

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *T.R. v. Saskatchewan Government Insurance*,
2004 SKAIA 027

Date: 20040629

File: 061 of 2003

BETWEEN

T.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

T.R., Applicant

Jocelyn Clement and John Schmidt, for the Respondent

***Before:* Beverly Cleveland, 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 6, 2003

DECISION

FACTS

[1] The Appellant, T.R., appeals the decision of SGI dated April 24, 2003 to deduct his children's portion of a Canada Pension Plan disability benefit from his income replacement benefit.

[2] The Appellant was injured in a hit-and-run motor vehicle accident on April 8, 1998 in Regina, Saskatchewan. He suffered a C6 fracture that went undiagnosed for more than a year. In 1999 he underwent a C5, 6 discectomy and fusion in Regina but experienced subsequent complications. In 2003 the Appellant underwent a further discectomy and fusion at C9, 10 and 11 in Calgary, Alberta.

[3] Prior to the accident the Appellant was employed for 15 years as a journeyman electrician with [employer] at [a potash plant] near [town]. He was unable to return to work as an electrician and applied for Canada Pension Plan disability benefits. In April 2001 he received a lump sum payment as follows:

Year	Amount
2000 (April – December)	\$ 8,190.90
2001 (January – March)	<u>2,798.55</u>
Sub-total:	\$ 10,989.45

Disabled Contributor's Children Benefits

2000 (April – December)	\$ 3,133.26
2001 (January – March)	<u>1,070.52</u>
Sub-total	\$ 4,203.78
 TOTAL:	 <u><u>\$ 15,193.23</u></u>

[4] The Appellant continues to receive a monthly CPP disability benefit¹ of \$976.21 and \$186.71 for each of his children, Child 2 and Child 1. The benefit is received as a single cheque

¹ 2001 \$932.85 (Child 1), \$178.42 (Child 2), \$178.42 (Child 3); 2002 \$960.84 (Child 1), \$183.77 (Child 2), \$183.77 (Child 3).

in The Appellant's name however the cheque stub itemizes the amount payable to each beneficiary. He receives a T4A(P) for his portion of the benefit and pays income tax on that amount. The children's benefit is not taxable.

[5] The Appellant also receives a monthly income replacement benefit² from SGI that is reduced by the amount of the monthly CPP benefit *including* his children's portion. SGI demanded payment of the total lump sum payment of \$15,193.23. The Appellant withheld the children's benefit of \$4,203.78 on his lawyer's advice pending settlement of the matter but SGI threatened to terminate his benefits. The Appellant paid the total CPP disability benefit to SGI.

[6] John Schmidt for SGI says the comment that he would be cut-off benefits was unfortunate. Schmidt says however that SGI is required to reduce the Appellant's income replacement benefit by any CPP benefits he receives pursuant to section 207 of *The Automobile Accident Insurance Act*.³ It reads:

“**207** If, as a result of an accident, a victim is entitled to an income replacement benefit and a disability benefit pursuant to the *Canada Pension Plan* or any similar program in a jurisdiction outside Saskatchewan, the insurer shall reduce the income replacement benefit by *the amount of the disability benefit payable to the victim*.” (emphasis added)

THE APPELLANT'S ARGUMENT

[7] The Appellant submits he is entitled to his full income replacement benefit without having his children's CPP disability benefits deducted. He says section 207 of *The Automobile Accident Insurance Act* states that only benefits payable to the **victim** shall be deducted. Victim is defined:⁴

“**victim**’ means a person who suffers bodily injury caused by an automobile in an accident;”...

[8] He also submits that section 44(1)(e) of the *Canada Pension Plan Act*⁵ provides children's CPP disability benefits are benefits payable to the child, not the parent. Further he

² The IRB is non-taxable.

³ c. A-35 as amended prior to 2002 (the “old” *Act*).

⁴ C21; Part VIII **Personal Injury Benefits** DIVISION 1 s. 100(1)(x) of the “old” *Act*.

⁵ C13 –C18; R.S., c. C-5.

submits that section 75 states that benefits are payable to the person having custody and control of the child. Those sections provide in part:

“44.(1) Subject to this Part,....

- (e) a disabled contributor’s child’s benefit shall be paid to each child of a disabled contributor who
 - (i) has made contributions for not less than the minimum qualifying period.
 - (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor’s application for a disability pension was actually received, or
 - (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 555 or 55.1 had not been made;”

“75. Where a disabled contributor’s child’s benefit is payable to a child of a disabled contributor or an orphan’s benefit is payable to an orphan of a contributor, payment thereof shall, if the child or orphan has not reached eighteen years of age, be made to the person or agency having custody and control of the child or orphan, or, where there is no person or agency having custody and control of the child or orphan, to such person or agency as the Minister may direct, and for the purposes of this Part,

- (a) the contributor, in relation to a disabled contributor’s child, except where the child is living apart from the contributor, ...”

[9] The Appellant testified that “[D]” at the CPP office advised him if SGI requested payment of his disability benefit be made directly to it, CPP would only submit his portion and payment of the children’s benefits would be paid to the Appellant.

[10] The Appellant argues the legislation is clear that the CPP children’s disability benefit is payable to the children and should not be deducted from his income replacement benefit.

SGI’S ARGUMENT

[11] The Appellant is entitled to an income replacement benefit as a result of his injuries. An income benefit is calculated as outlined in sections 135 – 138 of the *Act*. Those sections are attached as Schedule “A”.

[12] The terms that apply are **Gross Yearly Employment Income**, which means the gross yearly employment income of the insured customer's employment that SGI is required to use or that SGI determines as is required by Division 4 of the *Act*. The second term is **Maximum Insurable Earnings**, which means the maximum yearly earnings that are payable under the *Act*. The final term is **Net Income**, which means the net income as calculated under section 137.

[13] Before a customer can be advised what amount of IRB they will receive, the gross yearly employment income has to be determined as the customer is entitled to 90% of the net income calculated by SGI. Section 136(1) provides the authority for the income benefit payable at 90% of the net income. Section 136(2) goes on to state that the benefit will not be less than minimum wage. The section also states there is a seven day waiting period before the customer can receive an income benefit.

[14] How does SGI determine net income? Section 136 says the net income is determined according to the following formula. **NI-GYEI-D**. "NI" is the amount of the injured customer's net income. "GYEI" is the amount of the gross yearly employment income of the insured customer. "D" is the amount of income tax the customer would have had to pay on the income earned, as well as Employment Insurance premiums and contributions to the Canada Pension Plan. Pursuant to section 137(2)(b) SGI must take into account the number of dependents of the injured customer when completing the calculation.

[15] Section 30 of *The Personal Injury Benefit Regulations*⁶ ("PIBR") must also be considered in determining net income. Section 30(1) outlines that in arriving at NI, the gross yearly employment income is reduced by income tax, EI premiums and CPP premiums. Subclause (2) outlines the customer's taxable income is the GYEI less any amounts allowable under sections of the *Income Tax Act* (Canada) and any amount that would have been exempt under sections of that Act. Subclause (3) outlines the income tax payable by the customer is the taxable income of the customer calculated in accordance with the *Income Tax Act* (Canada) and (Saskatchewan) with allowable credits. The credits are as set out in the formula in the *Income Tax Act* regarding

⁶ c. A-35, Reg. 3.

EI premiums and CPP contributions. Section 30(3)(b) requires the credits for a dependent are to be considered and no reduction is to apply to an income they earn.

[16] SGI's position is *The Automobile Accident Insurance Act* requires the income replacement benefit paid to an injured customer shall be reduced by the amount of the CPP disability benefit that is paid to the injured customer. The income replacement benefit paid by SGI changes when the customer's net income is no longer calculated using the dependent, e.g. the child reaches 18 years of age, the credit provided in the calculation of net income changes and the amount of the net income decreases. At the time the child would receive the CPP benefit directly and not the customer, SGI would reduce the amount of the CPP benefit by the same amount that is paid directly to the child and is no longer payable to the customer.

[17] SGI agrees that the Appellant is a "victim" as defined in the *Act* otherwise he would not be receiving an income replacement benefit. He is also receiving a CPP disability benefit. The CPP disability benefit is payable only to him and while it includes a benefit on behalf of his children, the payment is still payable to the Appellant and will continue to be paid to him until the children reach the age of 18 years when they will receive the benefit directly. It is submitted on behalf of SGI that section 207 is clear in stating the income replacement benefit is reduced by the amount paid to the Appellant.

[18] It is also submitted that if CPP had paid the \$10,989.89 amount directly to it, SGI would still look to the Appellant for the children's benefit of \$4,203.78. It was agreed however if the children did not have their primary residence with him, SGI would not seek the children's benefit and his income replacement benefit would be recalculated accordingly.

POST-HEARING INFORMATION

[19] At the conclusion of the hearing, the Commission requested SGI calculate the Appellant's income replacement benefit with and without dependents. As well, it asked for SGI's position on the Appellant having to pay income tax on his portion of the CPP disability benefit.

[20] By letter dated October 10, 2003 to the Commission and copied to the Appellant, SGI provided the following calculations of his income replacement benefit. Quote 1 is one dependent and quote 2 is no dependents:

	QUOTE 1	QUOTE 2
Gross Income	\$ 51,368.60	\$ 51,368.60
Income tax	10,310.69	10,585.69
CPP	1,801.80	1,801.80
EI	<u>819.00</u>	<u>819.00</u>
Total deductions	\$ 12,931.49	\$ 13,206.49
= Net Income	\$ 38,437.11	\$ 38,162.11
/weeks = weekly income	\$ 739.18	\$ 733.89
90%	\$ 665.52	\$ 660.50
Bi-weekly	\$ 1,330.52	\$ 1,321.00
-75% reduced income	0.00	0.00
- Adjustment 1*	\$ 622.91	\$ 622.91
= Ongoing bi-weekly IRB	\$ 707.61	\$ 698.09
+ Adjustment 2	0.00	0.00
= Final IRB	\$ 707.61	\$ 698.09

*Version continues to provide a reduction for CPP benefits received of \$622.91 biweekly.

[21] SGI also advised SGI will consider the income tax paid by the Appellant on his CPP disability benefit and directed that he provide his tax returns to his Injury Representative for review.

CONCLUSION

[22] I agree with the Appellant's position concerning the deduction of his children's CPP disability benefits from his income replacement benefit. I do not agree with SGI's interpretation of the phrase "payable to a victim" in section 207 of the *Act* as including the children's benefits

simply because they are received by the Appellant as custodial parent. Mr. Justice Ball in *Lehrer v. Saskatchewan Government Insurance*⁷ wrote:

“Statutory language should be interpreted using the “modern contextual approach” described by Driedger on the Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994) and affirmed by L’Heureux-Dube J. in *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 at 554. Driedger at p. 131 states:

‘... There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.’

Driedger expands upon the application of this approach by enunciating the following propositions:

- It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
- Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. The (sic) must take into account all relevant indicators or legislative meaning.
- In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, must be plausible, that is, it must be one the words are reasonably capable of bearing.”

[23] In my view section 207 is intended to prevent “double recovery” of benefits that may be payable by other payers. SGI submits it is a last payer and this is consistent with the that interpretation. But what is meant by “payable to a victim”? I find the plain, ordinary meaning of those words, in the context of “double recovery”, to be the amount received by the Appellant alone. SGI agrees that the Appellant is a “victim”. If the phrase was intended to include dependents I would have expected to find words such as “payable to a victim *and a victim’s dependents*”.

[24] I am mindful of Mr. Justice Baynton’s decision as it relates in part to section 207 in *Miller v. Saskatchewan Government Insurance*.⁸ He says:

⁷ QB02030; 2002 SKQB 3 at paragraphs 6 and 7.

“I agree with the position of the respondent (SGI) as to the manner of calculating the appellant’s income replacement benefits, including the calculation of her gross and net income and the deduction of her Canada Pension Plan benefits. The provisions of the AAIA and the PIBR are clear in this respect even if they appear to be somewhat unfair. I make this observation because the respondent in effect receives the benefit of the appellant’s Canada Pension disability pension without having to reimburse her for her Canada Pension contributions premiums which are in turn deducted in the calculation of the amount of the AAIA benefits payable to her in arriving at her net income...”

[25] The *Miller* case though did not deal with deduction of children’s disability benefit and is thus distinguished.

[26] I agree with SGI’s submission that section 137(2)(b) compels it to take into consideration the number of dependents of the victim when calculating net income. It is a qualifying subsection where “D” is the amount deducted for federal and provincial income tax, EI premiums and CPP contributions. Similarly, section 30(3)(b) of the PIBR identifies the permissible credits and provides there shall be no deduction for income earned by a dependent.

[27] SGI submits in calculating the Appellant’s income replacement benefit, he is credited for any dependent under the age of 18, thus reducing the amount of income tax deducted, which provides a greater income benefit. Therefore, the income benefit⁹ paid to him is reduced by the amount of the benefit paid by CPP including the children’s portion. I disagree with that conclusion and find nothing in the legislation to support it.

[28] Sections 137(2)(b) of the *Act* and 30(3)(b) of the PIBR identify how net income is determined when calculating an income replacement benefit and that SGI shall take into consider the number of dependents when calculating “D”. The formula for calculating an income replacement benefit is set out in section 137(1) – $NI + GYEI - D$. An insured with dependents pays less income tax and receives a greater income replacement benefit than an insured with no dependents and earning the same income. The other permissible deductions are EI premiums and CPP contributions both of which are based on gross income and are not influenced by dependents. There is no reference to deduction of CPP benefits. I do not agree that “shall take

⁸ QB01312; 2001 SKQB 335 at paragraph 24.

⁹ The written notes say “the CPP benefit paid to him is reduced by the amount of the benefit paid by CPP.” It is assumed this was a typing error.

into account the number of dependents of the victim at the time of the calculation” to mean the children’s disability benefit portion shall be deducted from an income replacement benefit.

[29] The quotes provided by SGI confirm the number of dependents influences the formula for calculating income replacement income ($NI = GYEI - D$) by the amount of income tax deducted only. It does not support a conclusion that SGI shall deduct the children’s CPP benefit from the insured’s income replacement benefit. [It is noted that both versions are incorrectly reduced by the CPP benefit (\$622.91 biweekly) for two dependents.]

[30] Lastly, I am also influenced by the wording in the *Canada Pension Plan Act*¹⁰ that says a disabled contributor’s child’s benefit shall be paid to each child. That *Act* says the child’s benefit will be paid to the contributor except where the child does not live with the contributor. The cheque stubs identify the beneficiaries separately and the benefit paid to each. I am satisfied the CPP benefit paid to the child belongs to the child and the Appellant receives it only on their behalf and not in his personal capacity.

[31] For the above reasons, SGI’s decision to deduct the children’s CPP benefit from the Appellant’s income replacement benefit is set aside. SGI is directed to return the children’s lump sum payment of \$4,203.78 and retroactively calculate the Appellant’s income replacement benefit, taking into consideration two dependents, and reducing it for his CPP disability benefit only to the date it was first adjusted.

[32] Pursuant to section 193(9) of the new *Act*, the Commission has authority to award interest on the amounts not paid from the date when it should have been paid until the date of this decision at the rate prescribed under section 210 of the new *Act* and section 102 of the PIBR in accordance with *The Pre-judgement Interest Act*. Interest on the difference between his present income replacement benefit and the recalculated benefit shall be paid from the date it was first adjusted for CPP disability benefits to the date of this decision.

[33] As the Appellant has been successful in his appeal, he is entitled to his application fee and the expense of his attendance at the hearing.

Dated at Regina, Saskatchewan, on June 29, 2004.

Beverly Cleveland, Commission Member

¹⁰ s. 44 (1)(C)(e).

SCHEDULE “A”

The Automobile Accident Insurance Act, c. A-35 [as amended prior to 2002 (the “old” Act)]:

Interpretation of sections 135 to 138

135 In this section and in sections 136 to 138:

- (a) “**gross yearly employment income**”, with respect to a victim, means the gross yearly employment income of the victim’s employment that the insurer is required to use or that the insurer determines pursuant to this Division;
- (b) “**maximum yearly insurable earnings**” means the maximum yearly insurable earnings calculated pursuant to section 138;
- (c) “**net income**” means net income calculated pursuant to section 137.

Amount of income replacement benefit

136(1) Subject to the other provisions of this Division, the amount of an income replacement benefit that a victim is entitled to pursuant to this Division is equal to 90% of the victim’s net income, calculated on a yearly basis.

(2) Subject to sections 139 and 140, the income replacement benefit of a full-time earner or of a victim for whom the insurer determines an employment pursuant to section 131, 132 or 133 is to be not less than the amount of an income replacement benefit calculated on the basis of a gross yearly employment income determined on the basis of:

- (a) the minimum wage established pursuant to *The Labour Standards Act*; and
- (b) except in the case of a part-time employment, the number of hours of work per week set out in subsection 6(1) of *The Labour Standards Act*.

(3) Notwithstanding any other provision of this Division, no claimant is entitled to an income replacement benefit for the first seven days from the date of the accident.

(4) Subsection (3) does not apply to an income replacement benefit payable pursuant to section 143.

Calculation of net income

137(1) A victim’s net income is equal to the amount calculated in accordance with the following formula:

$$NI = GYEI - D$$

where:

NI is the victim's net income

GYEI is the lesser of the victim's gross yearly employment income and the maximum yearly insurable earnings; and

D is an amount calculated by the insurer in accordance with this section and the regulations for income tax pursuant to *The Income Tax Act* and the *Income Tax Act* (Canada), premiums pursuant to the *Unemployment Insurance Act* (Canada) and contributions pursuant to the *Canada Pension Plan*.

- (2) For the purposes of calculating D pursuant to subsection (1):
- (a) the insurer shall use the Acts mentioned in subsection (1) as they exist on December 31 of the year before the year for which the insurer is making the calculations; and
- (b) the insurer shall take into account the number of dependents of the victim at the time of the calculation.
- (3) For the purpose of determining net income pursuant to this section, the gross yearly employment income of a victim includes any benefits pursuant to the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada), or any other prescribed benefit, to which the victim would have been entitled at the time of the accident.

Maximum yearly insurable earnings

138(1) The amount of the maximum yearly insurable earnings for 1995 is \$50,000.

- (2) The amount of the maximum yearly insurable earnings for 1996 and each year after 1996 is the amount calculated in accordance with the following formula:

$$\text{MYIE} = \$50,000 \times \frac{\text{IAWY}}{\text{IAW95}}$$

where:

MYIE is the maximum yearly insurable earnings for the year;

IAWY is the average of the average industrial average wage for the 12 months before July 1 of the year before the year for which the maximum yearly insurable earnings are being calculated; and

IAW95 is the average of the industrial average wage for the 12 months before July 1, 1994.

(3) For the purposes of this section, the insurer shall use the most recent data available from Statistics Canada on October 1 of the year before the year for which the maximum yearly insurable earnings are being calculated.

The Personal Injury Benefits Regulations, c. A-35, Reg. 3:

30(3) For the purposes of these regulations, the income tax payable by a victim is the tax payable on the taxable income of the victim calculated in accordance with the *Income Tax Act* (Canada) and *The Income Tax Act* (Saskatchewan), allowing only the following credits:...

(b) the credits allowed in the following sections of the *Income Tax Act* (Canada), without reducing the credit or deduction respecting the income of a dependant mentioned in clause 137(2)(b) of the Act:

(i) subsections 118(1) and (2);

(ii) section 118.3;

(iii) section 118.8 with respect to the credit for the mental or physical impairment of a spouse;