

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *S.H. v. Saskatchewan Government Insurance*
2008 SKAIA 050
Date: 20081120
File: 012 of 2007

BETWEEN

S.H., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
S.H. and I.J., Applicant
Stephen McClellan and Chris Weitzel, for the
Respondent

Before: **Barbara Tomkins, Chair**
Joy Dobko, Commission Member
Conrad Hnatiuk, 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
October 2, 3 & 9, 2007
January 9, February 25 & 26, April 29 & 30,
September 22, 24, 25 & 30 and October 3, 2008

DECISION

[1] The Appellant appeals several decisions made by Saskatchewan Government Insurance (“SGI”). The following issues have been identified and appealed:

- a) Income Replacement Benefit: Decision letter dated June 9, 2006 - This decision letter classifies the appellant as a salaried employee rather than a self-employed person. The letter terminating mediation is dated February 15, 2007. The appellant appealed this decision on February 13, 2007.
- b) Orthotics and Heel Lifts: Decision letter dated May 15, 2007. The appellant claims entitlement to orthotics and heel lifts. Appeal application filed June 13, 2007.
- c) Accountant Fee: Decision letter dated October 4, 2006. The appellant is claiming an accountant fee of \$775.75. The letter terminating this issue in mediation is dated February 15, 2007. Appeal application filed February 13, 2007 seeking unpaid items in October 4, 2006 decision letter.
- d) PMI Fees: Decision letter dated October 4, 2006. The appellant is claiming PMI fees for which SGI denied reimbursement. The letter terminating this issue in mediation is dated February 15, 2007. Appeal application filed February 13, 2007 seeking unpaid items in October 4, 2006 decision letter.
- e) Massage Therapy: Decision letter dated May 15, 2007. The appellant is seeking reimbursement for massage therapy treatment. Appeal application filed June 13, 2007.
- f) Employment Insurance Deductions: The appellant is seeking reimbursement of employment insurance deductions taken by SGI when calculating IRB.
- g) Miscellaneous Expenses: Decision letter dated October 4, 2006. The appellant is seeking reimbursement for various miscellaneous expenses which SGI has refused to pay. Mediation was terminated effective February 15, 2007. An appeal application was filed February 13, 2007 seeking unpaid items in October 4, 2006 decision letter.

- h) Caregiver Benefit/Childcare: Decision letter dated February 28, 2008. An appeal application was filed on April 21, 2008.
- i) Living Assistance Benefits: There were three decision letters issued with respect to this matter. The first decision letter dated January 14, 2008 was based upon a home assessment completed by NRCS. It assessed living assistance benefits as of November 30, 2007. The second decision letter dated February 14, 2008 assessed living assistance benefits from December 23, 2005 to November 29, 2007. The third decision letter also dated February 14, 2008 assessed living assistance benefits as of January 21, 2008. An appeal application was filed at the appeal hearing on April 21, 2008 with respect to the calculation for current living assistance benefits and the interest payable on all living assistance benefits. On August 28, 2008, the appellant filed an appeal application with respect to the calculation of past living assistance benefits. The Commission had been previously advised on more than one occasion that the appellant would not be appealing the calculation of past living assistance benefits before the Commission. When we review the documentation we see that the appellant requested mediation with respect to the calculation of past living assistance benefits on May 5, 2008. SGI refused on the basis that the matter was already appealed before the Commission and it would be addressed by us. In accordance with the correspondence of SGI and hearing no objection from SGI, the Commission received evidence and reviewed the calculation of past living assistance benefits despite the fact that the appellant failed to file his appeal with respect to the calculation of past living assistance benefits within the 90 days required by the legislation.

[2] Two mediation sessions were held: one on December 6, 2006 and the other on February 12, 2007. Some of the matters addressed at mediation were living assistance benefits for services provided by Helping Hands; issues surrounding Western Health Management; PMP fees; accounting fees; IRB; and outstanding bills. SGI was seeking further income information from the appellant and as a result of not receiving adequate information; the mediation was terminated effective February 15, 2007. The appellant had already filed an appeal application on February 13, 2007.

[3] Each of the above issues/appeals will be addressed individually.

LAW AND ANALYSIS

[4] The Commission's jurisdiction to review a decision of SGI is set out in section 193(7) of the *Automobile Accident Insurance Act* (the "Act"). The Appeal Commission may:

- (a) set aside, confirm or vary the insurer's decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part.

FACTS:

[5] The appellant, his wife and two children were injured in a motor vehicle accident on November 12, 2005 when the vehicle they were riding in was struck on the passenger side by another vehicle being pursued by the police.

[6] The appellant suffered significant injuries including loss of consciousness, fractured left femur, fractured right wrist, fractured right clavicle, fractured right ribs and fractured nose. He suffered facial lacerations, whiplash associated disorder II, lumbar pain dysfunction and cervicogenic headaches.

[7] The appellant spent four weeks in Regina General Hospital recovering from his injuries. He has had three surgeries to his left leg. As a result of his injuries, his left leg is shorter than his right. Upon discharge from the hospital, the appellant spent a further two weeks in Wascana Rehabilitation until he was discharged home.

Income Replacement Benefit (IRB)

[8] The appellant was an Information Technology Professional. He operated a consulting business (the "consulting company"), which contracted with AC Inc. from November 12, 2004 to November 12, 2005.

[9] On December 7, 2005, the personal injury representative (PIR) assigned to the appellant's file paid an advance on the appellant's income replacement benefit on the basis that the appellant advised SGI he was self-employed. On February 6, 2006, the personal injury representative wrote to the appellant requesting financial records so that an income replacement benefit could

be calculated and paid to the appellant. In that correspondence it stated that an advance could be provided to allow the paperwork to be gathered and further, that a preliminary income replacement benefit could be provided based on 2004 income tax returns until more current income records were available. It was also noted that if the appellant did not pay EI premiums, then this deduction would not apply to his income replacement benefit.

[10] However, SGI did not pay further income replacement benefits until June 9, 2006, when it sent a decision letter to the appellant outlining his entitlement to income replacement benefits. SGI classified the appellant as a salaried earner and calculated his biweekly entitlement to IRB based on the gross income shown on his 2004 tax return. The December 7, 2005 advance was deducted.

[11] In July 2006, the file was transferred to a different personal injury representative. SGI advised the appellant that given the information on their file, SGI maintained its position that he was a salaried employee as stated in their decision letter of June 9, 2006. The appellant disagrees with being classed a salaried employee. He states he is self-employed.

[12] It should be noted that SGI made several requests to obtain income information from the appellant; specifically, January 3, 2006, February 6, 2006, June 9, 2006 and September 21, 2006. The request was for cheques written to the appellant that would substantiate the income on his 2005 income tax return. In the appeal hearing on October 2, 2007, the appellant produced cancelled cheques confirming his income for the 52 weeks prior to the motor vehicle accident.

[13] As a result of finally receiving that information, SGI revised the appellant's IRB to reflect his gross yearly employment income as shown on the cheques. It is our understanding that there is no longer a dispute regarding that IRB calculation and payment.

[14] However, the appellant argues that interest should be payable on these amounts. SGI argues that the appellant is not entitled to interest on the income replacement benefits because it was his refusal to provide cancelled cheques that led to the delay in receiving income replacement benefits based upon a the adjusted gross yearly employment income.

[15] The other disagreement remains over the classification of the appellant as a salaried employee. The appellant asserts that he is self-employed and his IRB should be calculated using an income equal to that earned by the consulting company. This income is significantly higher than the amount he was paid as an “employee” of the consulting company. SGI asserts that the appellant is an employee of the consulting company and that any losses are losses of the consulting company and not losses of the appellant. SGI further asserts that the proper avenue for recovery for the appellant is pursuant to an economic loss claim under section 103 of the *Act*.

[16] As stated above, the consulting company is in the business of providing IT consulting services to AC Inc. The appellant solely provided those IT services and managed the consulting company, directing it to pay himself and his wife certain salaries. The appellant and his wife each owned 50% of the shares of the consulting company. The appellant’s wife provided bookkeeping for the consulting company but primarily remained at home to care for their children. The appellant made all decisions with regard to allocating any surplus that existed in the corporation at year end. He stated he would take money out whenever he needed it. There is no doubt that it was the appellant’s consulting that earned all of the income of the consulting company and that he chose to structure his affairs by way of a limited company as a tax planning vehicle to split income between himself and his wife.

[17] The *Act* provides the self-employed with different treatment than the salaried employee in the context of calculating income replacement benefits. Therefore, we must determine whether SGI properly classified the appellant as a salaried employee or whether the facts of this case make it an appropriate case to “lift the corporate veil” and treat the appellant as self-employed.

[18] The income tax returns show the appellant as an employee of the consulting company. It is also clear that the consulting company, not the Appellant, is retained by AC Inc. Therefore, on the face of it, the appellant is an employee of his own company.

[19] However, it is also apparent that the corporate structure was one of convenience only intended for tax planning and income splitting. The appellant’s and his wife’s incomes - the family income - was the entire net income of the consulting company and this was derived entirely from the consulting services of the appellant. The reality is that when the appellant was injured and could no longer provide consulting services and earn an income, the loss to his

family was the entire net income of the consulting company and not the amount reflected as income in his tax returns.

[20] Counsel for SGI submitted that the appellant's claim is properly an economic loss claim, although in fairness he also noted a perhaps different view in the case of *Everett v. King*¹.

[21] Normally Canadian courts are reluctant to go behind the corporation in certain contexts, specifically when the corporation is being sued for losses caused by it. In *Salomon v. Salomon & Co.* [1987] 1 S.C.R. 2, it was found that as a general rule a corporation is a legal entity distinct from its shareholders. There is a real question as to whether a person who chooses to do business through a corporate vehicle for limited liability and/or tax considerations should not be forced to bear the disadvantages of incorporation. In *Kosmopoulos vs. Constitution Insurance Co.* [1987] 1 S.C.R. 2, the Supreme Court of Canada addressed whether a sole shareholder and director had an insurable interest in the assets of the corporation. The Court stated:

...The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or interest of the Revenue"...

There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interest of third parties who would otherwise suffer as a result of that choice": Gower, *supra*, at p. 138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time.

[22] However, the Court in *Everett* noted that there is ample authority for the proposition that a personal plaintiff is entitled to recover a business loss suffered by a company of which he is the controlling shareholder, provided of course, that the loss is proven and is directly linked to the injuries sustained by the personal plaintiff. The Court in *Everett* relying upon *Johnstone v. Melina*² agreed with the conclusion that where an injured party has chosen to conduct their personal business through a corporate entity, the tortfeasor should not benefit from any legal niceties arising from that structuring. The Court determined that the loss sustained by the company was a loss sustained by *Everett*. The Court further stated that to find otherwise would

¹ (1981), 20 C.C.L.T. 1 (B.C.S.C.), affirmed (1983), 53 B.C.L.R. 144 (C.A.)

ignore the realities of the situation. Taking a realistic approach, McKay J. concluded that “the corporation [was] merely a vehicle by which [the plaintiff] carried on his business and he should not be penalized because he chose that method of operation rather than sole proprietorship”. McKay J. went on to state at paragraph 10:

10 The problem before me is somewhat different in that the shares in the company are equally held by Mr. and Mrs. Everett. Does that mean that Mr. Everett’s recovery must be limited to 50 per cent of the lost income? I think not. I am not dealing with the respective share holdings of strangers at law but rather with a small husband-wife company. It matters not whether he has 99 shares and she has one or whether he has 500 shares and she has 500 shares. They operate a small family business in which everything goes into the family “pot”. I hold that in the circumstances of this case the loss sustained by the company was a loss sustained by Mr. Everett. To hold otherwise would, in my view, be contrary to the realities of the situation.

[23] The Saskatchewan Court of Appeal has also accepted the approach taken in *Everett* in *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 408 where it held that “shareholder proprietors generally earn income in two ways: wages and profits generated by the business. In the event of injury the shareholder/owner is entitled to be compensated for the loss of wages and for the loss of profit just as a wage earner is to recover lost wages. To do otherwise would result in an untenable distinction between shareholders and wage earners”.

[24] We are guided by the principles in *Everett* and believe that this is an appropriate case to lift the corporate veil to place the appellant in the same or as close to the same financial position he was in prior to the accident. We are mindful of the ruling in *Kosmopoulos* but as it relates to the shareholder’s interest in the company’s assets, we are more persuaded by the conclusions of *Everett* given the similarity in the factual circumstances and the issue we are dealing with, namely loss of income. Although the *Everett* case does not deal with a no-fault system of compensation, we think the major guiding principle should be the same: that is, to put the aggrieved party into the same or as close to the same financial position as before the accident.

[25] We do not believe that the legislators intended to create financial hardship simply because a family structured their affairs as a corporation to allow for tax planning and income splitting. The appellant and his family have been under financial hardship since the date of this accident. The loss to the household income is real. We do not believe that the legislators intended to create this injustice within the legislation.

² [1975] 3 W.W.R. 655

[26] Section 113(3)(b) of the legislation states:

(b) subject to the regulations, if the insured holds an employment as a self-employed earner, the greater of:

- (i) the yearly employment income determined in accordance with the regulations for an employment of the same class as the primary employment the insured held or would have held but for the accident in the first 180-day period after the accident; and
- (ii) the yearly employment income the insured earned or would have earned from all his or her employments held at the date of the accident;

[27] *The Personal Injury Benefits Regulations* (“*Regulations*”)³ for the purposes of calculating self-employment income state:

18(2) The insured’s yearly employment income derived from self-employment that was carried on at the date of the accident is the greatest amount of net business income that the insured earned within the following periods:

- (a) the 12 months before the accident;
- (b) the fiscal year before the year prior to the accident;
- (c) if the insured has been self-employed for not less than two fiscal years before the date of the accident, the two fiscal years before the year prior to the accident divided by two;
- (d) if the insured has been self-employed for not less than three fiscal years before the date of the accident, the three fiscal years before the year prior to the accident divided by three.

2(1)(e) “**net business income**” means the income derived from self-employment, by the way of a proprietorship or from a partnership interest, less any expense that relates to that income and that is allowed pursuant to the *Income Tax Act* (Canada) and *The Income Tax Act, 2000*, but does not include:

- (i) any capital cost allowance or allowance on eligible capital property;
- (ii) any capital gain or loss;
- (iii) any loss deductible pursuant to section 111 of the *Income Tax Act* (Canada); or
- (iv) any mandatory or optional inventory adjustments pursuant to section 28 of the *Income Tax Act* (Canada);

[28] Neither “self-employment” or “self-employer earner” are specifically defined by the legislation. The *Regulations* in section 2(1)(e) define net business income as income from self-employment as that being by way or proprietorship or partnership. We find this provision to provide SGI with a way of calculating the income for self-employed people. When we lift the corporate veil, the appellant becomes parallel to that of a sole proprietor and his income can be calculated in the same way as that of a sole proprietor. In our opinion this does not offend or contravene the provisions of the legislation.

³ Chapter A-35 Reg 3 (effective January 1, 1995)

[29] It is important to our decision that the appellant was the sole source of income for the corporation. It seems immaterial to us whether the appellant injured is a sole proprietor or the one man in a one-man corporation or even one where the shares are held by a husband and wife. The physical injuries are the same for the appellant as for the sole proprietor and the economic consequences are the same. It seems to us illogical to regard the financial loss with respect to the sole proprietor as compensable under the legislation and the latter as not being compensable.

[30] Accordingly, we find it appropriate to lift the corporate veil and order SGI to calculate the appellant's income as if he were self-employed as a sole proprietorship in accordance with the calculations in the legislation. In order for this to occur, the appellant will have to provide appropriate proof of income and he is encouraged to be co-operative about doing so. We also know that the appellant's income was split with his wife and that she is/was receiving an income replacement benefit as a result of this arrangement. That will have to be taken into account and deducted when calculating the appellant's income.

[31] In reaching this conclusion, we wish to be clear that we recognize that there are limits for piercing the corporate veil and it would not be appropriate to do so in every factual situation.

Interest on Income Replacement Benefit (IRB)

[32] The other outstanding issue relates to whether interest is payable on all of the IRB benefits not paid since the date of the accident.

[33] SGI submitted that the appellant should not be entitled to interest on the income replacement benefit that was adjusted after the Appellant provided cancelled cheques on October 2, 2007. SGI said his own conduct resulted in the delay in receiving the adjusted income replacement benefits.

[34] We agree that the appellant had information available to him that if he had provided earlier would have resulted in his receiving the increased income replacement benefits at a much earlier date. He refused to do that until this Commission was involved. In this sense, the delay in receiving the increased income replacement benefit was his own responsibility.

[35] The Commission queried whether there was legal authority for the proposition put forward by SGI that the appellant should be denied interest because of his own delay. Legal counsel for SGI advised us that he had no legal authority to support his argument nor was he aware of any.

[36] We have reviewed the decision in *Irvington Holdings v. Black*, (1987) 58 O.R. 449 (C.A.) wherein it was held that the purpose of pre-judgment interest is to compensate a plaintiff for the deprivation of the monies to which the plaintiff has been found to be entitled and that the exercise of the court's discretion must be related to the task of putting the plaintiff in the same position, so far as money is concerned, as he would have been if he had not suffered the loss. Finlayson J.A. went on to state that interest should not be used as either a reward or a penalty but should reflect the value of money wrongfully withheld from the date of demand for payment to the date of determination at trial. It is also clear from that case that the onus is on the defendant to persuade the court that it is appropriate to exercise its discretion to disallow pre-judgment interest.

[37] The award of interest is in our discretion pursuant to subsection 193(9) of the *Act*. SGI has asked us, in effect, to penalize the appellant by not awarding pre-judgment interest on the amount of the October 2, 2007 adjusted IRB amount. While we in no way condone the conduct of the appellant in refusing to provide the necessary income information, it seems clear that pre-judgment interest is to be awarded because one party had monies to which the other party was entitled.

[38] We are not clear why the appellant put himself through the hardship of having insufficient funds to care for his family when he could have easily submitted the necessary information and received his IRB in the second increased amount. However, he has obviously suffered as a result of his own decision in that regard. In light of our conclusion that his IRB is money he was entitled to, we find no basis to exercise our discretion and disallow the award of pre-judgment interest on IRB. The appellant is entitled to receive pre-judgment interest on his IRB – both as to the October 2007 adjustment amount and the further amount payable pursuant to this decision after lifting the corporate veil - as calculated pursuant to Part VIII from the date of the accident.

Orthotics and Heel Lifts

[39] The Appellant submitted that he has been prescribed both orthotics and heel lifts and that the costs of obtaining and affixing these should be reimbursed by SGI. SGI suggested that, if we conclude orthotics and heel lifts are medically required, it is nonetheless unreasonable to conclude that the Appellant is entitled to the devices for each pair of shoes he owns.

[40] The issues with regard to heel lifts were resolved on October 2, 2007. SGI advised that it agreed that heel lifts were medically required because the Appellant's left leg is shorter than his right, consequent on his injuries and surgery. SGI also agreed that heel lifts are required for each pair of the Appellant's shoes as they are affixed and cannot be moved from shoe to shoe.

[41] SGI agreed to reimburse the Appellant for any outstanding amounts relating to the purchase and installation of heel lifts. On October 19, 2007, SGI reimbursed the Appellant for the cost of two pairs of heel lifts in the amount of \$110.00. **This matter has been resolved by mutual agreement of the parties.**

[42] The Appellant also seeks custom-made orthotics for each pair of footwear he owns. SGI does not concede that the orthotics requested are medically required. Further, SGI says, that even if orthotics are medically required, they can be moved from shoe to shoe and SGI is not reasonably required to reimburse the cost of a pair of orthotics for each pair of shoes the Appellant owns.

[43] On April 27, 2007, SGI advised the Appellant that as the cost of one pair of orthotics had already been reimbursed, a second pair would not be funded unless medical information indicated the previously funded orthotics were not sufficient. On May 15, 2007, SGI advised the Appellant by written correspondence that it was not prepared to fund a second pair of orthotics based on the information it had available at the time. However, SGI indicated that it had received correspondence from the Appellant's podiatrist and would have the matter reviewed by its medical consultant before a final decision on the matter was made.

[44] In her May 2, 2007 letter, the Appellant's podiatrist explained to SGI that the original pair of orthotics was prefabricated and they were not providing enough support for the Appellant

or aligning his joints sufficiently. She explained that custom-made orthotics would correct the Appellant's alignment and remove excess pressure from his back, hip and knee joints. She further stated that more than one pair of orthotics was required because they "mould to the inside of the shoe and would sit differently when placed in another pair and may not feel as comfortable as before". She also stated that every time the orthotics were moved, the Appellant would need to readjust to the orthotics. She said this might cause him some discomfort.

[45] After reviewing the podiatrist's letter, SGI's medical consultant reported that there was little evidence that orthotics are designed to help with knee problems, low back problems and neck problems. He stated that additional information was required with respect to alignment of the feet. He advised that he had requested further information from the podiatrist to assist him in reaching conclusions.

[46] The podiatrist wrote SGI's medical consultant on July 6, 2007. She confirmed the cost of the custom orthotics and said that the Appellant "would benefit in having a pair of orthotics to place in each pair of shoes so that he would not have to remove and replace and possibly be without them for any length of time".

[47] SGI counsel advised that he does not believe its medical consultant provided further direction to the personal injury representative after receiving the podiatrist's medical report of July 2007. On August 22, 2007, SGI wrote to the Appellant and advised that there was not sufficient objective medical information concerning alignment or how the orthotics would assist the femur injury and therefore the orthotics would not be funded.

[48] Although there is no appeal provision provided in this correspondence, we have treated this as a decision from which the Appellant can appeal, especially because of the representations made in the May 15, 2007 letter that a further letter would be sent once the medical consultant completed his review. The Appellant appealed the issue of orthotics on June 13, 2007. The Appellant stated that he used the pre-fabricated orthotics for several months but that they were not comfortable. He stated that once he switched to the custom orthotics, after the initial breaking in period, he experienced less discomfort in his knee and femur. The Appellant submitted that the podiatrist advised him that he required one pair of orthotics for all of his daily footwear. The Appellant testified that he never moved the custom orthotics because his

podiatrist told him not to but later stated that he had tried moving them to another pair of shoes and it had caused him extreme pain. In light of our conclusions below, it is not necessary that we resolve this discrepancy in the Appellant's evidence.

[49] The Appellant admitted that his podiatrist never told him the orthotics had to be glued into the shoes and she certainly did not indicate this in either of her reports to SGI. The Appellant stated that the shoe store glued the orthotics into the sandals to prevent them from slipping around. He then stated that Regina Foot Clinic cut the custom orthotics to fit the shape of his shoes and because of that, he didn't think it was reasonable to move them from shoe to shoe. There is no medical evidence from the podiatrist to support that the orthotics need to be cut to fit the shape of the shoes, nor did she provide this as a reason as to why the orthotics cannot be moved from shoe to shoe. She stated only that, in effect, it might be inconvenient to move them from shoe to shoe.

[50] The Appellant stated that at the time of the appeal he had five pairs of custom made orthotics and that he required 3-4 four more pairs of custom orthotics. At the conclusion of discussion of this issue, the Appellant's representative suggested that if the Appellant had 40 pairs of shoes, he should be allowed 40 pairs of orthotics; it was his view that SGI should be required to fund the cost of as many pairs of orthotics as the Appellant had shoes, with no maximum being reasonable.

[51] Section 157 of *The Automobile Accident Insurance Act* states:

157(1) Subject to the regulations, an insured is entitled to reimbursement for the following items:

...

(b) prostheses or orthopaedic devices;

[52] Section 55 of the *Personal Injury Benefits Regulations* states:

55(1) Subject to sections 56 to 67, the insurer shall reimburse the insured for any expense that the insured incurs to purchase, rent, repair, replace, fit or adjust a prosthesis or orthosis if the prosthesis or orthosis is:

(a) medically required; and

(b) prescribed by a practitioner.

(2) The insurer shall reimburse an insured pursuant to subsection (1) only in an amount that the insurer considers reasonable and proper.

...

- 60 The insurer shall reimburse the insured for expenses incurred by the insured to repair, replace, fit or adjust anything in sections 55 to 59 that the insured did not wear before the accident if the expenses:
- (a) are incurred:
 - (i) owing to a changing condition resulting from the accident; or
 - (ii) owing to the ordinary usage of the prosthesis or orthosis; or
 - (b) are incurred to enhance the performance of the prosthesis or orthosis.

[53] SGI argued that the podiatrist did not state that the Appellant medically required the orthotics in every shoe, but rather that it was a comfort issue. SGI further submitted that the podiatrist only indicated it would be a benefit to the Appellant to not have to move the orthotics from shoe to shoe so he would not have to be without them for any length of time. SGI submits that the test for coverage is that the orthotics must be medically required and prescribed and then, only in an amount that the insurer considers reasonable and proper. The Appellant's submission, SGI says, does not meet this test.

[54] SGI further submitted that one pair of orthotics is reasonable and proper for shoes and that the orthotics should be moved from shoe to shoe. SGI further agreed to fund a pair of orthotics for the sandals because, given the construction of sandals, they need to be glued in place to prevent slipping.

[55] On October 19, 2007, SGI reimbursed the Appellant for the cost of one pair of orthotics being affixed in sandals in the amount of \$75.00. There is still an outstanding amount in Item #45 of Appendix "A" for the fixation of orthotics in a second pair of sandals.

[56] We are satisfied that the custom orthotics are medically required and are prescribed by the podiatrist. We accept the opinion of the podiatrist that the custom orthotics would correct his alignment and remove excess pressure from his back, hip and knee joints.

[57] We have no reason to disagree with her statement that they would mould to the shoe and may cause discomfort for a period of time when moved from shoe to shoe. We do not find this as a medically required reason for having more than one pair. We are in agreement that one pair is medically required for one pair of shoes but that pair can be moved among shoes. We also agree that one pair is medically required for the Appellant's sandals because they have to be affixed.

[58] We do not believe that the matters of comfort and convenience should be excluded from this consideration. This Appellant has suffered a significant disability that is relieved by the use of orthotics; for this reason he is required to wear some sort of footwear with orthotics at all times. While the evidence establishes that one pair of orthotics can be moved from shoe to shoe, it is obviously inconvenient and, more important, there is medical evidence that it will be temporarily uncomfortable to manage orthotics in this manner. Given the intention and purposes of Part VIII of the Act, it is perhaps surprising that the wording of this regulation is so narrow that it does not afford the opportunity to address, in a reasonable manner, the comfort and convenience of the injured person.

[59] On the other hand, the Appellant's position is clearly unreasonable and uncompromising. It is not reasonable to suggest that SGI is or should be required to provide essentially unlimited numbers of pairs of orthotics when they can be moved among shoes.

[60] Had the regulation provided more flexibility, we would have concluded that the Appellant should be provided, on an on-going basis as shoes and orthotics wear and are replaced, three pair of orthotics: one to be affixed in sandals, one for a pair of "day" shoes and one for a pair of dress shoes. These might be moved to shoes he wears less frequently as needed. However, the regulations do not allow us to decide in this manner.

[61] As such, the Appellant is entitled to two pair of orthotics – one to be affixed in sandals and one pair that will be moved among his other footwear as needed. We leave to SGI's later decision, if necessary, whether the Appellant might be allowed the cost of orthotics and affixation of them in his second pair of sandals. While not medically necessary, we note that it is certainly not uncommon or unreasonable that a Saskatchewan resident might wear more than one pair of sandals in the summer time.

Accounting Fee

[62] SGI advised the appellant that in order to calculate his income replacement benefit, they required his last three years' income tax returns or, if he felt that his prior 52 weeks were his highest income years, then he could have his accountant provide financial statements for that period. A handwritten note and an injury note prepared by an SGI claims representative state

that SGI will pay reasonable expenses to have an accountant prepare a financial report for the 52 weeks prior to the accident.

[63] In response to SGI's request, the appellant retained an accounting firm to prepare a Profit and Loss statement for November 12, 2004 through November 12, 2005. The accounting fee, paid by the appellant, was \$775.75.

[64] On October 2, 2007, SGI agreed to pay this fee. On October 19, 2007 SGI reimbursed the appellant for this accounting fee. **This matter has been resolved by mutual agreement of the parties.**

PMI Fees

[65] On October 4, 2006, SGI advised the appellant that there was no provision under the legislation to cover expenses incurred by himself with respect to the Project Management Institute. These expenses are itemized as #23 and 24 in Appendix "A". The appellant stated that these fees were incurred on August 29, 2005 and that he required the membership in order to take the certification exam. As a result of the injuries sustained in the motor vehicle accident, the appellant was not able to take the certification exam which had to be taken within one year of the payment date.

[66] The appellant paid an individual membership, application fee and initial certification exam fee totaling \$912.96.

[67] Legal counsel for SGI argued that reimbursement for this loss is not provided for in the legislation and it may be contemplated as a loss recoverable under the economic loss provisions in Section 103 of the *Act*. The appellant argues the loss is directly attributable to the accident and SGI has an obligation to reimburse it. He provided no provision of the *Act* which would provide for his reimbursement.

[68] Section 161 of the *Act* provides for the reimbursement of "non-refundable expenses" that an insured incurred before the accident for a service or benefit that, as a consequence of the accident, the insured is unable to use. The maximum benefit is \$1,000.

[69] In light of the fact that neither party brought this section to our attention, we recommend that SGI consider whether the appellant's PMI fees should be covered under this provision and if not, provide him with reasons why. SGI's decision on this matter can be appealed if the Appellant thinks it is incorrect.

Massage Therapy

[70] The appellant seeks reimbursement for 10 massage therapy treatments between October 21, 2006 and July 20, 2007. The total amount of the claim is \$340.00 and is set out in Appendix "A" - Items 32-34; 38-40; 42-43; and 47-48.

[71] On June 17, 2006, SGI advised the appellant that they would approve massage pending the recommendations of the secondary assessment. On October 31, 2006, Dr. Beggs advised SGI that the appellant was unable to continue with the functional rehabilitation and that there was no role for continuing therapy due to the appellant's pain threshold. The appellant asserted that his family physician referred him for massage therapy on April 5, 2007 and accordingly SGI should reimburse him for those expenses.

[72] There is no objective medical evidence to support that massage therapy would contribute to the appellant's rehabilitation. In fact, further therapy was not recommended due to the appellant's low pain threshold. A prescription written by a family physician without reasons or objective medical information to support the recommendation for therapy is not sufficient to require SGI to reimburse the appellant for this expense. **Accordingly, SGI's decision to refuse to fund massage therapy between October 21, 2006 and July 20, 2007 is upheld.**

Employment Insurance Deductions

[73] Initially when SGI calculated the appellant's entitlement to IRB, they took deductions for employment insurance. The appellant advised that he never paid employment insurance deductions and argued that these were not properly deductible when calculating IRB.

[74] On October 2, 2007, SGI agreed to reimburse the appellant for employment insurance deductions. On February 28, 2008, SGI also agreed to pay the interest on the amount reimbursed in this regard. **This matter has been resolved by agreement between the parties and payment had been made in full by the conclusion of the hearing.**

Miscellaneous Expenses

[75] A summary of a spreadsheet of unpaid miscellaneous expenses asserted by the appellant as of August 30, 2007 and has been included as Appendix "A". The amounts set out below are taken from Appendix "A".

a) Exercise clothing

[76] Item #1 in Appendix "A". The appellant testified that he did not own any clothing that was appropriate and required for him to attend physiotherapy and rehabilitation treatment. SGI agreed to reimburse the cost for exercise clothing on February 25, 2008. **On February 29, 2008 SGI reimbursed the appellant for this expense.**

b) Phone calls

[77] Item #2 in Appendix "A" in the amount of \$213.66. The appellant stated that his average phone bill before the accident was \$35 to \$40 per month. After the accident, he stated he incurred a significant increase in his telephone bills up to \$102.66.

[78] The appellant produced one page of a four page Primus statement with a long distance charge of \$106.73. The statement date is December 7, 2005. The appellant produced a Mastercard statement showing a charge for SADAQTEL on December 13, 2005 in the amount of \$50.00 and another on December 25, 2005 for \$50.00 which he stated are phone calls relating to the accident. The appellant produced one page of a five page Rogers Wireless bill dated January 24, 2006 showing a charge of \$102.66.

[79] The appellant did not provide copies of the entire phone bills which may have helped to prove his claim. This would be an example of how the appellant has presented his claims to SGI. He provided them with a bill without support, documentation or explanation to legitimize the

claim and demanded that they pay the claim. If SGI denies the claim or requests explanations, the Appellant responds with anger. If the appellant wishes to have SGI reimburse him for expenses related to the accident then he must provide appropriate proof of the claim. Failing such, he is not entitled to reimbursement.

[80] In this case, SGI agreed that it would be reasonable to reimburse the appellant for a reasonable number of calls made in the few days following the accident. We acknowledge the submissions of SGI. However, we find the appellant failed to provide satisfactory proof and documentation of his claim and we are unable to determine an appropriate award, despite SGI's agreement. The Appellant has not proven his loss. **Accordingly, the decision of SGI to refuse to reimburse the appellant for costs for telephone calls after the accident is upheld.**

c) Expenses regarding family members I.D., A.L., Dr. M

[81] Items #3-6; 9-11; 13-22 in Appendix "A" relate to I.D. Items #7 and #12 relate to A.L. Item #8 relates to Dr. M. As a result of the accident, the appellant made arrangements for a few family members to fly to Canada to assist with his and his family's care following the accident. Essentially the items claimed are airline tickets, health insurance, visa fees and payment for caregiver services.

[82] Dr. M provided care to the appellant's wife and children immediately after the accident on November 16th to November 19th, 2006. The appellant submits a claim for \$1435.00 for that time period.

[83] The appellant also testified that he retained the services of Helping Hands ("HH"). HH is operated by Mr. Malik, the appellant's representative in this hearing. HH billed the appellant on April 12, 2006 for the following service to the appellant and his family:

- a) November 20th to 26th, 2007 – 84 hours
- b) November 27th to 30th – 48 hours
- c) December 1st to 3rd – 36 hours
- d) December 4th to 10th – 84 hours
- e) December 11th to 17th – 84 hours
- f) December 18th to 24th – 84 hours

g) December 25th to 31st – 84 hours

h) January 1st to 7th, 2006 – 84 hours

[84] The total bill from HH was \$10,066.56. In or around May 2006, HH confirmed the services provided were looking after the children and all their personal needs, personal care, household work, including meal preparation, washing dishes and laundry. Item #36 in Appendix “A” is a claim for \$19,162.00 for services provided by Mr. Malik until December 31, 2006. Item #50 is a further claim made from January 2007 to June 2007 in the amount of \$10,120.00 for services provided by Mr. Malik.

[85] The appellant submitted that SGI is responsible for these expenses. SGI submitted that these expenses are not recoverable under the legislation. Instead, they submit, the appellant is paid living assistance benefits and childcare benefits in accordance with the provisions of the legislation to assist with or cover these expenses.

[86] The appellant’s representative asked SGI on November 22, 2005 if the expenses for bringing over relatives to assist with the appellant’s care would be reimbursed by SGI. The PIR advised SGI that she would check into that once further medical documentation had been received. In any event, the appellant had already made the decision to have his relatives fly to assist with care before receiving confirmation from SGI that they would cover these expenses. This was a personal decision made by the appellant.

[87] On January 26, 2006, SGI advised in a telephone conversation that these expenses would not be covered. This response is unacceptably late, given the Appellant’s inquiry on November 22, 2005. However, as the Appellant had already incurred the expense of bringing the relatives to Canada and as he continued to pay them even after receiving SGI’s decision, we do not believe that he was compromised by SGI’s delay.

[88] The *Act* provides for living assistance benefits to those individuals that are unable to complete their activities of daily living. In addition, they provide a caregiver benefit to a parent whose primary duty is to care for the children and who is unable to do so because of injuries suffered in the accident. It is the provision of these benefits that compensate an injured person

and assist them with obtaining and paying to have these services provided by a third party until they recover.

[89] **Accordingly, the decision of SGI not to pay the expenses associated with the appellant's relatives and HH for providing personal care services etc. is upheld.** There is no provision in the legislation for direct reimbursement of these expenses. It is expected that the appellant will use the benefits received for living assistance benefits and caregiver benefits to pay the third parties that provided these services to him and his family.

d) Leather Jacket and Watch

[90] Item #25 and #26 in Appendix "A". The appellant claims that he damaged a leather jacket as a result of having to be on crutches after the accident. He further claims that his wrist watch was lost at the time of the motor vehicle accident.

[91] SGI argued that only clothing worn and damaged at the time of the accident is reimbursable under the legislation. There is no provision to reimburse an appellant for personal belongings. They further submitted that items like this would be recoverable under a home insurance policy.

[92] It seems reasonable to conclude that the appellant's leather jacket may have suffered some damage from the use of crutches relating to his broken femur. However, this Commission considered the same issue in *U.R. v. Saskatchewan Government Insurance, 2007 SKAIA 081*. It stated:

[8] Counsel for SGI submits that SGI does not have responsibility under Part VIII of *The Automobile Accident Insurance Act*, R.S.S. 1978, c.A-35 (the "Act"), to compensate the Appellant for the damage to his jacket as there are no specific sections in the legislation or in the regulations requiring such reimbursement. SGI has the power pursuant to section 206 of the *Act* to make *ex gratia* payments, but this Commission does not have the authority to order such payments to be made. We agree with SGI that it has no legal responsibility under the *Act* to reimburse for damaged clothing except, pursuant to subsection 157(1), when that clothing has been damaged in the motor vehicle accident:

157(1) Subject to the regulations, an insured is entitled to reimbursement of the following items:

...

(c) cleaning, repairing or replacing clothing that the insured was wearing at the date of the accident and that was damaged.

[93] We are in agreement with the decision above. We are unable to find any provision in the legislation that would require SGI to reimburse the appellant for the above lost and damaged items. **The decision of SGI denying the appellant reimbursement for his leather jacket and watch is upheld.**

e) Prescription and Over-the-Counter Drugs

[94] Items # 28-29; 31; 35, 41; and 46 in Appendix “A”. SGI agreed at the appeal to reimburse the appellant for Items #28 and #31 if the appellant provided a receipt for the medications. Item #31 was paid March 5, 2008. Item #28 was paid on March 10, 2008. Item#35 and #46 relate to a massager for back pain and a blood pressure monitor. SGI provided reimbursement to the appellant for these items on February 29, 2008.

[95] Item #29 is Ginko Bloba. The appellant asserts that this was recommended by one of the physicians at Wascana to assist with the appellant’s thinking and concentration. Item #41 dated May 20, 2007 is Flonase which was recommended by Dr. Fritz due to the appellant’s fractured nose. In a report dated April 4, 2007, Dr. Alport recommended that all medications prescribed since August 28, 2006 be paid on a without prejudice basis. In light of this recommendation, it is our recommendation that SGI also pay the two outstanding expenses for Flonase and Ginka Bloba on a without prejudice basis and as a gesture of good faith.

f) Drugs Paid by Others

[96] Item # 27 in Appendix “A” in the amount of \$501.19. The appellant claimed expenses submitted to Group Medical Services for medication prescribed as a result of injuries sustained in the accident. The appellant testified that some of this expense, approximately \$49.46, related to his wife’s claim and that she would be making this claim. The total claim submitted for the appellant’s expenses was \$416.59. At the time of concluding this hearing, SGI had reimbursed the appellant for these expenses. **This matter was fully resolved by agreement of the parties.**

g) Mediation Fee

[97] Item #9 in Appendix “A”. The appellant is seeking reimbursement of his fee paid for mediation in the amount of \$43.00.

[98] Section 84 of the *Regulations* states that an appellant requesting mediation shall pay the insurer a fee for mediation. SGI states in their decision letters that they will cover the cost of the mediation. This may be confusing to some appellants. It should be explained to the appellant that this refers to the cost of hiring the mediator and for the session. It is not the legislated fee the appellant is required to pay to request mediation. There is no provision in the legislation to compel SGI to reimburse the appellant his mediation fee. **Accordingly, the appellant is not entitled to reimbursement of the mediation fee.**

h) Photocopying

[99] Item #54 in Appendix “A”. The appellant states that these charges relate to photocopying done for the appeal and for purposes of his claim with SGI. The appellant produced a bill from Staples which showed photocopy charges of \$8.68 on April 9, 2006. He testified that he has copied approximately 850 pages at \$0.07 per page but did not produce any other bills.

[100] There is no provision in the legislation to reimburse the appellant for costs associated with photocopying receipts to be submitted to SGI. Costs associated with photocopying for purposes of the appeal are considered to be the costs associated with the appeal and are claimable as costs pursuant to section 193(11) of the *Act*. These costs will be reimbursable if the appellant is successful on appeal and he can provide proper documentation of the expense.

i) Doctors’ Reports, Interest, Legal Fees and Credit Card Penalties

[101] Item #49 in Appendix “A” refers to a medical report of Dr. Patel. Section 169 of the *Act* states:

169 Subject to the regulations, an insured is entitled to reimbursement for his or her expenses in obtaining a report from a practitioner if:

- (a) The insured made an appeal pursuant to Division 11 and filed the report in support of the appeal; and
- (b) The appeal mentioned in clause (a) is allowed.

[102] As the appellant has been partially successful on appeal, he would be entitled to the cost of this report in addition to any costs awarded pursuant to Section 193(11) of the *Act*.

[103] Item #53 refers to Legal Fees. Section 193(11) of the *Act* and Section 96 of the *Regulations* provide for the claimant's cost associated with the appeal. They read:

193(11) Subject to the regulations, the insurer shall reimburse a claimant who is successful on appeal pursuant to this section or section 194 for the claimant's costs in the prescribed amount.

96(1) For the purposes of subsection 193(11) of the Act, the insurer shall reimburse a claimant up to a maximum amount of \$2,500 for all reasonable expenses incurred from the date of filing the appeal to the date of the judgment or the appeal commission's decision.

(2) For the purposes of subsection (1), "**reasonable expenses**" includes meals, lodging, travel expenses and expert reports.

[104] Pursuant to the above provisions, the appellant would be entitled to his costs capped at \$2500.00. This would include any legal fees incurred by the appellant in preparation for this appeal. These legal fees must be documented, substantiation shall be provided to SGI and the legal services provided must relate to this appeal and not the appellant's action before the Court of Queen's Bench.

[105] Item #51 in Appendix "A" is for interest and credit card penalties. Interest is paid to a successful appellant in accordance with section 193(9) of the *Act* and section 102 of the *Regulations* which read:

193(9) If the appeal commission determines that the insurer should have paid the claimant benefits other than those which the insurer has been paying, the appeal commission may award interest on the value of the benefits not paid from the date when those benefits should have been paid until the date of the appeal commission's decision at the rate prescribed in section 210.

102 Interest payable pursuant to Part VIII of the Act is to be calculated in accordance with *The Pre-Judgment Interest Act*.

[106] The appellant will be entitled to interest on the income replacement benefit in accordance with our decision in paragraph [38].

[107] There is no provision in the legislation for the appellant to recover expenses associated with credit card penalties.

j) The Appellant's son's Missed School Fee

[108] The appellant asserted a claim for a missed school fee for his son in 2005. We were not provided with any documentation to support this claim. The appellant also advised the Commission that he may include it in his appeal to the Court of Queen's Bench. In light of the fact that we were provided with no substantiation of the expense, we have no evidence or argument before us and therefore we make no findings or rulings with respect to this claim.

Childcare/Caregiver Benefit

[109] On February 28, 2008, SGI sent a decision letter to the appellant stating that because his wife was the primary caregiver to the children, the appellant would not be entitled to a caregiver benefit under Section 119 and 120 of the Act. At the same time, SGI stated that the appellant's wife was only entitled to a reduced benefit because she was in receipt of an income replacement benefit as per section 120 of the Act.

[110] The appellant argued that either he should be entitled to a reduced caregiver benefit also, or his wife should be entitled to the full caregiver benefit. By mutual agreement of the parties, SGI agreed to pay the appellant's wife a full caregiver benefit from the date of the accident until January 20, 2008 at which point the benefit will be terminated. A caregiver benefit will not be paid to the appellant.

[111] Given the agreement of the parties, the appellant abandoned his claim for caregiver benefits. This matter will be addressed in the concurrent decision of the appellant's wife.

Living Assistance Benefits

[112] The appellant was involved in an accident on December 12, 2005. In July 2006, SGI began a process of trying to have a worksite and home assessment completed for the appellant. The appellant had not at that time received any assistance from SGI for living assistance benefits.

[113] On August 10, 2006, SGI wrote to the appellant advising that they had asked Western Health Management to assist with a worksite and home assessment for the appellant and his wife. The appellant refused to sign a release form that would allow Western Health Management

to conduct a proper home assessment. Without a home assessment, SGI was of the opinion that they could not provide living assistance benefits for activities of daily living.

[114] In the October 2, 2007 appeal hearing, it was agreed that the appellants would sign the appropriate releases to allow SGI to retain NRCS to complete a home assessment. That assessment took place on November 29 and 30, 2007. This assessment only addressed the current abilities of the appellant. Due to reasons beyond the control of SGI and the appellant, NRCS was not able to complete the assessment. As a result, IRC was retained by SGI to complete a home assessment for the appellant's abilities to perform activities of daily living since the date of the accident until January 20, 2008. That report is dated January 22, 2008.

[115] On January 14, 2008, SGI sent a decision letter to the appellant with respect to the calculation of living assistance benefits for the appellant's current abilities effective November 30, 2007 as assessed by NRCS.

[116] On February 14, 2008, SGI sent a decision letter to the appellant with respect to the calculation of living assistance benefits as assessed by IRC. This decision letter addressed the appellant's abilities to do activities of daily living from the date of the accident to November 29, 2007 as assessed by IRC. Also on February 14, 2008, SGI sent a decision letter to the appellant with respect to the calculation of living assistance benefits for the appellant's current abilities effective January 21, 2008 as assessed by IRC.

[117] Section 156 of the *Act* provides for benefits for living assistance. It reads:

156(1) Subject to the regulations, if an insured is unable because of the accident to care for himself or herself or to perform the prescribed basic activities of daily living without assistance, the insurer shall pay a living assistance benefit to the insured for the expenses related to obtaining assistance.

(2) The insurer shall calculate and reimburse the insured for the living assistance benefit in accordance with the regulations.

(3) The maximum amount of a living assistance benefit is \$947 per week.

[118] The calculation of living assistance benefits was broken up into several time periods:

(a) December 23, 2005 to May 23, 2006

(b) May 24, 2006 to June 13, 2006

(c) June 14, 2006 to November 2, 2006

(d) November 3, 2006 to November 29, 2007

(e) November 30, 2007 to January 20, 2008

(f) January 21, 2008 to current.

[119] An occupational therapist from IRC conducted the home assessment on January 21, 2008. She also testified at the appeal hearing. She stated that because of the time delay on this file she used the medical information on file, the functional rehabilitation report dated November 3, 2006, in conjunction with the report prepared by NRCS and also the appellant's statements regarding his capabilities. She stated that if the medical information did not contradict what the appellant relayed about his abilities then she accepted what he said and completed her grids accordingly. The PIR also provided evidence at the appeal. She stated that she relied upon the occupational therapist's report and grids when completing her assessment of the living assistance benefits. She said she does so because they have the expertise and education to assess the appellant's capabilities. She stated that in some cases, when calculating SGI's grids in accordance with their guidelines for completing grids, the appellant would have received a lower point value than those awarded by the occupational therapist. In those situations, she indicated that she gave the appellant the benefit of the doubt and awarded the higher point value.

[120] The appellant took considerable issue with the fact that he had two surgeries: one on his left knee on October 13, 2006 and the other on August 30, 2007 on his right wrist. He stated that following both of these surgeries he had a period of two to three weeks when he was unable to do several of the activities of daily living that he was able to do prior to the surgery. He submitted that the occupational therapist never took this into account when preparing her assessment and completing her grids. He argues that his benefits should have been increased during those periods of time.

[121] This file is difficult to analyze and assess. For the most part, the living assistance benefits have been paid in accordance with the stated abilities of the appellant. There is little medical documentation to support what the appellant could and could not do during the above time periods except after November 30, 2007 when the first home assessment was completed. It is clear that there may be periods of time where the appellant was not compensated for activities of daily living that he could not perform due to surgeries but there are other areas where the

appellant received ongoing benefits long after he reported to us that he was capable of performing the activity. The delay on this file is the fault of both parties and since there is no objective medical evidence before us other than the occupational therapist's attempt to reconstruct the past, we accept her evidence and are not prepared to disturb the assessment for activities of daily living other than those which the appellant specifically disputed.

[122] In addition, the appellant specifically took issue with SGI's assessment and calculation of his living assistance benefits for laundry, heavy housekeeping, functional supervision, purchasing supplies and transportation. With respect to the issues of laundry, heavy housekeeping and transportation, the customer submitted that SGI is not entitled to apportion the living assistance benefits based on the way he and his wife shared duties prior to the accident. We will address this argument after we have reviewed each of the activities individually.

[123] With respect to laundry, this task was shared with the appellant's wife prior to the accident. The occupational therapist considered the appellant to be 100% dependent for his 50% portion from December 23, 2005 to November 2, 2006. From November 3, 2006 to current she considers him to be 50% dependent for his 50% portion. In her report dated January 21, 2008, she noted that the laundry facilities are located on the lower floor of the apartment building down three flights of stairs. She determined in accordance with the Secondary Assessment in June 2006 that he was able to lift 10 pounds. Prior to June 2006, she determined he was dependent with the majority of the laundry task. After June 2006, she opined that he was unable to carry items down the stairs due to difficulty with lifting with his right hand and needing to hold on to the rail with his left hand. She opined that he would be able to load the machine with his left hand and unload the majority of the items from the machine. She determined that he would require assistance for carrying laundry items and loading and unloading heavy blankets and linens. Given that he only did 50% of the task pre-mva, she determined he required 25% assistance for his share of the task. She further stated that his ability to assess the laundry facilities would be covered in the functional mobility section.

[124] SGI assessed him to be 100% dependent from December 23, 2005 to November 2, 2006. From November 3, 2006 to current they assessed his dependency at 50%. We are in agreement

with this assessment in so far as his ability to load and unload laundry. We will address his ability to mobilize stairs in the functional supervision category.

[125] With respect to heavy housecleaning, the appellant stated that prior to the accident he cleaned the bathrooms, vacuumed and washed blinds. The occupational therapist considered the appellant to be 100% dependent for his 50% portion from December 23, 2005 to January 20, 2008. From January 21, 2008 to current he has been assessed as 20% dependent for his 50% portion. In her report she stated that NRCS considered him to be independent with the task of vacuuming, using pacing techniques. She admitted that he would require assistance with moving heavy furniture. With respect to cleaning bathrooms, the occupational therapist was of the opinion that with a long handled bathtub scrubber he would likely be independent with this task. The appellant stated that he does not currently participate in this task due to the smell of the cleaning chemicals. He also reported being unable to wash blinds which the occupational therapist considered reasonable due to his difficulty in reaching low levels and limited right shoulder range of motion. It is reasonable to assume he requires assistance with this task once every two months.

[126] SGI assessed the appellant to be 100% dependent with respect to this task until January 20, 2008 at which time they reduced this benefit to 20% dependent for the 50% portion and awarded nothing. We are in agreement with SGI as to the assessment of dependency of the appellant for heavy housekeeping for these time periods, however, we are not in agreement with the apportioning of this duty for reasons which will be stated below.

[127] With respect to purchasing supplies, the appellant and his wife shared this duty prior to the accident. The occupational therapist considered the appellant to be 100% dependent for his 50% portion from December 23, 2005 to November 3, 2006. From November 3, 2006 to current he has been assessed as 50% dependent for his 50% portion. The occupational therapist relied upon the appellants demonstrated abilities in November 2006 in his Functional Rehabilitation Program in determining that he would be able to load the majority of grocery items and push a shopping cart. The appellant disputed that he could push the grocery cart full of groceries. The occupational therapist agreed the appellant was unable to carry heavy items and would require assistance carrying groceries up three flights of stairs. She was of the opinion that he should

receive some assistance for purchasing supplies until further evaluation could be completed. In the guidelines provided by SGI a customer is considered to be 50% dependent if they are unable to lift items over 10 lbs or reach lower shelves. Also, they are unable to lift heavy items on to the till and are unable to place the bags of groceries in the vehicle. We find this to be an equivalent description of the appellant's current abilities.

[128] SGI assessed the appellant to be 100% dependent with this task until November 3, 2006 and 50% dependent from then until current. We are in agreement with SGI as to the assessment of dependency of the appellant for purchasing supplies for these time periods, however, we are not in agreement with the apportioning of this duty for reasons which will be stated below. We also will assess his ability to carry groceries up the stairs in the functional supervision category.

[129] With respect to functional supervision, the appellant was assessed to be 25% dependent from December 23, 2005 to November 29, 2007. From November 30, 2007, a benefit was not assessed for functional supervision. The occupational therapist noted that NRCS as of November 30, 2007 found the appellant to be independent with walking the stairs relying upon the handrails. However, the occupational therapist goes on to indicate that medical information provided does not provide objective information regarding the appellant's ability to mobilize stairs for carrying groceries and laundry. The occupational therapist indicated under the laundry assessment that the appellant's ability to carry laundry up and down the stairs would be assessed under functional mobility. SGI has not provided a current benefit in this regard. The guidelines provided by SGI when completing the grids identifies that this category includes accessing locations where the use of stairs restricts the ability of the customer to use the location. Accordingly, we have concluded that the appellant is entitled to ongoing functional assistance. We think it is reasonable to continue to assess him as 25% dependent to assist with carrying laundry and groceries up and down the stairs. This would result in a further 3 points on the grid.

[130] With respect to transportation, the appellant was assessed to be 100% dependent from December 12, 2005 to May 23, 2006 after which time SGI stopped providing the benefit. In her assessment the occupational therapist stated that the appellant was physically capable of driving but may have difficulty with shoulder checking. The appellant advised that his psychiatrist told him not to drive because of his medications. The occupational therapist determined that further

clarification was required regarding his restrictions for driving before properly assessing his ability to drive. At the appeal, the appellant advised this Commission he was currently on approximately 10 different medications. We are satisfied that the appellant is not independent with respect to transportation. We accept that he should not be driving and has been advised so by his doctors. Accordingly, he is entitled to this living assistance benefit.

[131] This brings us to how this should be calculated. We have relied upon the guidelines provided to us by SGI. We find this to be similar to the situation where the customer lives in the city but is responsible for driving his children or family to their activities. Accordingly, we find it appropriate to award the appellant the full 5 points on the Evaluation Grid of Required Functional Activities. We consider this to be an ongoing benefit to which the appellant is entitled until he has received medical clearance to drive.

[132] As stated above, with respect to the issue of laundry, heavy housekeeping and purchasing supplies, the customer submitted that SGI is not entitled to apportion the living assistance benefits based on the way he and his wife shared duties prior to the accident. He argues that he was 100% dependent and should receive 100% of the benefit. In accordance with *O.H. v. Saskatchewan Government Insurance* 2006 SKAIA 074, this Commission previously decided that SGI is not entitled to reduce the amount of the benefit because activities of daily living were shared prior to the accident.

[133] However, the *Regulations* were amended since *O.H.* to allow SGI to adjust the amount payable for each prescribed task identified in the grids by the percentage the insured did not perform or complete the whole task by himself or herself before the date of the accident.⁴

[134] At the appeal, SGI agreed to pay the appellant for 100% of those benefits which were reduced from December 23, 2005 to the date the *Regulations* came into effect, which counsel submitted was August 24, 2007. SGI argued that effective August 24, 2007, new *Regulations* came into effect that allowed SGI to apportion the benefits based upon pre-accident sharing of duties. It was suggested to counsel that we believed the *Regulations* may have come into force on September 1, 2007. We were somewhat surprised that counsel for SGI suggested that we

⁴ *The Personal Injury Benefit Regulations*, Chapter A-35, Reg 3, Appendix D, Section 2(5).

could let him know the effective date if we determined it to be other than August 24, 2007 rather than requesting permission to confirm the date the *Regulations* came into force and providing the information to us. In fact, the effective date of the amended *Regulations* is September 1, 2007.

[135] In accordance with the agreement made between the parties and what we have determined to be the effective date of the new Regulation, the appellant is entitled to the following adjustment to his living assistance benefits for the period of December 23, 2005 to August 31, 2007:

- a) Laundry – 5 points from December 23, 2005 to November 2, 2006. 3 points from November 3 to August 31, 2007.
- b) Heavy Housekeeping – 2 points from December 23, 2005 to November 29, 2007.
- c) Purchasing Supplies – 3 points from December 23, 2005 to November 2, 2006. 1 point from November 3, 2006 to August 31, 2007.

[136] As stated above, it is our opinion that the appellant is entitled to ongoing functional supervision for carrying groceries and laundry up and down stairs. We find him to continue to be 25% dependent in this regard and entitled to 3 points from November 30, 2007 to current. Also, with respect to transportation, we find the appellant entitled to 5 points from May 24, 2006 to current given his restrictions in driving due to the medications he is currently prescribed.

[137] We have determined that, effective September 1, 2007, the *Regulations* were amended to allow SGI to adjust the amount payable for each prescribed task identified in the grids by the percentage the insured did not perform or complete the whole task by himself or herself before the date of the accident.⁵ We must determine whether SGI is entitled to apply the new *Regulations* after September 1, 2007 to an accident that occurred prior to the date that Regulation came into effect.

[138] The rate for payment of the Appellant's LAB after September 1, 2007 shall be reserved in accordance with the paragraphs following.

⁵ *The Personal Injury Benefit Regulations*, Chapter A-35, Reg 3, Appendix D, Section 2(5).

[139] We are satisfied that all claimants involved in an accident after September 1, 2007 will be subject to the new provisions in the *Regulations*. However, the question of whether and how the amendments apply to injured people who were collecting LAB prior to the effective date of the amendment is much more difficult.

[140] SGI argued that the amended regulations apply to all injured persons, including those injured prior to September 1, 2007 and those who commenced receipt of LAB prior to that date. Legal authority was not provided for SGI's position.

[141] We accept it as realistic to expect, as SGI has argued, that legislation will be amended from time to time to make changes to the administration of benefits and that may negatively affect insured parties. However, it also seems reasonable that a change to the regulations that would have negative effect on insured parties would normally not be given retrospective operation unless that retrospective operation is expressly stated in the legislation or is necessarily inferred.

[142] We are mindful of the significant consequences of the decision on this issue, not only on this appellant but on other claimants and SGI. Accordingly, we require that the appellant and SGI both provide written submissions, including applicable legal authority, on the issue of the effect of the September 1, 2007 amendment to the *Regulations* on claimants involved in accidents prior to September 1, 2007. These submissions shall be provided by December 8, 2008 unless at a later date in accordance with the paragraph below.

[143] The parties are invited to advise the Commission immediately if this date for submissions is not suitable and if so, alternative dates will be considered. However, the panel cautions both parties that extensions of these dates are not likely to be granted at their expiration, unless for extraordinary and unanticipated reasons.

[144] Within a reasonable time after our receipt of the parties' submissions, an addendum to this decision will be rendered on the effect of the September 1, 2007 amendment on LAB for persons who were injured in accidents that occurred prior to that date.

Interest on Living Assistance Benefits

[145] SGI submitted that the appellant should not be entitled to interest on the living assistance benefits because he refused to provide a proper release so that SGI could conduct an assessment of his ability to perform activities of daily living. SGI acknowledged that they did not request a home assessment until July 2006 which was nine months after the accident. The appellant did not receive any benefits for living assistance until February 2008 which was more than 2 years after his accident. The Commission queried whether there was legal authority for the proposition put forward by SGI that the appellant should be denied interest because of his own delay. Legal counsel for SGI did not provide any legal authority supporting their position.

[146] We note that the primary impediment was the provision of a limited release that apparently prevented the rehabilitation consultant from acquiring, assessing and reporting on the necessary information. That limited release was provided by the Appellant after consultation with counsel and apparently on the advice of counsel. Although the limitations in the release apparently prevented the provision of benefits, it was not unreasonable for the Appellant to rely on the advice of counsel and it would not be appropriate to effectively penalize him for this action by denying interest on the retroactive payment.

[147] We also refer to our previous comments with respect to interest not being used as a penalty. As such, we are satisfied that interest ought to be paid on all living assistance benefits.

MISCELLANEOUS MATTERS

[148] We were frankly disturbed by the manner that this file was administered by SGI and by the Appellant and his representative. **The fault lies with both parties.** This claim was aggravated by the fact that SGI paid virtually no benefits to the Appellant and his wife for almost a year after the accident, despite clear evidence that there had been serious and disabling injuries to both. However, we believe it is significant that the Appellant and his representative adopted unrealistic attitudes and positions in the advancement of their claim and during the hearing. The Appellant should not misunderstand that his attitude and the positions taken with SGI has caused a majority of the delay in the administration of his claim since August 2006. It is necessary that we point this out because in our opinion the PIR that assumed conduct of the file in August 2006

has tried in good faith, with little cooperation from the Appellant, his wife and his representative, to administer their benefits. In our opinion, it is in large part the actions of the Appellant and his representative after August 2006 which tied the hands of the new PIR in effectively administering the appellant's and his wife's Part VIII benefits.

[149] This claim will likely continue for many years. It is critical that the Appellant and SGI cooperate and work together in good faith to ensure that the administration of benefits can continue with less disputes and hostility between the parties.

CONCLUSION

[150] With respect to whether the appellant should be classified as a salaried employee or a self-employed earner, we find it appropriate to lift the corporate veil in the circumstances of this case. SGI is ordered to calculate the appellant's income as if he were self-employed as a sole proprietorship. The appellant is entitled to interest on his Part VIII income replacement benefits.

[151] With respect to the issue of reimbursement of custom orthotics, the decision letter of SGI is upheld. The appellant is entitled to reimbursement for one pair of moveable custom orthotics and one pair of custom orthotics fixed in his sandals.

[152] The matter of the accounting fee has been resolved by mutual agreement of the parties.

[153] We recommend that SGI review whether the appellant is entitled to be reimbursed for his PMI fees as a non-refundable expense under section 161 of the *Act*.

[154] SGI's decision to refuse to pay for massage therapy between October 21, 2006 and July 20, 2007 is upheld.

[155] The matter of EI deductions and the interest on those amounts has been resolved by mutual agreement of the parties.

[156] The only miscellaneous expenses not resolved by mutual agreement of the parties are telephone calls, expenses for family and Helping Hands, leather jacket and watch, ginkgo bloba and flonase, mediation fee, photocopying, the appellant's son's missed school fee and doctors reports, legal fees and credit card penalties. SGI's decision with respect to the telephone calls,

expenses for family and Helping Hands, leather jacket and watch, mediation fee, photocopying and credit card penalties are all upheld. We recommend that SGI pay the ginkgo bloba and Flonase as a measure of good faith since all prescription medications were paid as recommended by Dr. Alport. The appellant is entitled to Dr. Patel's fee for his report because he has been successful. The appellant is entitled to legal fess in accordance with paragraph [104] above.

[157] The Childcare/Caregiver Benefit was resolved by mutual agreement of the parties.

[158] The appellant is entitled to an increase in his living assistance benefits for functional supervision and transportation. The increase in functional supervision addresses his difficulty with carrying laundry and groceries up and down stairs. The appellant is entitled to transportation because it is our opinion and he has been advised by his psychiatrist that his current list of medications make it unsafe for him to drive.

[159] The decision with respect to the amendment to the Regulations effective September 1, 2007 is reserved until both parties have been provided an opportunity to present written submissions and legal authority for their submissions.

[160] As the appellant has been partially successful in his appeal he is entitled to his reasonable expenses capped at \$2500 as governed by the legislation. He is also entitled to be reimbursed for his appeal fee.

Dated at Regina, Saskatchewan, on November 20, 2008.

Barbara Tomkins, Chair

Joy Dobko, Commission Member

Conrad Hnatiuk, Commission Member