

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *I.S. v. Saskatchewan Government Insurance,*
2006 SKAIA 047
Date: 20060720
File: 159 of 2004

BETWEEN

I.S., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Robert Borden, for the Applicant
Dale Brown, for the Respondent

Before: **Peter Bergbusch, Chair**
Stephanie Pfefferle, Commission Member
Darleen Topp, Commission Member

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

Heard at Saskatoon, Saskatchewan
June 8, 2005

DECISION

[1] The Appellant, I.S., has appealed from a decision of Saskatchewan Government Insurance (“SGI”) dated October 8, 2004, which advised her that the income replacement benefit she was receiving from SGI would be reduced from \$587.34 biweekly to \$86.18 biweekly, effective November 5, 2004. The reason for this reduction was that one year had elapsed since SGI had advised the Appellant that her “determined employment” was the position of a “Parking Lot Attendant,” with a yearly employment income of [amount], or [amount] biweekly. The yearly employment income of her determined employment would be deducted from her income replacement benefit.

[2] The Appellant seeks to have SGI’s decision set aside and the previous income replacement benefit reinstated.

PRELIMINARY ISSUE

[3] In correspondence to the Commission office, SGI advised that it would be taking the position that the Appellant could not put in issue SGI’s decision to initiate the determination process, as that decision had been communicated to her by letter dated November 5, 2003, and she had not appealed within the time periods prescribed in *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (the “Act”). SGI first outlined to the Appellant the determination process and advised her of its intention to proceed with that process on October 8, 2003. Following a meeting between Brad Dixon, the SGI personal injury representative assigned to the file, and the Appellant, SGI sent to the Appellant a further letter dated November 5, 2003, confirming that she would be determined into the position of a Parking Lot Attendant and that, one year from the date of the letter, SGI would reduce her income replacement benefit by the determined gross yearly employment income for this position (or the amount of any income she earned, whichever was greater).

[4] However, at the outset of the hearing, Mr. Dale Brown, SGI’s counsel, advised that SGI was abandoning its challenge to the Commission’s jurisdiction and its argument that the Appellant had missed a limitation period. He explained that neither the October 8 nor the

November 5, 2003 letter was drafted in the form of a decision letter setting out the appeal process. Accordingly, SGI conceded that the correctness of SGI's determination of the Appellant into an employment position was properly before the Commission.

FACTS

[5] The Appellant was injured in an automobile accident on November 24, 2000. While traveling west on [road] in Saskatoon, she entered the [avenue] intersection and collided with a vehicle making a left turn. She struck her head during the accident but did not lose consciousness, was taken by ambulance to Royal University Hospital and was released the same day. She had immediate knee pain, with neck pain starting a few days after the accident.

[6] According to the Application for Benefits completed by the Appellant on December 6, 2000, she was suffering from severe neck, shoulder and low back pain and headaches. She also complained of arm and mid back pain. She could not perform activities of daily living, such as housecleaning or her employment duties and could not lift her 19 month old baby. Her only pre-existing condition was a left wrist injury from 6-7 years earlier. Overall, she described her health before the motor vehicle accident as excellent, but only fair afterward.

[7] At the time of the accident, the Appellant was employed part-time as a dietary aide at a nursing home, sometimes working full-time hours. She had held this position since January 28, 1991. Her duties included mixing and pouring juices for residents, lifting trays and setting out glasses of juice, washing food carts, and various cleaning duties. Except during breaks, she would be on her feet during her entire shift. Before obtaining this employment, the Appellant had worked in a variety of positions, including as a waitress, cook, cashier and bartender, since 1984.

[8] Dr. Andrew Lacny, the Appellant's family physician, diagnosed her initially with grade II whiplash associated disorder. He referred her for physiotherapy treatments at the Daniels-Kimber Physiotherapy Clinic, which began on December 12, 2000.

[9] Denise Williamson, a registered kinesiologist with NRCS Inc., visited the Appellant in her home on December 21, 2000. At that time, the Appellant reported constant neck and lower

back pain, which she rated at 8/10 in severity. Walking or sitting for more than 10 to 15 minutes aggravated her pain symptoms. Some of these symptoms were alleviated by lying down or stretching. She also complained of periodic knee pain and disturbed sleep. Ms. Williamson recommended an in-depth physical demands analysis of the Appellant's employment and the development and implementation of a graduated return to work program when appropriate. If her condition did not improve during physiotherapy, a multidisciplinary assessment should be performed.

[10] Dr. Lacny provided a progress report to SGI following an examination of the Appellant on January 26, 2001. The Appellant's condition showed minimal improvement and Dr. Lacny prescribed pain medication and continued physiotherapy. Dr. Lacny also recommended a tertiary assessment.

[11] In November 2001, the Appellant saw Dr. Peter Davidson, a neurologist, following a referral by her family doctor. He summarized the Appellant's explanation of the headaches she began to experience following the accident. About a week after the accident, she felt a pressure and tightening in the left side of her neck, which spread to the back of her head. She also began to feel a pulsing sensation, which increased in severity and spread to the front of the left side of her head. The headaches worsened over five days, leading to nausea and vomiting. During these headaches she would feel light-headed and was bothered by light and noise. After the fifth day, the Appellant would feel sore all over for a couple of days. Then she would have another headache, with the cycle repeating every four to seven days. These headaches were exacerbated by physiotherapy. From February to April 2001 she was in physiotherapy, but it was stopped from May to July, and her headache symptoms improved somewhat. She resumed physiotherapy from July through September, but it had to be discontinued again because of headache symptoms. Dr. Davidson could not find any neurological basis for the headaches upon examination, and concluded that the headaches were migrainous. He recommended a change in medication in order to attempt to prevent the recurrence of migraines. Unfortunately, the Appellant reported to Dr. Davidson that the new medication therapy was not effective, and he prescribed an alternative in January 2002.

[12] Ms. Williamson met with the Appellant and Dr. Lacny on February 13, 2002, to discuss her rehabilitation. The Appellant continued to suffer from headaches, including severe migraines on a weekly basis and dull headaches radiating from the base of the neck to the head about three times a week. The Appellant had tried several different medications to prevent the onset of migraine headaches, but had not tolerated them well and wanted to terminate their use. She continued to need to take medications for pain relief. Dr. Lacny indicated that the Appellant would not benefit from further rehabilitation treatments such as functional restoration, exercise and strengthening programs, or work hardening or conditioning. It could not be determined if the Appellant had reached maximum medical improvement, as her symptoms might improve. While he believed that the Appellant could return to work without risk to her health, she was likely to suffer greater headache pain as a result. Ms. Williamson planned to develop a gradual return to work, designed to manage the Appellant's headaches as much as possible.

[13] Although the Appellant began a graduated return to work, she discontinued it on March 20, 2002, due to continued headache symptoms and the side effects of new medications. She reported that the severity of her headaches had increased after working a few hours each afternoon. She had been examined by Dr. Lacny on March 19, who prescribed Amitriptyline but advised her that she could return to work the next day. The Appellant found that the new medication made her extremely drowsy. When Ms. Williamson "job shadowed" the Appellant at work, she observed that her ability to function did not seem to be affected by her headaches, although she complained that they were worse after work.

[14] Dr. Lacny discontinued the Amitriptyline in May and the Appellant began using a TENS machine to see if it would provide any headache relief.

[15] Dr. Andrew Kirk, a neurologist, assessed the Appellant on August 7, 2002, further to arrangements made by SGI. Dr. Kirk summarized his conclusions as responses to questions posed by Ms. Williamson:

2. The two commonest types of headaches are tension type headache and migraine. I believe that her headaches are a mixture of the two. They begin with muscle tension in the neck brought on by activity related to her prior injury. However this then appears to trigger a very migrainous headache with nausea, throbbing, photophobia, etc.

3. You ask about the cause of her headaches. Although she likely had an underlying tendency toward migraine, these were never a problem for her until the accident. Therefore, I believe that the accident is the cause of her current headache problem. You ask about the permanency of her symptoms. They have been with her for over a year and a half so the prognosis for their disappearing now is not good. However, it is a bit encouraging that they have been getting somewhat less frequent and often this sort of headache can improve over time. Of course, their reduced frequency may just be related to her reduced activity.

...

5. Yes, I think that she is disabled from performing the active tasks outlined in her dietary aid employment. She is barely managing with activities of daily living if she marshals her resources and doesn't do everything in one day.

...

8. You ask for a list of restrictions. I don't think it is really possible for me to list specific restrictions. Restrictions are those of physical activity as imposed on her by her headaches. Clearly her activity has to be much reduced and not sufficient for her to work as a dietary aid.

[16] Dr. Kirk also discussed alternate medications that might be tried to alleviate pain symptoms and prevent migraines, although he indicated that it was "hard to be optimistic" given the lack of positive results to date and the adverse side effects she experienced.

[17] Dr. Lacny wrote on September 27, 2002 that it was too pessimistic to conclude that the Appellant was permanently disabled. Her headaches had gradually improved and did not occur daily, although they were still precipitated by prolonged or strenuous activity. Two months later, the Appellant continued to try different medications, but in trying to improve her tolerance to activity had developed a migraine after just half an hour of playing volleyball. However, according to her family doctor, she was bored and wanted to try another graduated return to work, even though her doctor was "not overly optimistic of her tolerance to work shifts and physical labor, considering her current headache frequency."

[18] On February 12, 2003, the Appellant underwent a physical work performance evaluation at Kinetik in Saskatoon City Hospital. The evaluation consisted of 21 tasks divided into 6 sections, testing her dynamic strength, position tolerance, mobility, fine motor skills, balance, and endurance. The Appellant was able to meet all of the demands of her job, with the exception of standing. While she was able to stand at a frequent level, her employment required her to be

able to stand constantly but she could not do so because of headache pain. However, the Appellant reported a marked increase in pain symptoms following the assessment:

... Prior to participating in the Physical Work Performance Evaluation [the Appellant] reported headache pain was 3/10, cervical spine pain was 3/10 and there was no low back pain. Upon re-evaluation the day after testing she reported headache pain was 8/10, cervical spine pain was 7/10 and low back pain was 3/10.

[19] A physical therapist also noted a mild increase in tension in the bilateral upper trapezius, suboccipital and cervical paraspinal muscles. Kinetik's report concluded that the Appellant was capable of fulfilling medium level job demands for an 8-hour day. The report suggests that the Appellant's difficulty with the requirement for constant standing might be addressed if the task were modified to allow for stretching breaks or alternations with other tasks. A return to work with modified duties was recommended.

[20] Dr. Lacny saw the Appellant again on March 19, 2003. She reported that she had suffered persistent headaches and a sore neck for 3 to 4 weeks following the Kinetik assessment and had had to increase the use of pain medications. He disagreed with a graduated return to work at that time and recommended that she be placed in a more sedentary position or be retrained.

[21] The SGI personal injury representative responsible for the Appellant's claim, Brad Dixon, spoke to her in May and June 2003 about initiating the employment determination process. In July 2003, Susan Campbell, a rehabilitation consultant with NRCS Inc., prepared a lengthy report entitled, "Transferable Skills Analysis," in order to identify alternate employment options for the Appellant based upon her current physical abilities, education and training. Following Dr. Lacny's recommendation that the Appellant should be considered for sedentary employment, Ms. Campbell considered employment possibilities demanding light rather than medium level of activity. The Appellant advised Ms. Campbell that she wanted to return to work, but did not think that she could satisfy the demands of her dietary aide position. Using the results of a General Aptitude Test Battery and a Canadian Work Preference Inventory test completed by the Appellant, Susan Campbell identified a number of potential occupations for

which the Appellant was suited and then ruled some out following a review of market data available for Saskatchewan.

[22] The Appellant expressed a preference for continuing employment with the Saskatoon Health District, as this would allow her to retain her existing benefits and seniority. Brad Dixon indicated that SGI would try to “find [her] a job” within the health district, but would also consider other employment opportunities within a 60 miles radius of her residence.

[23] In a letter to Donna Graham, a Return to Work Coordinator within the Saskatoon Health District, Ms. Campbell summarized the results of the functional capacity evaluation as reported by Kinetik. According to the report, the Appellant had not been tested to her maximum limits, but rather to the job demand requirements of her dietary aide position. Testing was limited in this manner in order to “be able to control the headaches and as a result the Appellant would successfully complete the two days of testing.” Ms. Campbell also corresponded with the Appellant on September 10, 2003, advising her to contact her union representative and to begin applying for posted positions with the health district.

[24] By letter dated October 8, 2003, SGI advised the Appellant that it had identified five potential positions for which she was suited by reason of her residual functional capacity, vocational testing, aptitudes and interests:

- 1) Retail Salesperson
- 2) Sales Clerk
- 3) Funeral Attendant
- 4) Cashier
- 5) Park Lot Attendant.

[25] According to the letter, the Appellant was to choose from one of these occupations for the purpose of the “determination” process. SGI also indicated that it would try to help the Appellant to locate employment within the health district, but would also look outside the health district if necessary. The effect of the determination process on the Appellant’s income replacement benefit was explained as follows:

Once an employment has been determined, a one-year grace period is allowed. During the one-year grace period, if you find employment your income replacement benefit will be reduced by 75% of your actual income. After the one-year grace period we will reduce your income replacement benefit by 100% of the net income of the determined employment.

[26] Ms. Campbell spoke to Dr. Lacny on October 8, 2003, to clarify his opinion regarding the Appellant's functional limitations. He advised the consultant that, although the Appellant could perform numerous physical tasks, doing so exacerbated her headache condition. His opinion was that the Appellant was totally disabled from employment involving physical exertion, but that she was capable of sedentary employment.

[27] Brad Dixon met with the Appellant in her home on October 29, 2003. At that time, according to Mr. Dixon's subsequent correspondence, the Appellant elected to be determined into the position of Parking Lot Attendant. Effective November 5, 2003, SGI would pay to the Appellant an income replacement benefit equal to the gross yearly employment income ("GYEI") of that position, [amount]. One year from that date, SGI would reduce the income replacement benefit paid to the Appellant by the greater of the income actually earned by her or the GYEI of a Parking Lot Attendant. In the meantime, 75% of any income actually earned by her would be deducted from her income replacement benefit.¹

[28] Over the next several months Brad Dixon had several conversations with the Appellant, Susan Campbell and representatives of the Saskatoon Health District for the purpose of identifying possible job opportunities compatible with the Appellant's skills, training, functional ability and seniority with her employer. Two possible openings were Unit Clerk and Constant Care Provider. It was necessary for the Appellant to take a medical terminology course and computer training in order to meet the demands of these positions. Susan Campbell prepared an Individual Written Rehabilitation Plan for the Appellant, supported by her family physician, designed to provide her with training in medical terminology and computer skills and then to allow for a work trial as a Constant Care Provider and a Ward Clerk, both of which Dr. Lacny believed the Appellant could do. At this time, in February 2004, the Appellant continued to

experience headaches after physical exertion such as housecleaning activity. Dr. Lacny recommended reading on coping with headaches and suggested a new pain medication to her.

[29] The Appellant completed a ten-week medical terminology course, funded by SGI, in May 2004, receiving a grade of 91%. The SGI personal injury representative, Brad Dixon, noted that Susan Campbell was diligently following up with the health district to identify possible employment positions for the Appellant.

[30] In July 2004, Brad Dixon visited with the Appellant in her home and took the opportunity to explain again the determination process, including the planned reduction of the Appellant's income replacement benefit in November. The Appellant complained that it was unfair for her benefits to be reduced since she was still injured from the motor vehicle accident. Mr. Dixon responded that it had been determined that she was able to work at a sedentary level.

[31] By August the Appellant had not been successful in obtaining new employment within the health district, although she had applied for a few positions. She was reluctant to apply for positions with alternate employers because she did not want to lose the benefits package offered by the Saskatoon Health District. Brad Dixon and Susan Campbell were concerned that the Appellant was not seeking employment more actively. Following her successful completion of the medical terminology course, the Appellant had attended a work placement for the constant care provider position for only one day, although she told Ms. Campbell that she was interested in the position. The required qualifications for the position of a ward clerk had changed to include completion of a one-year business/office program, and accordingly it appeared that this position was no longer an option for the Appellant without further training.

[32] In September, the Appellant advised Susan Campbell that she had been laid up for three days with a migraine headache after she had been canning.

[33] During a meeting in October, the Appellant's union representative indicated that he would pursue her eligibility for the ward clerk position further, as he thought that she should still

¹ The letter stated: "In the interim from the date of this letter to November 5, 2003, any income earned by you will only be deducted at a ratio of 75%." The year, 2003, was a typographical error but it was obvious from the context

be capable of fulfilling the requirements of this employment. The Appellant also participated in a four-hour job shadow for the position of sitter, watching patients with head injuries, at Royal University Hospital. She said that she was put on a casual list, but did not receive one call to work even though she was interested in the job.

[34] On October 8, 2004, SGI sent to the Appellant the decision letter which is the subject of this appeal, advising her of the reduction of her income replacement benefit effective November 5, 2004.

LAW AND ARGUMENT

[35] The Commission's power on appeal is provided in subs. 193(7) of the *Act*. The Commission may:

- (a) set aside, confirm or vary the insurer's decision; or
- (b) make any decision that the insurer is authorized to make pursuant to Part VIII of the *Act*.

[36] The standard of review applied by the Commission on such appeals is that it will overturn a decision of SGI only if an applicant establishes that SGI's decision was erroneous, or based on erroneous assumptions, or was unreasonable.² This standard of review is currently the subject of an appeal to the Saskatchewan Court of Appeal, and a decision is pending. The outcome of this appeal does not depend upon the standard of review and would not be different regardless of the decision of the Court of Appeal.

[37] The hearing before the Commission proceeded on the basis that the burden of proof rests with SGI to prove that benefits are no longer payable.³

[38] This case involves a consideration of the employment determination process in the *Act*. The *Act* provides that a claimant who is able to work but is not able, by reason of her injuries sustained in a motor vehicle accident, to return to her employment can be "determined" by SGI into alternate employment:

that the reference was to 2004.

² *R.C. v. Saskatchewan Government Insurance*, 2003 SKAIA 1.

³ *Job v. Saskatchewan Government Insurance* (2004), 257 Sask. R. 85 (C.A.).

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(2) Following the second anniversary of the accident, the insurer may determine an employment for an insured if the insured:

- (a) is able to work; but
- (b) is not able because of the accident to hold an employment from which the yearly employment income is equal to or greater than the yearly employment income on which an insured's income replacement benefit is calculated.

[39] The *Act* specifies numerous factors that SGI must consider when choosing an employment into which a claimant is determined:

134(1) In determining an employment pursuant to subsection 119(4) or section 132 or 133, the insurer shall consider the following factors, if applicable:

- (a) the education, training, work experience and physical and intellectual abilities of the insured at the time of the determination;
- (b) any knowledge or skill acquired by the insured in a rehabilitation program approved pursuant to this Part;
- (c) the insured's intended employment at the date of the accident;
- (d) whether the determined employment is available in the jurisdiction in which the insured resides;
- (e) whether the determined employment is available:
 - (i) on a regular and full-time basis; or
 - (ii) if it would not be possible for the insured to hold employment on a regular and full-time basis, on a part-time basis;
- (f) any other prescribed factors.

(2) Subject to clause (1)(e) and section 135, the income replacement benefit of an insured for whom an employment is determined pursuant to section 132 or 133 is not to be less than an income replacement benefit calculated on the basis of a yearly employment income determined on the basis of a 40-hour work week paid on the basis of the minimum wage established pursuant to *The Labour Standards Act*.

[40] No regulation prescribing additional factors as contemplated by subs. 134(1)(f) has been adopted.

[41] Once the claimant obtains or is able to obtain the employment position determined for her, or a year has passed since SGI determined an employment for the claimant, SGI is entitled to reduce the income replacement benefit payable to the claimant by the amount actually earned by the claimant or the yearly employment income calculated in accordance with the regulations, whichever is greater:

135(1) Subject to the other provisions of this Division, the insurer shall reduce an insured's income replacement benefit in accordance with subsection (2) if:

- (a) the insured holds or is able to hold an employment determined for the insured pursuant to section 132 or 133; or
- (b) one year has expired since an employment was determined for the insured pursuant to section 132 or 133.

(2) For the purposes of subsection (1), the amount of an insured's reduced income replacement benefit is the amount RIRB calculated in accordance with the following formula:

$$\text{RIRB} = \text{IRB} - \text{NI}$$

where:

IRB is the income replacement benefit the insured is receiving pursuant to section 113, 114 or 115, subsection 119(4) or section 122 or 123; and

NI is the income replacement benefit the insured would earn from an employment and calculated on the greater of:

- (a) the yearly employment income the insured actually earns from holding an employment; and
- (b) the yearly employment income determined in accordance with the regulations.

[42] In this case, the Appellant argues that SGI erred in determining her into employment because she cannot hold a job requiring any amount of physical activity, whether at a medium level as required in her dietary aide position or at a sedentary level as suggested by Dr. Lacny. SGI argues that the provisions of the *Act* governing determined employment do not require that the Appellant be fully recovered from her injuries or the employment that she held at the time of the motor vehicle accident – she only has to be able to hold the determined employment.

[43] It is not disputed that the Appellant is not capable of returning to her pre-accident occupation as a dietary aide. She made two unsuccessful attempts to return to work in her dietary aide position following her motor vehicle accident, but severe headaches prevented her from resuming her job. Brad Dixon testified that he had never thought that the Appellant was exaggerating her pain symptoms and accepted that physical exertion triggered headaches for her.

[44] The Appellant testified that she continues to suffer from severe headaches. Pain symptoms typically start on the left side of her neck, progress behind her ear, to the top of her head and finally to her left eye. By evening, she experiences a throbbing pain and feels nauseated, occasionally vomiting from the pain. She is sometimes laid up in bed for three to four days. Sometimes she has had to be taken to hospital for treatment to relieve the pain symptoms.

She testified that these episodes occur after she has tried to do too much but can be triggered simply by attempting to help her children with their school work.

[45] Much attention was focused during the parties' closing arguments on the evaluation of the Appellant's functional abilities performed by Kinetik in February 2003. The report concluded that the Appellant was able to fulfill nearly all of the requirements of her dietary aide position, which was considered to be medium-level work, with the exception of constant standing. A surprising omission from the report is that the Appellant had to be taken from Kinetik's premises to the hospital emergency department for treatment with Demerol for a severe headache the morning after a full day of testing. We do not doubt the Appellant's testimony about this event. The report does note that the Appellant reported a sharp increase in headache pain symptoms following testing. The Appellant testified that she was fully capable of performing the tasks asked of her, but following such exertion she would suffer from severe headaches.

[46] Mr. Brown explained in SGI's closing argument that SGI had relied upon the Kinetik report in making its decision to reduce the Appellant's income replacement benefit following the determination process. He said that, if we accepted the Appellant's evidence regarding her abilities, we would have to find that SGI had erred because she cannot perform medium level work and it might be impossible for SGI to determine the Appellant into employment at all.

[47] For the Appellant, Mr. Borden also argued that everything in this case turns on the Kinetik report. SGI should not have relied upon this report, he said, when it was apparent that the Appellant continued to suffer from severe headaches and had even been taken to hospital following eight hours of functional testing.

[48] Kinetik's conclusion that the Appellant was capable of satisfying the demands of medium level work for an eight-hour day was summarized as follows:

Requested FCE Information:

“Does [the Appellant] meet her guaranteed hours of work?”

“What level and how many hours of work is she capable of?”

Based on the results of the Physical Work Performance Evaluation [the Appellant] has demonstrated that she is physically capable of sustaining medium level work for an eight hour day.

When looking at specific job requirements for her position as Dietary Aide at [Employer] [the Appellant] met all job requirements with the exception of constant standing when pouring juice. The Physical Demands Analysis performed by Denise (Williamson) Kruppi on January 10, 2001 reported a requirement to stand and pour juice 50% of the four hour shift and 75% of the eight hour shift. Based on this information, client report and demonstrated abilities, [the Appellant] would have the most difficulty with the task of pouring juice which requires constant standing. Based on the results of the Physical Work Performance Evaluation [the Appellant] does not match for the position that would involve 75% of the eight hour shift spent performing this task. Self-management methods including activity modification and stretch breaks are encouraged to be utilized during activities to allow increased participation. If this task could be modified to allow for frequent position adjustments or alternated with other tasks she may be better able to perform this task as well.

[49] Based upon the circumstances surrounding the evaluation performed by Kinetik and the reports of Dr. Lacny, we are not satisfied that it was reasonable for SGI to rely upon this report. The question is not whether the Appellant can perform the tasks of her employment over an eight-hour day. Rather, what must be determined is whether she can work an eight-hour shift, go home and participate in the activities of daily living, and do it all again the next day. If she cannot repeat a day of normal work and other activities because the previous day's exertions have triggered a disabling headache, then she cannot sustain medium level work. The report is clearly based upon one day's testing; the following day the Appellant experienced a severe headache which, she testified, required treatment in hospital. The Kinetik report does not ignore the Appellant's limitations resulting from increased pain symptoms and in fact some suggestions are made for ways to moderate these symptoms. However, no testing was done to determine whether any of these suggestions might be effective.

[50] SGI seems to have had some doubts about the validity of Kinetik's conclusions as well. Shortly after the date of that report, Dr. Lacny wrote that the Appellant should only be considered for sedentary work. Brad Dixon testified that he understood Dr. Lacny to be saying that the Appellant could make the attempt to work at a sedentary level, not that she could work at this level. From that point SGI did not insist that the Appellant could perform medium level work; instead, all efforts were directed at identifying and, if possible, securing for the Appellant a job with light physical (but not sedentary) demands. For example, in selecting suitable

employment for determination purposes, Ms. Campbell limited the choices to positions having physical demands at a light level. From the possible options, SGI suggested five positions to the Appellant and asked her to choose one of them as her determined employment.

[51] For the foregoing reasons we think that the Kinetik report did not properly assess the Appellant's functional capacity. Since SGI's decision was based upon the findings of the Kinetik report, it must be set aside.

[52] Although SGI's reliance on the Kinetik report was, we find, a fatal error, we have no specific criticism to make about the way SGI proceeded to follow the determination process in this case. The personal injury representative, Brad Dixon, and the NRCS consultant hired by SGI, Susan Campbell, actively and diligently consulted with the Appellant's employer and union representative in attempting to secure alternate employment for her. Although not required to do so, SGI respected the Appellant's desire to remain with her current employer in order to maintain her seniority and benefits and tried to assist her in doing so. SGI also funded additional training, including a medical terminology course, in order to broaden the range of positions within the health district for which the Appellant would be qualified.

[53] In response to a concern raised by Mr. Brown, we wish to make it clear that we are not suggesting that SGI will never be able to determine the Appellant into employment. From the evidence before us we cannot say what the Appellant's residual functional capacity might be. While she has had serious difficulty returning to work, she was able to complete the medical terminology course very successfully. However, she continues to experience intense, lasting headaches that are sometimes triggered by mundane activity. Before SGI can determine the Appellant into employment, however, SGI must be satisfied that the Appellant is capable of working eight hours a day, five days a week (or at least for the number of hours per week that she worked pre-accident), at whatever position she is determined into.

CONCLUSION

[54] SGI's decision of October 8, 2004, is set aside and SGI is directed to pay to the Appellant interest on the amount of the income replacement benefit owing to her in accordance with s. 102

of the *Regulations*. SGI shall also reimburse the Appellant for her costs in accordance with subs. 193(11) of the *Act*, to a maximum amount of \$2,500 as prescribed by s. 96 of the *Regulations*.⁴

Dated at Regina, Saskatchewan, on July 20, 2006.

Peter Bergbusch, Chair

Stephanie Pfefferle, Commission Member

Darleen Topp, Commission Member

⁴ *The Personal Injury Benefits Regulations*, c. A-35, Reg 3.