

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *E.M. v. Saskatchewan Government Insurance,*
2005 SKAIA 002
Date: 20050104
File: 007 of 2004

BETWEEN

E.M., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
E.M., Applicant
Darrell Mack, for the Respondent

Before: **Joy Dobko, Chair**
Beverly Cleveland, Commission Member
Darleen Topp, 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 Saskatoon, Saskatchewan
July 20, 2004

DECISION

[1] This is an appeal by E.M., the Appellant, of a decision made by Saskatchewan Government Insurance (“SGI”) dated October 22, 2003 with respect to the termination of his income replacement benefits. SGI relied upon Section 129(1)(e) of *The Automobile Accident Insurance Act*¹ (the “Act”).

FACTS:

[2] The Appellant was injured in a motor vehicle accident (the “accident”) on March 22, 1996 in Saskatoon, Saskatchewan. He suffered soft tissue injuries to his neck and upper back between his shoulders. He completed his Application for Benefits on March 27, 1996.

[3] At the time of the accident, the Appellant was working full-time as a chef at [employer one] and part-time at [employer two]. The Customer Services Manager at employer one completed an Employer’s Verification of Earnings on March 28, 1996. He reported the Appellant’s prior annual income to be [amount] and his present hourly rate to be [amount] with a regular work cycle of 37.5 hours over a 5 day period. The Payroll Clerk at employer two completed an Employer’s Verification of Earnings on March 29, 1996. She reported the Appellant’s prior annual income to be [amount] and his present hourly rate to be [amount] with a regular work cycle of 15 hours over a 3 day period.

[4] On April 2, 1996, Dr. Melenchuk completed a Practitioner’s Report and diagnosed a WAD II with headaches. He expected the symptoms to resolve within six to twelve weeks. He referred the Appellant to massage therapy.

[5] On June 3, 1996, SGI wrote to the Appellant and advised him that he would receive a bi-weekly income replacement benefit of \$205.70. The income replacement benefit was calculated using a gross yearly employment income of [amount], which represented the Appellant’s loss of income from employer two. Although the decision letter from SGI referred to the Appellant as a part-time earner, the calculation sheet clearly placed him in the earner category of full-time. the

¹ *Automobile Accident Insurance Act* RSS 1978, c. A-35 (1995)

Appellant continued to work his full-time employment at employer one and therefore an income replacement benefit was not paid for any lost income at employer one.

[6] Dr. Melenchuk re-examined the Appellant on September 6, 1996 and provided another Practitioner's Report. Dr. Melenchuk reported that the Appellant still had a WAD II but had significantly improved. The Appellant reported that he still experienced headaches 2-3 times per week but that he was almost back to full-time employment at both jobs.

[7] The Appellant attended a Secondary Assessment at FIT for Active Living on December 18 and 19, 1996. The Assessment Team diagnosed the Appellant to be suffering from mild resolving cervical sprain with cervicogenic headaches and persistent upper back muscular tenderness and tightness. The recommendations for treatment were:

1. That the client be referred to a secondary centre. Components of the program to include:
 - Biomechanical treatment to address trigger points within suboccipital muscles
 - Regional conditioning of the neck and abdomen, postural re-education, strengthening postural muscles
 - Education re: tissue healing and hurt vs. harm
 - Aerobic conditioning
 - Consultation with an occupational therapist to set up return to work so that he can move completely into his job at [employer two].
2. Dr. Levesque will work with the secondary centre especially in addressing the trigger points.
3. [The Appellant] was given the information necessary to purchase an audio tape for progressive muscle relaxation. If this provides insufficient help in pain relief it is suggested he see a psychologist for about five sessions to learn pain management techniques.
4. [The Appellant] to continue with Ricco's until he begins treatment at the secondary centre.
5. FIT will contact [the Appellant] and the secondary centre in three months to ensure progress is satisfactory.

[8] The Appellant attended at S.T.A.R. Rehab for his secondary rehabilitation program. The Final Assessment Report dated February 3, 1997 indicated that the Appellant did very well with his rehabilitation program. The Assessment Team reported that the Appellant felt his condition had plateaued at about 90-95% improvement. They recommended that the Appellant attend Saskatoon Musculoskeletal Rehabilitation Centre ("SMRC") for passive therapy in the future. The Appellant started attending SMRC on February 13, 1997. The components of his treatment program included regional conditioning of the neck, abdomen and postural muscles, postural re-education, education regarding home strengthening and strengthening exercises, formal education regarding tissue healing, hurt vs. harm and specific ergonomics regarding his

occupation activities at employer two. Mr. Thompson, the physiotherapist treating the Appellant, reported that the Appellant's symptoms continued to be of a mild nature.

[9] On April 30, 1997, SMRC reported that the Appellant had completed a modified functional restorative program over an eight week period. The Appellant presented with full range of cervical motion. Mr. Thompson reported that he saw no reason why the Appellant should not be able to return to his full employer two activities by July 1997 when the new schedule would come out.

[10] On June 3, 1997 SGI completed a review of the calculation of income replacement benefits being paid to the Appellant. The Appellant was seeking an increase in his income replacement benefits because of pay increases he received at his employment with employer one. In their Application for Review, SGI clearly defined the Appellant as a full-time earner with a part-time job. SGI advised the Appellant that the legislation only provided for a calculation based on the greater of one's current pay period or one's salary in the twelve month's prior to the date of the accident. SGI stated that the legislation did not have any provisions for increasing the gross yearly employment income after the accident for increases in pay, however, it provided for a consumer price index increase on an annual basis where the disability extended beyond a year. This increase would be done on the anniversary of the accident.

[11] On July 17, 1997, Dr. Melenchuk re-examined the Appellant with respect to his injuries suffered in the accident. Dr. Melenchuk diagnosed WAD I. The Appellant reported headaches and neck pain especially when cutting vegetables and when [action] at employer two. The Appellant reported to be 95% on a good day and 85% on a bad day.

[12] Dr. Levesque provided chiropractic care to the Appellant after the accident on an as needed basis to restore spinal function. In a Practitioner's Report dated September 22, 1997, Dr. Levesque diagnosed the Appellant to be suffering from a WAD II with cervicogenic headaches and "recurrent upper neck and shoulder pain usually occurring when working bent over or in one position for a long time". Similarly, Dr. Melenchuk reported on September 26, 1997, that the Appellant was still experiencing difficulty with [action] at employer two. He reported the Appellant to be suffering from neck strain and upper back strain and diagnosed a WAD I. Dr.

Melenchuk reported that the Appellant was only working one day a week at employer two instead of the three days that he had worked prior to the accident.

[13] The Appellant attended to Dr. Melenchuk again on November 13, 1998. The Appellant reported problems with upper neck and upper back. He reported difficulties with driving a car and [action] at employer two. Dr. Melenchuk noted that he had returned to working at employer two for two short shifts per week. Dr. Melenchuk diagnosed the Appellant to be suffering from a WAD I.

[14] On March 22, 2002, the Appellant's income replacement benefit was re-calculated to account for the two shifts per week that the Appellant was working. His bi-weekly income replacement benefit was calculated to be \$148.51. This was done in accordance with Section 140 of the *Act* and took into account 75% of his net earnings from employer two. The Appellant testified that his income replacement benefit would fluctuate depending on the number of hours he would work at employer two.

[15] On April 5, 2002, the Appellant attended upon Dr. Levesque for chiropractic treatment to his neck and upper back. Dr. Levesque reported that the symptoms the Appellant reported were the same as in the past but had cleared after three treatments. Dr. Levesque opined that the Appellant would be able to function as a [part-time position] again at that time.

[16] SGI retained the services of Occupational Therapist, Ms. Michelle Wimpey, to evaluate the Appellant's work progress and ability to perform his job duties as a [part-time position]. On July 17, 2002, Ms. Wimpey reported to SGI that the employer and the Appellant were willing to try a graduated increase in hours. She also reported that the positions and movements used by the [part-time position] were fairly standardized in the industry and could not be modified. She recommended a work program which would commence with two 6 hour shifts per week and increase to the Appellant's pre-accident level of shifts per week. Ms. Wimpey continued to monitor the Appellant throughout his graduated increase in hours at employer two. The Appellant continued to report discomfort with [action] at employer two. On October 15, 2002, Ms. Wimpey reported that the Appellant had been able to handle three shifts per week at employer two. On October 28, 2002, Ms. Wimpey reported that the Appellant was working

three shifts per week for the last five weeks; however, the Appellant reported a significant increase in his symptoms. Ms. Wimpey reported that given the number of chiropractic treatments and objective findings and increased use of pain relievers, she recommended that he decrease his shifts to two per week. On November 13, 2002, the Appellant reported that the decrease in shifts had resulted in a decrease of his symptoms.

[17] On November 29, 2002, Ms. Wimpey attended to employer two again to assess the Appellant's ability to resume working three shifts per week at employer two. Ms. Wimpey reported that the static positions and the repetitive motions continued to be a barrier and repeatedly stressed the soft tissue area in the Appellant's neck and upper back. In her opinion, the Appellant would be able to manage two shifts per week but would not be able to achieve the goal of returning to three shifts per week.

[18] The Appellant obtained a new job with employer three in or around June 2002. His combined reported income for 2002 was [amount]. He earned [amount] from employer three and [amount] from employer two.

[19] On January 7 and 8, 2003, the Appellant attended a two day assessment at the FIT for Active Living Program. FIT assessed the Appellant to be at maximum medical improvement and found that he was very close to returning to his pre-accident level of function. The Appellant reported a return to 90% of his original level of functioning.

[20] On October 22, 2003, SGI terminated the Appellant's income replacement benefits pursuant to Section 129(1)(e) of *The Automobile Accident Insurance Act* on the basis that the Appellant's current earnings exceeded his earnings at the time of the motor vehicle accident.

LAW AND ANALYSIS

[21] 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.

[22] The Commission determined in *R.C.*² that its discretion under section 193(7) must be exercised in a judicial manner. The discretion will be exercised in favour of the Applicant only if it is demonstrated that the decision of SGI was erroneous; or based on erroneous assumptions; or at the very least, the decision was unreasonable.³

[23] The issue of whether the Appellant was substantially able to complete his employment duties at employer two was not the basis upon which SGI relied in terminating his benefits on October 22, 2003 and is therefore not the subject of this Appeal. The only basis for termination outlined in the October 22, 2003 decision letter was the application of Section 129(1)(e) of *The Automobile Accident Insurance Act*.

[24] The issue in dispute is the interpretation of Section 129(1)(e) of the *Act* which states:

129(1) Notwithstanding any other provision of this Division, a victim ceases to be entitled to an income replacement benefit when any of the following occurs:

...

- (e) the victim holds an employment from which the gross yearly employment income is equal to or greater than the gross yearly employment income on which the victim's income replacement benefit is calculated;

[25] SGI submitted that when the Appellant's combined gross yearly employment income from both employer three and employer two exceeded his combined gross yearly employment income from employer one and employer two at the time of the accident, then the Appellant's entitlement to an income replacement benefit would cease under section 129(1)(e) of the *Act*.

[26] The Appellant submitted that his income replacement benefit had always been calculated based upon his part-time employment at employer two only, and therefore, SGI is not entitled to rely on his combined gross yearly employment income, or more specifically the increase in his full-time employment income with employer three, to terminate his income replacement benefits

² *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

³ *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB 97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB 98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB 98113.

received for his lost wages at employer two. The Appellant further submitted that SGI has classified him as both a full-time earner and a part-time earner whichever was to their benefit.

[27] On June 3, 1997, SGI made it clear in their Application for Review, that the Appellant was classified as a full-time earner with a part-time job. We recognize that the original decision letter of SGI dated June 3, 1996 was written in error by the Personal Injury Representative, however, this is the only reference to the Appellant being assessed as a part-time earner. The Appellant asked to have his income replacement benefit reviewed to take into account salary increases he had received at employer one. This is further support for the fact that the Appellant considered himself a full-time earner under the *Act*. In our opinion, there is more evidence showing that SGI placed him in the Earner Category of full-time earner than that of a part-time earner. Furthermore, there is no evidence that the Appellant went through a 180-day determination as would be the case with a part-time earner.⁴

[28] The Appellant also fits into the definition of full-time employment as found in Section 14 of the *Personal Injury Benefits Regulations* (the “*Regulations*”), which states:

14 A person hold regular full-time employment on a full-time basis where the person:

(a) is employed at one employment for not less than 28 hours, not including overtime hours, in each week of the year preceding the date of the accident; or

(b) is employed at one employment:

(i) for not less than 28 hours per week, not including overtime hours; and

(ii) for a total of not less than two years, for successive or intermittent periods of not less than 32 weeks and with intervals of not more than 16 weeks between those periods.

[29] The Appellant also submitted in written argument that his gross yearly employment income was calculated in accordance with Section 112(2)(c). This clearly supports SGI’s written submissions that the Appellant was classified as a full-time earner with a part-time job pursuant to Section 112(1)(b).

[30] Section 112 addresses the entitlement of a full-time earner to income replacement benefits. Section 112 reads as follows:

⁴ *Automobile Accident Insurance Act* RSS 1978, c. A-35, Section 115.

112(1) A full-time earner is entitled to an income replacement benefit if, as a result of an accident, the full-time earner:

- (a) is unable to continue the full-time employment he or she held at the time of the accident;
- (b) is unable to continue any other employment that he or she held at the time of the accident in addition to the full-time employment mentioned in clause (a); or**
- (c) is deprived of a benefit pursuant to the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada), or any other prescribed benefit, to which he or she was entitled at the time of the accident.

(2) The insurer shall calculate the income replacement benefit pursuant to clauses (1)(a) and (b) on the basis of:

- (a) the gross yearly employment income the full-time earner earned from his or her employment, if the full-time earner holds employment in the employ of another at the time of the accident;
- (b) the greater of:
 - (i) the gross yearly employment income determined in accordance with the regulations for an employment of the same class as his or her employment; and
 - (ii) the gross yearly employment income the full-time earner earned from his or her employment;
 if the full-time earner is self-employed at the time of the accident;

(c) the gross yearly employment income earned from all employment that the full-time earner is unable to continue because of the accident, if the full-time earner holds more than one employment at the time of the accident.

(3) The insurer shall calculate the income replacement benefit pursuant to clause (1)(c) on the basis of the benefit that would have been payable to the full-time earner.

(Emphasis mine)

[31] The Appeals Commission in *W.I. v. SGI*, [2004], SKAIA 014, considered the definition of “full-time earner” and stated: “We note from section 112(1)(b) that a full time earner may have additional employment on top of the full time employment, and is entitled to an income replacement benefit for that additional employment as well”. The Appellant clearly fell within the provisions of Section 112.

[32] We would agree with the Appellant that Section 112(2)(c) was correctly applied when calculating his income replacement benefit in June 1996. The Appellant was a full-time earner unable to continue his employment at employer two. The gross yearly employment income for that employment was [amount]. If the Appellant had been unable to work at employer one then

his gross yearly employment income of [amount] would also have been included in the calculation under Section 112(2)(c).

[33] We have reviewed *Lawless v. Saskatchewan Government Insurance*, (2001) SKQB 380. In that case, Pritchard J. referenced Section 112 as follows:

[6] Looking at s.112 as a whole, it is apparent that only s. 112(2)(b) tells SGI how it is to calculate a full-time earner's income replacement benefit if that earner's full-time earnings are from self-employment. Section 112(2)(c) does not tell SGI how it is to calculate gross yearly self-employment income or any other type of income. It simply clarifies that if the insured is a full-time earner who holds more than one type of employment, then the income replacement benefit is to be based on the gross yearly employment income earned from all employment that the insured is unable to continue because of the accident.⁵

[34] The Court of Appeal overturned *Lawless v. Saskatchewan Government Insurance* on the grounds that a literal interpretation of Section 112(2)(c) on the facts of that case would create an absurd result.⁶ Mr. Lawless was unable to maintain both his full-time employment of farming and his part-time employment of driving school bus. We note that the Court of Appeal did not disagree with the Court of Queen's Bench interpretation of Section 112(2)(c) and only found that it would create an absurd result if the literal interpretation were applied in Mr. Lawless' case. The Court of Appeal held that although the statute does not expressly provide for the option of paying an income replacement benefit based on the greater of s.112(2)(b) and s. 112(2)(c), it is reasonable to imply that the greater of the amounts payable under these provisions should be paid in cases where the injured party holds more than one employment, at least one of which is a form of self-employment.

[35] On that basis, we find the interpretation of Section 112(2)(c) by Pritchard J. in *Lawless v. Saskatchewan Government Insurance* does have application in the Appellant's case. While we recognize the Court of Appeal overturned the lower court on other matters of statutory interpretation, to that extent, we distinguish *Lawless v. Saskatchewan Government Insurance* on its facts. Unlike Mr. Lawless who was both self-employed and had salaried employment, the Appellant was full-time employed with part time employment both of which were salaried income. The only employment the Appellant is unable to continue because of the accident is that with employer two. In accordance with Section 112(2)(c), the gross yearly employment income

⁵ *Lawless v. Saskatchewan Government Insurance*, (2001) SKQB 380 at paragraph 6.

earned from employer two would be determined in accordance with section 20 of the *Regulations*, which states:

20 Subject to these regulations, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

(a) in the case of a full-time earner, the salary or wages, excluding benefits or commissions in clauses (d) and (e), received or receivable with respect to employment that the full-time worker held or would have held if the accident had not occurred and that are the greater of:

(i) the salary or wages received or receivable for the pay period in which the accident occurred, multiplied by the number of pay periods in the year; and

(ii) the salary or wages received or receivable in the 12-month period prior to the date of the accident;

...

[36] In accordance with Section 20 of the *Regulations* and relying upon the Employer's Verification of Earnings for employer two showing prior 12 months accumulated basic pay of [amount], SGI calculated the Appellant's gross yearly employment income for the purposes of Section 112(2)(c) as [amount]. The application of Section 112(2)(c) does not take the Appellant out of the category of a full-time earner to a part-time earner, it only prescribes how the gross yearly employment income is to be determined where the claimant holds more than one employment in addition to his full-time employment.

[37] The issue before us is whether Section 112(2)(c) is in conflict with Section 129(1)(e) of the *Act*. SGI submitted that Section 129(1)(e) is intended to take into account the total of all gross yearly employment income held at the time of the accident. In other words, once the Appellant obtained gross yearly employment income post-accident from all sources of employment that exceeded what he was making for gross yearly employment income from all sources at the time of the accident, his entitlement to an income replacement benefit would cease under section 129(1)(e) of the *Act*.

[38] The Appellant disagreed with SGI's assessment of Section 129(1)(e) of the *Act*. He submitted that his gross yearly employment income had always been calculated based upon his part-time employment at employer two only, and therefore, SGI is not entitled to rely on his

⁶ Saskatchewan Government Insurance v. Lawless, [2002] S.J. No. 23 (C.A.)

combined gross yearly employment income, or more specifically the increase in his full-time employment income with employer three, to terminate his income replacement benefit under Section 129(1)(e) of the Act.

[39] The issue before us is one of statutory interpretation and the principles to be applied when the provisions of a statute are in conflict, ambiguous or uncertain. SGI submitted that the approach to be applied in statutory interpretation is one which fulfills the purpose and overall spirit of the legislation. With respect to income replacement benefits under the *Act*, the purpose is to provide the claimant with income directly related to the income he would have experienced if not for his injuries.

[40] The Appellant submitted that the purposive approach is absurd and that legislation has a clear and precise meaning and if it does not it should be rewritten to express its intent.

[41] We are guided by the principles of statutory interpretation as noted by Hrabinsky J. in *Deitner v. Saskatchewan Government Insurance*. Hrabinsky J. stated:

23 Dealing with an ambiguity in a statute Duff J. in *McBratney v. McBratney* (1919), 59 S.C.R. 550 at p.561 stated:

Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one find [sic] there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it; for as Lord Selborne pointed out in *Caledonian Railway Co. v. North British Railway Co.* [6 App. Cas. 114], that which is within the spirit of the statute where it can be collected from the words of it is the law, and not the very letter of the statute where the letter does not carry out the object of it. See *Cox v. Hakes* [15 App.Cas. 506 at p.517]; *Eastman Co. v. Comptroller General* [[1898] A.C. 571, at p. 575].

24 In *Mawson Hotels Ltd. v. Solie* (1997), 156 Sask. R. 137 (Q.B.), I dealt with a section of a statute which gave rise to uncertainty and ambiguity. At pp. 140-41, I stated:

...Accordingly, one must look to the rules of statutory interpretation.

[11] *Driedger on the Construction of Statutes* (3rd Ed.), by Ruth Sullivan (Markham: Butterworths, 1994), at p.38 states:

“...Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity.”

At p.35 the author summarized the following propositions comprising purposive analysis:

- “(1) All legislation is presumed to have a purpose. It is possible for courts to discover, or to adequately reconstruct, this purpose through interpretation.
- “(2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of ordinary meaning.
- “(3) Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.
- “(4) The ordinary meaning of a provision may be rejected in favour of an interpretation more consistent with the purpose if the preferred interpretation is one the words are capable of bearing.”

...

[14] The author in Driedger on the Construction of Statutes at p.66 states:

“...Where the language to be interpreted lend itself to two plausible readings, legislative purpose may be relied on to resolve the ambiguity. This method of resolving ambiguity has been used in numerous cases involving both semantic and syntactic ambiguity.”

[42] Hrabinsky J. interpreted the income replacement benefit provisions of the Act and Regulations in light of the overall purpose of “no fault legislation”. He stated:

25 Sections 27 to 29 of the Regulations are of assistance in determining the purpose of The Automobile Accident Insurance Act and the purpose of income replacement benefits.

26 These sections indicate a legislative intent to have the IRB reflect the claimant’s earnings reality by providing for the reduction of the IRB calculation in certain circumstances such as those in which the claimant is capable of part-time work. In Driedger on Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994), the author states at p.38 that courts “do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity.” At p.41 one of the reasons for the advancement of the purposive analysis is examined. The learned author observes at p. 41:

A change in the style of legislative drafting has also encouraged reliance on a purposive approach. Modern legislation tends to be drafted in general, open-textured language. Provisions often embody standards as opposed to rules. Drafters no longer attempt to foresee and provide for every possible contingency; repetition and detailed itemization are now avoided whenever possible. This new style of drafting lends itself to a purposive approach.

27 Section 115(4) of the Act is an example of the legislative style above described. While the legislature provided for and foresaw IRB’s being paid on several different bases (loss of actual employment, loss of promised employment, loss of EI benefits) the legislature did not necessarily foresee payment of the benefits on two or more different bases during the initial 180-day period. **Rather than attempting to foresee each and every possible scenario to which the section**

might apply, general language was used to convey the overall spirit of the legislation. [Emphasis mine]

28 Sections 114 and 115 of the Act and s. 20 of the Regulations must be read in light of the purpose of income replacement benefits and in light of the overall purpose of “no fault” legislation. The purpose of the payment of IRB’s is to provide the appellant an income directly related to the income he might reasonably be expected to have experienced, if not for his injuries. Lay-off was a part of the appellant’s history and a predictable and demonstrable part of his immediate post-accident work experience. [Emphasis mine]

[43] The principles of statutory interpretation make is necessary for us to take a “purposive approach” to interpreting Section 129(1)(e). In order to determine the purpose of Section 129(1)(e) we must keep in mind that the purpose of income replacement benefits are to reflect the “**claimant’s earnings reality**” at the time of the accident. The legislation obviously intended for there to be situations where the entitlement to an income replacement benefit would cease. One such scenario is where the claimant obtains an employment with a greater gross yearly employment income than that of the employment he held at the time of the accident.

[44] The purpose of the income replacement benefit is to address the income the claimant lost when they were injured in the accident. The overall spirit of the *Act* does not compensate an individual for lost increases in wages after the accident nor does it compensate an individual who is poised to earn much greater amounts than he or she was earning just before the accident. In accordance with Section 20 of the *Regulations*, the gross yearly employment income is calculated at the time of the accident based upon the income earned prior to the date of the accident. If the disability lasts for a period of longer than one year, then SGI will recalculate the gross yearly employment income on the basis of a consumer price index increase and the new income replacement benefit will be paid. The consumer price index increase in gross yearly employment income occurs on the anniversary of the accident date.

[45] It is important to note that there are no provisions which allow SGI to increase the gross yearly employment income where the claimant can show that their employment income has increased after the date of the accident. This is particularly relevant when considering Section 140 of the *Act* in which the income replacement benefit is reduced in circumstances where the claimant is capable of earning some income but it is less than his gross yearly employment income. Section 140 reduces the income replacement benefit by 75% of the net earnings of the

claimant. For example, if the individual was earning \$7/hour at the time of the accident and working a 40 hour week, his or her gross yearly employment income and income replacement benefit would be calculated based on those earnings. If, subsequent to the accident, the individual is only able to work 25 hours per week but was earning \$10/hour, his income replacement benefit would be reduced by his actual net earnings even though the gross yearly employment income would not be increased to account for the \$3/hour increase in wages. Therefore, it reduces the amount of his income replacement benefit but that same increase in salary is not taken into account to increase the original gross yearly employment income calculated at the time of the accident and the basis upon which the income replacement benefit is calculated in the first instance. Effectively, Section 140 maintains the claimant's income after the accident at an income equal to what he or she was earning at before the accident. **This section suggests the purpose of the income replacement benefits is to replace the income lost at the time of the accident and not to provide the claimant with benefits for future earning capacity.**

[46] Upon review of the legislation, it is our opinion that the overall purpose of the payment of income replacement benefits is to provide the claimant with income directly related to the income he would have been earning at the time of the accident. Rather than attempting to foresee each and every possible scenario to which this section might apply, general language was used to convey the overall spirit of the legislation. The purpose of Section 129(1)(e) is to terminate income replacement benefits once the claimant has achieved an “**earnings reality**” greater than or equal to that which he held at the time of the motor vehicle accident, from whatever source.

[47] If we assumed that the Appellant missed time from both jobs following the motor vehicle accident, then in accordance with Section 112(2)(c), SGI would calculate his income replacement benefit on a gross yearly employment income of [amount], which is the total of the gross yearly employment income earned from all employment that the full-time earner is unable to continue because of the accident (ie. Employer one and employer two). As soon as the Appellant earned anything more than [amount], his income replacement benefit would be discontinued. It would seem unlikely that the legislation intended the income replacement

benefit in the above hypothetical to properly cease, yet in the actual facts of the Appellant's case, the income replacement benefit can not end based upon the Appellant's argument.

[48] We have also considered whether the clear and precise application of statutory interpretation of Section 129(1)(e) should apply. If we accept the facts as the Appellant would argue in his case, then he would never be entitled to an income replacement benefit for his loss of employment income at employer two. In the Appellant's case, he held an employment from which the gross yearly employment income (namely employer one with a gross yearly employment income of [amount]) is equal to or greater than the gross yearly employment income (namely employer two with a gross yearly employment income of [amount]) on which victim's income replacement benefit is calculated. Therefore, if you accept the Appellant's argument that his income replacement benefit is calculated only on the basis of his income from employer two, he could never recover for his lost income under a clear and precise application of Section 129(1)(e) because he held an employment with a greater gross yearly employment income. This would be an absurd result and not very favourable to the Appellant.

[49] SGI also submitted at the Appeal Hearing, that the Appellant received a greater benefit by using only the gross yearly employment income of employer two when calculating his income replacement benefit. The Appellant disagreed. We agree with SGI. The income replacement benefit calculation relying upon income of [amount] considered the Appellant tax exempt and did not deduct any amounts for income tax. If the Appellant were actually capable of working both jobs, as he was prior to the accident, and earning [amount], he would be taxed on all income regardless of source, therefore he would be remitting taxes on the [employer two amount]. SGI's calculations do not result in any deduction for income tax and therefore produce a greater net income replacement benefit being paid to him for his lost employment. We also find this was the correct calculation in accordance with Section 112(2)(c).

[50] It is our opinion, the purpose of Section 129(1)(e) is to disentitle an individual to income replacement benefits when the individual holds an employment after the accident which yields him an equal or greater gross yearly employment income than his gross yearly employment income earned prior to the accident. This provision can be reconciled with Section 112(2)(c) in that a claimant, who holds more than one employment, would be entitled to an income

replacement benefit calculated using the sum of all the gross yearly employment income earnings from all employment he was unable to continue. This would be the “gross yearly employment income on which the victim’s income replacement benefit is calculated” referred to in Section 129(1)(e). The legislature was not able to foresee each and every possible scenario to which this section might apply, such as the fact scenario with the Appellant, and therefore this is one example where they used general language to convey the overall spirit of the legislation which is to cease the entitlement to income replacement benefits when the claimant has achieved an “**earnings reality**” greater than or equal to that which he held at the time of the motor vehicle accident, from whatever source.

[51] The Commission may not agree with the fairness or the purpose of the legislation where there are no provisions to compensate an individual who has received significant salary increases post-accident or the situation where an individual is poised to earn much greater income in the future than they are earning prior to the accident, however, in our opinion the overall spirit and purpose of the legislation is to provide the claimant with income he might reasonably be expected to have experienced, if not for his injuries. Our jurisdiction is to review the decisions made by SGI and determine if they are in accordance with the provisions of the legislation, not to determine whether the legislation is fair or reasonable.

CONCLUSION

[52] The decision made by Saskatchewan Government Insurance (“SGI”) dated October 22, 2003 with respect to the termination of the Appellant’s income replacement benefits pursuant to Section 129(1)(e) of the *Act* is upheld.

Dated at Saskatoon, Saskatchewan, on January 4, 2005.

Joy Dobko, Chair

Beverly Cleveland, Commission Member

Darleen Topp, Commission Member