

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *N.V. v. Saskatchewan Government Insurance,*
2005 SKAIA 020

Date: 20050323

File: 147 of 2003

BETWEEN

N.V., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

N.V., for the Applicant

Stephen McLellan, for the Respondent

Before:

Peter Bergbusch, Chair

Jeff Scott, Commission Member

Conrad Hnatiuk, Commission Member

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

Heard at Saskatoon, Saskatchewan
December 22, 2004

DECISION

[1] The Appellant, N.V., appeals from a decision of Saskatchewan Government Insurance (“SGI”) dated September 16, 2003, in which SGI advised him that his income replacement benefit was \$402.68 bi-weekly. He also appeals from a second decision dated January 12, 2004, terminating his income replacement benefit effective February 4, 2004.

[2] Following the Appellant’s testimony in chief, SGI conceded that the Appellant was not fit to return to work. SGI sought an adjournment of the second appeal in order to have a further opportunity to consider whether the Appellant’s current back condition was caused by the motor vehicle accident. SGI agreed to reinstate the Appellant’s income replacement benefit, on a without prejudice basis, from the date of the hearing to the date that SGI completes its review. In light of these concessions, the Commission granted SGI’s request for an adjournment. The panel remains seized of the second appeal in the event that a further hearing is required.

[3] The hearing proceeded in respect of the Appellant’s first appeal concerning SGI’s calculation of his income replacement benefit. It was understood by the parties that the Commission’s decision on this issue would also apply to the amount of the reinstated income replacement benefit.

FACTS

[4] For the purpose of the issue in this appeal, only a brief summary of the facts is required.

[5] On December 18, 2002, the Appellant was traveling east in the right hand lane on [drive], in Regina, at a speed of 45 km/hr. A vehicle heading north on [street] slid into the intersection, and although the Appellant swerved into the left hand lane he was unable to avoid the collision. The front end of the vehicle the Appellant was driving struck the driver’s side of the other vehicle. Both vehicles sustained extensive damage.

[6] The Appellant had been heading to work at [employer one] in Regina at the time of the accident.

[7] The Appellant makes his living in the construction industry as a carpenter and a scaffolder. At the time of the accident the Appellant had been working as a scaffolder. His duties included setting up and dismantling scaffolding, putting up plastic sheeting so that welders could work inside a heated area, and so on. He was also the shop steward for his union.

[8] On January 16, 2003, the Appellant applied to SGI for injury benefits and for income replacement benefits. He complained of left side neck and shoulder pain, headaches and slight dizziness.

[9] The Appellant's total income from all sources during the five years preceding the accident was as follows:

Year	Gross Income
January 1 – December 31, 1998	\$XX,XXX
January 1 – December 31, 1999	\$XX,XXX
January 1 – December 31, 2000	\$X,XXX
January 1 – December 31, 2001	\$XX,XXX
January 1 – December 18, 2002	\$XX,XXX

[10] Following the first 180-day period, SGI reviewed the Appellant's income replacement benefit and reported its decision to the Appellant in a letter dated September 16, 2003, as follows:

... As a seasonal worker, your income replacement benefit is reviewed at 180 days and is based on the greater of:

- (a) Your average 2 year income (this includes employment income, Employment Insurance benefits, and Worker's Compensation benefits)
- (b) Minimum wage based on a 40 hour week as long as you are capable of working a 40 hour week.

In your case, your income is based on (b) which amounts to \$402.68 bi-weekly. Please see the attached calculation sheet which explains in detail.

[11] From the filed materials, it is not absolutely clear what was enclosed with the decision letter. However, SGI did file 22 pages of calculations and supporting material used to determine the income replacement benefit for the Appellant. Using the Appellant's income for 2000 and 2001, SGI determined that the Appellant's average income for those two years was \$XX,XXX. This amount was less than the yearly employment income for a minimum wage earner, which totaled \$XX,XXX per year. After total deductions for income tax, Canada Pension Plan contributions and employment insurance of \$X,XXX.XX, this left net income of \$XX,XXX.XX, or \$XXX.XX per week. The Appellant's entitlement was 90% of this amount, or \$XXX.XX per week, \$XXX.XX bi-weekly.

LAW AND ARGUMENT

[12] The Commission's power on appeal is provided in Subsection 193(7) of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (the "Act"). The 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 Part VIII of the Act.

The Commission must exercise its discretion judicially, and will overturn a decision of SGI only if an applicant establishes that SGI's decision was erroneous, or based on erroneous assumptions, or was unreasonable.¹

[13] Section 113 of the Act, which addresses an insured's entitlement to an income replacement benefit, reads in relevant part:

113...

(4) On and after the 181st day after the accident, an insured is entitled to an income replacement benefit if the insured is unable to hold employment he or she held or would have held but for the accident.

(5) An income replacement benefit pursuant to subsection (4) is to be the greatest of:

- (a) an income replacement benefit calculated on the basis of the yearly employment income attributed to the insured in the first 180-day period after the accident;
- (b) an income replacement benefit calculated on the basis of the average employment income the insured earned in the two years before the accident as set out in the

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

regulations, including any benefits received pursuant to the *Employment Insurance Act* (Canada), any benefits received under an employment disability plan, and any benefits received pursuant to *The Workers' Compensation Act, 1979* or similar provisions in any other Act, or any legislation of any other jurisdiction, that relate to the compensation of individuals injured in accidents; and

(c) an income replacement benefit calculated on the basis of a yearly employment income determined on the basis of a 40-hour work week paid on the basis of the minimum wage established pursuant to *The Labour Standards Act*.

(6) Notwithstanding subsection (5), if the insured held or would have held a seasonal employment at the date of the accident, the income replacement benefit pursuant to subsection (4) is the greater of:

(a) an income replacement benefit calculated on the basis of the average employment income the insured earned in the two years before the accident as set out in the regulations, including any benefits received pursuant to the *Employment Insurance Act* (Canada), any benefits received pursuant to an employment disability plan, and any benefits received pursuant to *The Workers' Compensation Act, 1979* or similar provisions in any other Act, or any legislation of any other jurisdiction, that relate to the compensation of individuals injured in accidents; and

(b) an income replacement benefit calculated on the basis of a yearly employment income determined on the basis of a 40-hour work week paid on the basis of the minimum wage established pursuant to *The Labour Standards Act*.

[Emphasis added]

[14] "Seasonal employment" is defined in the Act as follows:

100 In this Part:

...

(m) "seasonal employment" means recurring employment with periods of unemployment or lay-off over a 12-month period either:

- (i) with one employer; or
- (ii) at one type of employment;

1. Did the Appellant hold seasonal employment at the date of the accident?

[15] In order to determine whether the Appellant held seasonal employment at the date of the motor vehicle accident, it is instructive to review his work history.

[16] In about 1993, the Appellant was granted Journeyman Carpenter status, and he has been employed since then in construction, including drywalling, roofing, fencing and concrete work. We were not provided with details of the Appellant's employment history before April 1999. However, the Appellant acknowledged that, in the construction industry, finding work is like "feast or famine." He joined the Construction Union, Local 185 in 1994. He obtained work

through his union: he would put his name on a board and eventually he would be next in line for a position.

[17] The Appellant listed his recent employment in his application for income replacement benefits dated January 16, 2003. From April to October 1999 he worked as a carpenter for [construction company] in [location]. Following a half year of unemployment, he began working for [a paper plant] in [location], as a scaffolder, holding this position from May until November 2000. He next worked from June 2001 to January 2002² as a carpenter for [another construction company] in [location]. Shortly after leaving this position, he found work as a fourth year scaffolder for [a third construction company] starting on February 12, 2002, at the [project] in [location]. In addition to his duties he was also the shop steward and was allocated two hours per day to fulfill this responsibility. He was still working for the third construction company at the date of his motor vehicle accident.

[18] The construction company laid off its employees at the project from December 21, 2002, to January 2, 2003. While it had been anticipated that the project would end sometime between March and May 2003, the contract was extended for several months beyond May.

[19] Apparently [employer two] took over from the construction company at the project sometime in early 2003. During the hearing the question whether the Appellant would have been kept on by employer two was raised. The Appellant said that pretty well everyone who had worked for the construction company had been kept on, and we heard no evidence to suggest that the Appellant would not have been. SGI produced a facsimile dated January 22, 2004, addressed to [T.R.] from Bob Welte, a rehabilitation caseworker with Western Health Management, which appears to have been signed by T.R. and returned. The Appellant testified that T.R. runs employer two. The facsimile suggests that the Appellant would have been laid off from the project during the first round of layoffs, which occurred on September 10, 2003. The Appellant disputes this and says that his position as shop steward and his seniority meant that he would have been one of the last to be laid off. We do not have evidence before us to resolve this dispute and, in any event, it is not necessary for us to do so.

² His application says that his employment ended in January 2001, but he must mean 2002.

[20] SGI's counsel advised that he is not aware of any case where the term "seasonal employment" as defined in the Act has been considered by the Commission or the Court.

[21] Giving the words in the definition their plain and ordinary meaning, we have concluded that SGI did not err in determining that the Appellant held seasonal employment at the date of the motor vehicle accident. The Appellant's work history shows a pattern of recurring employment with periods of unemployment or lay-off. His employment was interrupted in every year, including in 2002, the year of his motor vehicle accident. Finally, although the Appellant was employed by various employers, the type of employment he held was consistent and involved construction work. For the purposes of the test, we do not think it matters that his duties varied from scaffolding to carpentry, or that sometimes he performed drywalling and other times concrete work, and so on.

2. If the Appellant held seasonal employment, what years should SGI have used in calculating his income replacement benefit?

[22] In his Application Form initiating this appeal, the Appellant states that he is "not satisfied with decision as to years used to average income." In argument he said that it was not fair for SGI to evaluate him based upon a year that he had no income.

[23] As noted above, in calculating the Appellant's income replacement benefit, SGI used his income for the years 2000 (\$4,551) and 2001 (\$19,848), his least remunerative years between 1998 and 2002. If the Appellant's income from any year other than 2000 had been used, he would have been entitled to an income replacement benefit well in excess of the alternative based upon the minimum wage.

[24] The Act compels SGI to calculate the income replacement benefit for a seasonal employee "on the basis of the average employment income the insured earned in the two years before the accident as set out in the regulations" including benefits received by the employee: Subsection 113(6)(a). The question is what years are to be used in calculating the benefit.

[25] Subsection 2(4) of *The Personal Injury Benefits Regulations* provides:

2(4) For the purposes of clauses 113(5)(b) and 113(6)(a), subsection 113(7), section 114, clauses 144(1)(b) and 144(2)(b) and subsection 144(3) of the Act, “year”, with respect to determining an individual’s income, means:

(a) in the case of an employed person, calendar year; and

(b) in the case of a self-employed person, the fiscal period of the person’s business ending in that year.

[26] Because the motor vehicle accident occurred on December 18, 2002, SGI has concluded that the income the Appellant earned in 2002 is not relevant for the purpose of the calculation, as the two calendar years before the accident to which the Subsection 113(6) refers are January 1 to December 31, 2000 and January 1 to December 31, 2001.

[27] “Calendar year” is not defined in the Act or the Regulations. *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, offers no assistance, since it simply defines “year” to mean “calendar year” in an enactment: Subs. 27(1). By contrast, Interpretation Acts in numerous other jurisdictions specify that a calendar year is the period from January 1 to December 31. For example, the *Interpretation Act*, R.S.C. 1985, c. I-27, provides:

37(1) The expression "year" means any period of twelve consecutive months, except that a reference

(a) to a "calendar year" means a period of twelve consecutive months commencing on January 1;

See also s. 29, *Interpretation Act*, R.S.B.C. 1996, c. 238; s. 38, *Interpretation Act*, R.S.N.B. 1973, c. I-13; and s. 26, *Interpretation Act*, R.S.P.E.I. 1988, c. I-8.

[28] Despite the absence of a clear definition in the Saskatchewan legislation, there can be no doubt, in our view, that calendar year means the twelve month period beginning on January 1 and ending on December 31. Examples where “calendar year” has been understood in this way include *Reeves & Co. v. Ozias* (1911), 1 W.W.R. 517 (S.C.C.) and *Ternoey v. Goulding* (1982), 132 D.L.R. (3d) 44 (Ont. C.A.).

[29] Accordingly, we have concluded that SGI was correct in calculating the Appellant’s income replacement benefit for the purpose of Subsection 113(6)(a) on the basis of the income he earned between January 1 and December 31 in 2000 and 2001.

3. Did SGI make any error in calculating the Appellant's income replacement benefit?

[30] For the purpose of Subsection 113(6)(b), SGI calculated an income replacement benefit based upon the minimum wage established pursuant to *The Labour Standards Act*. The provision requires SGI to calculate this benefit "on the basis of a 40-hour week," but the document on which SGI's calculation appears indicates that it is for "Full capacity of 30 hours/week." This is confusing, but it appears that the total of \$XX,XXX is based upon a 40-hour week.³

[31] Accordingly, we conclude that SGI did not err in its calculation of the income replacement benefit based upon the minimum wage.

CONCLUSION

[32] SGI's decision of September 16, 2003, setting the Appellant's income replacement benefit at \$402.68 bi-weekly, is upheld.

Dated at Regina, Saskatchewan, on March 23, 2005.

Peter Bergbusch, Chair

Jeff Scott, Commission Member

Conrad Hnatiuk, Commission Member

³ [calculation] = \$XX,XXX. Saskatchewan's minimum wage for the period commencing on November 1, 2002, was set at \$6.65 per hour: *The Minimum Wage Board Order, 1997*, Chapter L-1 Reg 7.