

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *G.M. v. Saskatchewan Government Insurance,*  
2005 SKAIA 056  
**Date:** 20051109  
**File:** 059 of 2003

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**BETWEEN**

**G.M., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**G.M., for the Applicant**  
**Darrell Mack, for the Respondent**

***Before:*** Beverly Cleveland, Commission Member

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

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Heard at Prince Albert, Saskatchewan  
December 10, 2003

## DECISION

### FACTS

[1] The Appellant, G.M., appeals a decision by Saskatchewan Government Insurance (SGI) dated May 20, 2003 determining him into the position of a Sales Clerk with a yearly employment income of \$13,832.00.

[2] The Appellant was seriously injured in a motor vehicle accident while on his way to work on December 22, 1997 resulting paraplegia. He sustained an L1 burst fracture and spinal cord injury. The onset of numbness and weakness in his legs was immediate following the accident and he was transferred by ambulance from [town] to North Battleford and subsequently to Royal University Hospital in Saskatoon, SK. On January 2, 1998, he underwent surgical intervention for internal fixation at T12 to L2, received a bone graft from his left hip and rods and wires placed to stabilize the area. The Appellant was transferred to Saskatoon City Hospital on January 27, 1998 where he remained until February 27 for inpatient rehabilitation.

[3] As well, the injury resulted in a neurogenic bladder and bowel and at the date of the hearing, the Appellant continued to experience periodic urinary and fecal incontinence. He also has weakness of the S1 through S4 muscles including the gastroc soleus, hip abductors, as well as the anal sphincter. The reported injury to his right brachial plexus has resolved. He is independent with self-care activities but the unpredictability of the neurogenic bowel continues to be a problem.

[4] The Appellant is in his thirties and married with two school-aged children.<sup>1</sup> Prior to his accident, he worked for about four years on the oil rigs progressing through different jobs from driller to tool push relief. As well, he has two years in an electrical apprenticeship. During his off week from the oil field, the Appellant also farmed with his father. He obtained his grade 12 (GED) after the accident and took several courses related to his previous oil field work, eg. handling dangerous goods, hydrogen sulfide and first aid training, to assist in his future employability.

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<sup>1</sup> RCE; my hearing notes however say that the Appellant has three children, two daughters (11, 10) and a son (6)

[5] Despite the serious and permanent nature of the Appellant's injuries, he was highly motivated and keenly interested in returning to the work force. Once he reached what is referred to as "medical maximum improvement", a series of functional and employment testing was undertaken.

[6] Based on work performance and residual capacity evaluation testing done by Kinetik in December 2000, it was felt that the Appellant could do a medium level of work for an 8-hour day. Whether the Appellant can work for 8 hours a day is essentially the sole issue in his appeal.

[7] He was first determined into the employment of gas field operator and a job placement located but the attempted return to work was unsuccessful. No accommodations were made for the heavier tasks required at the job site and the employer required 16-hour shifts that the Appellant could not physically tolerate. In a letter to the Appellant's family doctor, Dr. Bernacki writes in part:<sup>2</sup>

"I think he needs to work with his vocational rehabilitation worker to find an occupation which is more suitable to his physical capacity. When I did see him as part of the residual capacity evaluation, we suggested his work level may be able to be achieved in his previous occupation as an oil field worker with accommodations. However it does not appear that he has been able to return to work and maintain gainful competitive employment. He states that he can not maintain the hours they require, nor carry out several tasks which are required as part of the job description.

"I really think this gentleman is a hard working, motivated individual with a desire to find gainful employment. There is no element whatsoever of malingering or symptom magnification. He has a significant spinal cord injury and the sequelae of this are physically limiting for him.

"I have asked [the Appellant] to meet with his vocational rehabilitation consultant to discuss any options that are available to him within his community. I would suggest first that they meet with his employer to see if accommodations can be made."

[8] The Appellant was then determined into the employment of an agricultural equipment sales person. The vocational consultant contacted Dr. Bernacki about this job and it was subsequently felt that it was not suitable because of the driving component and the associated problems the Appellant has with urinary and fecal incontinence.

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<sup>2</sup> Barry Bernacki, M.D. , FRCP (physical medicine & rehabilitation specialist) who assessed the Appellant for the RCE

[9] Lastly, the Appellant was determined into the employment of a sales clerk and a (supplemental) labour market survey identified [the store] in [town] as being suitable. Russ Warner, vocational consultant for Innovative Rehabilitation Consultants (IRC) testified he asked both employers the same 6 questions – requirements (education, skills); duties; hours of work; salary; number of employees and future employment outlook. He adopted the results of the functional testing from the FIT report with noted restrictions for sitting, trunk rotation in sitting, work bent over in standing and reclining reach. Mr. Warner couldn't recall if he asked any questions about availability or location of a washroom.

[10] The Appellant's documents included a letter from the manager of the store. He wrote in part "[The Appellant] (sic) would not be able to match any of the job description due to his back problem and balance". In response Mr. Warner stated that in his opinion, the Appellant is able to do this occupation.

[11] On May 29, 2003 the Appellant was advised that his income replacement benefit would be reduced by the determined employment income of \$13,832 per year (gross). This translated into a net bi-weekly reduction of \$501.16 off the income replacement benefit he was receiving at that time.

[12] A follow up in September 2003 with Doug Usher, senior occupational therapist at Kinetik, was made. Mr. Usher concluded the sales clerk employment was a reasonable match based on the Appellant's functional testing in December 2000. He replied in part:

"The main area of concern is with respect to body positions/postures required for work. The NOC (National Occupational Classification) describes work positions to include primarily walking and/or standing. [The Appellant] demonstrated tolerances at a frequent level (up to 2/3 of an eight hour day) for both standing and walking. His limitation to these types of weight bearing activities related to leg fatigue and altered balance reactions as a result of neurological deficits impacting plantar flexion and gait. Walking activities would provide task variation to static standing; however, it is questionable whether [the Appellant] would adequately tolerate job demands that did not allow some variation into non-standing positions. If job demands allowed for a reasonable degree of sitting (at an occasional level) then positional demands should be reasonably met. The information in the supplemental labour market survey indicated that there were slower periods of the day when sitting would be possible (with both sales clerk positions described). If this accommodation were consistently applied, it would be a reasonable one and allow a fit with job demands.

“The writer discussed any potential concerns of employment with Dr. Barry Bernacki, the assessing physician at the time of the Residual Capacity Evaluation. Dr. Bernacki noted no concerns, as bowel management issues would be appropriately addressed with the work being primarily indoors and in reasonable proximity to washroom facilities.”

[13] Mr. Mack, appeals officer, submits that SGI will consider any deterioration the Appellant may experience in the future and reconsider their decision. At present however, he submits that SGI has complied with the legislation and the Appellant was properly determined into an employment based on evaluations conducted by the medical professionals and consultants working with the Appellant. In conclusion, he submits the sales clerk position exists and is available within the geographic region where the Appellant resides and as defined in the Act and regulations.

[14] The Appellant concludes by saying simply that he cannot be on his feet for 8 hours a day at any job whether in the paid work force or at home. He experiences muscle fatigue and pain particularly when standing on concrete (known as “concrete creepers”) because he has no “spring” in his heels and the concussion goes right to his back. He also talked candidly about the personal and social embarrassment because of fecal incontinence especially. The Appellant says he has what is called an “open bottom”; there is no predictability or warning and incontinence pads do not help when it happens. The Appellant also refers to the letter from the Manager at the store that he interprets as saying the store would not hire him because of his injuries.

## LAW AND ANALYSIS

[15] This Commission determined in the *R.C.* decision<sup>3</sup> that its discretion to set aside or vary decisions under section 193(7) of *The Automobile Accident Insurance Act*<sup>4</sup> must be exercised in a judicial manner. That discretion will be exercised in favour of the applicant if it is satisfied that SGI’s decision(s) giving rise to the appeal was wrong in law, based on inaccurate or incorrect assumptions; or at the very least, the decision was unreasonable.<sup>5</sup>

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<sup>3</sup> *R.C. v. Saskatchewan Government Insurance* 2003 SKAIAAC 001

<sup>4</sup> R.S.S. 1978, c. A-35 as amended

<sup>5</sup> *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB97557; *Donen v. Saskatchewan Government Insurance*, [1998] QB98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB98113.

[16] The statutory and regulatory scheme under the Act clearly provides that SGI is entitled to determine individuals into employment and reduce their income replacement benefits in certain circumstances. In order to decide whether in this case if the Appellant's was fairly determined into employment and his income benefit reduced accordingly, it is necessary to review the law in this area. The relevant sections of the Act in force at the time of the Appellant's accident in 1997 (the "old Act) are:

**"Determination of employment after second anniversary of accident**

132 Following the second anniversary date of an accident, the insurer may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112 or 113 or determined pursuant to section 131."

133 In determining an employment pursuant to section 132 or 133, the insurer shall consider the following factors:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skills acquired by the victim in a rehabilitation program approved pursuant to this Part;
- (c) whether the employment is available in the region of Saskatchewan in which the victim resides;
- (d) the employment that the victim is able to hold:
  - (i) on a regular and full-time basis; or
  - (ii) if it would not be possible for the victim to hold employment on a regular and full-time basis, on a part-time basis;
- (e) any other prescribed factors.

**"Reduction where income from determined employment is less than income previously computed by insurer**

139(1) Subject to the other provisions of this Division, the insurer shall reduce a victim's income replacement benefit pursuant to subsection (2) if:

- (a) the victim is able to hold an employment determined for the victim pursuant to section 132 or 133;...

[17] Also relevant is s. 17 of The Personal Injury Benefits Regulations:

17. For the purposes of clause 134(c) of the Act, an employment is available to a victim in the region of Saskatchewan where the victim resides when, at the time the insurer determines an employment for the victim:

- (a) the employment is being performed or is about to be performed by the victim; or
- (b) the employment or the category of employment exists and is likely to continue as an employment or category of employment within the foreseeable future.

[18] I am also referred to the decision in *Job v. Saskatchewan Government Insurance*<sup>6</sup> wherein Mr. Justice Matheson at paragraphs 50 and 51 writes:

“While SGI could have rejected the assessment report of the experts, it would have been folly to do so without some very convincing reasons therefore, which have not been demonstrated. SGI has a duty to deal fairly with the individuals who have been injured in motor vehicle accidents. To substitute the opinion of adjusters for that of experts would immediately raise a very serious question of fairness.

“For a court, without any real basis therefore, to substitute its opinion for that of experts would equally be the epitome of injudiciousness.”

[19] Mr. Justice Matheson notes the regulations don’t require that an injured person actually obtain employment in the determined category<sup>7</sup> and goes on to find that SGI properly determined Mr. Job into the category of employment that it did.

[20] In December 2004, the Court of Appeal dismissed Mr. Job’s appeal. Vancise, J.A. considered whether, if given a choice, an employer who hired a “healthy” person over a disabled person resulted in the employment not being available within the framework of Act and regulations. At paragraph 18, he writes:<sup>8</sup>

“...All that is required under the Act is that SGI prove there is employment of the kind and type identified pursuant to the assessment made pursuant to ss. 132 and 133 and that the “determined employment” exists and is likely to continue to exist within the foreseeable future. The Act does not guarantee employment....”

[21] I find the Appellant to be a credible witness. He testified in a frank and sincere manner about the physical and personal nature of his injury and the impact on his life and family. I believe him when he says that he can do the work but not continuously over an 8-hr day. The physical work performance evaluation indicates however he is capable of doing a medium level work for an 8-hour day with restrictions.

[22] SGI retained and relied on rehabilitation experts to assess the Appellant’s functional capacity for work and provided vocational assistance. The first two jobs of gas field operator and agricultural sales representative were not suitable because of the nature of the Appellant’s

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<sup>6</sup> [www.lawsociety.sk.ca](http://www.lawsociety.sk.ca); QB02456; note: appeal dismissed (orally) December 8, 2004; see 2004 SKCA 164

<sup>7</sup> paragraph 57

<sup>8</sup> 2004 SKCA 164

injuries although seemingly a “job match”. Eventually he was determined as a sales clerk – a category of employment that is light and less than his functional capability but one that could accommodate his restrictions.

[23] Russ Warner conducted a supplemental labour market survey in a satisfactory way but I am doubtful about his having taken into consideration the Appellant’s bladder and bowel incontinence. When asked he couldn’t recall whether he asked any questions about bathroom facilities. The necessity for close proximity to washroom facilities was identified as part of his instructions and it isn’t reasonable or plausible to me that he would remember the six questions he asked the Manager’s of the store but not remember if he asked about the bathrooms.

[24] In a public work place, incontinence, particularly fecal incontinence, has immense social and personal implications as well as medical ones. The Appellant said one of the reasons he was so excited about the first job placement was because if he had an accident he could shower and clean up. However, the opportunity for the Appellant to shower if he needed was not identified as required; only the reasonable availability to a bathroom in the work place was required.

[25] In a subsequent follow-up report to IRC, Doug Usher, OT, notes his conversation with Dr. Bernacki regarding the suitability of a sales clerk position for the Appellant and he specifically talks about bowel management. He writes that Dr. Bernacki had no concerns because the work was indoors and in reasonable proximity to washroom facilities.

[26] I am not obligated to accept what the experts say but as pointed out by Matheson, J. in the lower court decision in *Job* and as this Commission has stated in numerous previous decisions, discretion to substitute my opinion, particularly for that of an expert, must be done in a judicious manner. I find nothing that would permit me to do that in this case. I am satisfied overall that SGI acted reasonably and according to the governing legislation.

[27] Lastly, as was held in the *Job* decision(s), there is no requirement the employment be held by or even offered to the injured person under the regulations – the job is considered available if it exists and likely to continue to exist within a certain geographic proximity. The

sales clerk positions at the store are available within the meaning of the Act and within 100 km of the Appellant's farm residence.

## **CONCLUSION**

[28] SGI's decision is upheld and the appeal is dismissed.

**Dated** at Regina, Saskatchewan, on August 11, 2008.

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Beverly Cleveland, Chair