

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *R.T. v. Saskatchewan Government Insurance,*
2005 SKAIA 006
Date: 20050124
File: 136 of 2003

BETWEEN

R.T., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
R.T., Applicant
Dale Brown, for the Respondent

Before: **Ann Phillips, Chair**
Joy Dobko, Commission Member
Al Knippel, 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
September 9, 2004

DECISION

[1] This is an appeal by R.T., the Appellant, regarding several decisions made by Saskatchewan Government Insurance (“SGI”) with respect to his entitlement to Part VIII benefits under *The Automobile Accident Insurance Act*.¹ The decisions being appealed are:

- a) A decision dated September 12, 2003 regarding the reduction of his bi-weekly income replacement benefit from \$595.87 to \$552.02.
- b) A decision dated October 24, 2003 regarding the reduction of his bi-weekly income replacement benefit from \$552.02 to \$508.63.
- c) A decision dated December 3, 2003 with respect to the denial of payment for damages caused by his wheelchair to the walls and carpet of his rental accommodation.

[2] Another issue was raised at the appeal hearing with respect to whether or not SGI had considered the loss suffered by the Appellant of pension and other benefits when calculating income replacement benefits. It is our understanding that SGI is still reviewing this issue with the Appellant and that a separate decision letter will be issued regarding this issue from which the Appellant can appeal if he does not agree with the decision.

FACTS:

[3] The Appellant was injured in a motor vehicle accident on June 15, 1999 when another vehicle failed to yield the right of way and turned left in front of him while he was operating his motorcycle. The Appellant suffered multiple injuries including a punctured left lung, fractured ribs and a T3 fracture which resulted in complete paraplegia.

[4] The Appellant obtained a Degree in Physical Education in 1988 from the University of Saskatchewan and in 1993 he also obtained a Degree in Education from the same University.

[5] There are several facts which are relevant to the issues of income replacement benefits which are under Appeal. Many calculations and re-calculations were made to the Appellant’s

income replacement benefits as a result of changes to the Appellant's personal circumstances. Therefore, we find it necessary to set out chronologically the sequence of events that are relevant to the issues under Appeal.

[6] Following the motor vehicle accident, the Appellant would have been entitled to receive an Income Replacement Benefit ("IRB") until such time as he was able to return to work. On June 18, 1999, an Application for Benefits was completed on behalf of the Appellant by his brother and his mother. The Application for Benefits was signed by the Appellant's mother and witnessed by Leslie Regush, Personal Injury Representative for SGI. His mother advised Ms. Regush that the Appellant was paying child support of \$500/month to his ex-wife, however, she was not sure if this was deductible from the Appellant's income tax.

[7] At the time of the motor vehicle accident, the Appellant was employed full-time with [employer one] in Saskatoon, Saskatchewan as a Sales/Design Consultant. He held this employment since January 1999. The Appellant's original yearly employment income was calculated by SGI to be [amount].

[8] In November 1999, Ms. Leanne Jule, a consultant with Innovative Rehabilitation Consultants, met with the Appellant to discuss his ability to return to his former employment. Ms. Jule expressed concern that the Appellant would not be able to return to his previous job because the businesses that the employer served were not wheelchair accessible. She recommended that if job accommodation was not a possibility with employer one, that a Transferable Skills Analysis and Labour Market Survey be conducted. It was later determined that the Appellant would not be able to return to employer one and that retraining would be necessary.

[9] In or around December 11, 1999, the Appellant's IRB was increased to [amount] at the 180 Day Determination.

[10] The Appellant testified that he got married in March 2000. The Appellant further stated that he started working full-time with [a rehabilitation centre] in September of 2000.

¹ The Act in place at the time of the Appellant's motor vehicle accident was the 1995 Act with amendments.

[11] On December 11, 2000, the Appellant' IRB was increased to [amount] for consumer price index. SGI stated this increase was in accordance with the one year anniversary. It is not clear whether the Appellant was on a graduated return to work but he was working with the rehabilitation centre at that time.

[12] On August 18, 2001, the Appellant participated in and passed four practicum tests which allowed him to obtain his PFLC certification. We feel it is important to note that within two years of the motor vehicle accident which left the Appellant a paraplegic he had retrained himself and returned to work in an occupation that allowed him to assist others who suffered injuries in a motor vehicle accident. The Appellant was able to earn more income after his motor vehicle accident than he did prior to his motor vehicle accident. The Appellant continued to work even though he was experiencing pain in his buttocks and had been referred to Dr. Griebel for a consultation which was scheduled for January 2002. We do not find the Appellant to be a malingerer and feel it is important to acknowledge how hard he worked to return to full-time employment despite his injuries suffered in the motor vehicle accident.

[13] In October 2001, the Appellant was placed on full-time payroll with the rehabilitation centre in Saskatoon, Saskatchewan. However, in May 2002, the Appellant could no longer tolerate the pain in his buttocks and was forced to reduce his hours at the rehabilitation centre to part-time. On May 2, 2002 the Appellant started to receive an IRB from SGI. SGI treated the reduction to part-time hours by the Appellant as a relapse in accordance with Section 142(1)(a) and 142(3)(b) of *The Automobile Accident Insurance Act*. Section 142(1)(a) and 142(3)(b) state:

142(1) A victim who suffers a relapse of bodily injury is entitled to an income replacement benefit as though the victim had been entitled to the income replacement benefit from the day of the accident to the day of the relapse, if the victim suffers the relapse within two years after:

(a) the end of the last period for which the victim received an income replacement benefit, other than an income replacement benefit pursuant to section 139 or 140; or

...

142(3) The insurer shall calculate the income replacement benefit pursuant to subsection (1) on the basis of the greater of:

...

(b) the gross yearly employment income of the victim as the time of the relapse.

[14] On May 15, 2002, SGI calculated the Appellant's income replacement benefit to be \$589.27 using a gross income of [amount]. The gross yearly employment income at the time of the relapse is based upon the full-time salary the Appellant was receiving from the rehabilitation centre at the date of the relapse because it was greater than the full-time salary he was receiving at the date of the accident.² The gross yearly employment income in Section 142(3)(b) of the *Act* is calculated in accordance with Regulation 20 of *The Personal Injury Benefits Regulations*. In the Appellant's case, [amount] was calculated using the salary of [amount] per pay period prior to the relapse and multiplying that income by the number of pay periods in the year. SGI calculated the gross yearly employment income from a pay stub provided by the Appellant. His hourly pay rate was [amount]. We note the memo from Ms. Denise Leontowicz to the Calculator Unit of SGI in Regina which stated the following:

An IRB was calculated previously for [the Appellant], based on the appendix. He has since returned to work full time on Oct 1/01. However, he has had a relapse and is now working reduced hours of 4 hours per day. Please calculate an IRB based on [the Appellant] working half days as of May 2/02. I have attached a copy of a recent pay stub. I realize it is not the one directly before the relapse but **his income is the same each pay period. He does get a bank day every 3 Friday and does not get paid for these.** (*Emphasis mine*) His (*sic*) works a regular 40 hour week and gets paid every two weeks. If you need any further information, let me know.

[15] Handwritten notes on the Appellant's pay stub, also state that in May 2002, the Appellant was working a 40 hour week and that he got a bank day every third Friday and was not paid for these bank days. The total income replacement benefit calculated by SGI was adjusted for a 50% return to work. It appears that SGI relied upon the comment "**the income is the same each pay period**" when calculating the IRB despite the fact that Ms. Leontowicz noted that the Appellant got a bank day every third Friday and was not paid for these bank days.

[16] The calculations done by SGI in May 2002 also relied upon personal information used in their original calculations in June 1999, which was no longer accurate. The relevant information relied upon by SGI was that the Appellant had two dependants under the age of 18 and paid \$6,000 in maintenance. SGI also assumed the Appellant still did not have a spouse. Reference to this information is made in Version 6 of the Income Replacement and Death Benefit Summary

which was produced at the appeal hearing. Many Versions of the Income Replacement and Death Benefit Summary recalculations followed Version 6 and were produced at the appeal hearing.

[17] Version 6 is summarized as follows:

Date	GYEI ³	Spouse ⁴	Dependants ⁵	Support ⁶	Reason for Change ⁷	IRB ⁸
May'02	[amount]	No	2	\$6000.00	[The Appellant] had reduced hours to 50% therefore calculated on 50% RTW. Also refers to calculation at date of relapse.	\$589.27

[18] The total income replacement benefit calculated by SGI was adjusted for a 50% return to work. A 50% return to work calculation is completed in accordance with Section 140 of *The Automobile Accident Insurance Act*. When an injured party returns to work on a part-time basis, their IRB is reduced to take into account the net income they are receiving from their return to work. The amount paid is referred to as the Reduced Income Replacement Benefit. Section 140(2) of the *Act* states:

- (2) The insurer shall reduce the victim's income replacement benefit by an amount calculated in accordance with the following formula:

$$\text{RIRB} = \text{IRB} - (75\% \times \text{NIE})$$

where:

RIRB is the reduced income replacement benefit;

IRB is the income replacement benefit before the reduction; and

NIE is the net income the victim earns from the employment.

² Section 144 of *The Automobile Accident Insurance Act* allows the claimant to access the greater benefit when calculating his gross yearly employment income at the time of the relapse. In this case, the Appellant's gross income at the time of the relapse was greater than his gross income on the date of the accident, therefore SGI used his income from the rehabilitation centre.

³ This means the Gross Yearly Employment Income as calculated by SGI.

⁴ This relates to whether or not SGI assumed that the Appellant was married or not at the time of their calculation.

⁵ This relates to whether or not SGI assumed the Appellant had dependants when making their calculations.

⁶ This relates to whether or not SGI assumed the Appellant was making child support payments at the time of their calculations.

⁷ This highlights the reason for a recalculation to the current IRB that the Appellant would have been receiving.

⁸ This is the new IRB amount.

[19] In Version 6, SGI calculated the Appellant's net income earned from employment to be 50% of [amount] which is [amount]. The bi-weekly net income is [amount] therefore [calculation] = \$589.27. The Appellant received the bi-weekly IRB of \$589.27 from May 15, 2002 until in or around December 15, 2002.

[20] The Appellant testified that to the best of his recollection he stopped paying child support in or around the fall of 2002.

[21] The Appellant met with Dr. Bernacki in November 2002 with respect to his ongoing complaints of neuropathic pain in his buttocks. Dr. Bernacki reported:

I do not expect a complete return to work for [the Appellant] and the fact that he is working at 50% of full time, I believe, is a successful outcome for him now.

[22] In December 2002, Version 7 was completed for deduction changes which would be effective January 1, 2003. Version 7 is summarized as follows:

Date	GYEI	Spouse	Dependants	Support	Reason for Change	Bi-weekly IRB
Dec'02	[amount]	Yes	1	\$6000.00	Revised for January /03 deduction changes. [the Appellant] had 50% RTW.	\$595.87

[23] In Version 7, SGI calculated the Appellant's IRB as if the Appellant was married and had one dependant. This information was used to calculate the new IRB of \$595.87. It was not clear from the evidence presented at the appeal hearing, how SGI became aware of this information. The total income replacement benefit calculated by SGI was also adjusted for a 50% return to work. In Version 7, SGI calculated the Appellant's net income earned from employment to be 50% of [amount] which is [amount]. The bi-weekly net income is [amount] therefore [calculation] = \$595.87. The Appellant received the increased bi-weekly IRB of \$595.87 from in or around December 16, 2002 until in or around September 8, 2003.

[24] The Appellant testified that in March of 2003, one of his children came to live with him. In May 2003, the Appellant and his wife purchased a new home. The Appellant testified that the decision to purchase his home and the mortgage assumed by him and his wife was made based upon the current IRB that he was receiving from SGI.

[25] On September 12, 2003, SGI sent correspondence to the Appellant and advised that they had recalculated his IRB due to their recent knowledge of the fact that the Appellant had married in 2000, was no longer paying child support and now had one child living with him. SGI also applied the consumer price index changes to increase the gross employment income to [amount]. The September 12, 2003 re-calculation of the Appellant's IRB is summarized in Version 9 as follows:

Date	GYEI	Spouse	Dependants	Support	Reason for Change	Bi-weekly IRB
Sept.12'03	[amount]	Yes	1	\$0.00	This is based upon the one year anniversary consumer price index increase for May'03. Also refers to personal information changes.	\$552.02

[26] The total income replacement benefit calculated by SGI was adjusted for a 50% return to work. In Version 9, SGI calculated the Appellant's net income earned from employment to be 50% of [amount] which is [amount]. The bi-weekly net income is [amount] therefore [calculation] = \$552.02. The result was a reduction of the Appellant's bi-weekly IRB from \$595.87 to \$552.02. The Appellant received the decreased bi-weekly IRB of \$552.02 from in or around September 12, 2003 to in or around October 20, 2003. **This is the first decision letter which the Appellant appealed.**

[27] The September 12, 2003 re-calculation of the Appellant's IRB is summarized in Version 9; however, there were two Versions of re-calculations done by SGI at this time. Version 8 is summarized as follows:

Date	GYEI	Spouse	Dependants	Support	Reason for Change	Bi-weekly IRB
Sept.12'03	[amount]	Yes	1	\$0.00	Intended to replace Version 6.	\$536.05

Version 8 never resulted in a payment to the Appellant and it is not entirely clear to the Commission why it was completed. Mr. Ross Teneycke, Manager of SGI's Income Replacement Benefit Calculator Unit provided evidence at the appeal hearing. Mr. Teneycke testified that Version 8 should have replaced Version 6 at the time that the Appellant stopped paying child support. SGI was not advised that the Appellant had stopped paying child support until September 2003. Version 9 was completed in September 2003 to account for the Appellant's new personal information. A review and recalculation was not done to the Appellant's bi-weekly IRB on the May 2003 anniversary as required. SGI could not comment on why this was not done. In any event, SGI submitted that the Appellant was overpaid from the fall of 2002 when he stopped paying child support until September 2003 when the re-calculation was completed. As a result, SGI submitted the Appellant had not lost any income replacement benefits. In this case, it is important to note concerns expressed by the parties at the appeal hearing.

[28] The Appellant submitted that his file never had a regular annual review and that he was never advised of the relevance of his personal information in calculating income replacement benefits. Specifically, a review and adjustment was missed by SGI on the May 2003 anniversary. SGI submitted that on many occasions they calculated bi-weekly income replacement benefits on inaccurate personal information for the Appellant. Version 7 and 8 are examples of calculations done based on inaccurate personal information. Further, some adjustment should have been made to the Appellant's bi-weekly income replacement benefit in March 2000 when he remarried and it is not clear if a recalculation was done at that time. Version 6, which was completed in May 2002, relied upon SGI's original personal information for the Appellant and the calculation is based upon him being single although he had been married for two years at that time.

[29] The Appellant was cross-examined about why he did not advise SGI earlier about the changes to his marital status, elimination of his payments of child maintenance and the fact that one child came to live with him as these all impacted the IRB calculations done by SGI. The Appellant testified that he did not understand that information of that nature would be relevant to determining his entitlement to income replacement benefits. He advised that he had not completed his original Application for Benefits so he was not made aware of these issues at that time. He also stated that no one had conducted regular annual reviews and he was not made aware that any of this information was relevant until Mr. Brian Lymer became his Personal Injury Representative. The Appellant further testified that he used to sell disability insurance and information of that nature had no bearing on the amount the disability insurer was responsible to pay. We find the Appellant to be very credible and in no way find that he was misleading SGI with regard to this relevant information in order to increase or decrease the amount of the income replacement benefit to which he was entitled.

[30] It is our opinion there was an obvious break down of communication between SGI and the Appellant with respect to necessity of the disclosure of information. We are unable to place fault on either party, we simply note that there are several inconsistencies in the application of income replacement benefits which are directly related to a lack of communication between the parties which has ultimately resulted in a financial hardship to the Appellant.

[31] As a result of the September 2003 reduction to the Appellant's IRB, the Appellant submitted new pay information to SGI asking them to take into account the pay increases he had received since May 2002. His original IRB in May 2002 was based upon an hourly pay rate of [amount]. As of September 2003, his hourly pay rate was [amount]. This new hourly pay rate information was sent by Brian Lymer, Personal Injury Representative, to the SGI Calculator Unit in Regina on October 16, 2003. As a result, the Appellant's IRB was reduced even further. SGI submitted that this was the first notice they had that the Appellant was working 56 hours out of 112 hours every three weeks rather than 40 hours per week in May 2002 when he suffered his relapse. We are unable to reconcile this factual finding by SGI with that of Ms. Denise Leontowicz, Personal Injury Representative in May 2002, where she reported that the Appellant received a bank day every third Friday for which he was not paid. In May 2002, the Calculator Unit in Regina calculated the Appellant's IRB as if he was receiving equal pay each pay period.

In any event, in October 2003, SGI concluded that the Appellant's was working 56 hours out of 112 hours every three weeks and completed another re-calculation. This information would result in a higher net income earned from employment thereby reducing the amount of the income replacement benefit which the Appellant would be entitled to under Section 140 of the *Act*.

[32] The October 2003 re-calculation is found in Version 10 and is summarized as follows:

Date	GYEI	Spouse	Dependants	Support	Reason for Change	Bi-weekly IRB
Oct.16'03	[amount]	Yes	1	\$0.00	This is based upon a 50% RTW and 56 hours over a three week period at [amount]/hour.	\$508.63

This is the first version which recalculates the return to work based upon 56 hours over a three week period. Until this point in time, the return to work had been calculated on a 50% basis. Therefore, in Version 10, SGI calculated the Appellant's net income earned from employment to be [amount] which is based upon working 56 hours every three weeks at [amount]/hour. The bi-weekly net income is [amount] therefore [calculation] = \$508.63. On October 24, 2003, SGI sent correspondence to the Appellant advising that his IRB had been reduced from \$552.02 to \$508.63. **This is the second decision letter which the Appellant appealed.** The Appellant received the decreased bi-weekly IRB of \$508.63 from in or around October 21, 2003 to in or around December 29, 2003.

[33] The Appellant submitted that the reduction of his bi-weekly IRB in September 2003 and October 2003 resulted in a substantial decrease to his monthly income which he had relied upon when purchasing his new home.

[34] On December 2, 2003, Dr. Griebel referred the Appellant to Dr. Kumar for assessment of his complaints of chronic pain in his buttock which were exacerbated by sitting. Dr. Griebel stated in his referral that the Medtronic Pump with Morphine and an epidural stimulator used in the past had not provided the Appellant with any consistent pain relief.

[35] On December 18, 2003, Version 11 calculation for income replacement benefits was completed for deduction changes and is summarized as follows:

Date	GYEI	Spouse	Dependants	Support	Reason for Change	Bi-weekly IRB
Dec. 18'03	[amount]	Yes	1	\$0.00	Changes made to reflect deduction changes effective January 1,'04. This is also based upon a 50% RTW and 56 hours over a three week period at [amount]/hour.	\$516.73

In Version 11, SGI calculated the Appellant's net income earned from employment to be [amount] which is based upon working 56 hours every three weeks at [amount]/hour. The bi-weekly net income is [amount] therefore [calculation] = \$516.73. On January 8, 2004, SGI sent correspondence to the Appellant and advised that his IRB would be increased from \$508.63 to \$516.73 bi-weekly due to employment deduction changes that took effect on January 1, 2004. The Appellant received the bi-weekly IRB of \$516.73 from in or around December 29, 2003 to in or around January 12, 2004.

[36] The Appellant saw Dr. Bernacki again on January 13, 2004, and was advised by Dr. Bernacki to discontinue all work activities as sitting exacerbated his neuropathic pain. As a result, on January 21, 2004, SGI re-calculated the Appellant's bi-weekly IRB to be \$1082.60. This calculation was done because the Appellant was no longer able to work in any capacity. Version 12 was created and is summarized as follows:

Date	GYEI	Spouse	Dependants	Support	Reason for Change	Bi-weekly IRB
Jan.20'04	[amount]	Yes	1	\$0.00	Changes made to reflect deduction changes effective January 1,'04. This is based upon a 8 hour/week RTW for one week and then off work completely	\$1082.60 if unable to work

The Appellant received the bi-weekly IRB of \$1082.60 from in or around January 12, 2004 to in or around May 3, 2004.

[37] On April 16, 2004, Version 13 was completed for the two year anniversary consumer price index increase and is summarized as follows:

Date	GYEI	Spouse	Dependants	Support	Reason for Change	Bi-weekly IRB
Apr.16'04	[amount]	Yes	1	\$0.00	This is based upon the two year anniversary consumer price index increase for May'04 and no change in personal information.	\$1108.54

The Appellant started to receive the bi-weekly IRB of \$1108.54 from in or around May 17, 2004 and was still receiving it at the time of the appeal hearing.

[38] In May 2004, the Appellant met with Dr. Kumar regarding the continual pain and burning sensation that he was experiencing in his gluteal region. Dr. Kumar recommended a midline myelotomy. At the time of the appeal, the Appellant was receiving botox injections for his continual pain and was on the waiting list for his midline myelotomy.

[39] The Appellant's third issue under appeal is the denial by SGI to pay repair costs for damage caused to rugs and walls by his wheelchair while he lived in a rental accommodation. The Appellant testified that the total cost of repairs was \$4,429.80 and that this amount was paid by the landlord. The Appellant also stated that the reason that so much damage was done to the apartment was because it was not a suitable housing facility for someone who was in a wheelchair. He stated that at the time of his accident there was a lack of suitable housing which forced him to rent an apartment that was not specially equipped for a wheelchair.

LAW AND ANALYSIS

[40] The decisions under review in this Appeal relate to the calculation of income replacement benefits and the denial by SGI to pay for damage caused by the Appellant's wheelchair to the rental accommodation he was living in following the motor vehicle accident until he purchased his own home.

[41] 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.

[42] The Commission determined in *R.C.*⁹ 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 wrong in law; or based on erroneous assumptions; or at the very least, the decision was unreasonable.¹⁰

Calculation of Income Replacement Benefits

[43] SGI submitted that the income replacement benefits calculated in their September 12, 2003 and October 24, 2003 decision letters are correct. In fact, SGI submitted that the Appellant had been overpaid as a result of inaccurate information being provided or due to a lack of communication since his relapse in May 2002. It was clear at the appeal hearing that SGI now takes issue with the amount used for gross income to calculate the Appellant's income replacement benefit in May 2002. Mr. Ross Teneyke, SGI Consultant, testified that although the September 2003 re-calculations for his 50% return to work pursuant to Section 140 took into account working 56 hours over three weeks, the total Gross Yearly Employment Income calculated in May 2002 in the amount of [amount] was done in error and did not take into account the fact that the Appellant received every third Friday off without pay. Mr. Teneyke testified that the May 2002 calculation was based upon working 80 hours every two weeks at

⁹ *R.C. v. Saskatchewan Government Insurance 2003 SKAIA 1*

[amount] per hour. Mr. Teneyke further testified that the proper Gross Yearly Employment Income calculation in May 2002 should have been [amount] rather than [amount]. We note the memo from Ms. Denise Leontowicz to the Calculator Unit of SGI in Regina, as well as handwritten notes on the Appellant's pay stub, made it clear that in May 2002, the Appellant was working a regular 40 hour week and that he got a bank day every third Friday and was not paid for these bank days. Therefore, we conclude that if SGI miscalculated the income replacement benefit payable to the Appellant in May 2002 as a result of using incorrect Gross Yearly Employment Income, this was a mistake made solely by SGI and no fault should be placed upon the Appellant for this error.

[44] The Appellant submitted that the provisions of the legislation with respect to income replacement benefits are unfair in that SGI used his increase in hourly rate from [amount] in May 2002 to [amount] in October 2003 to reduce his income replacement benefit pursuant to Section 140. The Appellant submitted that if SGI relies on his current hourly rate, they should also use his current hourly rate to arrive at the Gross Yearly Employment Income which determines the amount of his entitlement to income replacement benefits.

[45] The jurisdiction of this Commission is to review the decisions made by SGI and determine if they are wrong in law, based on erroneous assumptions or unreasonable. Although the members of this Commission may be of the opinion that the provisions of the legislation as they apply to the Appellant are unfair, we have no jurisdiction to rewrite the legislation and are bound to apply the legislation as it existed at the time of the Appellant's motor vehicle accident.

[46] The Appellant submitted that wage increases should be taken into account when calculating the gross yearly employment income, particularly in his case where his hourly rate has increased to [amount]. Relying upon SGI's calculations in Version 10, this would give the Appellant a much higher Gross Yearly Employment Income of [amount] rather than the [amount], or the gross employment income of [amount] suggested by Ross Teneyke as now being the correct Gross Yearly Employment Income amount which should be used. Mr. Teneyke testified hourly wage increases are not taken into effect because the provision for

¹⁰ *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.

annual increases due to the consumer price index should result in a greater benefit to the injured claimant. We agree with Mr. Teneyke that this may be equitable as it relates to the individual who is totally disabled and never returns to work and one is unable to determine what that individual might have been earning in the future; therefore the consumer price index attempts to compensate for those situations. However, this is clearly not the case when you consider the Appellant's situation where he has returned to part-time employment and there is a definitive application of wage increases which far outweigh the increase allowed by the consumer price index. Clearly, the consumer price index in the Appellant's situation places him at a greatly reduced Gross Yearly Employment Income as compared to what he would be earning if he were able to work full-time at the rehabilitation centre.

[47] It would seem reasonable and logical that if SGI's calculations can take into account hourly wage increases to calculate the Reduced Income Replacement Benefit in accordance with Section 140, then those hourly rate increases should also be taken into account when calculating the Gross Yearly Employment Income from which the original Income Replacement Benefit is calculated. Regrettably, we are unable to find any provision in the legislation which allows the consideration of hour wage increases to be considered when SGI is conducting their annual review of the income replacement benefit. Section 112 of the *Act* defines the Gross Yearly Employment Income to be determined at the time of the accident. In the Appellant's case, the Gross Yearly Employment Income is calculated based upon the income he was earning at the time of his relapse in May 2002 in accordance with Section 142(3) of the *Act*.

[48] With respect to SGI's submissions regarding a miscalculated Gross Yearly Employment Income in May 2002 that does not reflect the 56 hours out of 112 hours every three weeks, we find this to be an error made solely by SGI and place no fault on the Appellant. In our opinion, Mr. Teneyke's submissions that this amount should be further reduced despite the Appellant's financial reliance on the calculation for more than two years, is completely unreasonable. The evidence is clear that if the Appellant were capable of working full-time he would be earning a much higher gross yearly employment income than the gross yearly employment income that SGI is currently compensating him for in Versions 10 through 13. The legislation is clearly under compensating the Appellant. In our opinion, the error made by SGI and the fact situation as it exists in the Appellant case and the reliance that SGI has created in the Appellant are very

strong reasons for SGI to apply Section 210¹¹ of the *Act*. We strongly recommend that SGI reconsider any further reductions to the Appellant's income replacement benefit by recalculating his gross yearly employment income due to the fact that the calculation error was made by their Calculator Unit in May 2002 and we find no evidence that the Appellant was fraudulent or misleading in the information that he provided at that time. It should be noted that the Appellant continued to work well beyond the period of time which Dr. Bernacki felt he would be able to continue working. We believe that if the Appellant were capable of working full-time he would and it is most unfortunate that there are not provisions in the *Act* which would allow the Appellant to be more fairly compensated for his loss of employment income.

[49] Therefore, although the provisions of the *Act* are clearly unfair in the Appellant's fact situation, the Commission is unable to determine that the income replacement benefits as calculated by SGI in their September 12, 2003 and October 24, 2003 are incorrect and accordingly, the decisions of SGI with respect to income replacement benefits are upheld.

Reimbursement for Damage to Carpet and Walls

[50] The Appellant's third issue under appeal is the denial by SGI to pay repair costs for damage caused to rugs and walls by his wheelchair while he lived in a rental accommodation. SGI submitted that there is no specific provision in the *Act* or *Regulations* to allow for recovery of this expense. SGI did not dispute the damage to the rental accommodation nor did they provide any evidence that they disagreed with the Appellant renting the type of accommodation that he did following the motor vehicle accident. In fact, SGI provided the Appellant with a rental subsidy for this accommodation from October 8, 1999 to May 26, 2003¹², which would suggest they did not disagree with his choice of rental accommodation and recognized there was no alternative available. The Appellant submitted that the damage caused by his wheelchair is an accident related expense and should be provided for in *The Personal Injury Benefits Regulations*.

[51] The intention of Part VIII of *The Automobile Accident Insurance Act* is to provide no-fault benefits to Saskatchewan residents who are injured in a motor vehicle accident. Section 12 of *The Personal Injury Benefits Regulations* provides a list of rehabilitation expenses which the

¹¹ Section 210 allows the insurer to make ex gratia payments to a person where the insurer considers the payment of the person's claim to be in the interest of the insurer and the better administration of Part VIII benefits.

¹² S68

insurer may provide the victim with if it is necessary and advisable for his rehabilitation. This includes; but is not limited; funds to alter the victim's residence, funds to relocate the victim and funds to adapt a motor vehicle for the use of the victim. We agree with SGI's submission that there is no "specific" provision to allow for reimbursement of the repair costs that the Appellant has claimed on Appeal. The Appellant submitted that the Appeal Commission should broaden the *Regulations* to allow for these costs.

[52] Section 193(7) of the *Automobile Accident Insurance Act* does not provide the Commission with any jurisdiction to broaden the *Regulations* or the *Act*, however, it does provide the Appeal Commission with jurisdiction to make any decision that the insurer is authorized to make pursuant to Part VIII.

[53] Section 210 of the Act provides SGI with the authority to make *ex gratia* payments. Section 210 states:

210 Where the insurer considers that the payment of a person's claim is in the interest of the insurer and the better administration of this Part, the insurer may authorize an *ex gratia* payment to be made to that person.

[54] The Appeal Commission has considered the decision of the Court of Queen's Bench in *Peterson v. Saskatchewan Government Insurance*, (2004) SKQB 331. In *Peterson v. Saskatchewan Government Insurance*, Ms. Peterson argued that the Court should reimburse her for rental costs associated with a suite which she rented in Saskatoon in order to receive medical treatment for her injuries. Ms. Peterson argued that driving into Saskatoon from her home 57 km away from Saskatoon aggravated her injuries. The Court noted that SGI never intended to reimburse Ms. Peterson for the cost of the rental suite as there was no objective medical documentation that it was necessary at the time, nor was there any objective medical evidence presented at the time of the appeal that it was medically necessary for her to obtain the rental suite. Ms. Peterson argued that the Court should, pursuant to Section 210, order SGI to reimburse her for the rental costs. The Court disagreed with Ms. Peterson and held:

Any payments made pursuant to s. 210 of the Act are within the unfettered discretion of the insurer as the payments are in the nature of a gift and this section is not one upon which this Court on appeal has any jurisdiction to order SGI to pay any amount that they do not believe is in its interest and the better administration of *The Automobile Accident Insurance Act*.

[55] In the fact situation before us, SGI was aware that the Appellant had rented accommodations which were not considered to be wheelchair accessible. They had provided him with a rental subsidy for those accommodations. SGI did not argue at the Appeal that the expense was unreasonable or that it was unrelated to the Appellant's injuries suffered in the motor vehicle accident. SGI only argued that the expense was not compensable under the provisions of the *Act*. In our opinion, the facts surrounding the Appellant's claim for reimbursement is clearly distinguishable from the findings of fact by the Court in *Peterson v. Saskatchewan Government Insurance*.

[56] Therefore, we conclude that the reimbursement of damages caused by the Appellant's wheelchair to the walls and rug of his rental accommodation is in the interests of SGI and the better administration of Part VIII benefits. Accordingly, relying on our jurisdiction found in Section 193(7)(b) of the *Act*, to make any decision SGI is authorized to make, we find that the Appellant is entitled to be reimbursed for the cost of repairs for damages caused by his wheelchair to the walls and carpet of his rental accommodation.

[57] The Appellant submitted that the total cost of repairs was \$4,429.80. This amount included painting of the bathroom ceilings. We are unable to conclude that the painting of the bathroom ceilings resulted from the Appellant's wheelchair. We accept that the remainder of the repairs relate to damage caused by the Appellant's wheelchair.

CONCLUSION

[58] The decisions of SGI dated September 12, 2003 and October 24, 2003 with respect to the calculation of the Appellant's income replacement benefits are upheld.

[59] The decision of SGI dated December 3, 2003 with respect to the denial of payment for damages caused by the Appellant's wheelchair to the walls and carpet of his rental accommodation is set aside. Section 193(7)(b) allows the Appeal Commission to make any decision SGI is authorized to make, therefore pursuant to Section 210 of the *Act* we find that the Appellant is entitled to be reimbursed for the cost of repairs due to damage caused by his wheelchair to the walls and carpet of his rental accommodation but not for painting the bathroom ceilings.

Costs

[60] As the Appellant has been partially successful in his Appeal he shall be entitled to all reasonable costs of his Appeal; including his Appeal fee, travel expenses, meals and lodging in accordance with Section 193(11) of *The Automobile Accident Insurance Act* and Section 86(4) and 96 of *The Personal Injury Benefits Regulations*.

Dated at Saskatoon, Saskatchewan, on January 24, 2005.

Ann Phillips, Q.C., Chair

Al Knippel, Commission Member

Joy Dobko, Commission Member