

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *R.S. v. Saskatchewan Government Insurance,*  
2006 SKAIA 004  
**Date:** 20060117  
**File:** 022 of 2004

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**BETWEEN**

**R.S., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**R.S., Applicant**  
**Dale Brown, for the Respondent**

**Before:** **Joy Dobko, Chair**  
**Al Knippel, Commission Member**  
**Marjory Gammel, 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 **Saskatoon**, Saskatchewan  
April 8, 2005

## DECISION

[1] This is an appeal by the Appellant, R.S., of a decision made by Saskatchewan Government Insurance dated February 7, 2003 with respect to the termination of his income replacement benefits on the basis that the Appellant was “substantially able to perform the essential duties of the employment” he performed at the time of his motor vehicle accident on June 2, 1999. SGI also terminated the Appellant’s ongoing funding for prescription medication, Dilantin, which the Appellant was taking for the control of seizures.

[2] The issues on appeal are:

- i) Was the Appellant substantially able to perform the essential duties of the employment he performed at the time of his motor vehicle accident when his income replacement benefits were terminated on February 7, 2003?
- ii) Is the Appellant entitled to receive ongoing funding for the prescription medication, Dilantin, which he is currently taking for the control of seizures?

### FACTS:

[3] The Appellant was involved in a motor vehicle accident on June 2, 1999 (the “motor vehicle accident”), when the vehicle which he was a back seat passenger in was involved in a collision with another vehicle which failed to yield a stop sign. The collision reportedly occurred at highway speeds and the Appellant was ejected from the vehicle. The Appellant suffered a concussion/mild head injury, fractured clavicle and compression fracture of the L4 vertebrae. The Appellant was involved in a previous motor vehicle accident in 1997 (the “1997 motor vehicle accident”) in which he suffered a chest injury and abrasions to his hands, chin and the back of his head.

[4] Following his 1999 motor vehicle accident, the Appellant was treated and discharged from the hospital. He returned to the hospital on June 4, 1999, reporting confusion and periods

of loss of consciousness. The Appellant was transported to Regina and remained in hospital until he was discharged on June 9, 1999.

[5] A CT scan taken of the Appellant's head on June 4, 1999 reported "no evidence of intracranial hemorrhage". The report also stated: "The CSF space over the frontal area is noted to be slightly more prominent than usual which could be due to minimal atrophy for this age group. I do not know the reason for this".

[6] On June 10, 1999 the Appellant completed his Application for Benefits. He reported injuries to his neck and shoulders, mid and low back, legs and feet. He also reported headaches. The Appellant reported loss of consciousness for an unknown duration.

[7] On June 23, 1999, SGI calculated the Appellant's income replacement benefits to be \$1710.70. At the time of the motor vehicle accident, the Appellant was a Team Leader with [employer], a mining company that subcontracted to [business]. His gross annual income was calculated to be [amount]. As a team leader, the Appellant was responsible for looking after a crew of men. The Appellant testified that blasting decisions were very important and could involve using up to 300 sticks of dynamite. He also stated he was responsible for many lives and this made his job extremely stressful. He was often required to climb up and down ladders and build raises as high as 60 feet. He reported that the work was labour intensive. The Appellant reported that he no longer felt confident to perform his work at the mine because of his memory problems which were caused by the head injury suffered in the motor vehicle accident.

[8] The Appellant underwent a neuropsychological evaluation with Dr. Landry on July 26<sup>th</sup> & 27<sup>th</sup>, 1999. Dr. Landry's opinion was that the Appellant had likely sustained a concussion/mild head injury in the motor vehicle accident. Dr. Landry stated:

...

Given that he is only approximately 1 to 2 months post-injury, he should demonstrate improvement in his level of cognitive functioning over the next 6 to 12 months. At the present time, he should not return to work, especially in a work environment considered to be potentially dangerous (i.e., mine blasting work). Driving should be kept to a minimum for at least 6 months post-injury. He should be able to carry out activities of daily living from a purely cognitive

perspective. He may, however, be more likely to forget to turn off household items like the stove or iron. At present, this may require some level of supervision.

Given that [the Appellant] is only 1 to 2 months post-injury, his present neuropsychological areas of impairment should demonstrate improvement over the next 6 to 12 months. In order to maximize his potential for a good overall outcome, he should be referred to the Acquired Brain Injury Outreach Coordinator for the [area]. The coordinator may be able to provide him with ongoing counseling for his very mild depression should this be required, and more importantly, monitor his eventual return to work. Given his type of work, safety (his and others) should be given priority in attempting a return to his pre-injury job. As he will likely require physiotherapy after removal of his back brace, a return to work is not likely to be possible for at least a few more months. It is hoped that also during this time he will demonstrate continued recovery from his mild head injury, with particular hoped improvement in his memory abilities and in the speed with which he can complete "thinking" tasks (e.g. processing speed).

A neuropsychological re-assessment of his cognitive abilities may be necessary before he attempts to return to his pre-injury occupation. Continued/ongoing processing speed and/or memory impairments would potentially preclude a return to his pre-injury occupation.

[9] Approximately one year after the motor vehicle accident, in June 2000, the Appellant suffered a seizure. He attended upon Dr. Ekong with respect to the seizure. He was placed on Dilantin to prevent further seizure activity. The Appellant first saw Dr. Ekong on June 5, 1999 and then again on July 18, 2000. A CT scan of the brain was completed on July 20, 2000 and reported by Dr. Ekong to be normal. With respect to the June 5, 1999 attendance, Dr. Ekong further reported:

Examination of [the Appellant] at the time showed him to be alert and orientated. Some of his answers to questions were somewhat vague. He moved all limbs well. My impression was that of cerebral concussion with associated post concussion syndrome. CT scan of the head was done and showed a small bifrontal hygroma (fluid in the subdural space). I suggested that he should be admitted for observation.

Cervical spine x-rays were done and were within normal limits. The lumbar spine x-rays showed minimal compression of the anterior aspect of L4. The alignment of the entire lumbar region was satisfactory. X-rays of the pelvic bones showed no abnormality. The chest x-ray was normal.

[The Appellant]'s status remained stable and he was discharged home on June 6, 1999. I reviewed him in the office on July 18, 2000. He had evidently done very well since discharge from hospital until a few days prior to that visit when he had a grand mal seizure. He was commenced on Dilantin 300 mg a day. My examination on July 18, 2000 revealed no specific abnormality. My impression at that time was post dramatic seizure and I felt we should rule out a subdural hematoma. As a result I organized for CT of the head to be done on him. That CT was done on July 20, 2000. It was normal. Copies of the original CT in 1999 and the follow-up one in 2000 are enclosed herewith for your information. I felt at that time that the seizure was probably due to a small scar resulting from the head injury one year previously. I organized for EEG to be done on him and recommended that he should stay on Dilantin 300 mg a day.

In summary, [the Appellant] sustained a head injury in a road traffic accident in June 1999. The initial CT scan of the head showed a small subdural hygroma.

[10] On October 6, 2000, the Appellant also had an EEG done. There was no abnormality noted.

[11] The Appellant underwent a follow-up neuropsychological evaluation with Dr. Landry on December 1, 2000. Dr. Landry stated:

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During the present assessment, [the Appellant] demonstrated residual significant impairments in the area of auditory memory. He also again performed below expectations (Low Average range) in the area of processing speed, or the ability to work quickly on tasks while maintaining accuracy. Some minimal improvement was noted in comparison with the results of previous testing. Recent onset of seizures and the need for Dilantin 300mg, may have limited the potential for further cognitive improvement.

Given that he was approximately 18 months post-injury, his current cognitive profile is likely stable. At the present time, he should not return to his former type of work as he might pose a risk to himself or others. Efforts to assist him to find alternative employment should be commenced.

[12] Dr. Landry opined that the Appellant's current memory impairments were consistent with a mild closed head injury. Dr. Landry further stated:

From a purely neuropsychological standpoint, [the Appellant] could potentially return to most pre-injury involvements. Physical limitations (compression fracture at L1) may pose a barrier with respect to some forms of employment. His ongoing memory impairments preclude a return to his previous occupation.

...Vocational rehabilitation designed to assist [the Appellant] obtain alternate employment. This should include interest exploration and identification of possible employment opportunities in his community. Any future employment should have very little potential for stress and should be relatively repetitive and routine in order to reduce ongoing short-term memory demands.

[13] On December 23, 2000, Dr. Landry wrote to SGI and advised:

Please find attached the neuropsychological evaluation I completed on [the Appellant]. I have already met with [the Appellant] and his wife to go over the results. You might want to consider obtaining vocational counseling and placement services for [the Appellant] as soon as is possible, as he is quite anxious to commence some kind of work. He should not return to the mines as a blaster/team leader because from a cognitive perspective, he is a safety risk to himself and others.

[14] On April 26, 2001, SGI sent correspondence to the Appellant advising him that they would be completing a residual capacity evaluation on him as he was someone who was unable to hold his original employment and had reached maximum medical improvement. SGI outlined four possible scenarios once the residual capacity evaluation was completed:

1. If it is determined you can return to your original employment, the Outreach Team/Vocational Rehabilitation consultant will then work with you to develop a return to work plan.
2. If it is determined that you will not be able to return to your employment, we will need a vocational assessment completed by the vocational rehab consultant. They will determine your transferable skills as well as any aptitude and interest testing that will be required. From these vocational assessments the consultant will then identify occupations that you are capable of doing.
3. If actual formal retraining is an option that will be considered, however, the vocational consultant will have to provide us with a cost analysis of this retraining to help us determine if it makes economic sense.
4. If it is determined that a person is not capable of holding employment or retraining, SGI will continue paying the income replacement benefit.

If you are capable of holding any employment and an employment has been determined, a one-year grace period is allowed. Although if a claimant has found some employment during this grace period we will reduce the IRB by deducting 75% of the net income earned. After this grace period, we will deduct 100% of determined income from previous IRB.

[15] However, on May 28 and 29<sup>th</sup>, 2001 the Appellant underwent a residual capacity evaluation at Wascana Rehabilitation Centre which recommended 12 to 16 weeks of tertiary treatment. The Residual Capacity Evaluation Summary was as follows:

[The Appellant] has some neuropsychological restrictions, and the most recent neuropsych assessment shows moderate impairment in auditory immediate memory and auditory learning efficiency with borderline to mild impairment auditory delayed memory and auditory delayed recognition. This is an improvement from his initial neuropsych assessment, but given the time lines involved it is felt unlikely that he will have further improvement.

There is a history compatible with a seizure, and he is on Dilantin which might affect his results in a minor way. The possible presence of a seizure disorder also restricts his activities.

[The Appellant] suffered a shoulder injury and low back injury. On physical testing, he was found to have marked restrictions based on the shoulder and low back problems. He was functioning at a sedentary level, but was unable to sit for prolonged periods of time. Therefore, it would appear that there are not potential vocational activities available. However, we note that given the findings and the diagnoses there is a high likelihood that with appropriate rehabilitative treatment [the Appellant] can improve his physical function.

We, therefore, recommend that he have tertiary level treatment for 12 to 16 weeks, after which we would anticipate his physical function will have improved and a repeat Residual Capacity Evaluation would be in order.

During treatment, given the amount of weakness present, it would be wise if he was watched closely for the development of any cervical or lumbar radiculopathy. However, specific signs that would suggest radiculopathy was present were not found on this assessment.

He appears to be highly motivated and this should have a very positive effect on his outcome.

[16] Therefore, it is clear that the Appellant had not reached maximum medical improvement, at least physically, by May 2001 when tertiary treatment was recommended to improve the Appellant's physical function. This is further supported by the medical opinion of Dr. Alexander dated August 17, 2001 in which Dr. Alexander stated that the need for tertiary treatment indicated that Maximum Medical Improvement had not occurred. There was no evidence presented by either SGI or the Appellant as to whether or not he ever completed his recommended tertiary treatment to improve his physical function.

[17] In May 2001, the Summary and Recommendations of the Residual Capacity Evaluation Psychological Database were as follows:

At this time, [the Appellant] does not demonstrate a significant level of psychological distress. Pain does not appear to be a significant barrier to functioning, but persistent memory and learning difficulties continue to limit his vocational choices. From a neurocognitive perspective, [the Appellant] has incorporated compensatory measure into his daily life and shows good insight into his deficits. His presentation on interview is consistent with his most recent neuropsychological assessment and is unlikely to change significantly over time. Further assessment in this area likely is not necessary at this time.

Although [the Appellant] exhibits good insight into his cognitive deficits, he is less aware of his physical limitations, attributing them to inactivity with a belief that they will improve if he just resumes some form of employment. Further exploration should be done into increasing his physical functional capacity as [the Appellant] values physical activity very highly and is unlikely to be satisfied with sedentary work. He has a strong work ethic and takes pride in his previous work record. Although his initial response to an active rehabilitation program may be one of frustration due to a strong focus on finding employment as soon as possible, he would likely adapt well to an active rehabilitation program. To this end, it is important that [the Appellant] understand that this would help to increase the range of employment he would be able to perform. In addition, a vocational assessment would aid [the Appellant] in choosing a career path as best suited to his areas of strengths and interests while also considering the physical and cognitive deficits related to his accident.

[18] As of May 2001, we find the medical evidence uncontradicted that the Appellant's neuropsychological impairments prevented him from returning to his pre-accident employment

as a Team Leader<sup>1</sup> with [employer]. This is clearly the opinion of Dr. Landry and also documented by the team that completed the neuropsychological testing at Wascana Rehabilitation Centre.

[19] Due to the Appellant's inability to return to his pre-accident employment both physically and cognitively, the Appellant's employment with [employer] was terminated on June 4, 2001, in accordance with the collective agreement. The collective agreement stated that his employment would be terminated where he had been absent from his employment due to illness or injury for a period of 24 months. The Appellant testified that he requested to return to work prior to his two year termination of employment. He stated that Dr. Landry would not provide him with medical clearance. The Appellant testified that Dr. Landry stated that irregular sleep patterns associated with shift work could trigger seizures. We accept and believe that the Appellant was unable to get medical clearance from his medical practitioners to return to his pre-accident employment prior to the termination of his employment on June 4, 2001.

[20] We also accept the Appellant's testimony that as a result of losing his job and being advised that he would no longer be able to return to mining he made the decision to relocate to [Alberta] with his wife. In June 2001, the Appellant's wife accepted a position with her employer in Alberta and relocated. The Appellant relocated to Alberta in August 2001.

[21] Dr. Alexander, medical consultant for SGI, reviewed the Appellant's file on August 17, 2001 with respect to the Appellant's entitlement to permanent impairment benefits. Dr. Alexander reported:

...As a result of the recent investigations, it has been identified that tertiary treatment would be of benefit for [the Appellant]. This indicates that Maximum Medical Improvement has not occurred. Under these circumstances it would be at the completion of the tertiary treatment program that a settlement would be best identified. As you note, a neuropsychological evaluation in the fall is appropriate. Permanent impairment is available at present for the fracture L4 and the scapula. We also recognize that there was significant brain injury leading to the development of seizures. Permanent impairment can be calculated in that regard as well. The difficulty that we have in organizing a complete settlement is what may be discovered by a further neuropsychological evaluation in the fall. We also need to know what the full range of motion of the shoulder is, particularly since there was a fracture of the left scapula. That can be done after the tertiary treatment program has been completed.

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<sup>1</sup> The Appellant was responsible for blasting and explosions in the mine. Dr. Landry felt that he would pose a risk to himself and others because of his cognitive difficulties. The evidence of a seizure disorder also prevented him from returning to his pre-accident employment.

On August 28, 2001, the Appellant received permanent impairment benefits for his fractured scapula, vertebrae and concussion. We note that as of August 28, 2001, SGI accepted that the Appellant had suffered a significant brain injury leading to the development of seizures.

[22] The Appellant attended a Physical and Functional Capacity Evaluation (“functional capacity evaluation) on December 17, 2001 at REMED Rehabilitation Centre Ltd. in Edmonton, Alberta. The Appellant was found to exceed medium work intensity tolerances but came up less than heavy intensity tolerances due to his frequent tendency to exceed the 85% limit of his age predicted maximum heart rate. The following is a Summary Table of the Appellant’s function:

<b>Activity</b>	<b>Current Capacity</b>	<b>Limitations</b>
Sustained sitting	Unlimited	None
Sustained standing	60 minutes tested	Intermittent position changes required
Walking	0.5 miles @ 4.3 mph	No perceived limits
Stair Climbing	140 steps in 53 seconds	Minor deconditioning
Ladder Climbing	84 steps in 60 seconds	Minor deconditioning
Crawling	Untested	No perceived limits
Floor to waist lifting	5 reps @ 65 lbs	Medium intensity
Waist to waist lifting	5 reps @ 65 lbs	Medium intensity
Waist to shoulder lifting	5 reps @ 50 lbs	Medium intensity
Front carrying	75 lbs x 50 ft	Medium intensity
Left side carrying	65 lbs x 50 ft	Medium intensity
Right side carrying	60 lbs x 50 ft	Medium intensity
Static pushing	122 lbs average peak force	Heavy intensity
Static pulling	194 lbs average peak force	Heavy intensity
Dynamic pushing	100 lbs force over 50 ft	Heavy intensity
Dynamic pulling	126 lbs force over 50 ft	Heavy intensity
Sustained overhead reaching	5 minutes test period	Shoulder muscle deconditioning
Sustained forward bending	5 minutes test @ 30 forward bend	Trunk muscle deconditioning
Squatting	20 squats in 90 seconds	No observed problems
Power gripping	Combined total 87 kg (poor)	Deconditioning
Static balance	No perceived limits	No observed problems
Dynamic balance	No perceived limits	No observed problems
Dexterity (medium)	Average to low test outcomes	May have fine motor minor deficits

[23] The functional capacity evaluation stated that the Appellant worked to his maximum tolerances and did not self-limit except where his heart rate exceeded physiological limits. As of December 2001, the Appellant had achieved medium work intensity tolerances but fell short of working at heavy or very heavy work intensity intolerances. Specifically, we note the shoulder

and trunk muscle deconditioning with respect to sustained overhead reaching and sustained forward bending to be very important with respect to the Appellant's physical function. We accept this to be an accurate assessment of the Appellant's physical abilities at that time and note that the findings of the functional capacity evaluation were not contradicted or disputed by either the Appellant or SGI. We also note that there are no activities in which the functional capacity evaluation concluded that the Appellant was functioning in the very heavy work intensity tolerances.

[24] In February 2002, the Appellant attended upon Dr. Green, a clinical neuropsychologist, for an assessment to determine cognitive impairment resulting from the motor vehicle accident. Dr. Green concluded in his written report that the Appellant had not been left with any permanent neuropsychological impairment as a consequence of the 1999 motor vehicle accident. Dr. Green noted several inconsistencies in the testing done by Dr. Landry on the Appellant and was skeptical of the conclusions reached by Dr. Landry. Dr. Green stated that the Appellant's intelligence test scores dropped from the first testing completed by Dr. Landry in July 1999 to the December 2000 testing. Dr. Green stated that one would expect intelligence scores to be resistant to the effects of a brain injury and he would not expect them to decline as a result of a mild head injury. Dr. Green noted that the Appellant also showed impairment for auditory word list learning and memory testing; however, it was his opinion that this was consistent with someone who had learning difficulties. Dr. Green reported a mild head injury would not be expected to cause the impairments that the Appellant showed on testing. It was his opinion that the Appellant's word list learning and memory impairments and fluctuations in intelligence scores were likely not related to his mild head injury but rather longstanding or due to fluctuating levels of effort on different test occasions.

[25] Dr. Green also attended by telephone at the hearing. Dr. Green testified that the Appellant's Glasgow Coma Scale was reported to be 14 out of 15 at the time of the motor vehicle accident which would not indicate any significant trauma to the brain. Dr. Green testified that the Appellant's recall for short stories was extremely low and that his word recall was similar to people who would present with dementia. It was his opinion that the scoring on these tests was completely inconsistent with a mild head injury and was far worse than the results

you would expect from someone with a severe brain injury. Dr. Green testified that the Appellant's impairments were more consistent with someone who had learning difficulties. He stated that the Appellant reported to him that he had only completed Grade 10, had trouble studying and had also failed a plumbing course. It was Dr. Green's opinion that the Appellant's difficulties were more likely related to difficulties with formal education and learning and listening skills rather than being caused by the mild head injury from the motor vehicle accident. Dr. Green also reaffirmed that one would expect the scores and testing to recover from Dr. Landry's first assessment to his second assessment when in fact the Appellant scored worse on some tests on the second testing. Dr. Green stated that this was inconsistent with a mild head injury which would show improvement over time or plateau.

[26] We found the evidence of Dr. Green to be credible. Unfortunately, Dr. Landry was not available to provide evidence and support for his medical opinion and it does not appear from Dr. Landry's subsequent reports that Dr. Landry had reviewed the testing and conclusions of Dr. Green.

[27] On April 8, 2002, SGI wrote to the Appellant and advised him that they had the residual capacity evaluation and the transferable skills and analysis report from Northern Rehab<sup>2</sup> which they would use to complete the two year determination of employment. SGI concluded that the Appellant was capable of working as a mail carrier, plumber or parts technician. The Appellant was advised to select one of the choices and he would be provided with one year to obtain that employment. These choices were based upon his education, training, experience, physical limitations and cognitive abilities.

[28] On April 22, 2002, Dr. Alexander, medical consultant for SGI reviewed the Appellant's medical file with respect to permanent impairment for a mild brain injury. Dr. Alexander concluded:

We now have the benefit of a neuropsychological assessment done by Dr. Paul Green. This is a very thorough, well applied, and well directed report. Dr. Green identifies that the vast majority of test results were normal. The impaired level of performance as portrayed by the test results may

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<sup>2</sup> The transferable skills and analysis report from Northern Rehab was not presented at the appeal, at least to our knowledge. We were only referred to the Physical and functional capacity evaluation completed by ReMed Rehabilitation Centre Ltd. in Edmonton and have relied upon this document as an assessment of the Appellant's physical abilities at that time. If there is a report from Northern Rehab it was not provided in evidence by either party.

not be indicative of brain injury, according to Dr. Green. There is some inconsistency in the report, however. On reviewing the 1997 accident information, as it is found in the file, there is no mention made of a head injury. There was a sternal fracture. Dr. Green reports that there were signs of memory difficulties prior to 1999, as per evidence of his academic performance. Dr. Green concluded, from the information available that there was no presence of a permanent neuropsychological impairment as a consequence of the 1999 motor vehicle accident. As a result of the “seizure” [the Appellant] was placed on medication. There was no loss of driving capacity, and there is no history of further seizures. With that taken into consideration, Dr. Green is of the opinion that [the Appellant] could possibly be capable of performing any work he had performed in the past. [The Appellant] himself is not confident in his own personal abilities to do such tasks.

An up to date OT assessment would perhaps be contributory. **It would also be a possibility to ask Dr. Landry to review Dr. Green’s information and comment.** (Emphasis mine)

[29] On April 29, 2002, the Appellant obtained employment with [employer]. The Appellant was earning \$10 per hour. SGI continued to supplement his income replacement benefits. The Appellant testified that his employment with this employer involved working in the shop repairing filters and also receiving and monitoring parts.

[30] On July 3, 2002, Dr. Green provided an updated report in which he stated he had reviewed the hospital records for the Appellant’s 1997 and 1999 accidents and reported that he would not alter his conclusions that the Appellant has not been left with any permanent neuropsychological impairment from the motor vehicle accident and that he should be capable of performing any work that he performed in the past.

[31] On August 28, 2002, Mr. David Ambrose of Innovative Rehabilitation Consultants completed a Physical Demands Analysis of the Appellant’s position as a team leader with his first employer, the mining company that subcontracts to [business]. Upon completion of his assessment, Mr. Ambrose concluded that the Appellant’s employment fell into the very heavy category of labour as defined by the dictionary of occupational titles. The relevant portions of his report are:

**Job Duties:**

- At the time of the evaluation, Mr. Jennett stated there was no written job description for [the Appellant]’s pre-MVA position. He reported that as a leader, [the Appellant]’s responsibilities were to
  - Receive direction from the crew foreman with respect to the work that needed completion and rough time lines for completion.
  - Organize his team of two to six members and plan out how the work should progress.
  - Ensure the safety of his team members and the efficiency of their work.
  - Perform mining duties alongside the other members of his team.

- Mr. Jennett stressed the team leader was responsible for performing mining duties alongside the members of his team, in addition to tending to the supervisory duties. The team leader was viewed as a miner with some extra duties, and was expected to perform the same mining work as the other team members would.
- When asked to comment on [the Appellant]’s task assignment in the last two years, Mr. Jennett estimated:
  - 70% of the time was spent drilling or blasting at the rock face.
  - 25% of the time was spent operating a boils drill
  - 5% of the time was spent performing various other mining tasks, such as scoop operation, schwing pump operation, backfill monitoring, and bulkhead construction.

...

**Drilling/Blasting:**

- As mentioned above, Mr. Jennett estimates [the Appellant] spent approximately 70 percent of his last two years at the mine performing drilling and blasting duties. Drilling and blasting occurs at the part of the mine called the face. The face is the fresh cut area of the mine. It is where the actual mining takes place. Drilling refers to the task of drilling holes into the face for placement of explosives. Blasting obviously refers to the placement and detonation of the explosives in order to progress the face of the mine. The face of the mine is 8 feet tall by 12 feet wide. In this area, the 2-person team will drill between 45 and 50 holes. Each hole is eight feet long.
- When the drilling is complete, each hole has a certain portion of explosive (dynamite stick) placed into it. The detonation of these explosives is timed so that the old face crumbles in a predictable pattern. Once this is done, this crumbled rock is called the muck. The scooper operator removes the muck and then the workers begin to drill the holes into the new face. There is generally one blast per shift.
- The drill used to produce these eight-foot long horizontal holes is called a Jackleg Drill. The 29 inch-long drill portion resembles a hand-held drill, only much larger in scale. This drill is secured onto a leg that is 63 inches long. From its attachment to the leg, the drill pivots up and down vertically and sweeps horizontally, so that it can be used at all angles required. Halfway down the leg there is a D-handle. This is used when moving the drill/leg combination from place to place. Together, the drill and the leg weigh 55 kilograms. When being moved by workers, these drills are held close to the body and dragged or very slightly lifted off the ground, to a height of about 5 inches.
- When drilling and blasting there is certain process that must be followed. The first step in this process following a blast is scaling. This involves taking a 68 inch long metal bar that weighs 8 kg and using it to tap the approach of the freshly blasted face (the walls and ceiling of the tunnel) in order to dislodge any rock that may fall and present a safety hazard. After this area to the freshly blasted face has been cleared, another worker comes and begins to clear away the muck that was created during the blast. As bit by bit the muck is removed, the driller/blasters then continue to scale the areas that they can access with their bars.
- After the blast sight has been scaled, the workers then use an eight-foot wand through which compressed air is funneled to clear away rock dust from the new floor ceiling and walls approaching the new face. This also clears away any explosive residue that may not have detonated. Once the rubble has been completely removed and all the scaling has been completed, the leader of the two-man crew will then paint a grid on the new face that will act as a guide to where the new holes must go. Approximately eight feet from the new face a large wooden beam is moved and secured onto the floor of the tunnel. Extending from this beam, directed toward the face, 2 ladders are also secured onto the ground. The beam and ladders function as a brace against which the leg of the drill pushes while the drill is boring into the face. This beam is pushed and pulled into place, dragged across the floor by one or both workers.
- At the time of the evaluation, the beam was already secured in place, and the evaluator was not able to measure the amount of force required to manipulate it. Once the grid is marked and the beam and ladders have been secured to the floor, the two people of the crew can then begin to drill. A worker will maneuver the jackleg as previously described and position its foot against the beam. The worker will then pivot the drill head so the 8-foot long drill rod with contact with the face. Initially, it takes quite an amount of muscular force to maintain contact between the drill and the face, and to put pressure through the drill in order for the actual drilling to begin. However, once the drill catches, the muscular force required to complete this is significantly reduced.

- The evaluator observed a miner complete the last six feet of the hole using only one hand on the drill. Once the drill catches, it appears to assist in pulling the leg forward. Workers still need to lift and push the leg forward somewhat but the drill provides significant mechanical assistance in this respect. As the drill progresses and it gets closer and closer to the wall, the leg is walked up the rungs of the ladder that is secured to the floor. When the drill is complete, the leg is flush with the face. The drill is then put in reverse and pulled out. It is repositioned for the next hole and the process is repeated until the grid has been drilled appropriately. Unfortunately, due to safety concerns, during the evaluation the evaluator was not able to place the dynamometer on the drill or the leg to get a reading of the amount of force required to stabilize the drill head or to move the leg while a drill was taking place. However, the miner observed, who was a man of average height and build did not display any changes in body mechanics that suggested he had to work at a maximal or near maximal level. Specifically, this man, although he used some body weight to assist him, did not need to put all of his body weight against the drill in order to have it catch. That is, his body remained fairly vertical when performing this task. Likewise, when moving the leg, he did not appear to widen his base of support or counterbalance at all. These observations lead the evaluator to estimate that the initiation of a new hole with this drill and the movement of the leg once the drill is in place would not require greater than 50 pounds of linear force.
- Once all the holes are drilled, it is the leader's responsibility to travel to the area of the mine in which the explosives are kept, and return with the required explosives. This area is always a fair distance from the face, for safety reasons. It is the leader's responsibility then to place the explosives appropriately into the drilled holes. There is a specific procedure that must be followed so that the blast results in accurately place muck.
- In addition to the drilling and blasting of the face, it is also these workers' responsibility to extend the pressurized air, water and ventilation into the new areas of the mine. This procedure involves drilling holes into the ceiling, securing brackets, hooks and bolts into these holes and then attaching the ventilation, water, and pressurized air lines onto these brackets. To drill into the ceiling, a drill called the Stoper Drill is used. It works exactly the same was as the Jackleg Drill except that it only drills vertically. This drill is a little shorter at 50 inches high. It weighs 46 kilograms. However, it is moved and operated in the same way as the Jackleg Drill, described above. This leg has a telescoping air powered mechanism that reduces the need to actually lift the drill when drilling upwards. The leg performs the work, which is guided by human movement. Again, due to safety concerns, the evaluator was not able to use a dynamometer to ascertain the required forces but the body mechanics of the operator suggest that a reasonable estimation for this activity could be approximately 30 pounds of vertical lineal force.
- Once these holes are drilled into the ceiling and brackets are hung, it is a simple matter of raising the piping and tubing up to secure it to the junction of the wall and the ceiling. The heavy pieces of piping are raised using a chain hoist. This chain host on its own weighs about 12 kilograms. During the time of the evaluation, there was not a chain hoist set up for use so the evaluator was not able to observe it's use or measure the amount of force required to hoist some of the heavier components upwards.

**Boils Drill:**

- Mr. Jennett estimated [the Appellant] spent approximately 25% of his last two years in the mine operating a Boils Drill. A Boils Drill is a mechanism that can create a shaft or a hole up to 100 feet long. The actual operation of this drill appears to be a light or sedentary to a light level of activity whereby the evaluator stands at the drill controls and monitors the speed of the drill, the output of water, etc. However, the setup and movement of this drill are physically more taxing. Unfortunately, again, at the time of the evaluation, there were no Boils Drills available for set up, take down or movement, although the evaluator was able to inspect the parts disassembled and the parts of the drill assembled and functioning.
- The motor and transmission of this drill weigh several hundred pounds each. They are lifted, carried and positioned through the chain hoists previously described. Again, unfortunately, we could not measure the amount of force required to use the chain hoist to move this equipment. Once the operator knows where the drill is to be set up, a large metal brace or leg is then secured between the floor and the ceiling of the tunnel. This again requires use of the Stoper Drill to drill upwards and the Jack Drill to drill down. Once these holes are drilled and the large beam is maneuvered in place (again with a technique similar to the one used to maneuver the Jackleg Drill) the beam is secured through use of impact wrenches. Once this beam is secure the chain hoist is secured onto the ceiling. The components of the drill are then elevated to the appropriate height using the chain hoist. While the chain hoist maintains the components at the required height, they are positioned against the beam and then fastened to

- it. Once the entire drill is assembled and secured onto the beam, the drill bit or drilling rod is attached to the drill. The hoses, i.e. water, compressed air, etc. are attached next, and then drilling is set to begin.
- The drill would be set in a position so that it will not need to be moved or so that the largest number of holes can be created from its location before having to be moved to a new location. Holes can be made at a variety of heights anywhere between shin height and overhead. The drill observed was positioned at waist height. The operator's controls are at the same level at which the drill is being used.

[32] Mr. Ambrose reported that the Appellant spent the great majority of his time drilling/blasting and operating the Boils Drill and that the task to which he was most frequently assigned appeared to have physical demands that fall into the very heavy category of labour as defined by the dictionary of occupational titles.

[33] Mr. Ambrose also advised SGI that the Appellant was reported to be a good employee whose employment was terminated in accordance with the collective agreement between his employer and the business they sub-contracted to. Mr. Ambrose further advised that if the Appellant wished to return to the mine to work he would have to accept an entry-level position.

[34] On October 1, 2002, Dr. Alexander, medical consultant for SGI reviewed the Appellant's medical file. He concluded:

...You have asked that we answer the question as to whether or not [the Appellant] would be able to return to his pre-accident employment position. Apparently, [the Appellant] does not consider himself capable. This to me is a significant influence on the reflection of his capacity, as it would interfere with safety on the job. There does not appear to be any physical reason he would not be able to compete for a job position, or complete work in the position he had prior to the accident. Testing has been limited, however, because of the influence of his heart rate while being tested.

On January 3, 2002, at the RE-MED Rehabilitation Centre in Edmonton a physical and functional capacity evaluation was performed. An element of deconditioning was noted, and the situation describes an increase in heart rate during activity, which caused the testing to stop. This raises the question as to whether this is accident related, and it is very likely not. Thus for non-related reasons it would be reasonable to request a cardiology consult to determine limitations.

[The Appellant] has moved to [Alberta], and it is not predicted that he will return to the work he once performed. This is not accident related.

A neuropsychological assessment was conducted by Dr. Green of Edmonton. Dr. Green has reaffirmed his original report stating that [the Appellant] should be able to return to his occupation, and we would agree with his findings. Dr. Pancyr presently has the file, and we will await his report.

To further evaluate the situation, either independently or under SGI, it would be appropriate to ask for an OT breakdown of needs and demands. It may be that this is not required once we get Dr. Pancyr's report.

We do recognize there was a head injury, and there was amnesia for the event within the first week of the accident. There is, however, no direct relationship of the head injury to the self-reported seizure in July of 2000.

[35] Dr. Alexander did not testify at the appeal hearing. We find his medical opinion of October 1, 2002 to be of limited assistance due to questions we have arising out of his opinion. Dr. Alexander states that there is no physical reason that the Appellant could not return to his pre-accident employment. He further suggests a breakdown of needs and demands be completed by an occupational therapist. In fact, a physical demands analysis was completed on August 28, 2002 which placed the Appellant's pre-accident employment in the very heavy category of labour. It is not clear from the written report whether Dr. Alexander had the physical demands analysis available to him when he prepared his report. Clearly the findings in the functional capacity evaluation that the Appellant was only capable of performing work in the medium category and also their opinion that he could with the resumption of progressive work activities achieve heavy work tolerances, conclusively prove that he was not able to physically work at a very heavy capacity at the time they completed their testing.

[36] Dr. Alexander also concluded that the Appellant's increase in heart rate and deconditioning was unrelated to the motor vehicle accident. He recommended a cardiology consult. The Wascana Rehabilitation Team in May 2001 found the Appellant to be functioning at a sedentary level. They recommended 12 to 16 weeks of tertiary treatment to improve the Appellant's physical function. There was no evidence before us that this treatment ever took place. Dr. Alexander does not rely on any medical evidence which would support that the Appellant's increase in heart rate would be anything other than deconditioning related to the motor vehicle accident as found by the Wascana Rehabilitation Team. It is our finding that the Appellant's deconditioning is related to the fact that he had been functioning at a sedentary to medium level since the date of the motor vehicle accident and is no longer conditioned at heavy or very heavy level work tolerances due to the injuries he suffered to his back and the lack of tertiary treatment. We place greater weight upon the findings of the functional capacity evaluation which recommended that the Appellant be re-entered into the work force in January

2002 with a progressive increase in his activity levels which would help him to achieve heavy level work tolerances. We find that the Appellant's physical deconditioning is related to the motor vehicle accident for the reasons stated above.

[37] In January 2003, Dr. Pancyr, medical consultant for SGI, also reviewed the Appellant's medical file to provide an opinion as to whether the Appellant could return to his pre-accident employment. Dr. Pancyr concluded that the medical evidence best supported the opinion of Dr. Green that the Appellant did not suffer any persistent cognitive problems from the 1999 motor vehicle accident and should be cognitively fit to return to his former level of employment. Dr. Pancyr's opinion related to the Appellant's cognitive abilities only.

[38] SGI terminated the Appellant's income replacement benefits on February 7, 2003. The decision letter stated:

It is my understanding that you have completed rehabilitation to the point that you are substantially able to perform the essential duties of the employment you performed at the time of the accident. At this time there is no medical information to confirm there is a brain injury from the motor vehicle accident...

[39] On March 24, 2003, the Appellant had an electroencephalogram which was normal. An MRI of the brain completed on April 10, 2003 noted no significant abnormality. As a consequence of the normal electroencephalogram and MRI, Dr. Makus advised the Appellant that he could wean himself off of his Dilantin medication.

[40] At the time of the appeal, the Appellant reported that he received chiropractic treatments from Dr. Allan Glambeck at Camrose Chiropractic Clinic. The Appellant testified that he received chiropractic treatments approximately every three weeks. The Appellant testified that his shoulder continues to bother him and that repetitive lifting and leaning over a table are bothersome to his low back. We accept his evidence in this regard and it is supported by the findings of the functional capacity evaluation which report shoulder and trunk muscle deconditioning.

[41] On June 3, 2003, Dr. Glambeck also reported ongoing shoulder and back problems:

[The Appellant] has been attending my office on a regular basis, and we are providing temporary symptomatic relief. [The Appellant] is receiving spinal adjustments and soft tissue rehabilitation as the main part of his treatment program.

The injuries that have been sustained have superimposed each other which results in longer period of pain and disability. Therefore [the Appellant]'s results from his rehabilitation has been modest. His symptoms have been characterized by periods of active muscle spasms and subsequent joint hypermobility. This pattern is typical of joint instability which is due to elongation of spinal and joint ligaments. In turn, marked fibrosis, muscle hypertonicity, and scarring has occurred in the treatment areas.

[The Appellant]'s prognosis is less than favorable by which there is a functional loss of cervical spine and left shoulder. Therefore a lack of strength and reduced ranges of motion have been noticed in these two areas.

[42] The Appellant's employment with his employer was terminated on April 4, 2003 due to reported difficulties with the Appellant's memory. Following his employment with this employer, the Appellant worked with [employer] until he was laid off for shortage of work. He also worked as a meat cutter at [a grocery store]. The Appellant testified that he only worked at the grocery store for two to three weeks before quitting because the cold room and the lifting of heavy boxes bothered his back and shoulder.

[43] On April 12, 2004, Dr. Makus, provided a medical opinion at the request of the Appellant. Dr. Makus concluded that the Appellant did not have epilepsy. Dr. Makus also stated:

From a review of the information, based on the history of the patient being confused after the accident in June of 1999, I do feel that he may have suffered from a mild head injury. As I explained to the patient, when I last saw him in April 2003, a mild head injury statistically has a low, perhaps entirely negligible, probability of resulting in a seizure. The difficulty with statistics is that, while a significant head injury, perhaps with resultant intracranial injury, can be easily associated with a subsequent seizure, many patients present in whom a definite clear cause for a seizure is not apparent. Thus, one might speculate that in at least some of these patients, mild head trauma in the past, with perhaps microscopic CNS damage, could have been the cause of a seizure. However, this is obviously difficult to prove and, as such, it must be emphasized that this represents definite speculation. What is clear is that many patients do not have a definite etiology for a seizure.

[44] On June 3, 2004, the Appellant suffered a recurrent seizure. He was admitted to St. Mary's Hospital in Camrose, Alberta. The Appellant was placed on anti-epileptic medication by his neurologist Dr. Makus on June 8, 2004. Dr. Makus concluded that on the basis of the two seizures suffered by the Appellant he would qualify for a diagnosis of epilepsy, albeit mild. In

December 2004, Dr. Makus concluded that it was unlikely that the Appellant's seizures were the result of either motor vehicle collisions. He stated:

...Referring to [the Appellant]'s situation, based on the somewhat incomplete information available to me, particularly from Dr. Landry's report of 1999 it appears that [the Appellant] only had a brief loss of consciousness at the scene. Thus the patient would appear to have had a mild head injury and according to the scientific literature his risk of seizures based on that injury should be extremely low, if not negligible.

The only complexity in [the Appellant]'s situation is the fact that he had apparently returned to hospital quite confused. It must be noted that occasionally apparent mild head injuries can evolve into a serious head injury associated with a subdural hematoma. These patient's typically present quite lucid initially, but then have a later deterioration in their level of consciousness. It is this fact that in large part underlies the commonly given advice in the Emergency Departments, that being to awaken a patient with a concussion every few hours. On again reviewing the information I do not feel that at any point was there any proof that [the Appellant] in fact had a subdural hematoma and I feel that the report of the CAT scan demonstrating a "small bifrontal hygroma" is likely of questionable clinical significance. **Thus, based on the scientific literature there is low probability that either the first or the second seizure was the result of either motor vehicle collisions. Thus unfortunately the cause for the patient's epilepsy is idiopathic or unknown.** (Emphasis added)

It is a fact that in a large percentage of patients the etiology for epilepsy is unknown. A study from the Mayo Clinic from 1935 to 1984 demonstrated that 68.7 percent of patients in fact had idiopathic epilepsy. The fact that such a high percentage of patients have an unknown cause of epilepsy is bothersome. As such one wonders whether or not at least a portion of these patients might have epilepsy perhaps secondary to even a long forgotten mild blow to the head. However, I can only reiterate my comments from April of 2004 where I emphasized that the above musings were mere speculation. For better or for worse, I strongly feel that medical legal decisions must be based on current scientific literature and given this at this time I do not feel that the patient's epilepsy can be definitively linked to the motor vehicle collision.

[45] On January 13, 2005, Dr. Landry completed a review of some of the medical reports on the Appellant's file. Dr. Landry stated:

Thank you for forwarding the three reports from Dr. K. Makus, the EEG report from March 2003, and the MRI from April 2003. After carefully reviewing this documentation at your request, it would seem that the consensus is that [the Appellant] sustained a concussion/mild brain injury in the motor vehicle accident of June 1999. As mentioned, he demonstrated auditory memory/learning impairments during the December 2000 assessment that I completed. Although it was hoped that he may demonstrate further cognitive improvement in memory functioning, it was recommended that at the time he find alternative employment, as it was felt that he should not return to his job as an underground team leader doing drilling and blasting work. According to Dr. Makus, Dr. Green assessed [the Appellant] in February 2002. Dr. Makus indicated that Dr. Green reported that brain functions were intact by that time. Given that this assessment followed the last assessment I performed, and given the possibility of continued cognitive improvement in [the Appellant]'s memory functioning, I would think that it would be reasonable to consult with Dr. Green as to whether or not [the Appellant] would be able to "substantially perform the essential duties of the employment he held at the time of the accident". At the time of my last assessment (December 2000), [the Appellant] was on Dilantin for seizures and was demonstrating some

memory impairments on testing. While the vast majority of his neuropsychological profile was within normal limits, given the dangerous type of work that he performed and his responsibility for the safety of his drilling/blasting team, I was not willing to assume the responsibility to clear him to return to that type of work. Dr. Green, having assessed [the Appellant] in 2002 may be able to clear him, from a cognitive perspective, to return to that type of work. One might also want to consult Dr. Makus concerning his “epilepsy” and whether or not he felt that [the Appellant] could return to his previous occupation.

[46] On January 17, 2005, Dr. Pancyr completed a review of the updated medical evidence and concluded:

...Given the details of this most recent seizure, and the information provided by the ambulance, emergency room personnel, and Dr. Makus, I conclude that my original opinion remains unchanged. I still believe the evidence supports the conclusion that he did not suffer any persistent cognitive problems stemming from the car crash, and that cognitively and psychologically he is free of symptoms attributable to the car crash and may return to his former employment without restrictions. It is not within my scope of practice to draw conclusions about his capacity to return to work with idiopathic epilepsy.

[47] The Appellant is currently employed at [employer], a recycling depot as an Assistant Coordinator. His job duties are 20% office or clerical work and 80% working on the floor dealing with employees and customers. He earns \$11.82/hour.

## **LAW AND ANALYSIS**

### **Issue #1 - Termination of Income Replacement Benefits**

[48] The Appellant suffered injuries covered under Part VIII of *The Automobile Accident Insurance Act* (the *Act*) and *The Personal Injury Benefit Regulations (PIBR)* in place at the date of loss on June 2, 1999.

[49] SGI terminated the Appellant’s income benefits based on his being substantially able to carry out the essential duties of his pre-accident employment. SGI terminated the Appellant’s income replacement benefits in accordance with their decision letter dated February 7, 2003 which stated:

It is my understanding that you have completed rehabilitation to the point that you are substantially able to perform the essential duties of the employment you performed at the time of

the accident. At this time there is no medical information to confirm there is a brain injury from the motor vehicle accident. This was determined by using the following information:

1. Medical information on your file assembled to date
2. Review of your file by the consultants
3. Physical Job Analysis

The union contract with your previous employer states that after you have been away from your job for two years you no longer have recall rights. Due to this you would not have a job to return to even if you were still living in [town]. Therefore, SGI will provide one year grace period to assist you in finding employment in a wage category closer to your pre-accident wage. Your income replacement benefit will continue until February 13, 2004 or until you obtain employment earning the same amount as you were prior to the accident, whichever comes first.

[50] The Appellant disagrees with SGI's decision and brings his appeal before this Commission. The Appellant appeals this decision stating that "Rehabilitation of my shoulder and back injuries is not complete. The shoulder injury has not been recognized by S.G.I. as a disability. The seizure is accident related; most medical doctors support this conclusion". The Appellant seeks reinstatement of his income replacement benefits and/or supplemental income replacement benefits. The Appellant submitted that he was advised by his medical practitioners that he should not return to mining due to his physical injuries and memory problems.

[51] 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.

[52] The Commission determined in *R.C.*<sup>3</sup> 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.<sup>4</sup>

[53] The termination of income replacement benefits was addressed in *Collis v. Saskatchewan Government Insurance* (1998), 165 Sask. R. 108 (Sask. Q.B.). Wimmer J. stated, a p. 112:

<sup>3</sup> *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

<sup>4</sup> *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.

[5] ...Cases dealing with disability insurance contracts hold that the insured has the onus of establishing that he or she is disabled within the meaning of the policy and, having done so, the onus shifts to the insurer to prove that benefits are not, or are no longer, payable. Also, the fact that the insurer at one time accepted the claim may weigh the balance in favour of the insured....

[54] Mr. Justice Wimmer continued at paragraph 6:

[6] In my view, Collis has met the onus that is upon him. By accepting his initial claim for income replacement benefits SGI acknowledged that he had suffered a disabling injury. Sibley is clear that had it not been for the 1995 accident, Collis would probably be capable of working as a taxi driver today. Boden, the chiropractor is of the opinion that the injuries sustained in the accident, complicated by the pre-existing spondylitis prevent Collis from working as a taxi driver. The remaining question is whether SGI has met the onus of proving disentitlement to benefits beyond those already provided....

[55] Accordingly, in the circumstances of this case, SGI bears the burden of proving that on a balance of probabilities its' decision for termination of income benefits is correct and reasonable.

[56] The Appellant was employed as a Team Leader with his employer at the date of the motor vehicle accident. His entitlement to an income benefit is set out in s. 112 of the *Act*:

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

- (a) is unable to continue the full-time employment he or she held at the time of the accident;
- (b) is unable to continue any employment that he or she had at the time of the accident in addition to the full-time employment mentioned in clause (a);...

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

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

if the full-time earner is self-employed at the time of the accident;

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

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

[57] The phrase “unable to hold employment” is defined in s. 18 of the *PIBR*:

**18** A victim is unable to hold employment when a bodily injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that the victim:

- (a) performed at the time of the accident; or
- (b) would have performed but for the accident.

[58] The issue to be determined by this Commission is whether or not SGI’s determination that the Appellant was substantially able to perform the essential duties of his employment with his employer as of February 7, 2003 is supported by the medical evidence on their file, the physical demands analysis completed on August 28, 2002 and the physical and functional capacity evaluation completed on December 17, 2001.

[59] Section 129 of the Act deals with termination of income replacement benefits:

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

- (a) the victim is able to hold the employment that he or she held at the time of the accident; ...

[60] The legislation does not define “able to hold employment” but rather “unable to hold employment” as set out in s. 18 of the *PIBR* and stated in paragraph [47]. What must be determined then is what is meant by *substantially* able to perform the *essential* duties of employment? The phrase is not further defined in the legislation. The ordinary meaning of the words ‘substantially’ and ‘essential’ must be considered.

[61] *The Concise Oxford Dictionary* (Oxford: Clarendon Press, 1992) defines “substantially” and “essential”:

**substantial** – **1 a** *adj* of real importance or value; **2** of large size or amount...*adv*  
*substantially*  
**essential** – **1** absolutely necessary; indispensable. **2** fundamental, basic

[62] The intent of s. 112 and 129 of the *Act* and s. 18 of the *PIBR* is straight forward – entitlement to income benefits and termination when a claimant is able to return to work and/or substantially able to perform the essential duties of his job.

[63] It is our opinion that the contradicted diagnoses by several medical practitioners of the Appellant’s head injury resulted unfortunately in the Appellant’s physical limitations being overlooked. In our opinion in order for the Appellant to return to his pre-accident employment he must be substantially able to perform the essential duties of his employment, both cognitively and physically.

[64] The early neuropsychological reports suggested that the Appellant suffered cognitive impairments as a result of the head injury suffered in the motor vehicle accident which would prevent him from returning to his pre-accident employment. Consequently, on April 26, 2001, SGI commenced the two year determination process. Following the Residual Capacity Evaluation it was reported that the Appellant had not physically reached maximum medical improvement and should be referred for 12 to 16 weeks of tertiary treatment, which never occurred.

[65] Therefore, an examination of the Appellant’s ability to substantially perform the essential duties of his employment will involve his ability to cognitively and physically complete the essential duties of his employment.

***(a) What are the essential duties of the Appellant’s employment with the mining company?***

[66] The Appellant’s duties of employment are those set out in the physical demands analysis and outlined in paragraph 31. Specifically, 95% of the Appellant’s duties of employment are drilling and blasting and operating a boills drill, all of which are classified in the very heavy

category of labour. Mr. Ambrose provided a very detailed analysis of the Appellant's duties of employment. The Appellant spent 70% of his time drilling and blasting and 25% of his time on the Boils Drill.

[67] Mr. Ambrose specified that the Appellant's blasting duties as a Team Leader involved the painting of a grid on the new face showing where the new holes will be drilled and the retrieval, placement and detonation of the dynamite along with the responsibility to ensure the safety of his team members. There was a specific procedure that must be followed when placing the dynamite. It was specifically these components of the Appellant's employment which involved the use of dynamite and his responsibility for other employees that resulted in Dr. Landry refusing to provide the Appellant with medical clearance as a result of his cognitive impairments. We find the painting of the grid and the retrieval, placement and detonation of the dynamite and his responsibility for the safety of his team to be an essential duty of the Appellant's employment as a Team Leader with his employer.

[68] Not only did the Appellant have responsibilities relating to the detonation of the dynamite in the mine, he was also required to perform mining duties and work alongside the members of his team as reported by Mr. Jennett. Therefore, according to Mr. Ambrose, the Appellant would be required, as an essential duty of his employment, to perform all of the physical and heavy tasks identified by Mr. Ambrose in his physical demands analysis and outlined in paragraph 31. Specifically, the Appellant would be required to assist in the drilling process using the Jackleg Drill for drilling holes into the face for the placement of explosives, the Stoper Drill for drilling into the ceiling, operation of the chain hoist and the Boils Drill. Mr. Ambrose reported he was unable to use a dynamometer to measure the force required to operate the Jackleg Drill and the Stoper Drill but estimated that each would not require greater than 50 and 30 pounds linear force to operate, respectively. Mr. Ambrose reported that the drills when being moved by the workers would be dragged or very slightly lifted off the ground. The Jackleg Drill weighed 55 kilograms and the Stoper Drill weighed 46 kilograms. Mr. Ambrose also reported that the set up and movement of the Boils Drill was physically more taxing than the operation of it, with the motor and transmission weighing several hundred pounds each. Ultimately, Mr. Ambrose concluded that the tasks involved with drilling, blasting and operation of the Boils Drill to which the

Appellant was most frequently assigned appeared to have physical demands that fall into the very heavy category of labour.

[69] Accordingly, we conclude that the essential duties of the Appellant's employment are those duties associated with drilling and blasting, including but not limited to, painting of the grid and the retrieval, placement and detonation of dynamite and operation of the Jackleg Drill, the Stoper Drill and the Boils Drill and all of the necessary physical tasks which accompany the drilling and blasting process. These duties fall into the very heavy category of labour as defined by the dictionary of occupational titles.

***(b) Was the Appellant substantially able to physically perform the essential duties of his employment?***

[70] The medical evidence on the file, specifically the functional capacity evaluation, must show that the Appellant was physically capable of performing the essential duties of his employment as stated above and in paragraph 31.

[71] The functional capacity evaluation did not specifically measure the Appellant's ability to perform the duties as set out by Mr. Ambrose because the functional capacity evaluation was completed prior to the physical demands analysis. The purpose of the functional capacity evaluation was to complete the two-year determination of employment, however, it is the only evidence before us with respect to the Appellant's physical abilities. There was no evidence before us which placed the Appellant within his work environment to determine if he was physically capable of performing the essential duties of his employment, primarily because the Appellant's employment with his employer had been terminated by the time the physical demands analysis was completed.

[72] The only medical evidence before us is with respect to the Appellant's abilities as reported in the functional capacity evaluation. The functional capacity evaluation concluded that the Appellant could exceed medium work level tolerances but fell short of heavy work level tolerances. Furthermore, the Appellant was not able to perform work tolerances in a very heavy category for any activity in the functional capacity evaluation as set out in paragraph 22. The

functional capacity evaluation reported shoulder muscle and trunk muscle deconditioning for sustained overhead reaching and sustained forward bending. This is consistent with the Appellant's testimony regarding his physical limitations in his shoulder and lower back. We found the Appellant to be very credible and accept that he has limitations with respect to his shoulder and back that would prevent him, at least at the time of his termination of his income replacement benefits, from returning to his pre-accident employment because of the very heavy physical nature of the work. The Stoper Drill was used to drill into the ceiling and the Appellant's limited ability for sustained overhead reaching would have prevented him from completing this essential duty of his employment. The Appellant has obtained employment since the motor vehicle accident which is less physically demanding. The only employment which was somewhat physically demanding was the meat cutter position at the grocery store and his evidence was that he was not able to do it because the heavy lifting bothered his back and shoulder. We accept his evidence in that regard and find that he is not able to perform activities of a very heavy nature due to the injuries to his shoulder and back. We accept the findings of the functional capacity evaluation that the Appellant, as of December 17, 2001, was only capable of working at medium level work tolerances. There is no medical evidence that he was able to perform very heavy work tolerances as of February 7, 2003 when his income replacement benefits were terminated.

[73] We do not agree with Dr. Alexander's conclusion that the Appellant could physically perform his pre-accident employment. Specifically, Dr. Alexander did not refer to the physical demands analysis and therefore little weight has been placed on his conclusion that the Appellant could physically return to his pre-accident employment. Once again, we rely upon the functional capacity evaluation which concluded that the Appellant's physical abilities were limited to performing working at a medium to high level.

[74] It is acknowledged that the Appellant's increase in heart rate limited his testing on the functional capacity evaluation. However, we have already found that the Appellant's deconditioning was caused by the fact that he had been functioning at a sedentary to medium level since the date of the motor vehicle accident and is no longer conditioned at heavy or very heavy level work tolerances. In addition, there was no evidence that the Appellant attended

tertiary treatment which was recommended by Wascana. The functional capacity evaluation opined that the Appellant would achieve close to heavy work tolerances after another couple of months of progressively increasing activity levels or the resumption of progressive work activities. The functional capacity evaluation recommended that the Appellant be re-entered into the work force in January 2002 with a progressive increase in his activity levels which would help him to achieve heavy level work tolerances. For the reasons stated above, we are unable to agree with Dr. Alexander that the Appellant's deconditioning is very likely not related to the motor vehicle accident. It is our opinion that the Appellant's deconditioning is related to the motor vehicle accident and the lack of tertiary treatment and ongoing strengthening of his back and shoulder injury following his motor vehicle accident injuries.

[75] We are unable to conclude that at the time that the Appellant's income replacement benefits were terminated in February 2003, he was "substantially able" to perform the "essential tasks" of his pre-accident employment, specifically work tolerances at the very heavy level category of employment.

***(c) Was the Appellant substantially able to cognitively perform the essential duties of his employment?***

[76] The essential duties of the Appellant's employment which related to his cognitive abilities involved his responsibility for painting of the grid on the new face and the retrieval, placement and detonation of the dynamite and his responsibility for the safety of his team members.

[77] In December 2000, Dr. Landry concluded that the Appellant suffered a mild head injury and that his ongoing memory and processing speed impairments may pose a danger to himself and others. Dr. Landry reported that the Appellant should seek vocational re-training and he advised SGI that the Appellant should not return to his former employment. Dr. Landry reported that he was not willing to clear the Appellant to return to work given the dangerous type of work that he performed and his responsibility for the safety of his drilling/blasting team. The Residual Capacity Evaluation Summary completed at Wascana also noted impairment in auditory immediate memory, delayed memory and delayed recognition.

[78] SGI accepted the assessments completed by Dr. Landry and Wascana and commenced the two year determination process. However, in December 2002, Dr. Green concluded that the Appellant did not suffer from ongoing cognitive impairments that would prevent him from returning to his pre-accident employment. Following that, SGI terminated the Appellant's income replacement benefits.

[79] We find that the Appellant did suffer a mild head injury as a result of the motor vehicle accident that initially prevented him from returning to his pre-accident employment. We are troubled by the contradictory diagnoses of the medical practitioners that resulted in the Appellant being prevented from returning to his employment, only to then be later terminated on the basis of Dr. Green's medical opinion that he was capable of cognitively returning to his pre-accident employment. It is troubling because of the significant impact those medical diagnoses have had on the Appellant's financial stability.

[80] This Commission does take note that to the best of our knowledge, Dr. Landry was not provided with the medical opinions of Dr. Green which we believe would have been helpful under these circumstances given the significant impact the contradictory medical reports have had on the Appellant's life. We note that Dr. Alexander on April 22, 2002 recommended that Dr. Landry be provided with an opportunity to review Dr. Green's information and provide his own comments. We acknowledge that this could have been done by either party in preparation for this appeal, therefore we fault neither party for the oversight; however, it would have been extremely helpful to this Commission to have Dr. Landry's response to Dr. Green's medical report.

[81] In any event, Dr. Landry was not available to provide evidence at the appeal and he deferred to the opinion of Dr. Green with respect to the Appellant's ability to return to his pre-accident employment as of February 7, 2003. We find the evidence of Dr. Green to be credible and we are unable to conclude on the basis of the medical evidence that the portion of SGI's decision with respect to the Appellant's cognitive impairments preventing him from returning to his essential duties of employment was based on an erroneous assumption, wrong in law or unreasonable.

*(d) Was the Appellant able to perform the essential duties of his employment?*

[82] In conclusion and for the reasons set out above, the decision of SGI to terminate the Appellant's income replacement benefits must be set aside due to our finding that the Appellant was not physically capable of performing the essential duties of his employment. His income replacement benefits should be reinstated with an adjustment being made to account for any employment income the Appellant has received from other sources.

**Issue #2 - Funding for Prescription Medication**

[83] The Appellant seeks to have his funding reinstated for the prescription, Dilantin, which he takes to control his seizures.

[84] SGI argues that the Appellant suffers from unknown or idiopathic epilepsy which is unrelated to the motor vehicle accident and therefore it is not their responsibility to provide ongoing funding for this medication.

[85] On the basis of the medical opinion of Dr. Makus that the cause for the Appellant's epilepsy is unknown, we are unable to conclude, at this time, that the prescription medication, Dilantin, should continue to be funded by SGI.

**CONCLUSION**

[86] SGI's decision dated February 7, 2003 which terminated the Appellant's income replacement benefit on the basis that he was substantially able to perform the essential duties of his employment is set aside.

[87] SGI's decision dated February 7, 2003 which terminated funding for the prescription medication, Dilantin, is upheld.

[88] We feel it is important to note that this was an extremely complex file given the contradictory medical diagnosis regarding the Appellant's cognitive impairments which prevented him initially from returning to his employment. The initiation of the two year

determination, followed by the termination of benefits on the basis of Dr. Green's opinion resulted in the focus primarily being on the Appellant's ability to cognitively perform his duties of employment. It is clear that his physical limitations were overlooked and conclusions were reached prior to the Appellant being restored to physical function which would have allowed him to return to his very heavy duties at the mine had a position been available to him. The Appellant's essential duties of employment certainly contained both a cognitive and physical component.

[89] It is our recommendation that the Appellant be referred to tertiary treatment if his medical practitioners still feel this would be of benefit in restoring physical function. We would also recommend that Dr. Landry be provided with the opportunity to review Dr. Green's report and provide his comments. We make these recommendations simply because it is not clear from the medical evidence whether the Appellant's back and shoulder injury will resolve to the point where he is able to complete very heavy work tolerances or whether maximum medical improvement has already occurred which will result in SGI completing the determination process. In either event, it would be appropriate for the above recommendations to be completed to ensure the Appellant has reached maximum medical improvement, both cognitively and physically.

[90] The Appellant argued that SGI should continue to provide supplemental income replacement benefits to him because he no longer had a job at the mine. It is important to note that the issue before us was whether or not the Appellant was substantially able to perform the essential duties of his employment at the time his income replacement benefits were terminated. We have concluded that he was not able to and accordingly he is entitled to continue to receive income replacement benefits in accordance with the legislation until he is able to perform his duties or he has been determined into an alternative employment. Following that, his entitlement to supplemental income replacement benefits at that time will be governed by the provisions of the legislation.

[91] As the Appellant has been successful in his appeal, he will be entitled to his costs associated with the appeal in accordance with Section 193(11) of *The Automobile Accident Insurance Act* and Section 96 of *The Personal Injury Benefits Regulations*.

[92] The Appellant argued that, if successful on appeal, he should be entitled to receive his lost wages for attendance at the appeal.

[93] Section 96(2) of the Regulations lists some reasonable expenses contemplated by the legislature but it is not, in our opinion, intended to be a conclusive list of prescribed “reasonable expenses”. We find the purpose and intention of the legislation is to reimburse a successful claimant for their costs. We do not interpret Section 96(2) to include reimbursement for only those expenses prescribed in Section 96(2); rather the intent of Section 96 is to reimburse a successful claimant for **“all reasonable expenses”** up to the maximum \$2500. We conclude that a claim for lost wages is a reasonable expense contemplated under section 96(2) of the Regulations.

[94] Accordingly, the Appellant is entitled to reasonable expenses including his lost wages for attending the appeal, travel expenses, meals and lodging. However, the Appellant’s entitlement to lost wages shall only be reimbursed if it is not already included in his claim for income replacement benefits. The Appellant is not entitled to receive an income replacement benefit and recovery of wages for the date of the appeal. Reasonable expenses are capped at the maximum amount of \$2500. In addition, the Appellant is also entitled to reimbursement of his Appeal Fee in accordance with Section 86(4) of *The Personal Injury Benefits Regulations*.

**Dated** at Regina, Saskatchewan, on [January 17, 2006](#).

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[Joy Dobko](#), Chair

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[Al Knippel](#), Commission Member

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[Marjory Gammel](#), Commission Member