

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *I.L. v. Saskatchewan Government  
Insurance, 2006 SKAIA 079*  
**Date:** 20061129  
**File:** 092 of 2004

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**BETWEEN**

**I.L., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**I.L., for the Applicant**  
**Greg Baines, for the Respondent**

**Before:** **Beverly Cleveland, Chair**  
**Stan Loewen, 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**

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Heard at Regina, Saskatchewan  
March 29, 2005

## DECISION

### ISSUE

[1] The Appellant, I.L., appeals a decision of Saskatchewan Government Insurance (SGI) dated April 2, 2004 determining him into an employment of a Customer Service Representative.<sup>1</sup>

[2] Briefly the issue is whether the Appellant is able to perform the duties of a Customer Service Representative for 8 hours a day under s. 132, the determination of employment scheme, of *The Automobile Accident Insurance Act*<sup>2</sup> (the *Act*).

### FACTS

[3] Some of the facts as set out are taken in part from the written submission prepared and filed by the Appellant and have been checked against the documents filed by both parties.

[4] The Appellant suffered an incomplete spinal cord injury in a roll-over accident on October 3, 1999. He had surgery to stabilize his spine from C<sub>4-7</sub> and was placed in a halo vest. He also incurred numerous other fractures elsewhere in his spine that did not require surgery.

[5] After one month at Royal University Hospital in Saskatoon, he was transferred to City Hospital for a three-month period of rehabilitation.

[6] In April 2002, the Appellant lost his balance due to ataxia and fell, fracturing his left arm and tearing his rotator cuff. He also has a sports related right knee injury dating back many years that is unstable that compounds the deficits related to his spinal cord injury. Dr. McIvor operated on him in September 2002 at Saskatoon City Hospital.

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<sup>1</sup> note the Appellant incorrectly identified August 8, 2003 as the date of the insurer's decision in his Application to this Commission

<sup>2</sup> c. A-35, RSS 1978 as amended 1995 (the old *Act*)

[7] The Appellant was [age] years old at the date of the accident. He was self employed full time with his own custom spraying business under contract with [employer] at [town] for the previous 5 years. Prior to this he had been involved in a lifetime of farming, during which he held several off farm jobs to subsidize his income.

[8] During the 2000 spraying season he was unable to operate his business and had to rely on hired help. This arrangement was unsuccessful and the business failed later that year resulting in a personal bankruptcy.

[9] The Appellant also attempted work as a machinery salesman in November and December 2002 at [implement dealer] in [town]. The job ended due to his physical inability to walk around, climb over and inspect equipment but also other complications such as problems with strength and balance in the snow. He testified on a good day he could work a total of four or five hours (included driving) before he was unable to function because of fatigue. The Manager at the implement dealership stated the Appellant was only capable of working one to two days a week and that he tired quickly.

[10] In January 2003, the Appellant attended Kinetic at Saskatoon City Hospital for a Residual Capacity Evaluation (RCE) consisting of a medical review, psychological interview and testing and physical work performance evaluation.<sup>3</sup> The latter is a comprehensive test consisting of 36 tasks divided into seven sections – Dynamic Strength, Position Tolerance, Mobility, Fine Motor Skills, Balance, Coordination, and Endurance.

[11] The Appellant demonstrated physical tolerances at a light level, however given issues with fatigue in functioning at this level, it was unlikely that even light work would be sustainable on a daily basis for 8 hours. It was recommended that he look at employment at a sedentary level as being appropriate to his physical tolerances.

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<sup>3</sup> note errors in report (work arms overhead supine should read “Never”); (Endurance: “...the client demonstrated significant fatigue over the course of assessment, with performance on endurance components above acceptable levels..)

[12] Doug Usher, occupational therapist, conducted the functional testing and concluded the Appellant was able to tolerate an 8-hour day at a sedentary level with underlying limitations:

- decreased muscular strength, control and endurance (arms and legs);
- impaired balance;
- decreased left shoulder range of motion with decreased left arm strength;
- pain (knees, calf muscles, wrists, forearms, and left shoulder);
- inability to get up unsupported from floor level;
- fatigue related to increased muscular effort required in postural stabilization (especially in lower extremities).

[13] Mr. Usher noted in the Summary Recommendations that:

- endurance was significantly affected by fatigue;
- there are impairments in dexterity and co-ordination;
- balance impairments;
- fatigue levels appear to be affected by mobility activities such as walking or stair climbing.

[14] In April 2003, SGI retained Innovative Rehabilitation consultants (IRC) of Saskatoon. The Appellant underwent testing for a transferable skills analysis and labour market survey with Russ Warner of IRC. As a result of the tests Mr. Warner chose 3 occupational alternatives using the National Occupational Classification (NOC) guide:

1. Insurance clerk
2. Customer Service Representative
3. Teacher's Assistant

[15] On August 8, 2003, Brian Lymer, SGI Personal Injury Representative, wrote to the Appellant advising he had been determined into the occupation of Teacher's Assistant.<sup>4</sup> This occupation was later withdrawn as it was considered a "light" level occupation.

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<sup>4</sup> The Appellant choose the Teacher's Assistant occupation

[16] On March 24, 2004, Denise Leontowicz, SGI Personal Injury Representative, sent the Appellant another list of employment from which to choose. They were:

1. Insurance clerk
2. Customer Service Representative
3. Warranty clerk

[17] On April 2, 2004, Ms. Leontowicz wrote to the Appellant advising he had been determined into the occupation of Customer Service Representative,<sup>5</sup> the amount of his income replacement benefit (IRB), and the one-year grace period. She reported the annual income for the determined employment was \$19,349 resulting in a bi-weekly IRB of \$646.00.

[18] One year after the date of the determination, on April 2, 2005, this income amount or the amount of his actual income earned from employment, whichever is greater, will be deducted from his current bi-weekly IRB of \$1,462. During the one year grace period however, only 75% of any actual income earned would be deducted from his IRB, rather than the full amount.

[19] The Appellant disagrees with SGI's decision that if he was allowed to work at a sedentary level it is likely he will be able to tolerate an 8 hour day. He says that he can do some work but not on a full time or regular part-time basis. He argues SGI's decision was solely based on the 3 hour and 40 minute physical work performance evaluation done by Kinetic. He states the functional testing (work performance) didn't take into consideration the permanent residual effects of his spinal cord injury caused by the motor vehicle accident particularly fatigue.

[20] The permanent residual effects that he refers to are persistent fatigue, stress, nerve pain, weakness of all extremities, left more than right and muscle spasm and stiffness, poor balance and coordination, decreased strength and endurance, disrupted sleep, no bowel control and limited bladder control and intolerance to cold. The Appellant currently takes Baclofen for spasticity and Nuerontin, Advil and Tylenol 3 for neuropathic pain.

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<sup>5</sup> The Appellant choose the Customer Service Representative occupation

[21] The Appellant also disagrees the determined employment is related to his qualifications and experience and questions how the annual income for the occupation was calculated.

[22] Mr. Usher stated the functional evaluation doesn't determine if someone is able to work full-time or part-time and (former) routines are factored into what is reasonable and sustainable. For example, he said it would be reasonable to conclude the Appellant would likely be capable of light level work (which he actually tested at) over a 4 hour day as it was to conclude he was likely able to sustain sedentary work over an 8 hour day. The Appellant was working 8 hours a day prior to the accident so that was the benchmark.

[23] Mr. Usher administered the evaluation over two days and consisted of an activities of daily living screen, interview for daily routines ranging from personal care, leisure, household activities and current and present activities of working. The physical assessment was done on the second day. It is a series of task-oriented tests and the conclusions are his own.

[24] The functional testing is standardized set of tests conducted in a certain order, eg. lifting tasks – floor to waist, are done first. An occasional task is defined as being sustainable up to one-third of the day but doesn't mean someone can do that task continuously. "Never" doesn't necessarily mean never but rather there may be safety reasons or that tolerance is so low the task would be problematic. For example, climbing a ladder, he says the Appellant probably can do it but because of the nature of his injury the task is not safe for him to perform.

[25] The Appellant disagreed with the conclusion he can occasionally perform tasks "work, kneeling", "work, squatting", and "work, arms over head-supine". Mr. Usher agreed with him that there is an error in "work, arms over head-supine" and that it should be shown as never.

[26] The Appellant agrees with Mr. Usher's conclusions that he can frequently "sit", "repetitive trunk rotation (standing)" and never do "work, arms over head (standing)", "repetitive squatting", "crawling", and "climbing a ladder".

[27] The Appellant disagrees with the conclusion that he can occasionally perform the remaining ten tasks and would rate his ability to perform these tasks as being in between occasional (up to 1/3 of a day) and never (< 1/3 of a day).

[28] Mr. Usher stated the evaluation looks at the person performing a greater amount of physical activity over a shorter period of time and is at the upper limits of one's capacity so you would expect him to be tired after this testing.

[29] The Appellant says he can never do the tasks "work, kneeling" or "work, squatting" and refers to Dr. Leszczynski's statement in the RCE that he can't do a full squat due to the weakness of his flexors/extensors. Dr. Leszczynski also states he has weakness, particularly of the left hand and to a greater degree the lower extremities, decreased endurance of the legs with walking, spasticity, particularly of his legs that is exacerbated with fatigue and cold. In addition the instability and osteoarthritis of the right knee compound the deficits from his spinal cord injury.

[30] Mr. Usher stated for the task of "work, kneeling" that the Appellant demonstrated difficulty and pain but his posture was adequate with observed shifting after 5 minutes and a significant increase in pain. Mr. Usher concluded therefore the task was sustainable on an occasional basis.

[31] Mr. Usher observed for the task of "work, squatting" that the Appellant was unable to get up independently in some positions at floor level and needs support or assistance. He concluded that lowered tasks such as squatting or kneeling are only functional in situations where objects are available to assist in getting up and down, as the Appellant can't get up unsupported.

[32] The Appellant noted in the mobility section of the evaluation, the activities "work, squatting", "ladder climbing" and "trunk rotation (standing)" are stated by Mr. Usher as never with limiting factors of pain (knees, calf muscles, shoulders, and hands), decreased lower extremity muscular strength, endurance and impaired balance. In that section of testing Mr. Usher also commented given the significant fatigue noted during testing, it was felt that

endurance scores were a more accurate indicator of performance for “stair climbing” and “repetitive squatting”.

[33] The Appellant then referred to the endurance portion of testing that lists “repetitive squatting” as one of tasks and feels it is contradictory to the above evaluation. He says he can’t do a repetitive squat, Mr. Usher observed he could not do “work, squatting” and Dr. Lesczyski reported he was unable to do a full squat. Mr. Usher said the definition of squat is highly variably but he was looking at being able to pick something up off the floor with knees bent as a repetitive squat.

[34] When asked why only 3 out of 21 tasks (lift floor to waist height, stair climbing and repetitive squat) are used for the endurance portion of the evaluation Mr. Usher replied these tasks are the most tiresome and if fatigue is a factor here, it would come into play in the other mobility tasks. As well, these tasks are the easiest to see performance differences because they are physically demanding.

[35] The guidelines used by Mr. Usher to arrive at his conclusions in the endurance testing are changes in heart rate and respiration in regard to the activity. Changes in performance > 25% is considered not sustainable. The Appellant demonstrated a 32% change in performance on the endurance portion of the evaluation and significant fatigue over the course of the assessment. As a result he concluded the Appellant could not do light level work for 8 hours a day but could likely do sedentary work over the same period.

[36] Mr. Usher filed a supplemental report dated January 24, 2005 that answered specific questions asked by SGI arising out of the original RCE. When asked how many hours per day on a regular basis (full-time or part –time), the Appellant could perform a sedentary occupation, such as a customer service representative, having regard to the fatigue/endurance issue, Mr. Usher opined in part:

Overall, [the Appellant] does demonstrate the ability to work at a sedentary level, which should be consistent with work over an 8-hour day. It would not be uncommon for someone to experience the effects of fatigue when going into a new job situation and this would certainly be anticipated with [the Appellant] given past experience with fatigue. The

comments provided with regard to fine dexterity are provided with respect to the job specific activities noted on the file. In particular, with respect to customer service representative activities at a Credit Union where specific inquiries had been made. This type of specific information is the best way of making a relevant comparison, however, job specific information with vary from job to job.

[37] The Appellant's evidence is that he has only 1 – 2 hours of sleep uninterrupted by pain, muscle spasms or bladder function every night and this pattern has not changed since he left the hospital. He is then awake for ½ - 1 hour and goes back to sleep for 1 – 2 hours. When asked by him what affect continuously interrupted sleep would have on his ability to sustain an 8 hour work day, Mr. Usher stated he was unable to answer what affect it would have.

### **STANDARD OF REVIEW**

[38] The Commission has the jurisdiction under section 193(7) of the (new) *Act* to set aside, confirm or vary a decision of SGI or make any decision that SGI is authorized to make pursuant to Part VIII of the *Act*.

[39] The Saskatchewan Court of Appeal addressed what is the appropriate standard of review on appeals to this Commission in *Allary v. Saskatchewan Government Insurance*.<sup>6</sup> The Court of Appeal observed that more than one standard of review was indicated by the legislation<sup>7</sup> and suggested the appropriate standard of review depends upon whether SGI has discretion to grant or deny the particular benefit claimed.<sup>8</sup> In *Allary*, as in this appeal, the Appellant put the facts in issue before the Commission. At paragraph [20], the Court of Appeal said, in part, that:

Where the facts are placed in issue, as they are here, the appeal commission has an obligation to receive and consider any new evidence submitted by the appellant and, depending on the nature of the hearing which is conducted, to consider as well the evidence received by SGI in making the finding of fact in dispute on the appeal. The appeal commission must determine whether the decision of SGI was erroneous having regard to all of the evidence.

[40] The legal framework for the determination process is set out below. SGI has discretion regarding when the process of determining an employment begins under s. 132, and in fact, in the Appellant's case, it was started about four years after the motor vehicle accident. However,

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<sup>6</sup> 2006 SKCA 89

<sup>7</sup> *Ibid* para [14]

once the determination process begins, SGI is required to comply with the legal framework and has no discretion in calculating the income benefit as per ss. 139 and 129.

[41] During the hearing of the Appellant's appeal, the Commission received and considered all of the new evidence submitted by both parties. Accordingly, as set out by the Court of Appeal in *Allary*, we will determine whether SGI's decision was erroneous having regard to all of the evidence. Also, as SGI has reduced the Appellant's income benefits pursuant to the determination process, it has the burden of proof on a balance of probability that the decision was correct.<sup>9</sup>

## LAW AND ANALYSIS

[42] The legal framework for this scheme is as follows:

### **Determination of Employment After Second Anniversary of Accident**

132 Following the second anniversary date of an accident the insurer may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112...<sup>10</sup>

### **Factors Applicable to Determinations Pursuant to Sections 132 and 133**

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

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved pursuant to this Part;
- (c) whether the employment is available in the region of Saskatchewan in which the victim resides;
- (d) the employment that the victim is able to hold:
  - (i) a regular and full time basis; or
  - (ii) if it would not be possible for the victim to hold employment on a regular and full time basis, on a part time basis;
- (e) any other prescribed factors.<sup>11</sup>

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<sup>8</sup> *Ibid*, para [19]

<sup>9</sup> *Job v. Saskatchewan Government Insurance*, 2004 SKCA 164

<sup>10</sup> Section 112 applies to the Appellant, a fulltime earner at the time of her accident. Sections 113 and 131 apply to people who would have held more remunerative employment but for special circumstances, or people who were temporary earners, part time earners or non-earners.

<sup>11</sup> Section 133 refers to determination of employment for a student or a youth.

[43] There are no specific “prescribed factors” applicable under the *PIBR*.

[44] Section 17 of the *PIBR* states:

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

...(b) the employment or the category of employment exists and is likely to continue as an employment or category of employment within the foreseeable future.

[45] Also, section 25 of the *PIBR* directs the reader to Appendix A when considering classes of employment and gross yearly employment income when an employment is determined under section 132, as follows:

25 The classes of employment and the corresponding gross yearly employment incomes set out in Appendix A apply to calculating the gross yearly employment income pursuant to the following provisions of the *Act*:...

(f) Section 132 in the case of an employment determined pursuant to that section.

#### **Appendix A, Classes of Employment, Determination of Level of Experience**

1 For the purposes of Table 1 of this Appendix the insurer shall determine the level of experience that the victim has in the class of employment determined for the victim, in accordance with the following:

- (a) Level 1 means less than 36 months of experience immediately prior to the accident;
- (b) Level 2 means 36 months or more but less than 120 months of experience immediately prior to the accident;
- (c) Level 3 means 120 months or more immediately prior to the accident.

[46] Where the victim is “determined” into an entirely new occupation, it will invariably be at the “Level 1” payment scale.

[47] Once a victim succeeds in obtaining employment in the “determined” job, his income replacement benefits are reduced according to a formula.

#### **Reduction Where Income from Determined Employment is Less than Income Previously Computed by Insurer**

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

- (a) the victim is able to hold an employment determined for the victim pursuant to section 132 or 133; and
- (b) because of bodily injuries caused by an automobile arising out of an accident, the victim earns a gross yearly employment income from the employment that is less than the gross yearly employment income used by the insurer to compute the income replacement benefit that the victim was receiving before the employment was determined pursuant to section 132 or 133.
- (2) The insurer shall reduce the victim's income replacement benefit pursuant to subsection (1) by an amount calculated in accordance with the following formula:

$RIRB = FIRB - NI$  where:

RIRB is the reduced income replacement benefit;

FIRB is the former income replacement benefit the victim was receiving at the time the employment was determined pursuant to section 132 or 133; and

NI is the net income that the victim earns or could earn from the employment determined pursuant to section 132 or 133.

[48] The income replacement benefit ends completely or is reduced one year after the date the victim is able to hold a “determined” employment.

#### **Termination of Income Replacement Benefit**

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:

...(d) one year has expired from the day the victim is able to hold an employment determined for the victim pursuant to section 132 or 133; ....

(2) Notwithstanding clause (1)(d), if a victim falls within the circumstances described in subsection 139(1), the victim's income replacement benefit is to be reduced pursuant to section 139 and is not to be terminated pursuant to subsection (1).

[49] What this means is that SGI pays income replacement benefits during the year between “determination” and “termination”<sup>12</sup> on the basis of his employment at the time of the accident, but deducts from that amount what the person “could earn” at the “determined” employment according to Table 1 of Appendix A (“the table”). Specifically, for the Appellant, this means that his income replacement benefit (90% of net income) is reduced by the amount set out in the table for a Customer Service Representative at Level 1 (\$19,349, adjusted for cost of living<sup>13</sup>).

<sup>12</sup> In the Appellant's case, s. 129(2) his IRB is reduced rather than terminated

<sup>13</sup> Under sections 187 and 188.

[50] The only basis upon which a person can challenge the “determination” is that the insurer has not appropriately considered the factors set out in section 134 above. It is on that basis we must consider in the Appellant’s case.

[51] The Appellant was classed as a full-time worker as per the definition set out in s. 14 of the *Personal Injury Benefit Regulations* (the *PIBR*)<sup>14</sup> and income benefits were paid as per s. 112 of the *Act* and s. 20 of the *PIBR*.

[52] Under the “no-fault” provisions of the *Act*,<sup>15</sup> if an injured worker is unable to return to his or her former job after two years of rehabilitation, SGI assesses the worker’s residual earning capacity, meaning “what are the worker’s present earning capabilities?” SGI is to consider the worker’s education, training, work experience, current abilities, etc. to “determine” what kind of occupation the person may be able to perform. If that occupation pays less than the former job, SGI pays the difference between the income earned at the former job and the worker’s current earning capacity.<sup>16</sup>

[53] The Appellant was determined into an employment after the second anniversary of the accident as per s. 132 of the *Act*. “Following the second anniversary of an accident, the insurer may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112 or 113 or determined pursuant to section 131.” In this case, the determination process was about four years post accident.

[54] The determination process under the *Act* requires SGI it to put its “mind” to whether there is any particular employment in the region of the province where the Appellant resides and that he can perform. The *Act* does not require that SGI actually find a job for him nor does it provide he will continue to receive his original income benefit until he actually gets a job.

[55] SGI hired medical and vocational professionals to assist in determining employment.

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<sup>14</sup> Chapter A-35, Reg. 3 (effective January 1, 1995)

<sup>15</sup> The new *Act* (Aug. 02) employs the same general scheme, but the language has been slightly changed, and the numbering is different

The Residual Capacity Evaluation assessment took place at Kinetic at Saskatoon City Hospital on January 22 and 23, 2003. The team was comprised of an occupational therapist, psychologist and medical doctor/physiatrist. At the conclusion of the assessment, the team provided their opinion that the Appellant was capable of returning to a sedentary level of work likely for 8 hours per day. The team agreed he was not capable of returning to the employment he held at the date of the accident. We note the teams' comments:

“...Although the assessment team is confident of [the Appellant's] abilities at a sedentary level, the issue of fatigue is still a difficult one to comment on as to how it will affect him in the long run. [The Appellant's] muscular deficits are likely permanent in nature and do affect him in terms of fatigue with his current activities of daily living. In approaching vocational activities at a sedentary level, it would be important to monitor [the Appellant's] tolerances and quality of life to ensure that 8 hour workdays were appropriate and sustainable.”

[56] After SGI received the RCE report, Russ Warner, a rehabilitation consultant was hired to conduct a transferable skills analysis and labour market survey. Based on his report, the Appellant was provided a letter dated March 24, 2004 explaining the results of the transferable skills analysis and 3 occupations from which to choose an employment.<sup>17</sup>

[57] The Appellant chose the Customer Service Clerk. SGI provided a decision letter dated April 2, 2004 showing his choice of employment and advising of the income amount of \$19,349 would be deducted after one year from his present income benefit. Section 129(1)(d) of the *Act* provides for a one year “grace” period where SGI continues to fund the income benefit at the full amount. Section 129(2) then says as per s. 139(1) and (2), SGI will reduce the income benefit by the amount he could earn (i.e. the determined income amount of \$19,349). The present income benefit is reduced by 75% of any actual (net) income earned during the so-called one year grace period.

[58] The Appellant says he can work probably at a sedentary level but not for 8 hours a day and not on a regular or part-time basis.

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<sup>16</sup> SGI Personal Automobile Injury Insurance, Your Guide to No-fault Coverage, SLB 224 12/2002, p. 10

<sup>17</sup> Note - initial letter August 8, 2004 re Teacher's Assistant was later withdrawn as it was a light level category of work

[59] We find that fatigue is a predominant residual effect for the Appellant that cannot be managed by pacing or resting to recover and accept his testimony that sleep is the only means by which he can recover. We accept he experiences general fatigue and fatigue caused by physical activity. The Appellant's evidence is, and we accept, that he has only 1 – 2 hours of sleep uninterrupted by pain, muscle spasms or bladder function every night and this pattern has not changed since he left the hospital. He is then awake for ½ - 1 hour and goes back to sleep for 1 – 2 hours.

[60] We accept the Appellant's evidence that before the accident he usually slept 5-7 hours per night and about 4 hours per night during spraying season. In either situation he states, and we accept, that it was continuous sleep and he awakened refreshed. We accept the reporting his pre-accident sleep pattern was not dissimilar to what he now experiences is inaccurate, or out of context, though it is noted as being related to his occupation.

[61] The RCE team reported that it was difficult to say how fatigue would affect the Appellant in the long run. We find it only considered fatigue caused by physical activity in their evaluation as noted in several portions of the report and not what the effect(s) of chronic fatigue, caused by lack of continuous sleep, may have on his ability to do sedentary work over an 8 hour day on a sustainable basis.

[62] In our view, common understanding or experience, is that chronic interrupted sleep would contribute significantly to a decrease physical ability in a non-injured or so-called "normal" person and we think it would only be magnified in the Appellant's situation.

[63] We find Mr. Usher's assumption that the Appellant was working at a light level of physical demand for a maximum of 5 hours per day on a daily basis at the implement dealer was overstated. We accept the Appellant's testimony he was not required to climb over and under equipment, he worked at most 4-5 hours per day that included up to 2 hours of driving and was only able to work 1-2 days per week. In fact, the Appellant was not physically able to do this job on a sustained basis.

[64] We do not accept that the Appellant's fatigue should be temporary while job routines are being established. This may well be the case for a "normal" person. His spinal cord injury is permanent and the issue of fatigue is intertwined with all the other limiting factors such as nerve pain and spasticity, impaired dexterity, balance, co-ordination and continuously interrupted sleep. We accept his testimony that strategies such as pacing activities or occasional resting are largely irrelevant because of the nature of his injury.

[65] The other significant residual effects are no bowel control and little bladder control. We agree it would be profoundly embarrassing and devastating for him in the event of an "accident" while in public but we are satisfied his needs could be met at the [town] Credit Union by proximate and easy access to a bathroom.

[66] We agree with the submissions of counsel for SGI that no serious challenge was raised by the Appellant that the determined employment as a Customer Service Representative was not related to his qualifications and experience nor do we find that he couldn't do the job based on the particulars of the position at the [town] Credit Union.

[67] The sole question in our minds is whether the Appellant is capable of doing the job for 8 hours a day on a full time basis. We accept Mr. Usher's comments the RCE does not determine whether the individual can work full time or part time and the benchmark is what the person's prior routine was. Mr. Usher also addressed this question in his supplemental report. He reiterated the results of the endurance portion of the RCE that work at a light level would not be appropriate over an 8 hour day but sedentary or "limited" level would be more consistent with his abilities. In particular, he stated in part:

...his response to activity was variable and that fatigue was at times a factor requiring rest of up to 2-3 hours per day. Additionally, [the Appellant] noted that in the fall of 2003, he was employed with an agricultural sales business in [town]. The general level of activity for the job tasks noted would be likely at a light level of physical demands and [the Appellant] noted that he was involved in job activities for a maximum of 5 hours per day.

[The Appellant] did demonstrate abilities on endurance tests which were consistent with task performance at a sedentary level and as such concerns with regard to the sustainability of employment at this level were not evident....

In making comparison to job activities at a sedentary level, it is important that postural issues be considered. As long as sitting is the primary work posture comprising up to 2/3 of the 8 hour day with ability to change positions to standing or walking, then job activities over an 8 hour day would be considered appropriate. There remains the possibility that fatigue levels may be higher while routines are being established within a new job and the client is becoming accustomed to activities that he is not used to, however, this should be a temporary issue once job routines are established.

[68] We have stated earlier our findings regarding the overstatement that the Appellant was working 5 hours a day every day when he attempted a return to work at the implement dealer. He, in fact, was not and Mr. Usher acknowledged that he assumed it was on a daily basis.

[69] In addition to our comments above, we also refer to the RCE report where essentially the same question was asked:

....Given the opportunity the opportunity to work at a sedentary level where sitting was the main work position, with some allowance for postural variation into standing and walking to deal with muscle stiffness, there is a good likelihood that [the Appellant] would be able to manage work over an 8 hour day. Although the assessment team is confident of [the Appellant's] abilities at a sedentary level, the issue of fatigue is still a difficult one to comment on as to how it will affect him in the long run. [The Appellant's] muscular deficits are likely permanent in nature and do affect him in terms of fatigue with his current activities of daily living. In approaching vocational activities at a sedentary level, it would be important to monitor [the Appellant's] tolerances and qualify of life to ensure that 8 hour workdays were appropriate and sustainable. (emphasis added)

[70] Of course there is no basis upon which the Appellant's tolerances are monitored as stated as being important by the team. Providing there is satisfactory compliance with the statutory scheme, once he is determined into an employment, his income benefit is terminated or reduced after the grace period. There is no requirement that he actually obtain employment in the determined category to see if he in fact can tolerate or maintain the level or category of employment identified in the evaluation.

[71] The Appellant also relies on two letters from Dr. Wine, a treating neurologist. Dr. Wine concluded:

Based on the history and examination to date, it is doubtful that the patient could perform sedentary work on a sustainable basis.

The patient states that he has been found capable of performing sedentary work based on an assessment at Kinetic in January 2002. (sic) The patient reports that after a three hour assessment session, it took the rest of the ay to recover. It is likely that the functional capacity assessment over-estimated his functional capacity.

The patient may be able to perform part-time sedentary work.

[72] Counsel for SGI submits that Dr. Wine's reports are subject to criticism because they based on little or not testing and the RCE report as not available to him. Counsel also suggested that he has come to different conclusions in each.

[73] We respectfully disagree that Dr. Wine came to different conclusions and interpret the earlier letter as referring to sustainable on a *full time* basis. The latter report is self explanatory. We also don't find Dr. Wine's conclusions necessarily inconsistent with the RCE in so far as the team clearly stated it would be appropriate to monitor the Appellant's tolerances and quality of life to ensure that an 8 hour workday was sustainable.

[74] The language used throughout the RCE is consistently "likely" and "probably". We also accept the RCE is intended to challenge the upper limits of one's ability and it is not unreasonable to conclude the result might overstate one's ability particularly in the Appellant's case where his rest or recovery is different from a "normal" individual's ability to recover.

[75] Counsel for SGI also referred us to the decision *Gerald Job v. Saskatchewan Government Insurance* 2002 SKQB 479; 2004 SKCA 164. He noted the RCE team in that case was the same as who conducted the Appellant's evaluation. We are particularly referred to Mr. Justice Matheson's comments in the lower court: For a court, without any real basis therefore, to substitute its opinion for that of experts would equally be the epitome of injudiciousness.

[76] As we have said in previous decisions and confirming the conclusions of the Court of Queen's Bench and Court of Appeal in the *Job* case, SGI is entitled to rely

on the reports of it's experts. As in *Job*, in the Appellant's case, SGI complied with the statutory scheme for the determination process.

[77] We are prepared, in this case, to substitute our opinion for that of the experts, because in our view setting aside the decision entirely would be unfair to SGI and a windfall for the Appellant. SGI is entitled to determine him into employment and he has some capacity to work. We find the residual capacity evaluation did not consider the effects of chronic interrupted sleep (1-2 hours sleep, interrupted by period of being awake ½ to 1 hours) he experiences on a daily basis due to pain, medication use or neurogenic bowel and bladder, on his ability to sustain employment for 8 hours a day on a full time basis. This is unlikely to change given the permanent nature of his injuries. We also find that the Appellant failed at an attempted return to work, albeit at a possible light level of employment (although he was not required to climb in and over equipment), at a maximum 5 hours per day (that included 2 hours driving) for a couple of days per week, as some evidence that he cannot sustain work for an 8 hour day and certainly not on a full-time basis..

[78] We find the Appellant has ability to work and accept that a sedentary level is appropriate but not sustainable for 8 hours a day and not on a full time basis. We accept he was appropriately classed as a Customer Service Representative and that while he didn't meet the NOC job requirements, we accept the information provided by Mr. Warner from the [town] Credit Union, as suitable for the Appellant and available under the *Act*, and note there were full-time, part-time and casual positions.

[79] In our view, having regard to all the evidence, and taking into consideration he experiences fatigue from continuously interrupted sleep, we find the Appellant is capable of working at a sedentary level of employment for 4 hours a day on a regular part-time basis as a Customer Service Representative.

[80] We are unable to find the table amount for Customer Service Representative in the old *Act*, set out in the April 2, 2004 decision letter - \$19,349. We recognize

Mr. Warner used “Customer Service Rep. (NOC #1433) = (SOC #4135) – Cashiers and Tellers, Appendix A, Level 1 - \$18,927. Our review of the table amount for a “Cashier and Teller” under the old *Act* for level 1 is \$16,380 and while there is an annual CPI increase, we are not sure \$19,349 is correct.

## CONCLUSION

[81] Accordingly, we find the Appellant, is unable to do sedentary employment for 8 hours a day on a full time basis and that SGI erred in its decision to reduce his income benefits. As stated above, it is our view that the Appellant is able to perform sedentary work 4 hours a day on a regular part-time (2.5 days per week) basis. SGI’s decision is set aside in part and we order his income benefit be recalculated retroactive to April 2, 2005. The Appellant is entitled to pre-judgement interest on the adjusted amount. We reserve jurisdiction if the parties wish to return the matter of calculation of the table amount for a Customer Service Representative/Cashier and Teller, level 1 under the old Act.

[82] The Appellant has been partly successful and is therefore entitled to his reasonable costs for travel and meals to attend the hearing and a refund of his appeal fee.

**Dated** at Regina, Saskatchewan, on November 29, 2006.

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Beverly Cleveland, Chair

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Darleen Topp, Commission Member

