

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *I.V. v. Saskatchewan Government Insurance,*
2006 SKAIA 048
Date: 20060809
File: 152 of 2004

BETWEEN:

I.V., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
I.V., for the Applicant
Dale Brown, for the Respondent

Before: **Beverly Cleveland, Chair**
Stephanie Pfefferle, Commission Member
Carolyn Jones, 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
July 6, 2005

DECISION

[1] This is an appeal by I.V., the Appellant, of a decision made by Saskatchewan Government Insurance (hereinafter referred to as “SGI”) set out in a letter, dated January 27, 2004, which essentially denied the Appellant’s request for continued funding of his education to become a Certified General Accountant (hereinafter referred to as “CGA”).

FACTS

[2] On September 29, 1995, the Appellant was injured in a motor vehicle rollover. As a result of this accident, he suffered multiple injuries including a basal skull fracture and a C6-7 fracture dislocation with resulting quadriparesis.¹

[3] At the time of the motor vehicle accident, the Appellant was employed on a full-time basis with [Employer One] in [location] as a heavy-duty mechanic at a wage of [amount] per hour. He had been working there for just over one year. Prior to this, he worked as a machinist in [Alberta].

[4] At the time of the accident, the Appellant had completed Grade 12, as well as a course in diesel engines. He was also involved in an apprenticeship program.

[5] The injuries that the Appellant suffered in the motor vehicle accident were significant and precluded him from returning to his former employment as a mechanic.

[6] The information on the appeal file is limited. As a result, we refer to and have included quotations from several file notes and memorandums prepared by the SGI injury representatives. We are not relying on the accuracy of the contents of this information though because the Appellant disagreed or disputed some of the facts or information contained in them and the

¹ Some of the reports on the appeal file record a C4 and C5 fracture. In the Application for Benefits, dated October 11, 1995, a C4-5 fracture was noted. However, the Saskatoon City Hospital Discharge Summary indicates in two separate places that the Appellant suffered from a C6-7 spinal cord injury.

authors were not called to testify at the appeal hearing. The notes are helpful, however, to show the chronology of events on this file and have been included for that purpose.

[7] In a Rehabilitation/Vocational Plan, dated October 29, 1996,² educational costs for the Appellant were calculated on an annual basis with respect to four possibilities: university (four years), SIAST (2 years CAD/CAM), SIAST (2 years Accountancy), and SIAST (2 years computer aided design and drafting).

[8] On January 17, 1997, a progress note from Paul Gustafson, rehabilitation, education and employment counselor with the Canadian Paraplegic Association stated that the Appellant had completed his assessment at Kelsey. He noted that he would follow up with this assessment and would continue to provide the Appellant with education and employment counseling.

[9] On September 19, 1997, SGI sent the Appellant a letter stating, in part:

At this time I would like to advise you that any programs you are seeking funding for in relation to your vocational rehabilitation must be forwarded to SGI in the form of a goal plan including the length of program, where it can be obtained and cost, as well your plan must be in consultation with an occupational therapist. Any equipment needed for your vocational rehabilitation must be first approved by SGI and have three (3) competitive estimates forwarded to us before funding will be considered.

[10] On October 29, 1997, a copy of Kelsey Institute's Career Assessment Report, undated, was forwarded to SGI. It is not clear why there was such a considerable delay as the Report appears to have been sent to the Canadian Paraplegic Association on November 12, 1996.

[11] The Report stated that the purpose of the assessment was to assist the Appellant in identifying realistic occupational options that were compatible with his physical limitations and focussed on his strengths. The assessment involved the administration of a series of four tests. Due to his psychomotor limitations, the Appellant was given additional time to complete the Career Abilities Placement Survey, which was the only one of the tests that had a time factor. As a result, the Report noted that the scores on this test may be somewhat misleading. However, for the purposes of the assessment, the scores achieved were considered to be valid, and the Report

² This document was filed by SGI, but it appears to have been prepared by Paul Gustafson, BSW.

noted that an upgrading program would provide a reasonable check on the accuracy of those scores.

[12] The Report concluded that:

There were a number of occupations that matched [the Appellant's] scores in the interests, values, abilities and personal preference inventories. The following were selected as also being compatible with his physical limitations: architectural design, accountant, accounting clerk, computerized accounting clerk, computer operator, computer assisted design and manufacturing, computer drafting, and desk top publishing. [The Appellant's] first choice options were for computer aided drafting design in areas such as manufacturing, architectural or desktop publishing. All of the occupations listed above will require some upgrading.
[Emphasis added]

[13] In a File Memorandum, dated November 12, 1997, it was noted that the goal was to enroll the Appellant into classes for CAD/CAM at Kelsey by September 1998 as he needed some upgrading first. At that time, the Appellant was taking a computer class, and it was noted that he could handle upgrading classes at night.

[14] An Injury Note, created by Karen Sorensen, personal injury representative, dated November 9, 1998, noted that the Appellant was: "...still struggling with his correspondence class in math since January. He needs three more math classes to complete grade 12 and then to qualify for the C.A.D. Cam course at Kelsey. He feels this will take him three years."

[15] There is a gap in information on the appeal file of over one year as the next Injury Note, created by Ms. Sorensen, is dated January 26, 2000 and reads as follows:

Discussion with Senior on SIAST classes. **Spoke to Dana Stutsky this morning about the funding being requested for [the Appellant] to get his diploma for a Certified General Accountant. Dana and I agreed that we will pay for these classes for now but that I should hire a vocational rehab counsellor to develop a plan for [the Appellant's] future to insure we are funding something that [the Appellant] will follow through on, something that he can actually get a job in and something that he can handle physically.**

I called IRC and left a message for Garry Derenski to call me. Need a vocational counsellor to get class course from Kelsey and find out where this will take [the Appellant], what percentage of people actually get jobs and at what point can they get jobs (how many classes) and paying what??
[Emphasis added]

[16] It is not clear from the information on the appeal file what SGI told the Appellant regarding the funding of his CGA classes.

[17] On February 18, 2000, SGI initiated a career assessment. Russ Warner of Innovative Rehabilitation Consultants assessed the Appellant. SGI was provided with the resulting Initial Assessment and Labour Market Survey Report, dated May 30, 2000. The primary purposes of this Report were: to determine if the Appellant's chosen career path was an appropriate one; to develop a vocational plan; to conduct a labour market survey to determine the likelihood of employment; to ascertain how long it would take to obtain the necessary credits to become a CGA; and to determine how long it might be before the Appellant was able to earn his pre-accident salary as a CGA.

[18] The Report indicated that if the Appellant were to continue to take two classes per semester it would take him four to six years to become a CGA because only two courses per semester were offered at the Saskatoon campus and no classes were offered during the summer months. In order to enroll in the full-time program, which is a two-year program, the Appellant would have to re-locate to Moose Jaw. The Report noted, however, that this program is more structured and the full-time pace may create considerable fatigue on the Appellant's part. Once the Appellant obtained his diploma from Kelsey, he would have to pass the courses offered by CGA Saskatchewan, which are done by correspondence, in order to receive his CGA designation. Apparently, this process can take up to six years, depending on the ability of the student.

[19] In the Report, Mr. Warner noted that he spoke with the Appellant's instructors. He was advised that in his economics class, the Appellant received 94% on his mid-term exam. In his accounting class, however, his mark was lower than expected (59%) since he had fallen just before the exam and experienced headaches and concentration problems.

[20] The labour market survey component of the Report outlined that most companies, on average, paid employees a starting wage of approximately eight to ten dollars per hour,

depending on experience.³ It was noted that after four semesters (or two years of classes), a few companies paid salaries in a range close to the Appellant's pre-accident level and, possibly, would offer to pay the remaining tuition costs to complete the CGA designation. However, the Report specifically stated that these positions were few in number.⁴

[21] The assessment portion of the Report identified four tests that were performed: an interest profile, a work preference inventory, a career aptitude survey and a transferable work content skills inventory. The Appellant did very well on four of the five aptitude tests administered, however, he was in the bottom third with respect to the visual speed and accuracy component. This test was timed and the Report noted that the Appellant's scores were likely low due to his limited hand coordination. The test was re-administered on May 12, 2000, with almost identical results.

[22] The Report concluded that:

The testing does not support this occupation based on the client's inability to quickly process numbers in a specific amount of time. [The Appellant] is in the bottom third in visual speed and perception whereas the Choices Occupational database suggests he needs to be in the top third to be an Accountant. **It is important to note, however, [the Appellant's] ability and skills will only improve over time which can improve the testing results. Another factor to consider is the type of employment he will seek once his [sic] able to be rehired.** The job requirements will vary among employers. In some instances, some employers may not have stringent time lines on projects and this would enable [the Appellant] to successfully complete tasks at his own speed.
[Emphasis added]

[23] The Report then recommended that:

...[The Appellant] continue his career path as an Accountant but his progress should be monitored on a consistent basis. This would ensure he continues to progress and should be in a position in approximately two years to secure paid employment in this area. If he were to experience difficulties the Consultant could assist in trouble shooting any problems that may arise.
[Emphasis added]

[24] It is apparent from a review of the appeal file that he did not want the assistance or interference of SGI in achieving his career goals. For example, in the Vocational Rehabilitation Report, dated May 9, 2001, Mr. Warner stated that: "[i]t was discussed with the Consultant that

³ One company reported a slightly higher wage after eighteen months and once hired on a permanent, full time basis. However, the Report noted that this company was unionized and, therefore, vacancies were filled internally before advertising outside the company.

at this point in time the client has made it clear he does not want the Consultant contacting or assisting him in any way.” Mr. Warner attempted to contact the Appellant on several occasions, but was not successful.

[25] It is also apparent that the Appellant was doing very well in his classes. A handwritten note from Mr. Warner to SGI, dated January 3, 2001, stated that: “I spoke to both his instructors from this past semester + they both said that he was one of their top students.”

[26] In another handwritten note to SGI, dated March 12, 2001, Mr. Warner noted that: “I contacted both of [the Appellant’s] instructors recently to see how he was doing. He doesn’t have the marks back yet but stated [the Appellant] is doing very well. ... said [the Appellant] received the 2nd highest mark in the class (88%). He went on to say that he is very vocal + is the best participator in the class.”

[27] The Vocational Rehabilitation Progress Report, dated May 9, 2001, indicated that the Appellant received 90% as a final mark in his cost accounting course and did “exceptional” in his accounting class.

[28] After completing his final examinations, the Appellant found a position which would allow him to “job shadow” for a few weeks that summer and then possibly go on to full time paid employment. The Injury Note, dated April 19, 2001, reads as follows:

... He is thinking that he *[sic]* as he needs two years experience to get the accounting job he wants after he is done his classes that this would be a good opportunity. He wanted to review what SGI would reduce his IRB by and whether or not the discontinuation of his CPP would then make a difference in the total IRB reduce *[sic]* by his employment. [The Appellant] is not sure his CPP Disability would be reduced but has a feeling it may be. If that is so his full IRB then comes into effect and he asked if we would then take 75% of his earnings from that full IRB. I advised yes unless he is able to earn more than the GYEI on his IRB.

[The Appellant] and I had some discussion on this as [the Appellant] reminded me that we have talked about the 75% rule about 3 times before and each time he understood that we would take 75% off forever no matter if he made more. I agreed that we have talked about this many times but I never said that this would last forever. What I may have said that as long as he was not able to earn a GYEI equal to or greater than his GYEI from the accident then we would pay him forever or top up from his earnings taking 75% off. [The Appellant] said he would have to rethink this as it would not be worth it for him to return to work and make \$200.00 more and work 80

⁴ Two companies were identified as following this policy.

hours bi weekly. **I said that the incentive would be the added income and the addition to his resume for future employment.** he *[sic]* still felt that he may have to continue with the classes and get them done sooner than working full time and only taking one class and then get his certificate and a job earning a much better wage.
[Emphasis added]

[29] In May or June of 2001, the Appellant testified that he began job shadowing at [Employer Two]. He informed SGI that he was placed on the payroll on August 15, 2001.

[30] On August 2, 2001, a Training-On-The-Job Contract was signed between the Appellant and [Employer Two] and was approved by a member of Post-Secondary Education and Skills Training and a member of Saskatchewan Social Services. This contract provided that from August 15, 2001, and continuing for 26 weeks, 50% of the Appellant's total weekly income would be refunded⁵ by Saskatchewan Post-Secondary Education and Skills Training, sponsored jointly by the Government of Canada and the Province of Saskatchewan under the provisions of the Employability Assistance for People with Disabilities Agreement.

[31] Mr. Brady Ives, personal injury representative III, testified at the hearing that he was unaware of this subsidy until the day before the hearing. He noted that there was no mention of the subsidy on SGI's file. The Appellant testified, however, that at the September 4, 2002 meeting,⁶ SGI was made aware that the employment income was subsidized. The Appellant acknowledged that this was not recorded in the Injury Note created by Karen Sorensen on that date. However, it is his testimony that he told them about the subsidy "...because that's when they told me that they were terminating my educational funding." This issue will be dealt with in greater detail in the analysis below.

[32] An Injury Note, created by Ms. Sorensen, dated August 27, 2001, indicated that the Appellant advised that his pay would be: "...about [amount] every two weeks net so we can discontinue his IRB for now." This Injury Note also recorded that the Appellant had registered for an evening class this semester and was to be reimbursed the full \$300 for that class.

⁵ It is our understanding that the employer is refunded and the employee receives the entire wage.

⁶ This meeting is discussed further at paragraph 36.

[33] While he was working full-time at Employer Two, the Appellant testified that he continued to take one evening class per semester at Kelsey.

[34] An Injury Note for May 15, 2002, indicated that the Appellant called SGI to find out what would happen if he quit his job. The Injury Note stated that he was “stressed out” and having personal issues with the employee he was sharing an office with. The remainder of this Injury Note reads as follows:

I told him that as he has shown that he is capable of holding employment that I was not sure he'd receive an IRB again. He said that wasn't fair as he was the one who went out and decided to find work (this after SGI hired Voc Rehab to do a plan and he refused to work with the voc rehab consultant for the most part). I told [the Appellant] I would find out what SGI required to make a decision on future IRB and then I would let him know.

[35] In an Injury Note, dated August 21, 2002, Ms. Sorensen indicated that the Appellant called to schedule a meeting to discuss his education and employment. The note further stated that the Appellant advised that he was:

...wearing out from school and work and should be able to go back on his IRB as his education is more important. I advised that no one told him he had to work and go to school at the same time. As he is capable of employment we are no longer responsible for his IRB and any further classes. He said this is the first he had heard this and I reminded him that when he was going to school I advised we had no responsibility to retrain him any further than the point where he could obtain employment equal to or greater than his IRB. At that time [the Appellant] disagreed with me.

However, he is capable of working and had he worked with IRC and let us develop a rehab plan the goal would have been a return to work or RCE and I explained the RCE. He said he went through his vocational testing at Kelsey and met IRC twice that should have been enough. This was the whole problem to begin with as [the Appellant] always wanted to do everything his own way without interference. [The Appellant] said that he should have stayed at home and collected his IRB. I advised that it would not have lasted forever and again referred to the RCE process. He asked why I did not explain this to him before and I advised because he had gone out and gotten himself full time employment greater than his IRB therefore I felt no need for it.

[36] A meeting with Ms. Sorensen, her supervisor, Mr. Brady Ives, and the Appellant took place on September 4, 2002. The Injury Note, created by Ms. Sorensen on that date, stated that: “.... [The Appellant] had a concern about the legislation ‘penalizing him’ for wanting to better himself. He explained that he wants to become a Certified General Accountant and so far SGI has been paying for his classes but now that he got himself a job we no longer want to pay for his degree.”

[37] The Injury Note also stated that:

Brady started out by saying that quite often when there is a dispute between the injury rep and the insured the problem is a lack of explanation as to what the insured is entitled to under the legislation....

....

Brady then explained that under the Spinal Cord Guidelines we have a discretionary fund of \$500.00 indexed to pay for life skills programs an insured may want to take. We could stretch that and use it to assist with [the Appellant's] classes but it would not cover everything.

Brady suggested that if by using the 'discretionary fund' he would not be satisfied, then [the Appellant] should do up a proposal of that total amount of classes he needs to take, how long that would take [the Appellant] and the total projected cost. Give this to Brady and he can take it to his Peer Review meetings and pitch the idea that [the Appellant] needs to be given special consideration. [The Appellant] asked what his chances are of a good outcome and Brady told him it's a toss up as to what will be decided but he would pitch the idea for him. [The Appellant] also asked who else he could go to for help on this. Brady told him the Ombudsman and explained what they will do or he could go right to the top of the corporation. It all comes back to the administration of the legislation and how have we done that on this file.

....

So [the Appellant] agreed to work on a proposal for Brady to take to Peer and for now SGI will use the discretionary fund towards [the Appellant's] classes. [The Appellant] will bring me his bill for this semester's class and books.⁷

[38] From the date of this meeting until the date of the hearing, the Appellant testified that he has accessed the discretionary fund to pay for his courses. He testified that, at the date of the hearing, he had already used a part of the 2005 fund. An Injury Note, dated September 8, 2004, indicated that he required two more classes to obtain his certificate in accounting.

[39] On August 24, 2003 a Record of Employment was issued by Employer Two, outlining that the Appellant worked there from July 29, 2001 to February 22, 2003 and indicated that the reason for issuing the record of employment was code "A," meaning lack or shortage of work.⁸ The Appellant testified that he was laid off from his employment at Employer Two for reasons which he would not disclose as they are currently the subject of an investigation by the Human Rights Commission.⁹

⁷ It does not appear that SGI received this information from the Appellant. At the hearing, the Appellant testified that he could not recall whether he provided it to SGI.

⁸ The meaning of code "A" was not disputed at the hearing.

⁹ The Commission has no information regarding the nature of this investigation.

[40] The Appellant testified that in October 2003, he began to work part-time at [Employer Three] as an accounting clerk. He stated that he worked with that company until March of 2004 and has been unemployed since that time.¹⁰ The Appellant also testified that he has not taken any classes since that time due to health reasons and course availability/scheduling problems.

[41] On January 27, 2004, SGI issued a decision letter to the Appellant, which stated as follows:

On September 4, 2002¹¹ a meeting between you, Mr. Brady Ives and myself was held in our office. The meeting centred around your request for continued funding of your education to become a Certified General Accountant.

Explanation was provided that SGI's obligation for retraining has been met, as you became capable of obtaining and holding employment that was more remunerative than the employment held at the time of the accident.

Therefore, SGI will provide our discretionary recreational/education funding of \$500.00/year (1995), indexed, to assist you with your educational endeavours.
[Emphasis added]

[42] Mediation took place on August 24, 2004 and was concluded the same date as SGI did not change its position.

[43] The Appellant testified that at the time of the appeal hearing he had one taxation course to complete before he could apply for his certificate. This class is only offered in January and the Appellant planned to take it in January 2006. Upon receiving his certificate, the Appellant would then apply for acceptance into the CGA Society's educational program, which involves a further set of courses and exams. Once these were successfully completed, he would be eligible for designation as a CGA. Two years of work experience are required before one is able to receive this designation. The Appellant testified that the courses required by the CGA Society would be much more costly than those offered at Kelsey Institute. However, he was unable to provide an estimate as to the cost of these courses.

¹⁰ The Commission has no information as to the Appellant's wage or his reasons for leaving this employment.

¹¹ It is not clear why this decision letter was not issued until January 2004.

LAW AND ANALYSIS

[44] The Commission's jurisdiction to review a decision of SGI is set out in section 193(7) of *The Automobile Accident Insurance Act*,¹² R.S.S. 1978, c. A-35, as amended (hereinafter referred to as the "Act"). The Appeal Commission may set aside, confirm or vary the insurer's decision. In addition, the Commission may make any decision that the insurer is authorized to make pursuant to Part VIII of the Act.

[45] The Commission determined in *R.C. v. Saskatchewan Government Insurance*¹³ that its discretion under section 193(7) of the Act must be exercised in a judicial manner. This discretion will be exercised in favour of the Applicant only if it is demonstrated that the decision of SGI was erroneous, based on erroneous assumptions, or was unreasonable.¹⁴

[46] The issue in this case is whether the decision of SGI to deny continued funding for the Appellant's education, using discretionary funding or otherwise (rehabilitation), was erroneous, based on erroneous assumptions or was unreasonable. The basis of SGI's decision to deny further funding was that its obligation for retraining had been met because the Appellant was capable of obtaining and holding employment that was more remunerative than the employment he held at the time of the accident.

[47] In general, SGI's position was that for a period of approximately one and one-half years, the Appellant had demonstrated the ability to earn income well in excess of the income he was earning at the time of the motor vehicle accident. Due to this demonstrated ability to hold an employment at an improved earning capacity, further retraining or vocational rehabilitation was not necessary.

[48] In its brief of law, SGI argued that the Appellant decided to take himself out of the vocational rehabilitation process by accepting employment with Employer Two. Once he made

¹² R.S.S. 1978, c. A-35.

¹³ 2003 SKAIA 1.

¹⁴ *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.

that decision, SGI's choices were limited to: terminating his benefits for non-compliance with the vocational rehabilitation path; or leaving him alone to pursue this employment. SGI contended that the Appellant's actions have prejudiced its position because now that he is unemployed, for reasons unrelated to the motor vehicle accident, he is again seeking to access funding for vocational rehabilitation. SGI took the position that since the Appellant demonstrated the ability to obtain employment at an income higher than his gross yearly employment income at the time of the accident, the vocational rehabilitation requirements set out in the legislation had been satisfied. Whether he was able to retain that employment is beyond the scope and mandate of the legislation.

[49] SGI further argued that the legislation does not require it to provide funding to obtain a CGA designation, nor was it necessary or advisable for SGI to fund this goal. The results of the tests set out in the Initial Assessment and Labour Market Survey Report did not support this occupation based on the Appellant's inability to quickly process numbers in a specific amount of time. SGI took the view that an insured's chosen path is one of many career paths to be considered and had the Appellant continued through the determination process, it was likely that he would have been determined into a position that would not have required training to the extent that he now requests.

[50] SGI's obligations with respect to rehabilitation are set out in section 110 of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35, being the act that was in force at the time of the Appellant's accident, (hereinafter referred to as the "old Act"). This section reads as follows:

110(1) In this section, "**rehabilitation**" includes any or all of the following measures, programs and treatments that the insurer considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen the victim's disability caused by an accident and to facilitate the victim's recovery from the accident:

- (a) physical and acquired brain injury programs and treatment;
- (b) occupational and vocational training and programs;**
- (c) alterations to a victim's residence;
- (d) modification or purchase of a motor vehicle for a victim;
- (e) purchase of special equipment for a victim;
- (f) any additional prescribed measure, program or treatment prescribed in the regulations.

(2) Subject to the regulations, the insurer may take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury and to facilitate the victim's recovery from an accident.

(3) The total combined maximum benefits payable to a victim pursuant to this Division and Division 7 is \$500,000 for each accident in which the victim suffers bodily injuries arising out of an accident.
[Emphasis added]

[51] Subsection 12(1)(f) of the *Personal Injury Benefits Regulations*, c. A-35, Reg. 3, being those regulations that were in force at the time of the Appellant's accident (the "old Regulations"), also deals with occupational, vocational and educational rehabilitation. This section states that:

12 (1) Where the insurer considers it necessary or advisable for the rehabilitation of a victim, the insurer may provide the victim with one or more of the following:

.....

(f) funds to pay for the victim's occupational, educational or vocational rehabilitation where the rehabilitation is consistent with the victim's skills and abilities after the accident and where the purpose of the rehabilitation is:

- (i) to lessen the victim's disability; and**
- (ii) to facilitate the victim's recovery from an accident in order to improve his or her earning capacity and level of independence.**

[Emphasis added]

[52] The January 27, 2004 decision letter implicitly tied SGI's "obligation" for retraining to the Appellant's ability to obtain and hold employment that was "...more remunerative than the employment held at the time of the accident."

[53] Although not specifically cited in the decision letter, it is evident from the wording therein that SGI terminated the Appellant's education funding on the basis of subsection 129(1)(e) of the Act. This section reads as follows:

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

...

(e) the victim holds an employment from which the gross yearly employment income is equal to or greater than the gross yearly employment income on which the victim's income replacement benefit is calculated;

.....

[Emphasis added]

[54] Mr. Brady Ives testified at the hearing. Mr. Ives is a personal injury representative, level three. He testified that he has been working for SGI in that capacity for approximately ten or twelve years and he has worked with SGI for approximately twenty-eight and one-half years in total.

[55] At the hearing, Mr. Ives testified that SGI's mandate with respect to rehabilitation is to either provide the funding necessary to return the person to the physical capabilities of their pre-accident employment or, barring that, to return them vocationally to an income level equal to their pre-accident earning level. Thus, in this case, Mr. Ives stated that SGI's vocational rehabilitation goal was essentially to return the Appellant to an employment with a gross yearly employment income equal to what he was making at the time of the motor vehicle accident, which was approximately [amount] or [amount], indexed. Since the Appellant was earning more at Employer Two than he was at the time of the motor vehicle accident, SGI concluded that he did not require any further education or retraining. Therefore, the funding of the Appellant's CGA courses was concluded, except for the discretionary funding allowance of \$500 (indexed) per year for general interest education as outlined in the Acquired Brain Injury/Spinal Cord Injury Guidelines (hereinafter referred to as the "Guidelines").

[56] The relevant section of the Guidelines reads as follows:

"Other" Education

Following SCI [*spinal cord injuries*], most individuals have major limitations to their previous recreational, vocational, and educational interests and goals. Taking a class or classes at a technical institute or university or other institution can be a good mental challenge and can facilitate socialization. It may also help an individual to choose the most suitable full-time educational program.

Recommendation:

- a. that at the claimant's request, education for general interest be funded for up to \$500 per year (indexed) to cover tuition/registration and associated expenses.

[57] The Guidelines also provide, under the heading "Vocational and Educational Assessment and Training (see also General Principles):"

The Committee fully supports the attempts of all individuals to seek and retain gainful employment following further education and training if required. However, it is acknowledged that rates of full time competitive employment following SCI, especially for individuals with quadriplegia, remain low. Some of the many factors affecting employment and education are discussed under GENERAL PRINCIPLES.

Recommendations:

- a. that at one year after the injury, the Personal Injury Representative contact the Rehabilitation Team for recommendations regarding educational and/or vocational assessment and training.
- b. that a specific request by the claimant for educational and/or vocational assessment and training be funded as **appropriate** (i.e. consistent with the claimant's disability, the job market, and the cost

being competitive). If the Personal Injury Representative questions the **appropriateness** of training, further assessment may be required.

[58] Mr. Ives indicated that there is nothing in the legislation that obligates SGI to pay for the Appellant's education to a CGA designation. Mr. Ives noted that the Initial Assessment and Labour Market Survey Report indicated that the path the Appellant has chosen was not necessarily appropriate given the testing that had been done up to that point. Despite the conclusions of these reports, Mr. Ives acknowledged that the Appellant has done exceptionally well in all of his classes.

[59] Mr. Ives also took the position that it is not clear whether any retraining was actually necessary in the Appellant's case, since the residual capacity evaluation and determination processes had not been completed. Mr. Ives testified that had this file gone its regular course, a complete residual capacity evaluation would have been undertaken to assist the Appellant in selecting a career path most suitable to his skills and abilities. He speculated that the Appellant would have been determined into an occupation with an income similar to what he was making at the time of the motor vehicle accident. Mr. Ives also stated that it is likely that the determination process would have identified job options that would have required much less education or retraining than what the Appellant requires to become a CGA.¹⁵ He noted that the career path that the Appellant chose results in a considerably higher income than the gross yearly employment income that he made at the time of the motor vehicle accident. Mr. Ives further stated that it is not incumbent on SGI to provide education far in excess of the threshold required to meet its goal.

[60] In addition, Mr. Ives testified that at the time the IRB was terminated, SGI was unaware of the fact that the Appellant's wage with Employer Two was subsidized. He stated that he only became aware of this fact the day before the hearing. However, Mr. Ives claimed that even if the wage paid to the Appellant was inflated due to this subsidy, it would not change the decision of SGI or the operation of section 129 of the old Act. SGI's target gross yearly employment income still would have been [amount]. However, Mr. Ives also stated that had the subsidy information been available, SGI likely would have interviewed the employer to find out the

extent of the funding, and what the typical job market would have been paid without the subsidization. However, Mr. Ives stated that: "...control is essentially wrenched away when *[the Appellant]* went down the path of employment."

[61] When asked about the effect of the lay-off, Mr. Ives testified that SGI is not responsible for variances of the local economy. He stated that the reasons the Appellant left his employment at Employer Two were not for conditions related to the motor vehicle accident. Mr. Ives also noted that he did not see a copy of the Record of Employment until the day before the appeal hearing and, therefore, was not aware that the Appellant had been laid off. He thought that the Appellant had left his employment due to problems with another employee.

[62] The Appellant testified that it was his belief that SGI had a legal obligation to assist him to complete his education. He did not think it was fair that SGI terminated its funding before he received a CGA designation. It was his submission that because SGI initially funded his classes, SGI is obligated to continue the funding until his goal has been achieved and he is qualified to work in his chosen field. The Appellant was unable to provide any estimate as to what it would cost to obtain his designation and get to the point where he could attain employment as a CGA.

[63] The Appellant submitted that he is being penalized for having the incentive and drive to improve himself and increase his earning potential. He found the job and the subsidy, which enabled his employment. It is his position that without the subsidization of his salary, his gross yearly employment income at that time would have been less than his gross yearly employment income before the motor vehicle accident. The Appellant believes that SGI would have continued to fund his education on that basis because of his IRB. He testified that had he known his efforts to gain work experience would result in a termination of his IRB, in addition to his education funding, he would have continued on with his studies.

[64] Further, it was the Appellant's submission that the Initial Assessment and Labour Market Report listed occupations that belittled him and downplayed his abilities and skills. The earlier

¹⁵ Although no basis for his comment was given, particularly as it might relate to someone with quadriplegia.

Kelsey Institute SIAST Career Assessment Report indicated that he had the abilities to pursue a career path that involved much greater remuneration, including accounting. In his view, he should be able to proceed with his best choice, being the CGA training and designation.

[65] The Appellant suffered what is sometimes referred to as a catastrophic injury that has permanently affected his life. We applaud the Appellant's ambition and determination to better himself through education and employment. While it is clearly his choice to pursue higher education with a view to greater remuneration in the long run, the legislation does not require SGI to fully fund the costs associated with his choice. Subsection 12(1)(f) of the old Regulations generally provides that where SGI considers it necessary or advisable it may provide funds to pay for vocational rehabilitation, where the rehabilitation is consistent with the skills and abilities of the insured and where the purpose of the rehabilitation is to lessen the disability of the insured or to facilitate his recovery from an accident in order to improve his earning capacity and level of independence. In the circumstances of this case, it is our view that this section must be read in conjunction with subsection 129(1)(e) of the old Act, which indicates that an insured ceases to be entitled to an income replacement benefit once he holds an employment with a gross yearly employment income greater than or equal to the gross yearly employment income on which his income replacement benefit was calculated.

[66] However, at the time the decision letter was issued, 50% of the Appellant's wage was subsidized. According to the Training-On-The-Job Contract, the Appellant was paid [amount] per hour, which would result in a total income of [amount] per year.¹⁶ However, if the subsidy were removed from the calculation, the Appellant's wage would have been approximately [amount] per hour, which would have resulted in a total income of approximately [amount] per year. This is considerably less than SGI's admitted vocational rehabilitation goal of [amount] per year.

¹⁶ We acknowledge that the contract appears only to extend to 26 weeks, however, the Appellant appears to have worked at Employer Two for approximately one and one-half years. After the hearing, attempts were made to obtain further information from the Appellant, but no response was received. SGI was notified that we were seeking this information and was given an opportunity to respond if a reply had been received. We note that the Appellant testified that the subsidy could apply for up to two years if the person that they are funding would be employed fulltime after that the subsidization was terminated.

[67] The unsubsidized wage of approximately [amount] per hour is in line with what was indicated by Mr. Warner in the Initial Assessment and Labour Market Survey Report, dated May 30, 2000.

[68] We note that Mr. Ives stated that had SGI been aware of the subsidy, it likely would have interviewed the employer to find out the extent of the funding and what the typical job market would have been paid without the subsidization. The latter information is found in the Initial Assessment and Labour Market Survey Report, dated May 30, 2000, and is noted to be approximately [amount range] per hour.¹⁷

[69] In light of the above, we find as a fact that at the time the decision letter was issued, the Appellant was not capable of obtaining and holding employment that was more remunerative than the employment held at the time of the accident. In addition, we find that the Appellant did not hold an employment that yielded a gross yearly employment income that was equal to or greater than the gross yearly employment income he earned at the time of the accident.

[70] As a result, we order that the decision letter, dated January 27, 2004, be set aside on the grounds that it was based on the incorrect assumption that the Appellant was capable of obtaining and holding employment that was more remunerative than the employment held at the time of the accident.

[71] At the hearing, the issue of estoppel was raised by the panel. As SGI had not considered this issue, written submissions were requested and reviewed. The Appellant represented himself in these proceedings and was provided a copy of SGI's submissions and invited to respond but no reply was received. For the limited purposes of this appeal, only a very a brief summary of the doctrine of estoppel is required.

[72] The Supreme Court of Canada reviewed the requirements of promissory estoppel in *Maracle v. Travellers Indemnity Co. of Canada* (1991), 80 D.L.R. (4th) 652. The judgment of the court was written by Sopinka J. He stated at p. 656:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position....

[73] In *Regina Sticks Ltd. v. Saskatchewan Government Insurance* (1993), 113 Sask. R. 40 (C.A.), Wakeling J.A. cited *Halsbury's Laws of England*, vol. 15, 3d ed. (London: Butterworths, 1956 at p. 169, para. 338) at paragraph 19:

338. ... Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

[74] In the case at hand, we have no evidence of a promise or an assurance made by SGI upon which the Appellant relied and changed his position to his detriment. There is no evidence to establish that SGI, by either words or conduct, agreed that it would fund the Appellant's education to the point where he would receive a CGA designation. An Injury Note on the file, dated January 26, 2000, indicated that SGI decided that it would fund his classes "for now" until a vocational rehabilitation counselor was hired to develop a vocational plan. Unfortunately, we do not know what the Appellant was told regarding the basis for this funding.

[75] It is important to note that the recommendation arising from the Initial Assessment and Labour Market Survey Report was not to fund the Appellant's education to obtain a CGA designation, but rather to monitor his progress so that he could possibly "...be in a position in approximately two years to secure paid employment in this area."

[76] In addition, we note that it appears that the Appellant was aware, at least by May 2002 that SGI would only fund his classes until he was able to obtain employment with a gross yearly employment income equal to or greater than the gross yearly employment income he earned at the time of the motor vehicle accident.

¹⁷ Refer to paragraph 20.

[77] Moreover, the evidence does not disclose reliance on the part of the Appellant. To the contrary, the evidence before us is that the Appellant would have proceeded to take the classes even if funding had been denied by SGI. In the IRC Report, dated April 3, 2000, Mr. Warner wrote that: “[*the Appellant*] went on to say he would pursue it even if it meant he had to pay for the training himself.”

[78] In light of all of the above, we are of the view that the doctrine of estoppel does not apply in the particular circumstances of this case.

CONCLUSION

[79] As stated above, we find that at the time the decision letter was issued, the Appellant did not hold an employment that yielded a gross yearly employment income that was equal to or greater than the gross yearly employment income he earned at the time of the accident. Further, we find that the Appellant was not capable of obtaining and holding employment that was more remunerative than the employment held at the time of the accident. Accordingly, we order that the decision letter, dated January 27, 2004, be set aside on the grounds that it was based on the incorrect assumption that the Appellant was capable of obtaining and holding employment that was more remunerative than the employment held at the time of the accident.

[80] As the Appellant has been successful has been successful in this appeal, he shall be entitled to all reasonable costs of the appeal, including the Appeal Fee, in accordance with section 193(11) of the Act and sections 86(4) and 96 of *The Personal Injury Benefits Regulations*.

Dated at Regina, Saskatchewan, on August 9, 2006.

Beverly Cleveland, Chair

Stephanie Pfefferle, Commission Member

Carolyn Jones, Commission Member