Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *S.M. v. Saskatchewan Government Insurance* 2008 SKAIA 051

Date: 20081120

File: 36 of 2007

BETWEEN

S.M., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances*:*
S.H. and I.J., for the Appellant
Stephan McClellan and Chris Weitzel, for the Respondent

Before: **Joy Dobko, Chair**
Conrad Hnatiuk, Commission Member
Barbara Tomkins, Commission Member

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

Heard at Regina, Saskatchewan
October 3 and 9, 2007
January 9, February 26, April 30, September 25 and October 2, 2008

DECISION

[1] The Appellant was riding with her husband and children in their family vehicle on November 12, 2005 when it was struck by a stolen vehicle that was being pursued by police. Each of the family members was injured in the accident: the Appellant's husband suffered the most serious injuries, her young son suffered a broken leg and the youngest child some serious bruising.

[2] The Appellant sustained, initially, three broken ribs and a pulmonary contusion. She was kept in hospital for observation for four days, primarily due to concern for the possible consequences of the pulmonary contusion. In the months after her discharge, she reported soft-tissue injury to her neck and back and on-going pain to her chest and left shoulder.

[3] The Appellant appeals and disputes decisions made by SGI regarding the calculation of or her entitlement to the following benefits. She has filed three appeals, as follows:

- On April 10, 2007, an appeal against SGI's decisions of September 20, 2006, October 4, 2006 and February 22, 2007: The first two listed of these letters relate to SGI's decision that entitlement to Income Replacement Benefits (IRB) could not be determined until SGI obtained medical and vocational information that was necessary to its decision. The third merely confirms the conclusion of mediation and does not include any decisions.
- On April 21, 2008, an appeal against SGI's decisions of February 14, 18 and 29, 2008: These involved the calculation of and interest payable on Living Assistance Benefits (LAB) for the period November 12, 2005 to November 29, 2007; entitlement to and interest payable on care giver benefits; and interest on a payment made for medications and treatment expenses.
- On August 28, 2008, an appeal against SGI's decisions of February 14 and 29, 2008: (These are the same decisions that were appealed in the April 21, 2007 appeal described above.) On this appeal, however, the Appellant indicated that she wished to challenge SGI's decision to terminate LAB and Care Giver Benefits.

[4] Nonetheless, the Appellant's representatives raised a number of additional issues as the appeal progressed. SGI, through counsel, did not take issue with the Commission's jurisdiction to decide those matters, probably because appeals were pending and the Appellant's disagreement with the decisions was clearly and repeatedly expressed to SGI. Therefore, the issues before the Commission are as follows:

- Income Replacement Benefits, and interest thereon;
- Living Assistance Benefits, and interest thereon;
- Care Giver Benefits, and interest thereon;
- Costs of Massage and Physiotherapy;
- Expenses for mediation, medical reports and legal fees; and
- Expenses for medications, and interest thereon.

[5] Given that the matters in dispute in this appeal do not involve matters of causation or the need to examine medical records otherwise, the Commission was not provided with all medical information relating to the Appellant's injuries and treatment. As such, we do not have and it is not necessary that we provide a detailed chronology of her injuries, treatment and recovery. Instead, our findings will focus on facts related directly to the matters in issue. Each aspect of the appeal will be discussed separately below.

PRELIMINARY MATTERS

[6] The Appellant did not appear or testify in these proceedings. Instead, her representatives chose to rely entirely on the documentary evidence. This is the Appellant's right but it comes with corollary consequences when there are discrepancies or contradictions in the documentary evidence. We were mindful of this in the course of considering and deciding this appeal.

FINDINGS, LAW AND ANALYSIS

A. <u>Income Replacement Benefits</u>

[6] Prior to the vehicle accident, the Appellant's husband worked as an Information Technology specialist and was sole earner of all income to a company he set up primarily for purposes of income management. The Appellant's primary occupation was in homemaking and caring for her children. She did, however, provide bookkeeping and clerical services for her husband's business. In February 2006, her husband is reported to have said she spent about 20 hours per week doing this work, in between caring for her children and her homemaking duties. At an interview in January 2008, the Appellant herself is reported to have said that she did this work when there was work to do and time to do it. For this work, she was paid a salary from her husband's company.

[7] While the documentation in our file is not complete, it appears that SGI requested income and medical information in order to determine whether the Appellant was entitled to Income Replacement Benefits (IRB) on a number of occasions. In a letter dated January 3, 2006, SGI requested personal income tax returns for the years 2002 to 2004 inclusive. SGI indicated in the letter that this information had been requested from the Appellant's representative on "several" occasions.

[8] Eventually, the Appellant provided the requested documents or, at least, some of them. By letter dated June 9, 2006, SGI provided IRB for the period from November 20, 2005[1] to June 3, 2006. In this letter, SGI requested further financial information including the Appellant's 2005 income tax return and copies of pay stubs for an unspecified period prior to the accident.

[9] The Appellant was not paid any IRB after June 3, 2006 because, according to SGI's documents, SGI required further medical information to support her claim that she remained unable to work after June 3, 2006; there was a concern that her reported injuries might be expected to have healed by that time and there was no medical information on file as to her condition at that time, recommended treatment or ability to work.

[10] Indeed, a letter dated September 20, 2006 from SGI indicated that it did not have "sufficient medical or vocational information to determine if a continued income replacement benefit is entitled". SGI indicated that it was seeking a comprehensive report from the Appellant's physician and waiting for information from its rehabilitation consultant respecting her employment and related duties. In this letter, no specific documentation was requested from the Appellant.

[11] On October 4, 2006, SGI advised that it had received the report from the Appellant's family physician but could not obtain a report from the rehabilitation consultant because the Appellant had refused to give permission for release of the report. Once it received the report, SGI said, it would consider whether further IRB was payable to the Appellant.

[1] Although the accident occurred on November 12, 2005, there is a one-week waiting period before an injured person is entitled to collect IRB.

[12] Eventually, the Appellant provided a form of release but it was so restricted that the rehabilitation consultant thought it impossible to undertake any vocational or rehabilitation initiatives, nor could it conduct homemaking or workplace assessments. In a letter dated December 15, 2006, the Appellant objected to this position and said that the rehabilitation consultant had not done an assessment or asked for the employment records. She said that she had provided a job description (‘that my employment is home based with [company] as a support worker and have never worked out of home to-date”) and tax records previously.

[13] No further information was provided by the Appellant and SGI was not able to obtain further useful information from other sources. Perhaps in light of this stalemate, SGI requested an opinion from its medical consultant.

[14] Dr. Alport, in an opinion dated April 10 2007, recognized that the information available was limited, especially as there was no Job Demands Analysis. Based on this admittedly inadequate information, Dr. Alport concluded that he didn’t “understand how her injuries would prevent her from doing any of the job described” [in a brief job description that was provided]. He was of the view that the injuries suffered would usually have healed within the seventeen months that had elapsed since the accident and that any residual symptoms would likely not prevent her from performing her job duties.

[15] As such, SGI did not reinstate or pay further IRB to the Appellant.

[16] Finally, in the course of the appeal hearing, SGI agreed that further IRB was probably payable and benefits were reinstated. A cheque was provided with a letter dated October 19, 2007, for IRB from November 20, 2005 to October 19, 2007 minus the sum paid as IRB in June 2006, with no deduction for Employment Insurance premiums. As such, the matter of IRB for the Appellant was resolved.

[17] For the record, we are satisfied that SGI did not have necessary financial information until at least September 2006 but that the determination of entitlement to IRB was still not possible due to the lack of vocational information. We are satisfied that SGI took reasonable steps to acquire that information but the Appellant’s actions prevented SGI from acquiring it.

[18] We are also satisfied that Dr. Alport's opinion is reasonable, given the limited information available. Indeed, it appears that SGI may have sought the opinion in order to learn whether the payment of IRB might be made, despite the lack of information. While the Appellant argued that Dr. Alport could not provide a useful opinion because he had not examined the Appellant, he was certainly able to provide an opinion whether the information from those who had examined the Appellant indicated that she was or was not able to manage her pre-accident work. He was mindful throughout that the information available was limited and it was clear that his opinion was tendered on that basis.

B. <u>Interest on Retroactive Income Replacement Benefits</u>

[19] The Appellant has argued that interest should be paid on the retroactive IRB payment but that it was not paid.

[20] We are satisfied that interest ought to be paid on the retroactive IRB that was paid on October 19, 2007. While the payment of IRB was delayed primarily due to the Appellant's refusal to provide information necessary to establish her entitlement to the benefit, we note that the primary impediment to obtaining that information lies in the provision of a limited release that apparently prevented the rehabilitation consultant from acquiring, assessing and reporting on the necessary information.

[21] 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[2], it was not unreasonable for the Appellant to rely on the advice of counsel and it would not be appropriate to effectively penalize her for this action by denying interest on the retroactive payment.

[22] Further, we are mindful of the decision in *Irvington Holdings* v. *Black*, (1987) 58 O.R. 449 wherein it was held that the purpose of pre-judgment interest was to compensate a plaintiff for the deprivation of monies to which the plaintiff has been found to be entitled. In general, interest should not be used as either a reward or a penalty.

[2] It should be understood that we have not examined the release to determine whether it was in fact so restrictive as to prevent the rehabilitation consultant from making the necessary inquiries and conducting and reporting on the necessary assessment. That determination is not necessary to our decision.

[23] We are satisfied that interest ought to be paid on the retroactive payment for the reason set out in *Irvington Holdings* – that of compensation for the deprivation of monies to which she has been found to be entitled - and because the primary action for which SGI seeks to penalize her was reasonable, given that it was based on the advice of counsel.

[24] However, the October 19, 2007 covering letter indicates interest was included in the amount paid and the attached form showing the calculation of the retroactive IRB appears to include the calculation and payment of pre-judgment interest on the amount. Neither party addressed this document in their submissions and certainly the Appellant did not suggest that the letter was incorrect.

[25] We are satisfied that pre-judgment interest should have been and was paid on the retroactive IRB. In this respect, SGI's decision is confirmed.

C. <u>Living Assistance Benefits</u>

[26] When a person is injured in an accident and as a result, unable to manage activities of daily living, Living Assistance Benefits (LAB) are payable. The relevant part of the Act reads as follows:

> 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 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.

[27] Regulations to the Act clarify the manner of determining the LAB. Specific activities are identified and points are assessed for the degree of independence or compromise with which the injured person is able to do the specified activities.

[28] The Appellant claimed that her injuries prevented her from performing activities of daily living and that she was therefore entitled to LAB. By letter dated August 10, 2006, SGI advised that it had retained a rehabilitation consultant to conduct a home assessment to clarify which activities the Appellant was unable to manage or could manage only with

difficulty. This information was necessary to determine whether she was entitled to LAB and if so, in what amount.

[29] It appears that the rehabilitation consultant met with the Appellant or her husband or both before they received SGI's letter explaining that the consultant had been retained and the purpose of the anticipated assessment. The Appellant's husband advised SGI by letter that he was disturbed by the meeting. He further provided a list of five reasons that he believed the Appellant could not attend a secondary assessment, including child care needs and the fact that the Appellant was pregnant at the time.

[30] It is unfortunate that the Appellant or her husband did not contact their Personal Injury Representative to learn why the contact was made by the rehabilitation consultant and to learn whether the difficulties raised in the husband's letter could be accommodated. It is likely, especially in light of the Appellant's pregnancy, that the assessment would have been deferred and possible that benefits would have been provided in the interim. Certainly the tone of the letter was unnecessary and unfortunate.

[31] It appears that SGI did not respond to the husband's letter and did not attempt to clarify the request for an assessment or to address the concerns the husband raised. This is also unfortunate.

[32] In the meantime, SGI continued to pursue further information from the Appellant in order to determine whether further IRB were payable. In this respect, SGI sent a letter on October 8, 2006 confirming that she had received a report from the Appellant's physician but that the rehabilitation consultant had advised that they had not obtained permission to release their report regarding income to SGI. While SGI confirmed in its letter that this report was necessary to its consideration of further IRB, it was also necessary to the determination of entitlement to LAB and Care Giver Benefits.

[33] In response, the Appellant's husband provided a letter challenging the consultant's need for authorization and SGI's need for the report. He indicated that he thought SGI had all of the information it should need. While suggesting that SGI had threatened him by

including information about the potential consequences of non-compliance in its letter, the Appellant’s husband’s tone was aggressive and argumentative.

[34] Eventually, the Appellant and her husband received legal advice about the release and provided one that had been significantly amended. The rehabilitation consultant advised that the amended release was so limited that he did not believe he could acquire the information necessary to provide a meaningful or useful report. He further advised that the Appellant’s husband had declined further contact and that an offer to conduct the necessary LAB and vocational assessments for his wife in conjunction with his own had been declined.

[35] In these circumstances, SGI sought an opinion from its medical consultant. In particular, they asked his opinion as to whether, based on information available, the Appellant would be compromised in her ability to do activities of daily living. The consultant advised on April 10, 2007 that he did not have information about the activities the Appellant claimed to be unable to perform or the condition that might prevent her from performing them. He said, absent that information, he did not think her injuries “would/should still prevent her from doing activities of daily living.”

[36] Finally, in the course of the hearing on October 3, 2007, the Appellant agreed to participate in an assessment so that SGI could determine her entitlement to Care Giver Benefits and LAB. Unfortunately, the person conducting the assessment left his employment with the rehabilitation consultant before the assessment was completed. While a report dated November 30, 2007 was provided and while it included some information about activities of daily living, it was not complete. The writer concluded that the Appellant was, by the date of the assessment, able to independently manage all activities of daily living. This was accepted by SGI and was not challenged by the Appellant.

[37] Another rehabilitation consultant was engaged to conduct an assessment and this was completed on January 21, 2008. Based on that report, SGI determined that the Appellant had been entitled to LAB from the date of the accident until November 29, 2007 and provided benefits accordingly.

[38] In most cases where a person's injuries are of such severity that the person is entitled to LAB, there will be a series of reports documenting the person's injuries, treatment and progress to recovery. LAB can be paid and adjusted on an on-going basis. In this case, however, such information was not available. SGI therefore determined LAB for five distinct periods of time that were defined by medical information available: November 12, 2005 to December 11, 2005; January 1, 2006 to January 11, 2006; February 12, 2006 to May 11, 2006, May 12, 2006 to December 31, 2006 and January 1, 2007 to November 29, 2007.

[39] The Appellant did not dispute the distinct periods established but does dispute the assessment of her ability within some of them. In particular, the Appellant says that SGI's assessment is incorrect in the following respects:

- arising from bed;
- dressing;
- mobility;
- laundry;
- grocery shopping; and
- SGI's calculations apportioned her benefits and should not have done so.

[40] We will consider each of these separately in the following discussion.

<u>Arising from Bed</u>

[41] The Appellant reported that she required assistance getting in and out of bed for the first three months after the accident. She said she was able to manage this task independently by mid-February 2006.

[42] Based on this information, the rehabilitation consultant determined that she was 50% dependent in this task until February 11, 2006. When it considered this information, SGI accepted this assessment and paid LAB on this basis.

[43] The Appellant objected to this assessment on the basis that she was assessed only 50% dependency. Her representative suggested that based on this information alone, there was no foundation for this assessment. He pointed out that SGI had done its own

assessment in November 22, 2005 and assessed the Appellant's level of independence at a higher level.

[44] All three of the assessments are based on the Appellant's self-reported limitation and a discrepancy among them might be difficult to reconcile. However, we note that in this case the November 22, 2005 report was completed within less than two weeks of the vehicle accident when the injury was probably at its most severe, while the later assessment extends to February 11, 2006. It is obvious, we believe, that the Appellant's ability to manage this task would have improved over time and while her dependence may have been higher than 50% at the beginning of her recovery, it was likely significantly lower in the time just prior to achieving independence in mid-February.

[45] We note that at her January 2008 assessment, the Appellant is reported to have stated that she had difficulty getting out of bed for two weeks after the accident. We are unable to reconcile this information with that provided during the same assessment; it may be that she was distinguishing between getting into bed and getting out of bed.

[46] Given this and the lack of medical information supporting her self-report, we think an element of proportionality is involved. An assessment of 50% dependence from the date of the accident until February 22, 2006 clearly overstates her dependence later in the period and this will likely balance any understatement in the earlier part of the time period. Without testimony from the Appellant indicating how she was restricted and how her condition caused the restriction and for the reasons above, we accept as reasonable the assessment at 50% dependent from the date of the accident until February 11, 2006.

Dressing

[47] The Appellant reported that she required assistance putting on her pants and shirt for two months after the accident. By then, she could put on her pants independently and by the end of January 2006, she was independent in dressing herself. Based on this report, the rehabilitation consultant assessed her degree of dependence at 50% until February 11, 2006.

[48] For the same reasons given in relation to "Arising from Bed", we accept this assessment.

Mobility

[49] The term "mobility" for purposes of LAB is defined in the regulations as "The physical ability of the insured to transfer himself or herself into or out of a vehicle or a wheelchair". The Appellant reported that she required assistance to get in and out of the vehicle for two months after the accident and that by that time, she was independent in this activity. The rehabilitation consultant assessed her degree of dependency at 50% until January 11, 2006 and SGI accepted this assessment. The time frame accords to the Appellant's reported term of disability but her representative submitted that we should instead accept SGI's assessment at November 22, 2005 when it was assessed at a higher level.

[50] At the time of the early SGI assessment, the Appellant had recently broken ribs and was utilizing a wheelchair. Within two months, she was independent in entering and exiting the vehicle. We were provided no evidence indicating the period of time she used a wheelchair or the reasons that a wheelchair was thought necessary for her. We were not provided evidence as to her progress to independence two month later.

[51] Given that we have no information respecting her wheelchair use, no evidence of the progress and rate of her recovery and given the lack of medical information supporting her self-report, we think an element of proportionality is involved. An assessment of 50% dependence from the date of the accident until January 11, 2006 clearly overstates her dependence later in the period and this will likely balance any understatement in the earlier part of the time period. Without testimony from the Appellant indicating how she was restricted and how her condition caused the restriction and for the reasons above, we accept as reasonable the assessment at 50% dependent from the date of the accident until January 11, 2006.

Laundry

[52] The activity of "Laundry" is defined in the regulations as "the physical ability of the insured, or the insured's requirement to have verbal cuing, to carry a basket of clothes and to wash, dry, fold, iron and pack away laundered items." At November 22, 2005, SGI assessed the Appellant as 100% dependent. The rehabilitation consultant assessed her at 100% dependant from the date of accident until May 11, 2006 and at 50% from May 12, 2006 until November 20, 2007.

[53] The Appellant, through her representative, suggested that this assessment is too low, although he provided no basis for this submission except the November 22, 2005 SGI assessment. There was no evidence from the Appellant as to the duration of the higher degree of disability. She did advise the rehabilitation consultant, however, that she did not participate in laundry for six months after the accident, when her sister who had come to help care for her returned home. This does not mean, of course, that she was unable to do laundry at all during all of that time, nor does it assist us in determining the degree to which she was able to do laundry and the time frames within which her ability improved. It is certainly obvious that she was not 100% disabled from doing laundry until May 2006 but only 50% dependent immediately thereafter.

[54] Since SGI assessed her disability at 100% from the date of the accident until May 11, 2006, we assume the Appellant's objection is to the assessment of 50% after that date. We do not think the assessment was unreasonable. Given the information available, SGI was required to make a reasonable estimate. They assessed her at full disability for the entire six month period alleged and allowed it at 50% after that time. Again, considering the lack of evidence and proportionality, we accept the assessment.

Grocery Shopping

[55] The Appellant reported to the rehabilitation consultant that she did not participate in grocery shopping at all until six months after the accident. She said that even then, she had difficulty carrying heavy, "two-handed items" and that she had difficulty bringing groceries upstairs. The rehabilitation consultant accepted this information but noted that the November 30, 2007 assessment report showed that the Appellant was able to lift 9

kilograms with her right hand and bilaterally. She said that with this capability, the Appellant could carry two-handed items and carry groceries upstairs.

[56] She assessed her disability at 100% until May 11, 2006 and 50% thereafter.

[57] SGI has accepted that she was entirely disabled from doing this task for the entire period the Appellant alleged and at 50% thereafter. Given the information available, we are satisfied that SGI's determination of disability in this respect is generous and is confirmed.

Apportionment

[58] With regard to the tasks of laundry and purchasing supplies, the Appellant suggested that SGI's assessment was unreasonable, despite the fact that she had been assessed at 100% disability for most of the challenged period. We suspect that the real objection lay not in the assessment but rather in the notion of apportionment. That is, prior to the vehicle accident, the Appellant had usually done about 50% of the work involved in laundry and about 50% of the work involved in purchasing supplies. SGI therefore "discounted" the amount she would otherwise receive for 100% disability by 50%. We believe it is probably this reduction that the Appellant challenged.

[59] SGI had interpreted the regulations respecting LAB as allowing the apportionment of benefits in proportion to the degree that the injured person engaged in the specific activity of daily living prior to the accident. That is, if a husband and wife shared responsibility for the laundry 50/50 prior to the accident and if the wife was injured in an accident and unable to do laundry afterwards, she would be given LAB calculated at 50% of the amount that she would have received if she had been entirely responsible for laundry. In effect then, if she was 100% disabled from doing laundry, she would receive only 50% of the benefit because she was only responsible for 50% of the laundry.

[60] This Commission's decision in *O.H.* v. *SGI* [3] concluded that this interpretation of the regulations was incorrect and that the regulations did not allow for apportionment in the manner that had been SGI's practice. The Commission concluded that, therefore, the wife

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in our example should receive 100% of the benefit, even if she only did 50% of the task prior to the accident.

[61] Effective September 1, 2007, the regulations were amended to specify that LAB are to be adjusted by "the percentage that the insured did not perform or complete the whole task by himself or herself before the date of the accident."

[62] In accordance with the Commission's decision in *O.H.*, the Appellant's LAB payable in respect of disability prior to September 1, 2007 shall therefore be payable at 100%, irrespective of "the percentage that she did not perform or complete the whole task by herself prior to the date of the accident." This applies to all benefits for activities of daily living that were assessed on an adjusted basis, including those that were not challenged on this appeal. They will similarly be recalculated at 100% until and including August 31, 2007.

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

[64] 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 receiving LAB prior to the effective date of the amendment is much more difficult.

[65] 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.

[66] We accept it as realistic to expect, as SGI has argued, that legislation will be amended from time to make changes to the administration of benefits and that these 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 been given retrospective operation unless that retrospective operation is expressly stated in the legislation or is necessarily inferred.

[67] 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.

[68] 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.

[69] 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.

D. <u>Interest on Living Assistance Benefits</u>

[70] SGI has argued that it was the Appellant's delay and lack of co-operation that caused the delay in assessing and paying her LAB and that, therefore, it would be appropriate that interest on any outstanding amounts should be declined.

[71] We note, however, that SGI is entirely responsible for the delay between its November 22, 2005 assessment and interim payment and the request for assessment in August 2006. The time between October 3, 2007 when the Appellant agreed to provide an acceptable release and participate in the assessment and the date that SGI was able to calculate and pay LAB based on the rehabilitation consultant's report was entirely outside the Appellant's responsibility. From August 2006 until October 3, 2007, the matter was primarily delayed as a consequence of the Appellant's actions.

[72] However, for the reasons stated in respect of interest on IRB set out in paragraphs [21] to [23] above, we are satisfied that interest is properly payable on the amount paid by SGI as LAB with its letter of February 14, 2008 and on all additional amounts payable as LAB consequent on this decision.

E. Care Giver Benefits

[73] The Appellant claimed but SGI did not initially pay Care Giver Benefits (CGB) for child care as it lacked information necessary to determine the Appellant's entitlement. Eventually, by letter dated February 29, 2008, SGI agreed that the Appellant was entitled to reduced CGB from November 12, 2005 until January 20, 2008. The Appellant, in her appeal, did not dispute the period of time for which SGI found she was entitled to the benefit but submitted that she was entitled to full CGB during that period of time.

[74] In the course of the appeal hearing on September 24, 2008, SGI agreed that SGI would pay her full CGB from November 12, 2005 until January 20, 2008 with interest thereon from January 20, 2008. The matter of interest from November 12, 2005 to January 19, 2008 was left for the Commission's decision. Aside from interest, therefore, the appeal respecting CGB is resolved.

F. Interest on Care Giver Benefits

[75] Primarily for the reasons given in respect of interest on IRB, we conclude that the Appellant should be paid interest from and after November 12, 2005 to date of payment notwithstanding that her own actions contributed to SGI's delay in determining her eligibility for the benefit. In this regard, we have also considered the fact that SGI did not raise the matter of CGB or attempt to acquire information in support of same until at least July 2006; this period of delay, therefore, does not lie with the Appellant.

[76] Such interest shall be payable on the retroactive payment of CGB, including both the initial payment of reduced benefits and the later payment raising the entitlement to full benefits.

F. Mediation Fee

[77] In his appeal, the Appellant's husband sought a refund of the monies he had paid for mediation that was held in February 2007. The Commission noted that this claim, in so far as it related to mediation of the Appellant's claims, needed to be included in her appeal. Therefore, although this Appellant did not directly request that her mediation fee be refunded and did not, therefore, appeal any decision refusing to give the refund, it was

agreed that this matter would be considered by the Commission in the course of this Appellant's appeal.

[78] Section 84 of *The Personal Injury Benefits Regulations* provides that an appellant who requests mediation will pay the insurer a fee. However, SGI's decision letters state that if an insured elects to mediate a dispute, SGI will cover the cost of the mediation. The Appellant suggests that if SGI is to cover the costs of the mediation, she should not be required to pay a fee.

[79] In fact, the Appellant is incorrect but we understand the confusion. Mediation under the Act costs a great deal more than the fee, particularly in regard to the mediator's fees. The words in the letter are intended to covey that SGI will pay all costs relating to the mediation *other than* the regulated fee. We suggest that SGI revise the wording in its decision letters to clarify this.

[80] As to the Appellant's specific claim, the regulations require an Appellant to pay a fee upon requesting mediation and there is no provision allowing a refund of that fee. For this reason, the Appellant is not entitled to refund of the fee she paid for mediation.

G. <u>Prescription and Over-the-Counter Medications</u>

[81] In circumstances similar to those recounted above regarding the Appellant's mediation fee, the Appellant's husband included in his appeal claims for miscellaneous expenses including some relating to this appellant's claim. The Commission noted that these expenses needed to be included in her appeal. Therefore, although this Appellant did not directly request coverage for these expenses and did not, therefore, appeal any decision refusing to provide coverage, it was agreed that these matters would be considered by the Commission in the course of this Appellant's appeal.

[82] The expenses claimed were for prescription and over-the-counter medications that the Appellant said were prescribed or recommended for treatment of injuries that she suffered in the vehicle accident. In the course of the appeal hearing and by letter dated February 28, 2008, SGI agreed to and provided a cheque reimbursing the Appellant's claimed expenses for medications. The appeal in this regard is therefore resolved.

H. <u>Interest on Reimbursed Miscellaneous Expenses</u>

[83] This Appellant did appeal SGI's decision to pay her medical expenses without the payment of interest thereon. SGI did not offer interest and did not address the question of whether or why interest might be denied. We presume, again, that SGI takes the position that it was the Appellant's refusal to provide or allow SGI to acquire information in support of her claims that is the basis for SGI's position.

[84] For reasons discussed in respect of IRB and CGB, we have concluded that interest should be paid on these amounts, from and after August 22, 2007 when SGI first declined to reimburse these expenses until date of payment.

I. <u>Rehabilitation Benefits</u>

[85] Finally, the Appellant claimed that she had been denied benefits for chiropractic, massage and physiotherapy care that had been recommended for her rehabilitation. However, we have been unable to locate any document whereby the Appellant appealed SGI's decision in this respect.

[86] The jurisdictional matter is perhaps moot, however, as SGI agreed, by letter dated February 28, 2008, to fund treatment and arrange an assessment as to appropriate on-going treatment. As the Appellant did not submit that specific treatment had been obtained at her expense, there is no evidence that she is entitled to reimbursement of any related expense in this regard.

[87] It is apparent that the Appellant was not enthusiastic about rehabilitative treatment in the course of her recovery and she is encouraged to participate diligently in any treatment hereafter recommended. She needs to be mindful that benefits for rehabilitative treatment are conditioned on the good faith effort of the insured and benefits can be terminated, even if further rehabilitation is required, if the injured person does not attend as scheduled and offer a real effort.

CONCLUSION

[88] The matter of the Appellant's entitlement to Income Replacement Benefit and the amount thereof has been resolved.

[89] The Appellant is entitled to interest on the amount of the retroactive payment for Income Replacement Benefits and this interest had already been paid.

[90] The matters of dependence, level of dependence and duration of dependence assessed by SGI in respect of Living Assistance Benefits are confirmed.

[91] For the period from November 12, 2005 until August 31, 2007, the amount calculated as Living Assistance Benefits for the Appellant shall be adjusted to provide full payment to the level of her disability, irrespective of the percentage of her participation in the activity prior to the accident in accordance with this Commission's decision in *O.H.* v. *SGI* and in accordance with SGI's concession in this regard.

[92] For the period commencing September 1, 2007, our decision as to whether the Appellant's entitlement to Living Assistance Benefits for specific activities will be adjusted by the percentage of her participation in those activities prior to the vehicle accident is reserved.

[93] The Appellant is entitled to and will be paid interest on any and all amounts paid retroactively for Living Assistance Benefits.

[94] The matter of the Appellant's entitlement to non-reduced Care Giver Benefits, the duration of entitlement and the amount thereof has been resolved.

[95] The Appellant is entitled to and will be paid interest on any and all amounts paid retroactively for Care Giver Benefits.

[96] SGI's decision refusing to refund the monies the Appellant paid as a mediation fee is upheld.

[97] The appeal respecting reimbursement of expenses for prescription and over-the-counter medications is resolved.

[98] The Appellant is entitled to and will be paid interest on any and all amounts paid in respect of prescription and over-the-counter medications, the calculation of such interest to commence on August 22, 2007.

[99] The Appellant's claim for reimbursement of expenses relating to past massage, chiropractic and physiotherapy care is denied.

COSTS

[100] Because the Appellant has been partially successful in her appeal, she shall have her *reasonable* costs and expenses reimbursed, to the regulated maximum. These expenses will include any sums for legal counsel that are documented and shown to have been expended for purposes of this appeal only. The Appellant is also entitled to have her appeal fee refunded.

[101] The Appellant is additionally entitled to be reimbursed the cost of Dr. Patel's medical report prepared for the hearing, pursuant to the provisions of section 169 of the Act.

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

Joy Dobko, Chair

Conrad Hnatiuk, Commission Member

Barbara Tomkins, Commission Member