

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *S.N. v. Saskatchewan Government
Insurance, 2006 SKAIA 083*
Date: 20061130
File: 021 of 2006

BETWEEN

S.N., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Jonathan Abrametz, for the Applicant
Allan McLeod, for the Respondent

Before: **Jane Lancaster, Q.C., 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
October 5, 2006

DECISION

[1] This is the appeal of the Appellant, S.N., with regard to 2 issues. Both counsel for Saskatchewan Government Insurance (SGI), and counsel for the Appellant advised the panel that the issue of living assistance, which had also been appealed by the Appellant, has been settled to the satisfaction of both parties. Counsel for the Appellant also advised that the issue of whether the Appellant was a student had been abandoned by the Appellant.

[2] The issues outstanding and the subject of this appeal are as follows:

- Quantum of income replacement both prior to the 180 day waiting period and post 180 day waiting period.
- Remoteness of the Appellant's hip fracture in May, 2005.

Preliminary Issues:

[3] The appeal panel raised the issue of its jurisdiction to hear the appeals based on the fact that the appeal application of February 6, 2006 was signed by counsel and not the applicant as required by section 86 of *The Personal Injury Benefits Regulations*.

[4] In addition, the Appellant's appeal dated April 7, 2006 was unsigned.

[5] Counsel for the Appellant urged the appeal panel to consider these deficiencies as oversights which could be remedied pursuant to section 196.4(3) of *The Automobile Accident Insurance Act* which states:

196.4 (3) If the requirement of this Act, the regulations and the rules of the appeal commission have been substantially complied with, no order or decision of the appeal commission is to be set aside by reasons only of a defect, error or irregularity in any matter associated with a proceeding before the appeal commission.

[6] Without deciding this issue, the panel was prepared to proceed on the Appellant's appeal as it appears that previous panels have chosen to correct this deficiency in appeals that have

occurred with this counsel. We were concerned that the Appellant have his matters considered on the substantive issues before us.

[7] The panel felt that it is important to draw counsel's attention to the requirement of the *Act*, which indicates that it is the applicant and not counsel who must sign the appeal, and if counsel signs on behalf of a client, the authority to act must be attached to the appeal. This authority must include the power of attorney, as well as indication that the client is incapable of signing. In the appeals before the panel, the application was signed by counsel under a purported power of attorney, which did not provide authority to act, but only to have SGI transfer funds to counsel's law firm. In addition, there was no evidence as required showing that the client was incapable of signing. In the other appeal, dated April 7, 2006, there was no signature.

[8] As this counsel has represented a number of clients before the Appeal Commission using the same power of attorney as in this case, the panel wanted to impress upon counsel the requirements of *The Automobile Accident Insurance Act* and *The Personal Injury Benefits Regulations*.

Relevant Statutory and Regulatory Provisions:

The Automobile Accident Insurance Act 2002 c. 35

Sec. 100(m) "seasonal employment" means recurring employment with periods of unemployment or lay-off over a 12 month period either:

- (i) with one employer; or
- (ii) at one type of employment

Sec.113(2) An insured is entitled to an income replacement benefit, if, as a result of an accident, the insured:

- (a) is unable to continue an employment held by the insured at the date of the accident;
 - (b) is unable to hold an employment he or she would have held in the first 180-day period following the accident if the accident had not occurred.
- (3) The insurer shall calculate the income replacement benefit for the employment that the insured is unable to continue on the following basis:
- (a) if the insured holds employment in the employ of another, the yearly employment income of the insured calculated on the basis of the income

the insured earned, or would have earned from all employments the insured held or would have held but for the accident in the first 180-day period after the accident.

- (4) On and after the 181st day after the accident, an insured is entitled to an income replacement benefit if the insured is unable to hold employment he or she held or would have held but for the accident.
- (5) An income replacement benefit pursuant to subsection (4) is to be the greatest of:
 - (a) an income replacement benefit calculated on the basis of the yearly employment income attributed to the insured in the first 180-day period after the accident;
 - (b) an income replacement benefit calculated on the basis of the average employment income the insured earned in the two years before the accident as set out in the regulations, including any benefits received pursuant to the *Employment Insurance Act* (Canada), any benefits received under an employment disability plan, and any benefits received pursuant to *The Workers' Compensation Act, 1979* or similar provisions in any other Act, or any legislation of any other jurisdiction, that relate to compensation of individuals injured in accidents; and
 - (c) 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*.
- (6) Notwithstanding subsection (5), if the insured held or would have held a seasonal employment at the date of the accident, the income replacement benefit pursuant to subsection (4) is the greater of:
 - (a) an income replacement benefit calculated on the basis of the average employment income the insured earned in the two years before the accident as set out in the regulations, including any benefits received pursuant to the *Employment Insurance Act* (Canada), any benefits received pursuant to an employment disability plan, and any benefits received pursuant to *The Workers' Compensation Act, 1979* or similar provisions in any other Act, or any legislation of any other jurisdiction, that relate to the compensation of individuals injured in accidents; and
 - (2) 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*.
- (7) Notwithstanding subsections (5) and (6), if the insured held or would have held a seasonal employment at the date of the accident, but the insured did not hold the

employment held at the date of the accident, in the two years before the accident, the income replacement benefit pursuant to subsection (4) is the greater of:

- (a) the yearly employment income as determined in accordance with the regulations for an employment of the same class as the seasonal employment the insured held or would have held but for the accident; and
- (b) an income replacement benefit calculated on the basis of a yearly employment 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*.

Background:

[9] On May 21, 2004, the Appellant was struck by a vehicle as he attempted to cross the Idylwyd Bridge in Saskatoon. He sustained a comminuted fracture of the left tibia and fibula, a fracture of the right clavicle, an undisplaced fracture of the left scapula, a sprain of the left acromioclavicular joint, bruising of the left wrist and multiple abrasions.

[10] The Appellant's recovery of particularly his left leg was hampered by repeated bone infections and the non-union of the tibia. He required a number of surgeries for wound repair. This situation continued through December 2004, where it was noted that the fracture site was unstable, and onwards with continued bone infection and non-union of the tibia through to April/May 2005.

[11] On May 12, 2005, the Appellant fell while exiting a vehicle and sustained a non-displaced intertrochanteric fracture of the left femur (hip).

[12] This injury, as well as continuing problems with the non-union of his tibia, continued to cause the Appellant to seek medical assistance.

Issue One: Calculation of the Appellant's income assistance

[13] The Appellant testified at the hearing and indicated that at the time of the accident he had been working as a stucco helper for [employer]. He stated that he had been working for several days before his accident.

[14] He stated that he expected this employment to last until it became too cold to continue this construction. His understanding from the employer was that he would receive \$10 per hour with an increase to \$12 if he continued to be employed at the end of May. The hours of work were to be 10 hours a day and for 6 days a week.

[15] At the date of his accident, he testified that the employer and his crew had planned to go to Edmonton to do a job on a swimming pool as the weather was not favourable in Saskatoon. He was to advise the employer if he was going to Edmonton, but his accident intervened. He candidly said he had decided not to go to Edmonton, but to stay in Saskatoon and wait for their return. He testified that his children were living in Saskatoon and the long hours cut into his time to see them. There is no evidence that his decision not to go to Edmonton with his employer was viewed as severing the employment relationship with the employer.

[16] The Appellant testified that the employer visited him in the hospital and gave him \$300 in cash for the hours that he worked. The Appellant mentioned \$3000 initially as the amount, but later said the amount was \$300. He was clear that he had received \$300 for the days that he worked. The Appellant said that this was in cash and there were none of the statutory deductions such as Employment Insurance, Canada Pension, or Income Tax.

[17] The employer proved difficult to track down in order to complete documentation of the Appellant's employment. The Appellant provided what information he could, telephone numbers and address, and although the personal injury representative for SGI spoke to the employer once by telephone, 3 subsequent letters sent to him did not receive a response.

[18] The panel believes that the Appellant provided what information he could as to the employer's whereabouts and did make attempts to contact him. His lawyer managed to obtain an employer's verification signed by the employer, which indicated that the Appellant had commenced his employment on May 17, 2004 and the projected end of his employment was November 30, 2004. His employment had ended on May 21, 2004 because of the accident. The employer also confirmed that the Appellant was to receive \$10

per hour for 10 hours per day and 6 days per week and this was to increase to \$12 per hour at the end of May.

[19] In the fall of 2004, the Appellant's personal injury representative was changed and Ms. Leontowitz was assigned to the Appellant's file.

[20] Ms. Leontowitz advised the Appellant's counsel that the employer verification form was not sufficient to calculate the Appellant's income replacement claim and provided a letter to counsel dated January 31, 2005, which stated, "There is no evidence to support that the Appellant would have worked the hours indicated on the Employer's Verification of Earnings Form. Please provide additional information from the employer confirming the days and hours his crew worked during this period as well as earning information of the worker that was hired to replace the Appellant."

[21] Counsel for the Appellant provided an affidavit signed by the employer dated April 8, 2005, which indicated the following:

- That the employer owned a stucco siding business and operated in the city of Saskatoon.
- That he employed the Appellant in May 2004 as a construction labourer with his stucco business. The terms of employment were an hourly wage of \$10 and 60 hours per week, (10 hours/ 6 days per week). In addition, the Appellant was promised a raise of \$2.00 per hour beginning on May 31, 2004.
- That the Appellant was unable to continue his employment after May 21, 2004.
- That his crew worked on average from May 2004 to November 30, 2004 at 50 hours per week rather than 60 due to the inclement weather.

- That the Appellant's replacement was hired on the same terms and conditions as the Appellant and worked the hours outlined above.

[22] Ms. Leontowitz testified that she did not feel that the employer's verification and affidavit was sufficient, although she did admit in cross examination, that it did respond to each of the inquiries she had requested in her letter to counsel.

[23] Ms. Leontowitz took the position that the onus was on the Appellant to provide sufficient documentation to satisfy the insurer, and it was not up to the insurer to take any steps if the documentation provided was not, in the opinion of the insurer, sufficient.

[24] As a result, the Appellant received income replacement based on the insurer's view that he was unemployed at the time of the accident, and therefore, had a wait period of 180 days. SGI calculated his income pursuant to Section 113(4) and Section 113(6). The rate of the income replacement was calculated on the basis of reviewing the Appellant's previous tax returns which showed an income of \$8,368 for 2002 and \$2,714 for 2003. As a result, the Appellant was entitled, in the view of the insurer, to be compensated based on the minimum wage from the 181 day, November 18, 2004 to January 26, 2005.

[25] Counsel for the Appellant argued that there was clear evidence that the Appellant was employed at the date of the accident and so therefore, he was not subject to a 180 day wait period. Therefore, his income replacement should have been calculated pursuant to s.113 (2) (a) of *The Act*.

[26] In addition, counsel for the Appellant advised that the appropriate rate of income replacement for the Appellant was pursuant to *The Personal Injury Benefits Regulations*: Table 1 – Table of Classes of Employment No. 7611 – Construction Trades Helpers and Labourers, Level 3 – Over 10 years of experience, based on the Appellant's work history and experience.

[27] The Appellant testified as to his work history. He advised he was 33 year of age and a member of the [text deleted] First Nation. He had been working since he was 17 years of

age, helping his uncles who worked on the First Nation building houses. He had worked as a security guard on the reserve, but that job ended in 2001. He moved to Saskatoon in 2002 and had worked at odd jobs for Labour Ready for basically minimum wage and in September 2003, he had worked as a labourer at a farm in Alberta.

[28] The Appellant's testimony on his work history was very vague and contradictory as he tried to answer detailed questions concerning the past. The panel believes that the Appellant was trying to create his past work history with few records to assist his memory, but his evidence as to his work experience was so vague and contradictory that the panel cannot rely on this evidence to make the findings of fact that the Appellant was a skilled construction worker with many years of experience. At the time of the accident, he had no fixed address and was living with friends and relatives.

Issue Two: Remoteness of Hip Fracture to original motor vehicle injuries

[29] On May 12, 2005, the Appellant broke his hip. He testified that he had accompanied his ex-girlfriend with whom he had been living during his convalescence to go grocery shopping. As she only had a learner's driver license, he went with her. Upon returning to his residence, he exited the vehicle and hopped approximately 8 feet on his right leg. It gave out on him and he fell breaking his left hip. He managed to get down the several steps to the basement suite and started drinking to deal with his pain. This was approximately 11 a.m. and when he awoke, he realized that his injuries were serious and an ambulance was called to take him to hospital.

[30] He had been scheduled to have further surgery on May 27, 2005 with regard to his injuries from the motor vehicle accident.

[31] In an In Home Assessment, dated April 11, 2005 the therapist advised that because the Appellant had a PICC line to receive inter-venous antibiotics on his left upper extremity and as a result was to remain off crutches and use a wheel chair for mobility. He was to participate in no strenuous activity and the report stated that he would not receive any further treatment until his next surgery which was scheduled in May, 2005.

[32] In the same In Home Assessment, April 11, 2005, under the Heading **Mobility/Transportation:**

Moderate Assistance. Due to the location of the PICC line in his upper left arm, he is dependent on a wheel chair to access his home and his community. He demonstrated the ability to access all areas of his home with the use of his wheelchair and transfer on and off all household surfaces. There is one step to enter and exit the home. He requires moderate assistance to transfer in and out of the home, and minimal assistance to transfer in and out of a vehicle.

[33] In the same report, under the Heading **Transportation**, the therapist indicated the following:

Prior to his motor vehicle accident, [the Appellant] reported that he did not drive. He reported that he accessed his community by foot, buss or rides with friends and family. Approximately one month ago, [the Appellant] reported that he had purchased a vehicle. He reported that he had a valid driver's license. He reported that he has driven twice since his surgery. It is the discretion of his medical doctor to provide direction on safety to drive. He reported that he has a cab account set-up through SGI to attend his medical appointments.

[34] Counsel for SGI argued that the fracture of the Appellant's left hip was too remote and therefore, SGI was not responsible for this injury. Counsel for SGI candidly stated that it was impossible to differentiate the damage to the Appellant's hip and the rest of the injuries to the Appellant's leg when it came to Living Assistance Benefits and that he and the Appellant's counsel had resolved these issues prior to the hearing. However, whether the Appellant's hip fracture was foreseeable and thus part of his initial accident would have an impact on the Appellant's entitlement for Permanent Impairment Benefits.

[35] Counsel for the Appellant argued that the Appellant's hip fracture was foreseeable and therefore, SGI is responsible to pay Permanent Impairment Benefits for the hip fracture.

Standard of Review:

[36] The Commission's power on appeal is provided in Section 193(7) of *The Automobile Accident Insurance Act*, c. A-35 ("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*.

[37] Recently, the Court of Appeal for Saskatchewan addressed the standard of review applicable for appeals to this Commission in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In this case, the Court of Appeal noted that more than one standard of review was indicated by the legislation. The Court of Appeal suggested that the standard of review depends on whether SGI has discretion to grant or deny the particular benefit claimed. In *Allary*, the claimant was seeking reimbursement for payments for medical and paramedical care as provided under Subsection 163(1) of the *Act*. The Court of Appeal held that because SGI does not have discretion to decide whether to pay the claimant benefits, the standard of review of SGI's decision is correctness.

{ 19} There is no discretion on SGI's part with respect to these benefits. The victim is entitled to a benefit for medical and paramedical care, including transportation. The Regulations in effect at the appropriate time impose limits on the amount paid but none of the limitations appear to apply here. For example, s.43 provides that an expense for which the insurer may be or is required to reimburse a victim pursuant to Division 7 of Part VIII of the Act or this Part is subject to any limit set out in the Act or these regulations or, where there is no limit as to amount, to an amount that the insurer considers reasonable. **Thus, where there is no discretion to provide a benefit, asking whether the decision was "unreasonable" is not the appropriate standard. The appropriate standard is correctness.** (Emphasis added)

[38] The Court of Appeal concluded that, where an appellant disputes SGI's decision and places SGI's findings of fact in issue and there is no discretion whether to grant or deny the benefit, the standard of review is correctness. Specifically, it stated:

[20] 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 or facts in dispute on the appeal. The appeal commission must determine whether the decision of SGI was erroneous having regard to all the evidence. The factual issue for determination with the case was whether there was a casual link between the benefits claimed and the injuries caused by the accident of September 8, 2001.

[21] Notwithstanding its comments on the appropriate standard of review, the Commission in fact applied the proper standard, i.e. correctness. It conducted a hearing, heard the evidence of the appellant and reviewed the record including certain documentary evidence concerning the issue of causation to determine whether or not there was a causal link between the transportation benefits and mental health benefits claimed and the injury.

Analysis:

[39] In this case, the Appellant has put SGI's findings of fact in issue by disputing that he was unemployed at the time of the accident, his rate of income replacement, and the foreseeability of his hip fracture.

[40] SGI, in their decision letter dated January 19, 2005 decided that the Appellant qualified for income replacement pursuant to section 113(4) of the *Automobile Accident Insurance Act*. Therefore, they made the decision that the Appellant was unemployed at the time of the accident, and that his replacement benefit would be based on the minimum wage which was greater than the last two years of his income based on his income tax returns of 2002 in which his reported income was \$8,368 and 2003 in which his reported income was \$1977. This was based on the SGI's decision that the Appellant was a seasonal worker who had full capacity at time of accident.¹

[41] SGI decided that the employer verification of earnings and the employer's affidavit dated April 8, 2005 was not sufficient to satisfy the onus that the Appellant had to establish that he was employed at the time of the accident. The onus was on the balance of probabilities.²

[42] The personal injury representative, Denise Leontowicz testified as to the efforts SGI made to obtain the verification they felt that was required by the policies of SGI. SGI had made a number of efforts to locate and obtain information from the employer, the employer of the Appellant. It is clear that counsel for the Appellant had also tried to obtain

¹ Income and Death Benefit Summary.

² *Collis v. Saskatchewan Government Insurance* (1998), 165 Sask.R. 108.

information from the employer and the Appellant provided whatever information as to telephone numbers and addresses that he could to satisfy the onus on the Appellant.

[43] With all of this effort, what was obtained was the Appellant's Application for Injury Benefits dated May 31, 2004, in which he advised that he was working for (T.E.) and provided a telephone number. This document was completed by the personal injury representative, Patti Schwartz. On the same day, the personal injury representative filled out a form called Income Loss Information which the Appellant signed as accurate. All of the information regarding the Appellant's employment was left blank on this form which was completed the same day as the Income Loss Information form.

[44] Counsel for the Appellant filed a adjuster injury note dated May 31, 2004 in which the Appellant advised that he was to work for a fellow called T.E., and had worked for him as a mixer for stucco on May 17, 18, 19, but not on May 20 and 21 because of the weather. He called the employer on May 21st to ask if working that day and T.E. had asked if he wanted to go to Edmonton and he was advised to call back around 1:00 p.m. that day if he wanted to go. He had told the employer that he would go, but in his statement to the personal injury representative, he said he was not sure if he would go to Edmonton or not, and that he was to phone his employer, but that he was not able to do so as he was hit by a car. He also said he was going to SIAST in the fall and as he had experience in carpentry, they had given him a card which said Apprentice One.

[45] The Appellant testified at the hearing that he had a job with the employer; that he was to work 10 hour days at \$10 per hour, and at the end of May, he was to get a raise of \$2 per hour. He said that he had been working for several days for the employer and he had called the employer on May 21, 2004, to see if he was working that day. The employer advised they were going to work in Edmonton and asked if he wanted to come. The Appellant was involved in the accident on May 21, 2004 and was hospitalized. Later the employer came to the hospital and paid him \$300. The Appellant was very nervous about testifying and at first said \$3000, later confirming it was \$300. He was candid in saying that he had decided not to go to Edmonton, but to wait for his employer's return. The \$300

payment in cash would appear to confirm his testimony that he had worked for 3 days at \$10 per hour for a 10 hour work day.

[46] The employer provided an employer verification to SGI and when SGI advised that they required additional information, he provided an affidavit. Ms. Leontowicz, in her testimony, advised that it was not that she did not believe what the employer had deposed, but those internal policies of SGI required payroll stubs, and in the case of seasonal workers, in work which was dependent on the weather, confirmation that the Appellant would have worked 10 hours /6 days a week.

[47] The appeal panel requested SGI to file copies of the relevant policies that Ms. Leontowicz advised were the reasons for limiting the Appellant's income replacement benefit.

[48] SGI filed additional documents as a result of this request, and these documents relate to "Injured Persons who would have held employment". The policies provided at S284A-S287, provide the personal injury representative with discretion with regard to acceptance of proof when a person has been promised employment at the time of the accident.

Relevant SGI Policies :

Income Replacement Benefit First 180 Days For Promised Employment after July 31, 2002

Regulation 17 allows benefits such as overtime, bonuses, and commissions to be included in determining the customers YEI if they did not hold employment in the 12 months prior to the accident. The calculation will be made up of the actual income the customer would have earned had he/she not been injured in the accident, plus the other benefits or commissions he/she may have been able to earn.

The PIR will need to look at the circumstances of the insured and the promised employment to establish if an estimate can be made of the income he/she may have been able to earn as they had not held this employment previously. The actual income should be provided by the employer, the problem will involve other benefits or commission.

If there is a problem identifying the amount of a benefit or commission, it may have to be determined sometime later in the year. Cooperation from the employer promising employment is critical. It is the responsibility of the insured to demonstrate his loss.

Example 2

An insured has been employed for only 2 months prior to the accident and has not held this type of employment in the past. Since there is little past history of benefits in the prior 52 week period for benefits the PIR will need to establish if the amount is reasonable and would apply on a 12 month. Confirmation of employment circumstances and ongoing communication with the employer will be required. A partial IRB based on the regular component that can reasonably identified at the time of the accident can be provided initially. Adjustments to include benefits, which would be reasonable, can be included as new information is provided by the customer, which is supported by the employer. This could be supported by the person hired in place of the injured customer.

Promised Employment After July 31, 2002

If you encounter an instance when the person claims they would have had a job, a complete investigation must be conducted. The following guidelines should be considered before providing an IRB.

- is there a written job offer from a person at arm's length (no relationship to customer other than as an employer – not a relative or close friend) from the customer?
- is there a history of working for this employer
- did the employer hire a replacement

If there is no formal job offer in place at the time of the accident, check that the customer has a history of working for the employer AND a replacement has been hired in place of the customer. Unless both conditions are in place, consider not paying.

If none of these requirements is satisfied, the claim should likely be denied. Individuals that are seasonal employees will meet these criteria as will the individual that may obtain his employment through an union hiring hall. If there is any concern about paying an IRB based on promised employment, speak to your PIR II.

[49] In the Appellant's case, the panel found that his evidence was credible when he testified that he had been working for the employer for May 17, 18, 19 and that he would be paid \$10 per hour per 10 hour day until May 31, 2005. We also accept that he had been promised a raise of \$2 at the end of May and his job would have lasted to November 30, 2004.

[50] The Appellant testified that he received \$300 in cash from the employer when he was in the hospital which would correspond with the rate of 3 days work, 10 hours a day, \$10 per hour.

[51] The Appellant has been consistent with his claim that he was employed with the employer under these conditions and provided the name “T.E.” and a cell phone number to his personal injury representative at the first interview with the personal injury representative.

[52] In addition, the employer provided both an employer’s verification and an affidavit providing both the hours of work, the proposed salary, and what in fact happened during the summer when the Appellant would have worked but for the accident.

[53] It is unfortunate, but perhaps it is not uncommon in the construction industry that the employer paid his employees “off the books” and so there was never a pay stub, nor were deductions for CPP, EI, or Income Tax made on the Appellant’s behalf. This is not the Appellant’s fault.

[54] It could be speculated that the Appellant would never have stayed in the employer’s employ until November, as his previous 2 years income tax show sporadic employment and he had indicated that he might go to SIAST in the fall of 2004. The Appellant had also testified that he had worked on the First Nation for several years and had also worked on construction with his uncles. It was also reasonable for the personal injury representative to expect that there would be a pay stub or more documentation. The appeal panel accepts that some employers operate in a cash only environment. The consequence of that should not mean that the Appellant should be penalized when there is proof of the employment as well the rate of salary and hours worked.

[55] Counsel for the Appellant urged the panel to consider section 171 of *The Automobile Accident Insurance Act* which provides to the insurer a positive duty: “shall advise and assist every claimant, and shall endeavour to ensure that every claimant is informed of and receives the benefits to which the claimant is entitled.” The position of SGI is that this section is limited to telling the customer what to do, but there is no obligation for them to do what is required for the customer.

[56] We find that the Appellant was employed by T.E. (the employer) as a stucco assistant commencing May 17, 2004. His employment was until November 30, 2004 at a rate of \$10 per hour with an increase of \$2.00 scheduled to take place May 31, 2004... He was scheduled to work 10 hours per day 6 days a week, but the employer in his affidavit indicated that his crew worked from May 2004 to November 30, 2004 at 50 hours per week due to inclement weather. We find that the Appellant has met the onus to provide evidence of his loss.

[57] We find that the Appellant is entitled to income replacement for the first 180 days pursuant to *The Automobile Accident Insurance Act*, section 113(2) (a). We find that the Appellant was employed at the time of the accident. The Appellant was entitled to receive Income Replacement Benefits in as a worker who was employed at the date of the accident. He would not have to wait for 180 days before receiving his benefits. In determining the classification of employment, the appeal panel determines that the Appellant should be classified as a Construction Trades Helper and Labourer pursuant to *The Personal Injury Benefits Regulations*, section 4(1) Table 1, Classification 7611, Under 3 Years of Experience. The appeal panel does not accept the Appellant's testimony regarding his work history as sufficiently probative on the issue of his work experience as a construction worker.

[58] Therefore, the Appellant's income replacement should have been calculated on the greater of the table amount of \$16,191 annual income or the calculation on the basis of a yearly employment income determined on the basis of a 40-hour week paid on the basis of the minimum wage established pursuant to *The Labour Standards Act*.

[59] We find that the internal policies filed by SGI have no application to this case as they deal with promised employment and we have found that the Appellant was employed at the time of the accident..

[60] With regard to the Appellant's hip fracture, the issue for the panel is whether the Appellant's leg injuries contributed in a substantial way to the Appellant's fall and subsequent hip fracture. If those injuries did, on the basis of the principles in *Athey v*

Leonati, [1996] 3 S.C.R. 458, SGI is fully liable for the injury resulting from the fall and the fractured hip. Those principles, restated for the present purposes are:

(1) Causation is established where the claimant proves to a civil standard on a balance of probabilities that the motor vehicle accident caused or contributed to the injury.

(2) The general, but not conclusive test for causation is the “but for” test, requires the claimant to show that the injury would not have occurred but for the motor vehicle accident.

(3) The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the motor vehicle accident “materially contributed” to the occurrence of the injury. A contributing factor is material if it falls outside the *de minimis* range.

(4) The claimant must prove the motor vehicle accident caused or contributed to the claimant’s injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision. It is essentially a practical question of fact which can best be answered by common sense. Although the burden of proof remains with the claimant, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

(5) It is not now necessary, nor has it ever been, for the claimant to establish that the motor vehicle accident was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. As long as the motor vehicle accident is part of the cause of an injury, SGI is liable, even though the motor vehicle accident alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: SGI remains liable for all injuries caused or contributed to by the motor vehicle accident.

[61] The appeal panel finds that the Appellant’s injuries due to the motor vehicle accident caused or contributed to his fall and his hip fracture. The medical evidence shows that the Appellant’s extensive leg injuries had not healed due to infections and the fact that his tibia fracture had not healed. Although he had used crutches for a period of time to move around, the infection in his leg was such that a PICC was placed in his upper arm to provide him with I.V. antibiotics.

[62] As a result, the Appellant was not able to use crutches but was confined to a wheelchair or to hop when use of the wheel chair was not feasible, i.e., exiting a motor vehicle and entering into his residence... In addition, he was wearing a cast on his injured

leg which further hampered his mobility. It was not unreasonable for the Appellant to hop the 8 steps to his home from the car especially in light of the fact that there was a step into his residence. As he had been advised not to use crutches because of the PICC in his arm, he could not rely on crutches to provide him with additional stability when he was trying to enter his residence. We find that the Appellant's motor vehicle accident materially contributed to his fall and the subsequent fracture of his hip. As a result, we find that SGI is liable for the Appellant's hip fracture. With regard to what effect alcohol consumption may have had on this accident, we accept the Appellant's explanation that he started drinking when he got into his home and that the ambulance was called some 5 hours after his fall

[63] As a result, we find that the hip fracture is not too remote to the original motor vehicle injury. The Appellant's account of his fall was, in our view, a credible one. The leg fracture incurred in the motor vehicle accident was a necessary contributing cause of the Appellant's instability which resulted in his falling and breaking his hip. We conclude that the May, 2005 fall was not "an independent intervening event" but was itself caused or contributed to by the motor vehicle accident and that the motor vehicle accident was a necessary and non-trivial contributing cause to that fall.

CONCLUSION

[64] The decision made by SGI dated January 19, 2005 which determined that the Appellant was eligible for income replacement benefits pursuant to Section 113(4) is set aside. The Appellant was eligible for income replacement benefits pursuant to Section 113(2) (a) and therefore, he does not have to wait for 180 days waiting period to have his income replacement benefits commence.

[65] The Appellant's income replacement should be calculated as a worker who was employed at the time of his accident. We agree with counsel for the Appellant that the appropriate classification in the *Regulations* was 7611, Construction Trades Helpers and Labourers. We disagree with counsel for the Appellant that his client has proved that his experience level is Level 3(Over 10 years of Experience). Based on the vagueness and lack of credible evidence provided by the Appellant as to his employment in this classification,

we find that the Appellant's income replacement should be based on Level 1 (Under 3 years of Experience).

[66] The Appellant's hip fracture is not too remote to his motor vehicle accident and so he is entitled to any benefits that he was entitled to receive from his motor vehicle accident.

COSTS

[67] As the Appellant has been partially successful in his appeal, he is entitled to reasonable costs of his appeal, (including his Appeal fee) in accordance with Section 193(11) of *The Automobile Insurance Act* and Section 86(4) and Section 96 of *The Personal Injury Benefits Regulations*.

[68] The Appellant will be entitled to his costs up to a maximum of \$2500.

Dated at Saskatoon, Saskatchewan, on November 30, 2006.

Jane Lancaster, Q.C., Chair

Stephanie Pfefferle, Commission Member

Darleen Topp, Commission Member