1998 vehicle accident and that he had not recovered from the injuries suffered in that accident at the time of the September 2002 accident. However, we note that he indicated he suffered injuries to his neck, shoulder and lower back. The question following, for which he checked "no", asked if he had recovered from his injuries. The form does not indicate which of those injuries he had not recovered from or that he continued to suffer the effects of all of them.

[74] We do know, however, that prior to the September 2002 accident, the Appellant had been referred to Dr. Ekong due to on-going difficulty with his neck and right arm tingling arising from the 1998 accident. There was no indication of on-going difficulty with his back in that referral. While this does not establish that the Appellant did not suffer on-going injury to his lower back at the time of the September 2002 accident, it certainly does not establish that he did. We have no evidence at all suggesting that he did.

[75] It is simply inadequate and not proof at all to submit, in effect, that because a person previously reported and was treated for a low back injury, it follows that any subsequent low back injury derives directly from the first and not a subsequent incident. This is effectively what has been suggested in this case. While it is certainly possible and not uncommon that a pre-existing condition is aggravated or exacerbated by or becomes symptomatic as a result of a vehicle accident, it is equally possible that an accident can cause a new injury, irrespective of the prior condition – resolved or not.

[76] We have concluded, therefore, that the Appellant was not suffering symptoms of a pre-existing low back condition at the time of the September 2002 accident and that he had not previously suffered any low back condition that involved pain radiating from the low back to his legs.

[77] As to the Appellant's neck and shoulder injuries, it is clear that he had a problem in these areas prior to the September 2002 vehicle accident and was, at the time, awaiting a

referral to Dr. Ekong in this regard. Nothing in the evidence provided has attempted to differentiate the pre-accident injury from the “new” injury or to determine whether the September 2002 accident caused a new injury at all or simply aggravated the pre-existing injury.

[78] In any event, we are not convinced that the answers to these questions, if available, would have an impact on our decision. The fact is that the pre-existing injury, if there was one and if it was aggravated in the September 2002 accident, was also incurred in a vehicle accident for which the Appellant was entitled to appropriate benefits under the no-fault provisions of the *Act*. Thus, whether the neck and shoulder injuries were incurred wholly in the September 2002 accident and thus entitled him to benefits or whether they were an exacerbation of the prior injury, or both, the Appellant’s entitlement to benefits would be the same.

A. February 2, 2004 Decision Letter

[79] SGI’s February 2, 2004 letter indicated that the Appellant’s IRB would be terminated effective on an unspecified date that appears was likely January 24, 2004. The termination was based on the fact that the Appellant had completed his GRTW and was, SGI concluded, able to resume his pre-injury employment

[80] SGI’s conclusion in this regard was based primarily on Wascana’s Discharge Report dated December 24, 2003. By this time, SGI (and Wascana) had received multiple reports regarding the Appellant’s injuries, all of which indicated that his back and leg pain were not neurologically based but instead, were mechanical in origin. The Appellant had undergone extensive rehabilitation and reported significant improvement, although he certainly complained of on-going problems.

[81] While the Appellant in evidence suggested that his complaints relating to back and referred leg pain were dismissed by Wascana and others as being “in his head” and a result of his being overweight, the evidence does not support his perception in this regard. It is clear that both secondary and tertiary treatment was focused on these injuries and that they were accepted as genuine. While the care providers thought them the result of soft

tissue injuries, there is no indication whatsoever that either rehabilitation facility thought that they did not require treatment or that they did not affect the Appellant and his ability to work. Indeed, for many months these very symptoms were considered to be of such severity that they prevented the Appellant from resuming his pre-injury employment. Even when concluding that the Appellant was able to return to work, Wascana recognized that accommodations would be required in light of these injuries.

[82] At February 2, 2004 when the decision was made, the Appellant had completed a GRTW, was working full-time at his pre-injury employment and continued to do so until late March 2004. In the face of this, it is difficult to conclude that he was unable to do the very thing that he in fact was doing. We are satisfied that the Appellant was physically able, with modifications, to manage his pre-injury employment at February 2, 2004 and SGI's decision letter in this regard is confirmed.

[83] The Appellant has submitted that, although he returned to work in accordance with his GRTW, his injuries prevented him from continuing his employment and forced him to discontinue his employment late in March 2004. He did not return until October 18, 2004. The Appellant argued that IRB should have been reinstated during that time.

[84] We do not agree. In his evidence, the Appellant spoke of significant and stressful problems at work. He was involved with and obviously deeply affected by an OH&S problem involving a fellow worker. Significant concerns were raised about his work performance. Finally, he was involved in a meeting in March when his boss became very angry and the Appellant was emotionally paralyzed and unable to talk. It was shortly following this incident that the Appellant left the employment.

[85] In the course of his testimony about these incidents, the Appellant became visibly agitated and it is apparent that he continues to find them emotionally exhausting. When asked what occurred that enabled him to return to work in October, the Appellant testified that he had a larger office and could more easily exercise. He also mentioned that he was "more careful" to do his exercises and to take his medications.

[86] We do not accept the Appellant's evidence that increased pain caused him to leave his employment in March 2004. We are satisfied that his leave at that time was consequent on stresses in the workplace that he had difficulty managing, at least in part, due to his earlier decision to discontinue his medications. It is much more likely that the resumption of those medications and a significant degree of resolution of the workplace issues described enabled his return to work; it was not simply circumstances that enabled him to exercise more comfortably and conveniently.

[87] We are supported in this conclusion by Nicole Gallais' Physical Therapy Assessment report dated April 21, 2004. On that date, Ms. Gallais examined the Appellant at SGI's request, presumably in light of his claim that his back and leg symptoms prevented him from remaining at work. She recorded that the Appellant told her his family doctor had wanted to take him off work in January due to stress but he stayed on as he thought he could handle it. He then described to her the events discussed above.

[88] With regard to physical complaints, he reported that he had one massage treatment in February, suffered low back pain that he described as "feeling worn out" at the end of the day and minor tingles in his right leg and foot. He volunteered that the latter were much better than they were when he finished the tertiary program. Ms. Gallais' testing and measurements did not indicate that the Appellant's musculoskeletal status had declined or that he was not physically capable of work.

[89] Ms. Gallais' report supports our conclusions drawn from the Appellant's evidence. As such, we are not satisfied that the Appellant's inability to work between late March and October 18, 2004 was consequent on his vehicle accident injuries and, therefore, he was not entitled to IRB during that time.

[90] However, the February 2, 2004 decision letter – quite properly in our view – terminated IRB only and not all Part VIII benefits. The Appellant's ability to resume his employment was in part, for example, due to his use of significant medications and on-going supportive rehabilitation that Wascana recommended be available at least for six to eight weeks after discharge. SGI did not purport to terminate benefits for on-going rehabilitation,

medical expenses or any other benefits consequent on the Appellant's injuries in the two 2002 accidents and it ought not to have done so.

[91] We note SGI's May 11, 2004 letter to the Appellant indicated that his file would "remain closed". We are not aware when or why his file was closed when only IRB had been terminated and circumstances clearly indicated continued entitlement to other benefits when and as appropriate. The continued provision of appropriate benefits other than IRB after January 24, 2004 is ordered.

B. July 5, 2005 Decision Letter

[92] SGI's July 5, 2005 decision letter was sent at the conclusion of the mediation and simply advised that SGI confirmed its February 2, 2004 decision. For the reasons given above in regard to the February 2, 2004 decision letter, we also confirm the July 5, 2005 letter, with the same qualification set out in paragraphs [90] and [91] above.

C. June 13, 2006 Decision Letter

[93] When the Appellant advised SGI that he had been diagnosed with L5 radiculopathy and that he would undergo corrective surgery, SGI neither dismissed nor accepted his request to reinstate his claim. SGI sought additional medical information and reports and reinstated IRB on a without prejudice basis pending its decision.

[94] Ultimately, after receiving the IME report and Dr. Matthew's comments on that report, SGI accepted their opinion that the surgery was not necessary at all or as a result of the vehicle accident and declined further benefits. It is this decision that is conveyed in the June 13, 2006 letter.

[95] Basically, SGI has concluded that pre-surgery testing did not indicate a neurological condition that could be corrected by surgery, that the surgery was therefore not indicated, not necessary and not effective. As such, SGI says, it follows that the Appellant is not entitled to benefits relating to the surgery or its consequences.

[96] We do not accept this conclusion.

[97] In regard to SGI's position that the surgery was not indicated, necessary or effective, we note that significant information was not available to or considered by those on whose opinions SGI has relied.

[98] We were fortunate to have Dr. Crooks give extensive and thoughtful oral evidence. However, his report and evidence were premised on his review of the file and the fact that all investigations and testing prior to the orthopaedic surgeon's testing disclosed no neurological basis to the Appellant's back and leg complaints. He did not believe that the orthopaedic surgeon's testing showed a neurological basis either.

[99] However, in the course of giving evidence, he said that he was not sure of exactly what the orthopaedic surgeon did when he did the spinal block and he was not aware of the results when the block was administered. He said that one would expect immediate relief of symptoms if L5 radiculopathy was present. This is exactly what the Appellant testified occurred.

[100] We have no basis to reject the Appellant's evidence in this regard. The orthopaedic surgeon did not recommend surgery based on his examination of the Appellant and the MRI results, even though he believed that the symptoms disclosed an L5 radicular pattern. Instead, he considered the possibility that the pattern was not evident because it only occurred, in effect, when the Appellant was upright. For this reason, he proposed the L5 block. Had the block not confirmed his suspicion, the orthopaedic surgeon simply would not have recommended the surgery. To conclude otherwise indicates a level of incompetence that is unfair and inconceivable. We must accept the Appellant's evidence that his symptoms were relieved when the L5 block was administered.

[101] Dr. Crooks also testified that the Appellant told him he experienced little if any change in his symptoms following the surgery. The Appellant says flatly that this is not correct.

[102] The Appellant testified convincingly that as soon as he was conscious after the surgery, he was immediately aware that the "Charlie horse" or knot in his hip", as he

variously referred to it, was entirely gone. Thus, while his symptoms were not wholly relieved, he said this was a very significant improvement.

[103] It seems to us likely that this information, if true, would have been relayed to Dr. Crooks. However, it is also possible that the Appellant merely described his on-going, post-surgery symptoms; these include low back and leg pain as described in Dr. Crooks' report. Dr. Crooks may have taken this to mean that the symptoms persisted as they had been pre-surgery. Either conclusion involves conjecture in which we are reluctant to engage.

[104] Given this uncertainty and the Appellant's convincing evidence of immediate and significant relief, we accept that he experienced immediate and significant relief of his symptoms following the surgery.

[105] It is unfortunate that we were not able to hear evidence from the orthopaedic surgeon or, at least, receive a post-surgical report from him. Instead, we engaged through Dr. Crook in an effort to understand his operative record and speculate or surmise what he meant or intended in various notations. For example, while both Dr. Crook and Dr. Matthews have concluded that the operative record shows that the orthopaedic surgeon did not find any nerve root compression, Dr. Crooks did agree that the fact that the surgeon showed the same pre- and post-operative diagnosis – L5 radiculopathy – might suggest otherwise.

[106] In the final analysis, we do not think it is necessary to resolve these questions. The issue for us is whether the Appellant acted reasonably in undergoing the surgery and if he did so for the purpose of treating or relieving symptoms suffered in the vehicle accident.

[107] The Appellant complained of low back pain radiating into his legs shortly after the accident and continuously thereafter. He was reluctant to accept that this was caused by soft tissue injury and appeared, as various care providers have suggested, to be seeking a cause that might be more quickly cured. It also appears that Dr. Chapple believed that his symptoms were not soft tissue in nature as she made repeated referrals to neurologists and, eventually, the orthopaedic surgeon.

[108] Once the Appellant consulted the orthopaedic surgeon, had an MRI and a spinal block and received a recommendation for surgery that the surgeon said would relieve his symptoms, we believe it was entirely reasonable for him to undergo the surgery. It is true, as SGI has submitted, that he did this in the face of repeated consultations, testing and opinions that his symptoms did not have a neurological base. However, he also did this on the indirect recommendation of his family physician and the direct recommendation of a specialist. Certainly he did not have the knowledge to reconcile conflicting medical advice he had received. He cannot be expected to consider and resolve complex medical diagnostic questions that, frankly, remain troubling to this date.

[109] SGI considered this question as well. That is, SGI relied on that part of Dr. Matthews' opinion where she said that since the surgery was not indicated due to a lack of neurological pathology, and since there was no pathology found at the surgery, there was no medical diagnosis that could be attributed to the accident.

[110] In our view, however, this has been reasoned in reverse. The question must be whether, at the time the surgery was recommended, a claimant undertook it reasonably for purposes of treating injuries incurred in the accident. This must be the test whether or not, after surgery, it is learned that the surgery was not effective to treat the injuries. Otherwise, claimants would be put in an impossible position whenever treatment is recommended of needing to know in advance whether the recommendation is appropriate and whether it will be effective; they would be required to exercise hindsight in advance.

[111] We are satisfied that the Appellant acted reasonably in undergoing the L5 laminectomy on January 12, 2006 and that he did so in furtherance of his recovery from injuries from the September 14, 2002 accident. We are satisfied that this is so whether or not the surgery was medically indicated and whether or not it was effective in relieving his symptoms.

[112] As such, SGI's letter of June 13, 2006 is set aside. The Appellant is entitled to all appropriate benefits under Part VIII of the *Act* for the period from his surgery on January 12, 2006 until he returned to work on June 19, 2006. No evidence was presented suggesting that the Appellant's return to work was unreasonably late or inappropriate and SGI did not

argue that it was. As such, we accept that his recovery and recuperation reasonably extended to that date.

[113] Benefits payable will include IRB only for the part of the period that SGI did not pay on a without prejudice basis at the time.² Benefits payable will also include any other appropriate benefits including, but not limited to, those for medical and pharmaceutical expenses, rehabilitation and activities of daily living. The Appellant shall provide information as is reasonably required, including receipts or other confirmatory documentation, in support of claims for specific benefits.

CONCLUSION

[114] SGI's decision letter dated February 4, 2004 is confirmed in so far only as it relates to income replacement benefits. All other appropriate benefits are payable in accordance with paragraphs [90] and [91] above.

[115] SGI's decision letter dated July 5, 2005 is confirmed in so far only as it relates to income replacement benefits. All other appropriate benefits are payable in accordance with paragraph [92] above.

[116] SGI's decision letter dated June 13, 2006 is set aside. The Appellant is entitled to and shall be paid all appropriate benefits in accordance with paragraphs [112] and [113] above. The Appellant shall, when reasonably requested, provide receipts or other records in support of his claims.

[117] In the event that the parties are unable to resolve questions relating to appropriate benefits or their amounts, either may bring the matter back before the Commission by so requesting in writing and without the necessity of filing further Application to Appeal. The Commission retains its jurisdiction for this purpose.

² In the documents and in the course of the hearing, it was indicated that these were paid from January 12 to March 22 inclusive. SGI has indicated these were paid from January 12 to May 5 inclusive.

[118] The Appellant shall be paid pre-judgment interest on outstanding income replacement benefits and any out-of-pocket expenses which he has paid and is entitled to have reimbursed by reason of this decision.

COSTS

[119] As the Appellant has been successful in his appeal, he is entitled to his reasonable expenses and costs calculated on double Column 3 of the Queen's Bench Tariff of Costs, subject to the cap of \$2,500.00 pursuant to s. 193(11) of the *Act* and s. 96 of the *Personal Injury Benefit Regulations*.

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

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

Beverly Cleveland, Chair

Conrad Hnatiuk, Commission Member

Barbara Tomkins, Commission Member