

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *R.E. v. Saskatchewan Government Insurance,*
2005 SKAIA 035
Date: 20050712
File: 133 of 2003

BETWEEN

R.E., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Martel Popescul, Q.C., for the Applicant
Dale Brown, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverley Cleveland, 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 Prince Albert, Saskatchewan
September 21, 2004

DECISION

[1] R.E., the Appellant, appeals a decision of Saskatchewan Government Insurance (SGI) dated August 18, 2003. The decision calculated the surviving spouse benefit payable to her as a result of her husband's death in a motor vehicle accident on July 11, 2003.

[2] The surviving spouse benefit, under the provisions of *The Automobile Accident Insurance Act* in force at the time of the Appellant's husband's fatal accident (the new Act)¹ is equal to 50% of the weekly income benefit the Appellant's husband would have been entitled to if he had survived². It is payable every two weeks for the lifetime of the surviving spouse, but may be paid out as a lump sum on the option of the surviving spouse.³

[3] The issue in this case is whether the weekly income calculation should have included, in addition to his salary from employment, the value of the personal use of a motor vehicle provided by his employer. SGI did not include this value because the Appellant's husband had not included it on his income tax returns as taxable income. His widow's position is that the regulation governing the calculation of yearly employment income does not require it to be reported.

FACTS

[4] The Appellant's husband had been a 70% shareholder in [business], an auto repair shop in Prince Albert. The corporation owned several vehicles, a couple of trucks, a small car apparently used as a courtesy car and, since 1998, a car used by the Appellant's husband to get from his residence at [home town] to and from work.

[5] His chartered accountant Mervin Schneider testified that his firm did the monthly statements for the corporation, and at year end the financial statements and corporation tax returns. The firm did not do the Appellant's husband's personal tax returns. In 1998, the corporation bought a Dodge Intrepid for \$24,260, for the Appellant's husband's personal use. Revenue Canada (now the Canada Revenue Agency) considered driving to and from work as

¹ S.S. 2002, c. 44.

² Section 144 of the new *Act*.

personal use, although Schneider said many of his clients are surprised to learn this, and think of it as “work-related.” He specifically discussed with the Appellant’s husband the fact that Revenue Canada required that a standby charge be included in his personal income. He had made a note that there was no existing shareholder’s loan against which this standby charge could be applied. He provided the Appellant’s husband with the amount for inclusion, 2% of the capital cost for standby, and an additional 1% of the capital cost (half the standby charge) for operating charges, an amount that remained fixed as long as the corporation owned the vehicle. In 2001, the car was traded in for a Chrysler Sebring, that had a capital cost of \$31,760.

[6] After the Appellant’s husband’s death, Schneider became aware that the Appellant’s husband had not included the standby charge on his income tax returns. He thought it likely that the Appellant’s husband had not done so in order to save tax. He said that the practice was somewhat common. He said that if Revenue Canada had done an audit of the corporation’s books, they would have noticed the ownership of the automobile, asked if it were for personal use, and reassessed the Appellant’s husband’s personal tax returns accordingly.

[7] Schneider testified that the Appellant’s husband was a salaried employee of the corporation as well as a shareholder. There was no personal use of vehicles by other employees of the corporation of which he was aware. He noted that if a corporation owns more than one car, there could be standby charges on each for one employee, but Revenue Canada generally charges only one per person. Trucks can also be considered as available for personal use, although a stronger argument can be made that they are for business use. He did not consider the corporation’s trucks as available for personal use in this case. On cross-examination, he acknowledged that his firm had prepared the T4 slips for the employees of the corporation and had not included the standby charge in the Appellant’s husband’s T4 for 2000, 2001 or 2002. He thought that he would have discussed whether or not his firm would do this for the corporation with the Appellant’s husband, pointing out that it would result in different withholdings for income tax, and that the Appellant’s husband would “probably” have told him to leave it to him to include in his personal return.

³ Section 146.

[8] Schneider also discussed the applicable sections of *The Personal Injury Benefit Regulations* made under the new Act [see below at paragraph 12], and section 6(1) of the *Income Tax Act* (Canada), which formed the basis for the calculations he had made and provided for SGI's consideration.

[9] The taxable benefits for personal use of the car that the Appellant's husband was required to report in his 2001 to 2003 tax returns were as follows:

2001	\$9,633.60
2002	\$11,433.60
2003	\$5,716.80 (six months to date of death)

[10] Since the yearly income used by SGI in its calculations was [greater than \$35,000], it can be seen that the inclusion in income of the personal use value of the automobile would have had a significant effect on the Appellant's husband's tax and would have a similar effect on the Appellant's surviving spouse benefit.

[11] Counsel for the applicant stipulated that if the Appellant were called to testify, she would confirm that her husband had used the Dodge and the Chrysler for personal use driving back and forth to work.

Applicable Legislation

[12] Section 17 of *The Personal Injury Benefit Regulations* (PIBR) requires the inclusion in the insured's yearly employment income of:

“(b)...

(v) the value of the personal use of a motor vehicle provided by an employer at the date of the accident, in the amount reported in the insured's personal income tax return in the calendar year before the **accident or, if no amount was reported, in an amount calculated pursuant to paragraph 6(1)(e)** of the *Income Tax Act* (Canada) as an annualized benefit;” (emphasis added)

[13] Section 6(1)(e) of the *Income Tax Act* (Canada) provides as follows:

“Amounts to be included as income from office or employment
6.(1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable

Standby charge for automobile

(e) where the taxpayer's employer or a person related to the employer made an automobile available to the taxpayer, or to a person related to the taxpayer, in the year, the amount, if any, by which

(i) an amount that is a **reasonable standby charge** for the automobile for the total number of days in the year during which it was made so available

exceeds

(ii) the total of all amounts, each of which is an amount (other than an expense related to the operation of the automobile) paid in the year to the employer or the person related to the employer by the taxpayer or the person related to the taxpayer for the use of the automobile;"

[14] Section 6(2) of the *Income Tax Act* (Canada) further provided⁴:

(2) For the purposes of paragraph 6(1)(e), a **reasonable standby charge** for an automobile for the total number of days (in this subsection referred to as the "total available days") in a taxation year during which the automobile is made available to a taxpayer or to a person related to the taxpayer by the employer of the taxpayer or by a person related to the employer (both of whom are in this subsection referred to as the "employer") shall be deemed to be the amount determined by the formula

$$A/B \times [2\% \times (C \times D) + 2/3 \times (E - F)]$$

where

A is the lesser of

- (a) of the total kilometres that the automobile is driven (otherwise than in connection with or in the course of the taxpayer's office or employment) during the total available days and
- (b) the value determined for B for the year under this subsection in respect of the standby charge for the automobile during the total available days,

except that the amount determined under paragraph (a) shall be deemed to be equal to the amount determined under paragraph (b) unless

- (c) the taxpayer is required by the employer to use the automobile in connection with or in the course of the office or employment, and
- (d) the distance travelled by the automobile in the total available days is primarily in connection with or in the course of the office or employment;

B

is the product obtained when 1,000 is multiplied by the quotient obtained by dividing the total available days by 30 and, if the quotient so obtained is not a whole number and exceeds one, by rounding it to the nearest whole number or, where that quotient is equidistant from two consecutive whole numbers, by rounding it to the lower of those two numbers;

C

is the cost of the automobile to the employer where the employer owns the vehicle at any time in the year;

D

⁴ Revisions to the standby charge provisions were made in the federal budget of February 18, 2003. We do not find it necessary for the purpose of this decision to consider the effect of the changes, although obviously the changes could affect calculation of the charge.

is the number obtained by dividing such of the total available days as are days when the employer owns the automobile by 30 and, if the quotient so obtained is not a whole number and exceeds one, by rounding it to the nearest whole number or, where that quotient is equidistant from two consecutive whole numbers, by rounding it to the lower of those two numbers;

E

is the total of all amounts that may reasonably be regarded as having been payable by the employer to a lessor for the purpose of leasing the automobile during such of the total available days as are days when the automobile is leased to the employer; and

F

is the part of the amount determined for E that may reasonably be regarded as having been payable to the lessor in respect of all or part of the cost to the lessor of insuring against

(a) loss of, or damage to, the automobile, or

(b) liability resulting from the use or operation of the automobile.

[15] The evidence was clear that the Appellant's husband had the personal use of the motor vehicle, the Dodge and the Chrysler owned by his employer, in that first the Dodge and then the Chrysler was available to him and was in fact used for him for personal use. There was no evidence that there were any amounts paid by him to his employer under section 6(1)(e)(ii) of the *Income Tax Act* for the use of either car.

[16] It is also clear that he did not report any amount on his income tax returns for any of the years 2000 to 2002, although advised to do so. SGI's counsel argued that his failure to do so disqualifies his widow from having that included in her surviving spouse benefit. As the letter from SGI dated December 11, 2003 states:

“[The Appellant's husband] consistently provided personal tax returns to Canada Customs & Revenue Agency leading up to the loss year which provided no indication of his personal use of a corporate vehicle.

They [SGI's calculation unit] accept [the Appellant's husband]'s position as declared 'that the information given on his tax return and in any documents attached is correct and fully discloses all my income'.”

[17] The wording of section 17(2)(b)(v) of the PIBR is somewhat unusual, in that it appears to include the value of the personal use of a motor vehicle whether or not it is reported on the tax return. This is to be contrasted with the treatment of tips, which are to be included in yearly employment income only if they are reported.⁵

⁵ Section 17(2)(b)(ii): “tips, in the amount that is the greater of: (A) the amount reported in the insured's personal income tax return in the calendar year before the accident; and (B) the amount reported in the insured's personal income tax return for the calendar year in which the accident occurred.”

[18] The wording of section 17(2)(b)(v) is substantially the same as that used in *The Personal Injury Benefits Regulations* under the old Act that came into force in 1995.⁶

[19] We accept the argument advanced by the Appellant that section 17(2)(b)(v) provided an alternative, either the value reported, or if no amount was reported, the amount calculated according to the *Income Tax Act*. It appears that the drafters of the *Regulations* intended, through the choice of the wording employed, to give this option. We note that the wording *could* apply in circumstances where an insured has not reported the amount, but has not dodged the tax man, as the Appellant's husband appears to have done: for example, if a motor vehicle was first purchased in the year of the accident, an insured would not have reported the amount. "in the calendar year before the accident". However, the regulation places no restriction of a legitimate reason for not reporting the amount in the prior calendar year.

[20] We do agree with SGI that it is inequitable that a benefit can be claimed when the corresponding burden was not earlier assumed. In that regard, we note that Schneider admitted that he had not received instructions to file amended returns for the taxation years in question for the Appellant's husband. His estate will require a clearance certificate from the Canada Revenue Agency if his executor is not be personally liable for taxes, and we expressed the hope that amended returns would be filed.

[21] The wording is clear, and we must apply it. We observe that the wording presents difficulties in more than just this case. For example, if the amount reported "in the calendar year before the accident" was small because the car was available for a few months only, there appears to be no provision for dealing with it as an annualized benefit. It does not contemplate what happens if there is a change in automobile from the prior year to the current year: why should the insured not be charged with the value of the car owned at the time of the accident, rather than the one that has been sold? It does not contemplate averaging over three calendar years as, for example, commissions are section 17(2)(c)(iii).

⁶ *The Personal Injury Benefits Regulations*, c. A-35, Reg. 3, s. 20, (d) (v): "The value of the personal use of a motor vehicle provided by an employer at the time of the accident in the amount reported in the victim's personal income tax return for the calendar year before the year in which the accident occurred or where no amount was reported in an amount calculated pursuant to subsection 6(1) of the *Income Tax Act* (Canada) as an annualized benefit."

[22] SGI's decision is set aside. We direct SGI to recalculate the Appellant's surviving spouse's benefit on the basis of the amount that should have been included as income by the Appellant's husband in the calendar year before the accident.⁷, as set out in Schneider's calculations, with interest at the rate prescribed under section 210 of the new Act and section 102 of the PIBR, i.e. that payable under *The Pre-judgment Interest Act*.

[23] The Appellant is entitled to her costs of the application, including the application fee, counsel fee on the basis of Column 3 of the Tariff of Costs of the Court of Queen's Bench,⁸ and witness fees with respect to Mervin Schneider's attendance as a professional witness at the rate of \$100.⁹ The whole of the costs is not to exceed \$2,500.

Dated at Regina, Saskatchewan, on July 12, 2005.

Ann Phillips, Q.C., Chair

Beverley Cleveland, Commission Member

Al Knippel, Commission Member

⁷ 2002 - \$11,433.60.

⁸ Section 96(1), PIBR.

⁹ Schedule IV, A, Fees payable to witnesses and interpreters in civil proceedings prescribed pursuant to Rule 562 of the Queen's Bench Rules.