

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *E.A. v. Saskatchewan Government Insurance,*
2007 SKAIA 095
Date: 20071009
File: 002 of 2006

BETWEEN

E.A., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
E.A., Applicant
Allan McLeod, for the Respondent

Before: **Barbara Tomkins, Chair**

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

Heard at Saskatoon, Saskatchewan
September 10, 2007

DECISION

[1] The Appellant, E.A., was involved in a vehicle accident on April 13, 2004. He suffered certain injuries in the accident and applied for benefits under Part VIII – the no-fault provisions – of *The Automobile Accident Insurance Act*. His claim was accepted and he received benefits from Saskatchewan Government Insurance (“SGI”) until October 27, 2005 when SGI advised that no benefits for rehabilitation would be paid after January 25, 2005.

[2] The Appellant disagreed with this decision and appealed to the Automobile Injury Appeal Commission.

JURISDICTION

[3] The Commission derives its jurisdiction from section 191(1) of the *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.

[4] SGI’s decision letter is dated October 27, 2005 and shortly after receiving it, the Appellant requested that the matter be mediated. By letter dated November 17, 2005, the mediator advised that the mediation was concluded.

[5] The Appellant then appealed and his application for appeal was received by the Commission on January 11, 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

Documentary Evidence

[6] The Appellant was involved in an accident on April 13, 2004 when, while driving his vehicle and pulling a utility trailer, he was struck on the driver's side rear by another vehicle. Initially, he didn't notice any injury but, after a few hours, he developed pain in his upper back and neck and he also developed a headache. Some hours after this, he had an episode when he was able to think and formulate thoughts but could not speak coherently; this episode lasted about one-half hour.

[7] The Appellant saw his chiropractor the day after the accident. Dr. Wilkinson diagnosed cervicothoracic posterior joint dysfunction, right rib dysfunction and trapezius myofascitis. His examination showed that the Appellant experienced right neck and upper back pain that radiated to the suboccipital area of the skull and right ear, producing headaches. He concluded that the Appellant suffered Whiplash Associated Disorder (WAD) II and treated him twice weekly for some weeks and weekly thereafter.

[8] On June 11, 2004, the Appellant saw his general practitioner and the person designated as his primary practitioner for purposes of his Application for Benefits, Dr. B. Large. She reported a diagnosis of WAD II that had significantly improved.

[9] Also on June 11, 2004, Dr. Wilkinson reported on-going pain to the Appellant's skull, right neck, upper back and right shoulder blade. However, Dr. Wilkinson noted that the Appellant had said he was 70% improved and Dr. Wilkinson himself rated the Appellant's pain at five out of ten, whereas he had rated it at seven to eight out of ten in his earlier report. He continued to rate the injury as WAD II.

[10] Dr. Wilkinson next reported by letter dated August 13, 2004. In this letter, he repeated his findings from the June 11 examination but stated that the Appellant's condition had regressed since that date. Dr. Wilkinson indicated that a secondary assessment would be appropriate at that time.

[11] The Appellant had a multi-disciplinary assessment at the Canadian Back Institute Physiotherapy & Rehabilitation Centre (“CBI”) on September 8, 2004. At that assessment, the Appellant was examined by a team comprised of a physician, chiropractor, physiotherapist and an exercise therapist.

[12] In their Assessment Report the team indicated that it found mild limitation in left lateral flexion of the neck, consistent with soft tissue tightness, and “significant muscular tightness and associated tenderness in the right levator scapulae muscle” and some tightness and tenderness of both trapezius muscles and the right scapular retractors. Finally, they found mild to moderate joint stiffness in the right T3/4 facet and costovertebral joint and in the cervical spine at the C3/4 level. They diagnosed “Mild but persistent WAD II, with some spread into the upper back and history of cervicogenic headaches.”

[13] The team recommended a six to eight week modified secondary treatment program, including therapeutic exercise and continued biomechanical treatment, and concurrent massage therapy.

[14] While the Appellant’s symptoms were thought to be more stubborn than one would like, the team anticipated that he would nonetheless recover to his pre-injury condition.

[15] Progress reports during the Appellant’s secondary treatment indicate some improvement but continued discomfort and restriction. By the time of his discharge on December 2, 2004, the team recorded that the Appellant continued to report intermittent headaches and continued cervical, right shoulder and shoulder girdle discomfort. The Appellant reported that his symptoms had been exacerbated as the level of exercise was increased.

[16] In its Discharge Report, the team reported its objective findings as follows:

Objective Findings:

1. Cervical range of motion continues to be moderately restricted; restrictions are increased with increased symptom level. Myofascial restrictions have improved, but continue to be noted in the levator scapula intermittently. Articular restrictions at the first rib complex have improved.
2. There are no signs of neurological deficit or neural tension.

[17] In a section titled “Analysis of Findings”, the team concluded that “[The Appellant] continues to present with mechanical cervical dysfunction, grade II, primarily myofascial in nature, with cervicogenic headaches.”

[18] The Appellant was discharged with recommendations that he undertake and continue an independent exercise program. The team also noted that he might benefit from a few biomechanical visits during the first few months, given his “increased symptoms with increased activity”.¹

[19] Following receipt of a copy of the Discharge Report discussed above, SGI referred the Appellant’s file to its medical consultant for his opinion whether SGI should provide benefits for the post-discharge biomechanical treatments that had been recommended as beneficial.

[20] In her memorandum requesting the review, the Appellant’s Personal Injury Representative (PIR) provided a summary of the Appellant’s treatment and then recounted a conversation she had had with Dr. Wilkinson on December 2, 2004. The PIR reported that Dr. Wilkinson had told her that he had seen the Appellant on December 1 and that the Appellant reported that he felt worse than he had before. She recorded that Dr. Wilkinson “feels SGI has been very generous in all the treatment we have provided and he feels SGI should be discharged from further responsibility.”

[21] Dr. Mireau, a chiropractor consultant for SGI, provided his opinion on January 11, 2005. While he briefly recapped the Appellant’s injuries and treatment, he fully adopted Dr. Wilkinson’s reported opinion. In the section titled “Opinion”, Dr. Mireau wrote:

The treatment provider informed SGI on December 2, 2004 that treatment for MVA related conditions is not longer indicated. This opinion should be accepted; that more treatment for MVA related conditions is not indicated after December 2, 2004. This opinion is based on information provided by the customer’s care provider.

[22] Based on Dr. Mireau’s opinion, SGI advised the Appellant by letter dated January 26, 2005 that Dr. Mireau had concluded that “treatment for motor vehicle accident related conditions are no longer indicated” and that SGI had accepted Dr. Wilkinson’s opinion in

¹ “Biomechanical visits” for purposes of this recommendation related to chiropractic or physiotherapy visits.

that respect as well. As such, the letter advised, SGI would not provide further rehabilitation benefits.

[23] In a letter to his PIR dated February 10, 2005, the Appellant took issue with much that was said in SGI's prior letter. He stated that he left the CBI program in worse condition than when he started and he therefore could not understand SGI's conclusion that further treatment was not indicated. He also stated that he had spoken to Dr. Wilkinson and that Dr. Wilkinson indicated that SGI's interpretation of his position was wrong.

[24] SGI referred the Appellant's file to Ms. Thompson, a supervising PIR, for review. In the course of that review, Ms. Thompson consulted Dr. Wilkinson by phone. In regard to the Appellant's suggestion that Dr. Wilkinson had said he was misunderstood by the PIR during the December 2 conversation, the note states:

He could not recall the exact contents of their conversation and I read the note of same. I let him know that part of his conversation was justification for the decision along with all of the other medical reporting – and the consultant's review of all of these factors. I asked him if we have misinterpreted something or if there is any new medical information – he did not think there was any new medical information to submit.

[25] Based on this conversation, on February 15, 2005, SGI sent a further letter to the Appellant. It stated:

SGI's decision to discontinue chiropractic treatments based on a complete medical review of all medical documentation on your file as well as a conversation with your caregiver conducted by our medical consultant.

[26] While not specifically so stating, the letter appears to confirm SGI's January 26, 2005 decision to discontinue benefits for rehabilitative treatment. Reference to options for appeal and mediation were provided.

[27] The Appellant's PIR made note of a conversation she had with Dr. Wilkinson on September 22, 2005. It appears that Dr. Wilkinson wanted to clarify the December 2, 2004 conversation. While he said he could not recall exactly what had been discussed, he said that at the time of the call, the Appellant was not at his pre-injury condition. The PIR

indicated that she had not understood him to say so but only that the Appellant should be discharged from SGI's responsibility.

[28] By letter to the Appellant dated October 6, 2005, Dr. Wilkinson further clarified his position. He said that by January 26, 2005, it was his opinion that the Appellant's neck and upper back injuries had resolved to pre-vehicle accident status. However, by February 23, the Appellant reported and was treated for right upper back symptoms. From May 6 until June 15, 2005, Dr. Wilkinson treated the Appellant's neck and upper back symptoms. At first, the Appellant experienced a recurrence of neck and upper and lower back pain with headaches but shortly after, the neck and back symptoms improved. Frequency of treatment was reduced. After June 15, 2005, the Appellant no longer attended to Dr. Wilkinson for treatment.

[29] With regard to the termination of benefits, Dr. Wilkinson wrote that he thought there was a misunderstanding during the telephone conversation on December 2, 2004. He wrote:

I don't recall what was said, but it makes no sense that I would discharge you from care on December 2, 2004, when I clearly entered in my notes the previous day that you had not reached pre-accident status. In addition, I had written the comment: "overall doesn't feel better, rather worse, wonders if it should be left alone now." I wonder if communicating that comment to the adjuster was misinterpreted as a reason to discharge you. At that time I probably assumed you were eligible for a few crisis treatments as was recommended by CBI following the cessation of your secondary rehab and treatment. That would explain why I recommended a weekly treatment frequency on December 1, 8, 17, 2004.

[30] Upon receiving this letter, the matter was again referred to Dr. Mireau for his opinion. By memorandum dated October 18, 2005, Dr. Mireau quoted Dr. Wilkinson's statement that the Appellant's neck and upper back were at pre-accident status by January 25, 2005. Dr. Mireau did not believe that the balance of the letter provided new medical information. His opinion was unchanged.

[31] On October 27, 2005, SGI again wrote the Appellant. SGI concluded that the Appellant had reached pre-injury status by January 25, 2005 and rehabilitation benefits would not be funded beyond that date. Reasonable chiropractic expenses between December 2, 2004 and January 25, 2005 would be considered for payment.

[32] On January 9, 2006 the Appellant wrote his PIR. He advised that he has seen his physician regarding a then current relapse and the anticipated wait time for a pending appointment with a neurologist. He noted that he was still suffering pain, dizziness, sleeplessness, tinnitus, and limited physical ability. He said he was convinced that he had an undiagnosed injury.

[33] Eventually, the Appellant consulted Mr. Richard Bourassa, a Saskatoon physiotherapist. Mr. Bourassa conducted an examination of the Appellant and reviewed MRI, EEG, ultrasound and CT scan reports. He provided an analysis and opinion dated June 6, 2007.²

[34] First, Mr. Bourassa commented that the nature of the accident was unusual in that the Appellant was hauling a utility trailer that took the brunt of the damage; the torque forces, he said, would create different injury forces than would a “direct hit MVA”.

[35] In terms of treatment, Mr. Bourassa was particularly concerned by two incidents of what he described as aphasia – the first on the day of the accident and the second occurring during his treatment program at CBI months later. (These are occasions when, for a period of time, the Appellant reported that he was unable to speak. See paragraph [6] above.)

[36] The reported incidents of aphasia suggested to Mr. Bourassa the possibility of circulatory difficulty to the Appellant’s brain and brain stem. In these circumstances, certain kinds of treatment of the cervical spine may involve risk of serious complications, including stroke and death. Despite the fact that CT, MRI and ultrasound tests that did not show damage, Mr. Bourassa retained the opinion that the Appellant was at some level of risk. Therefore, Mr. Bourassa declined to provide treatment that involved manipulation of the Appellant’s cervical spine.

[37] Mr. Bourassa diagnosed mechanical dysfunction of the joints and muscles of the C6/7 through to T3/4 segments on the right side of the Appellant’s spine. The capsular pattern of restriction, he said, is a characteristic pattern of limitation and one that is “often

² In oral testimony, Mr. Bourassa indicated that he had reviewed and considered all evidence that constitutes the appeal package including practitioner’s reports, secondary treatment reports, and test results for purposes of considering the Appellant’s case and preparing his opinion.

seen after inflammatory events or in a joint system that has been damaged.” Movement in these joints was limited, particularly in their habitual movement patterns, and they were more restricted than their partners on the Appellant’s left side. Mr. Bourassa found that these joints had 60% to 75% of normal motion and that the range fell as low as 50% of normal when the Appellant was in a symptomatic state.

[38] After completing his assessment, Mr. Bourassa provided what he described as a “carefully graded but vigorous approach to biomechanical restoration of the cervicothoracic joints with firm mobilization and actually carefully graded manipulation distal to the C6/7 joint.” Mr. Bourassa thought that this treatment succeeded in improving range of motion and decreasing stiffness but that the change was not significant in the long term. Additionally, the Appellant was provided a program of self-applied maintenance exercises. Mr. Bourassa referred the Appellant for intramuscular needling and for anaesthetic/steroid injections but neither was significantly effective.

[39] Mr. Bourassa concluded:

Therefore, all in all, despite all reasonable efforts to deliver evidence based treatment to restore segmental mobility of muscle and joint and to desensitize and strengthen this area, you have failed to respond to be anything different than what you started with; therefore, the likelihood that we will have long term benefit with ongoing treatment is quite low. Having said this, biomechanical treatment during times of crisis can sometimes prevent further trauma and damage. I have advised you that it may be wise to receive crisis intervention during periods of times of high levels of symptoms with restriction where you are not responding to self applied exercises.

[40] Following receipt of Mr. Bourassa’s report, the matter was referred again to Dr. Mireau for his consideration. Dr. Mireau provided his third and final opinion on June 22, 2007. He said that Mr. Bourassa had provided new medical information documenting the Appellant’s then current condition and the clinical result of intervention and assessment by Mr. Bourassa.

[41] Dr. Mireau was not impressed by Mr. Bourassa’s opinion in this case. First, Dr. Mireau thought that biomechanical treatment of the neck was absolutely contraindicated in light of concerns of injury to the circulatory system.

[42] Dr. Mireau thought Mr. Bourassa's opinion on the matter of causation was questionable as Mr. Bourassa hadn't seen the Appellant until more than two years after the accident and therefore was not familiar with his condition immediately prior to the accident, or with his progress in recovery after the accident. Dr. Mireau noted the minor amount of damage to the Appellant's vehicle (which he stated as \$85) and his conclusion that the dizziness that compromised the Appellant's ability to take on certain activities was not related to the vehicle accident.

[43] Where in conflict, Dr. Mireau preferred Dr. Wilkinson's reports and conclusions to those of Mr. Bourassa, given that Dr. Wilkinson had treated the Appellant immediately and for some time after the vehicle accident.

[44] In all these circumstances, Dr. Mireau's opinion was unchanged. So, therefore, was SGI's position.

Oral Evidence: The Appellant

[45] The Appellant testified at the appeal hearing. I thought his evidence was forthright and, as care providers commented in their reports, I observed nothing that suggested he exaggerated his symptoms or their impact.

[46] The Appellant had been involved in a vehicle accident some years prior to 2004 and that it also caused injury to his shoulders and neck. He testified that over time, he had learned to maintain his condition through exercise and stretches. He thought some activities, such as his participation in martial arts, helped improve his condition; he said as a result of his participation, his range of motion at the time of his April 2004 accident was "outstanding".

[47] Nonetheless, the Appellant admitted that he had occasional flare-ups of the old injury when he would experience headaches and/or neck and shoulder pain. He estimated that this might happen every month or two.

[48] Despite injury to the same or similar areas in the prior accident, the Appellant says the two are, for him, distinctly different. A bad day now, he said, is significantly worse than

a bad day prior to the April 2004 accident. Prior to the accident, if he was experiencing a bad day, he would find relief in stretches or treatment from Dr. Wilkinson. Since the April 2004 accident, stretches and treatment do not provide relief or, at least, do not provide the same degree of relief.

[49] The Appellant has not seen Dr. Wilkinson since June 2005 and now sees Mr. Bourassa approximately every three or four weeks. Between these care providers, the Appellant sought other treatment, including acupuncture. This was not effective.

[50] Following his 2004 injury, the Appellant continued his martial arts training but occasionally excused himself from certain activities. He said that in March 2006, he found the strain of his arms on his shoulders and neck during the warm up left him dizzy and staggering; he said he knew he had to stop. He discontinued martial arts training at that time.

[51] Ideally, the Appellant would like to be cured. At present, he said he still experiences symptoms, including headaches and restricted mobility. He manages his life and his work despite the injuries but says that his lifestyle has had to change. At minimum, he seeks ongoing maintenance and supportive care, as well as compensation for permanent impairment.

Oral Evidence: Richard Bourassa

[52] Richard Bourassa's credentials include a Bachelor's degree in physical therapy, an advanced diploma in manipulative therapy and a Master's degree in Science (Community Health and Epidemiology). He is the provincial workers' compensation consultant, a Clinical Associate Professor in the faculties of Physiotherapy, Medicine and Dentistry at the University of Saskatchewan and one of five Chiefs of the national examiners for the Canadian Physiotherapy Association. For our purposes, it is significant to note that Mr. Bourassa's Master's thesis focused on motor vehicle injuries, including some consideration of the relationship between the nature and severity of a vehicle accident and its related injuries.

[53] Mr. Bourassa explained the reasons for his concern that the Appellant suffered an injury to his vertebral arteries. He said that if a patient suffers injury to the vertebral artery, there are significant risks from manipulative treatment, including stroke or death. In this case, the Appellant complained of two incidents that Mr. Bourassa considered aphasia and aphasia is or can be indicative of injury to the vertebral artery. For this reason, Mr. Bourassa was unwilling to treat the Appellant until he had secured copies of CT, MRI, ultrasound and other test results.

[54] The tests did not show a tear in the vertebral artery, nor did any test show indication of an injury that had healed. Nonetheless, Mr. Bourassa remained concerned that the Appellant had suffered an injury to his vertebral artery. First, there were two unexplained episodes of aphasia. Second, the artery might have been subjected to torque or been stretched; in this circumstance, no injury would be evident on the tests that were done but the area affected would be weakened and the Appellant would nonetheless be at risk. Mr. Bourassa said that an injury to the vertebral artery would be permanent.

[55] Given these concerns, Mr. Bourassa embarked on a treatment program that did not involve manipulation of the Appellant's neck. Unfortunately, the treatment was not effective in correcting the Appellant's condition or in securing long-term improvement. Mr. Bourassa testified that the Appellant's condition is at maximum medical improvement (MMI) meaning that further treatment is unlikely to improve his recovery from the accident; he has, in all likelihood, recovered as much now as he ever will.

[56] Mr. Bourassa believes that the Appellant's condition was caused, or caused primarily, in the April 2004 vehicle accident. In so concluding, he has accepted the Appellant's assertion that his injury from the previous accident, while occasionally symptomatic, was managed with stretches and chiropractic care on an as-needed basis and that it was relatively asymptomatic at the time of the April 2004 accident. Given this premise, Mr. Bourassa considered other possible causes – for example, arthritis or postural change – and eliminated each. On the other hand, he said, the symptoms are consistent with an injury in the 2004 vehicle accident.

[57] Specifically in regard to the Appellant's symptoms of aphasia and dizziness, Mr. Bourassa said that the information available to him suggested this was caused in the accident, given that it occurred for the first time in the Appellant's life within hours of the accident and is possibly consequent on an injury to the vertebral artery that is, itself, consistent with the kind of forces he would have anticipated in the accident.

PRELIMINARY MATTERS

[58] The series of decision letters is unclear as to whether SGI's decision terminated all benefits consequent on the Appellant's April 2004 vehicle accident or only benefits for rehabilitation. At the hearing, counsel for SGI advised that the effect of SGI's October 27, 2005 decision letter was to terminate all benefits relating to the vehicle accident. This decision is rendered on that basis.

ONUS OF PROOF

[59] 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.

[60] 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

³ 1998 CanLII 13463, 165 Sask. R. 108

⁴ paragraph [5]

⁵ 2002 SKQB 479 (CanLII)

⁶ 2004 SKCA 164 (CanLII)

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.

[61] 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.

[62] The Appellant has established that he was disabled as a result of the vehicle accident. In fact, SGI has not suggested otherwise. SGI has provided rehabilitative care and benefits and has accepted responsibility for injuries to the Appellant’s neck, upper back and shoulders. It has now concluded that further treatment to those areas is not compensable under Part VIII of the *Act*.

[63] 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 further benefits are not payable.

STANDARD OF REVIEW

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

[65] In this case, SGI has refused further rehabilitation benefits for on-going and occasional chiropractic care on the basis that “treatment for motor vehicle accident related conditions are no longer indicated” and, therefore, that further rehabilitation benefits would not be provided. In effect, therefore, SGI had concluded that further treatment was neither necessary nor advisable for purposes of section 112 of the *Act*. The relevant portion of that section reads:

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

⁷ 2006 SKCA 089

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

LAW AND ANALYSIS

[67] Since the April 2004 accident, the Appellant has complained of pain in his neck, shoulders and upper back. In addition, he experienced two incidents of aphasia and occasional periods of dizziness. He attributes all of these symptoms to the vehicle accident.

[68] In argument, SGI conceded that Dr. Wilkinson had retracted his purported statement that the Appellant was at his pre-accident condition by January 25, 2005. This is a reasonable position, in light of the admittedly confusing explanations subsequently provided by Dr. Wilkinson and the fact that at the time Dr. Wilkinson was alleged to have made the statement, he had prescribed further on-going treatment for the very conditions. Given this concession, the foundation for Dr. Mireau's position in that regard has been removed and his opinions given January 11, 2005 and October 18, 2005 have lost their value.

[69] Nonetheless, I must consider whether SGI's decision was reasonable, based on the information available at the time it was made – October 27, 2005. Even without Dr. Wilkinson's retraction, I am satisfied that SGI's decision was not reasonable.

[70] At the time SGI made its decision, it had available a number of medical reports from Dr. Lange, Dr. Wilkinson and CBI. Each of these reported consistent reported injuries and consistent diagnoses of WAD II. In addition, it had a report that Dr. Wilkinson had said:

... he saw [the Appellant] the day before and he said that he feels worse now that he did before. He told me [the Appellant] has a lot of subjective complaints. Dr. Wilkinson feels that SGI had been very generous in all the treatment we have provided and he feels SGI should be discharged from further responsibility.

⁸ 2006 AIAC 097

[71] In fact, therefore, Dr. Wilkinson was not reported to have said that the Appellant had recovered from his injuries; he said that he felt worse and had “a lot of subjective complaints”.

[72] What SGI and Dr. Mireau relied on from the quoted conversation, was Dr. Wilkinson’s view that SGI should be relieved from further responsibility for the Appellant’s care and it is this, and this alone, that formed the basis of Dr. Mireau’s subsequent opinions that further treatment was not indicated. Dr. Mireau provided this opinion without commenting on the reports – including that from Dr. Wilkinson in the quoted paragraph – that the Appellant had not recovered from his injuries. Indeed, the diagnosis in the Discharge Report from CBI was WAD II, identical to the diagnosis shortly after the accident and throughout his care. At that time, no one – including Dr. Wilkinson – had suggested that the Appellant did not require further treatment.

[73] In so stating, I am aware that there was no specific recommendation for further treatment pending at that time, aside from CBI’s recommendation for crisis biomechanical visits with a chiropractor or physiotherapist. But I am also aware that the on-going diagnosis was WAD II and there was no suggestion that the Appellant’s reported symptoms were exaggerated.

[74] It is unclear why CBI discharged the Appellant without recommendation for further treatment. CBI’s discharge report acknowledged on-going measured myofascial and range of motion restrictions, accepted the Appellant’s reports of intermittent headaches and did not suggest that the Appellant had reached MMI. The team said that while there had been some improvement, there had also been regression. The report is simply silent as to the nature or advisability of further treatment or reasons for discharge notwithstanding a condition diagnosed as WAD II. It appears, perhaps, that CBI was satisfied that the Appellant might be discharged simply because he was performing his normal functional activities. It has not been argued and I am not satisfied that this is the test for discontinuing benefits.

[75] I think that these are matters that SGI was required to consider in deciding whether or not to discontinue rehabilitation benefits. Instead, SGI relied on Dr. Wilkinson’s

purported opinion about SGI's responsibility; this is a matter of law and not within Dr. Wilkinson's expertise. In his January 18, 2005 opinion, Dr. Mireau wrote:

Opinion:

The treatment provider informed SGI on December 2, 2004 that treatment for MVA related conditions is not [sic] longer indicated. This opinion should be accepted; that more treatment for MVA related conditions in [sic] not indicated after December 2, 2004. This opinion is based on information provided by the customer's care provider.

[76] In effect, therefore, Dr. Mireau simply adopted Dr. Wilkinson's view regarding on-going responsibility and extrapolated that Dr. Wilkinson thought that further treatment was not indicated. SGI's October 27, 2005 decision is based on Dr. Mireau's opinion and apparently without consideration of all related information and without seeking further information, clarification or confirmation from his care providers. In my view, a decision based on the opinion of someone unqualified to give it and without consideration of all relevant information and without clarification of obvious questions cannot be reasonable.

[77] For these reasons, SGI's decision of October 27, 2005 is unreasonable and the decision letter is set aside.

Causation

[78] While the Appellant suffered similar injuries to the same areas in a prior accident, I accept his evidence that the nature and severity of those injuries now are significantly different than they were before the April 2004 accident. I accept his evidence that, prior to the April 2004 accident, he was able to manage his symptoms with stretches and occasional biomechanical care, while these no longer provide a similar level of relief.

[79] I also note that no care provider, with the possible exception of Dr. Wilkinson, has opined that the Appellant is at his pre-accident condition. Dr. Wilkinson, in the course of stating that he thought the Appellant had achieved a pre-accident level of recovery at January 25, 2005, also indicated that he had provided subsequent on-going treatment that appears to or may have related to his April 2004 vehicle accident injuries; this anomaly was not explored or explained. While the most recently provided diagnosis is of WAD II, no

one has suggested that the Appellant suffered WAD II condition and symptoms immediately prior to the April 2004 accident.

[80] In argument, counsel for SGI suggested that some had opined that the Appellant's April 2004 injuries had resolved. In this regard, he made reference to CBI's Assessment Report. In that report, the team recorded only that it accepted that the Appellant was suffering a great increase in his pre-existing symptoms but that they found it difficult to understand why, given the circumstances of the accident and the fact that the Appellant was a relatively young, healthy and active man who received fairly regular treatment. I have found nothing in the referenced report or any other where any care provider has suggested that the Appellant's April 2004 condition had resolved.

[81] For these reasons, I am satisfied that the injuries that the Appellant now suffers were caused in the April 2004 vehicle accident and that he has not yet been returned to his pre-injury condition.

[82] In regard to possible injury to the vertebral artery, there is no evidence of benefits paid directly in respect of this injury, nor is there any recommendation for such treatment at this time. Mr. Bourassa, in fact, testified that the vertebral artery injury would be permanent and is managed by exercising caution in one's activities.

[83] The matter is further complicated by the fact that neither Dr. Mireau nor Mr. Bourassa possesses particular expertise in neurological conditions such as the diagnosis of vertebral artery injury. However, because vertebral artery injury is significant in the determination of appropriate treatment, each has sufficient expertise to identify indications of such injury and to give evidence in that regard. I am satisfied that this issue can be resolved on that basis.

[84] In the time following the accident, the Appellant suffered symptoms (aphasia and dizziness) that are indicative of vertebral artery injury. Mr. Bourassa's treatment of the Appellant assumed that there has been a vertebral injury and he said this approach must and would continue unless and until vertebral injury is positively eliminated.

[85] Dr. Mireau has not specifically opined that the Appellant has or has not suffered vertebral artery injury. However, his opinion adopts the concern and he agrees that certain treatment to the Appellant's neck is contraindicated as a result.

[86] There being no evidence that the Appellant did not suffer vertebral injury and given the necessity of cautious treatment unless such injury is eliminated, I must proceed on the basis that such injury exists and so must SGI.

[87] As to causation, Mr. Bourassa testified that episodes of dizziness and aphasia can be indicative of vertebral injury caused by trauma, arterial sclerosis, contact with the speech nuclei or head injury. There being no suggestion of any of these other than trauma and the first episode taking place within hours of the accident, in the absence of any other explanation, the preponderance of evidence satisfies me that the vertebral artery injury, if there is one, was caused in the vehicle accident.

[88] In reaching these conclusions, I am mindful of Dr. Mireau's opinion suggesting that the Appellant's dizziness was not caused in the April 2004 accident. However, Dr. Mireau did not provide the reasons for his conclusion in this regard. Without those reasons and with no basis to reject Mr. Bourassa's conclusion, I will accept it.

[89] I am therefore satisfied that the Appellant suffered injury to his neck, upper back and shoulders in the April 2004 vehicle accident, that his current condition is consequent on that accident and that he has not achieved his pre-injury condition. I am also satisfied that if vertebral injury is subsequently confirmed, by further testing or otherwise, it was caused in the accident.

Rehabilitation Benefits

[90] As is stated in section 112 (quoted in full at paragraph [65] above), benefits are payable for treatment if that treatment is "necessary or advisable to contribute to the rehabilitation of an insured, to lessen the insured's disability caused by the accident and to facilitate the insured's recovery from the accident."

[91] Dr. Bourassa, in both his report and his oral testimony, indicated that he tried a careful but aggressive course of biomechanical treatment, anaesthetic/steroid injection and intramuscular needling; none of these were effective in achieving long-term benefit. He concluded that the Appellant has reached MMI and there is no evidence to the contrary. This means that a course of on-going treatment is unlikely to change or improve the Appellant's condition. It follows that on-going treatment is unlikely to facilitate his recovery for purposes of section 112.

[92] Mr. Bourassa has prescribed a course of exercises that he believes will assist the Appellant to maintain his current condition. However, Dr. Bourassa said that, even doing these exercises as recommended, the Appellant will occasionally require crisis intervention when he suffers flare-ups of his condition. Mr. Bourassa said that in those circumstances, there will be a loss of function that can be restored to the MMI level with appropriate treatment. This, in my view, is rehabilitative for purposes of section 112 as it would lessen the Appellant's disability.

[93] Since the crisis treatment would lessen the Appellant's disability and restore function to his neck, back and shoulders, it is certainly at least advisable that the Appellant undertake such treatment when indicated and it would be unreasonable if SGI were to decline to provide benefits to enable such treatment.

Transitional Matters

[94] Having set aside SGI's October 27, 2005 decision letter and having concluded that on-going crisis treatment is appropriate, the question arises whether SGI bears responsibility to the Appellant for benefits during the period between January 26, 2005 and the date hereof.

[95] It is clear that by removing the October 27, 2005 letter, SGI's responsibility to the Appellant continued. During the time after that letter, the Appellant received chiropractic care from Dr. Wilkinson, specialized chiropractic care from a different chiropractor, Chinese acupuncture and treatment from Mr. Bourassa.

[96] No evidence was provided regarding the specialized chiropractic care or Chinese acupuncture beyond the Appellant's bare evidence that he had undergone such treatment. I have no evidence, therefore, as to whether and by whom these were recommended or for what purpose.

[97] Dr. Wilkinson reported a number of treatments between February 22 and June 15, 2005. While it appears that most, if not all, may have related to the Appellant's April 2004 accident injuries, the nature, purpose or effect of that treatment is not indicated.

[98] Mr. Bourassa gave evidence regarding the treatment he provided. While he admitted that the course of biomechanical treatment, injection and needling that he recommended were not successful in achieving any or long-term benefit and while he has not suggested that they continue, this does not necessarily mean that benefits regarding same would be inappropriate. In fact, SGI frequently provides benefits in regard to recommended treatment – pharmaceutical, surgical or other – that is eventually shown to be ineffective. The question is whether the recommendation was appropriate and whether the proposed treatment might have been effective. Mr. Bourassa said in his oral evidence that he had to try the treatment to learn whether it would work.

[99] I think that this position is reasonable. Mr. Bourassa said that he had reviewed all reports and information that was before me for purposes of this appeal and noted that what he attempted had not been tried previously and that it had the potential to achieve good results.

[100] Had the Appellant still been in receipt of benefits at the time Mr. Bourassa recommended these treatments and had he requested benefits from SGI for purposes of these treatments, SGI would reasonably be expected to extend benefits for this purpose. As such, it should reimburse the costs related to those treatments.

Miscellaneous

A. Dr. Bourassa's Evidence

[101] In the course of this decision, I have accepted and relied on much of the evidence given by Mr. Bourassa. Dr. Mireau, in his opinion, rejected much of Mr. Bourassa's opinion on the bases that:

- Mr. Bourassa did not see the Appellant until more than two years after the April 2004 accident and did not have direct knowledge of his pre-injury condition;
- The nature of the accident is inconsistent with the kind of musculoskeletal injury;
- Mr. Bourassa did not have detailed knowledge of the circumstances of the vehicle accident;
- Mr. Bourassa's opinion was inconsistent within itself in offering biomechanical treatment in the fact of possible injury to the vertebral artery.

[102] I do not believe that Dr. Mireau's views in this regard are convincing. First, Mr. Bourassa had access to and reviewed all of the reports and other records that were provided to the Commission for purposes of this appeal. Since the *Act* requires SGI to file all relevant documents for this purpose, I must assume that Mr. Bourassa therefore reviewed all records that Dr. Mireau reviewed and no fewer. In addition, he obtained certain test results, such as the Appellant's MRI and ultrasound results, that I am not certain were available to Dr. Mireau. It may be, therefore, that Mr. Bourassa had reference to more documents and reports than did Dr. Mireau.

[103] While both Dr. Mireau and Mr. Bourassa, therefore, had reference to similar or identical information, Mr. Bourassa additionally had opportunity to examine and treat the Appellant. While it would have been preferable – probably to Mr. Bourassa as well – if he had been able to examine the Appellant shortly after the accident, Mr. Bourassa's opinions are based on no less and no less reliable information than are Dr. Mireau's opinions.

[104] Dr. Mireau did not provide any information expanding his view that the kinds of injuries alleged were inconsistent with the nature of the accident beyond the statement that the Appellant's vehicle suffered only \$85.00 in damage. He did not provide information

about the amount of damage to the Appellant's utility trailer or to the other vehicle. Thus, the bare statement about the amount of damage is obviously incorrect. Indeed, the Appellant said that the damage to the other vehicle was very significant.

[105] More important, however, is that I was provided little evidence of the relationship, if any, between the amount of vehicle damage sustained in an accident and the anticipated injuries to parties involved. Dr. Mireau provided none and Mr. Bourassa, who testified that he did some study in this area as part of his master's thesis, said that there are numerous variables and that the relationship involves many factors beyond the value of the damage, even if Dr. Mireau's assertion in that regard is correct. In this case, for example, Mr. Bourassa drew our attention to the torque forces that he said would be created by impact involving both the Appellant's vehicle and his utility trailer.

[106] I am not required to reach conclusions on this matter and will not do so. I will say, however, that the bare assertion of minimal damage is wholly ineffective to suggest the nature of injuries that a party might suffer. I therefore reject this as a reason to discount Mr. Bourassa's evidence and opinions.

[107] Given my conclusion above, Dr. Mireau's concern that Mr. Bourassa's lack of familiarity with the circumstances of the accident lessens the value of his opinions is also without merit. In this regard, however, I might mention that I was provided no evidence as to Dr. Mireau's familiarity with the circumstances of the accident.

[108] In regard to Dr. Mireau's concern that Mr. Bourassa had provided treatment that elsewhere in his opinion Mr. Bourassa had suggested was contraindicated, SGI's counsel has conceded that Dr. Mireau's view in this regard was based on misunderstanding. I agree.

[109] As is evident in this decision, I was impressed by Mr. Bourassa's evidence. He was careful in his testimony and clearly explained his conclusions, without apparent regard to the Appellant's interests. Dr. Mireau's objections to Mr. Bourassa's evidence are less convincing.

B. Relapse Provisions

[110] In the course of argument, counsel for SGI suggested that if I concluded that SGI should provide benefits for crisis care, I should consider doing so in accordance with the provisions of the *Act* dealing with relapse.

[111] A review of sections 140 – 142, titled “RELAPSE”, shows that these sections are part of the Division of the *Act* dealing with income replacement benefits and relate only to the provision of that kind of benefit. They have no relevance for purposes of rehabilitation benefits.

CONCLUSION

[112] For reasons given above, I am satisfied that the Appellant suffered injuries to his neck, shoulders and upper back in his April 13, 2004 vehicle accident. I am also satisfied that he may have suffered vertebral artery injury and that, if he did, it occurred in the April 13, 2004 vehicle accident.

[113] For reasons given above, I am satisfied that SGI’s decision to terminate benefits by letter dated October 27, 2005 was unreasonable and it is wholly set aside.

[114] I am satisfied that the termination of all benefits at that time, even had the decision been reasonable regarding rehabilitation benefits, was without foundation. The information available to SGI at that time did not suggest that the Appellant had achieved his pre-accident condition and, in fact, indicated that he continued to suffer WAD II with measured myofascial and motion restrictions; benefits may have been payable in this regard and should have been considered.

[115] The Appellant shall have all appropriate benefits reinstated effective January 26, 2005 and continuing until no longer indicated. In this regard, the Appellant may provide and SGI shall consider for payment receipts for treatment secured after January 26, 2005.

[116] The Appellant shall be reimbursed for costs of the examinations and treatment he received from Mr. Bourassa from and after June 2006.

[117] On an on-going basis, the Appellant shall be provided benefits for rehabilitative treatment to restore function so that he is returned to his level of maximum medical improvement in the event of regression. For consistency of administration, SGI may require the Appellant to provide regular (for example, annual or biannual) reports confirming the on-going need and effect of such treatment.

[118] SGI shall consider whether, in light of this decision, the Appellant is entitled to other benefits and shall pay same, if and as appropriate.

[119] I would like to thank both parties for the fair and reasoned approach that they took in the course of this appeal. They were respectful to each other and the witnesses and appeared to be more interested in finding answers than in protecting their positions.

COSTS

[120] As the Appellant has been successful in his appeal, he shall have his reasonable costs in accordance with section 193(11) of the *Act* and section 96 of the *Personal Injury Benefit Regulations*, subject to the legislated maximum of \$2500.00.

[121] In addition, the Appellant is entitled to reimbursement for the costs of Mr. Bourassa's report dated June 6, 2007 in accordance with section 169 of the *Act* and section 76(1) of the regulations.

[122] Finally, the Appellant shall have his appeal fee refunded.

Dated at Regina, Saskatchewan, on October 9, 2007.

Barbara Tomkins, Chair