

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *D.S. v. Saskatchewan Government  
Insurance, 2006 SKAIA 089*

**Date:** 20061211

**File:** 005 of 2004

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**BETWEEN**

**D.S., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**

**Brad Jamieson, for the Applicant**

**Dale Brown, for the Respondent**

**Before:** **Beverly Cleveland, Chair**  
**Darleen Topp, Commission Member**  
**Al Knippel, Commission Member**

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

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Heard at Saskatoon, Saskatchewan  
September 22, 2004

## DECISION

[1] The Appellant, D.S., appeals a decision of Saskatchewan Government Insurance (SGI) dated September 17, 2002 determining her into the employment of an Occupational Therapy Assistant.<sup>1</sup> The issue in this appeal is whether SGI has correctly applied the provisions, known as the “two-year determination” sections of *The Automobile Accident Insurance Act*.<sup>2</sup>

### FACTS

[2] On May 9, 1999, the Appellant was the belted driver of a northbound vehicle traveling in the right lane intending to turn right when the vehicle she was operating was struck on the left hand (driver’s) side. The other vehicle was also traveling northbound when the driver attempted to move into the right hand lane and collided with the left side of the Appellant’s vehicle pushing her into the ditch. She did not lose consciousness and didn’t think she was injured but reported being shaken up.

[3] Following the accident she went home and a few hours later developed a headache and neck pain and attended a medi-clinic and then, her family doctor, Dr. Rajakumar. Rest and time off work were recommended but there was no abatement in her symptoms and she eventually became depressed. She was referred to Dr. G. Singh, psychiatrist, by her family doctor in June 1999.

[4] The Appellant has a history of medical problems including fibromyalgia, nausea, depression and chronic pain following a 1992 motor vehicle accident. At that time she was working as a manager of an import convenience store. She reported missing many isolated days and brief periods between 1992 and 1994. She was laid off work in March 1994 when the business was sold and remained off work until January 1998 when she found work as a short-

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<sup>1</sup> in her application for appeal to AIAC (December 31, 2003) The Appellant identifies the date of the insurer’s decision from which she appeals as November 26, 2003. This refers to the date she was advised that mediation was closed and she brings her appeal within 60 days as per s. 190(1)(b) of *The Automobile Accident Insurance Act* (the new Act)

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

order cook. During this period, the Appellant attended physiotherapy at Bourassa's for at least two years with no change in her symptoms. Her chronic nausea resolved in 1997 and her generalized body pain resolved in 1998. She testified she was well (not depressed) and had manageable aches and pains when the May 1999 accident occurred.

[5] The Appellant attended a multidisciplinary rehabilitation program at FIT from August to October 1999 with no change in her physical symptoms: headache, pain in her neck and right arm and nausea. Her participation and effort in different segments was stated as good to excellent but progress was limited due to pain and nausea. The team recommended she participate in a home exercise program, individual psychological therapy, gradually increase household responsibilities and was encouraged to seek some form of employment.

[6] In October 1999 she saw Dr. Voll, neurologist, who reported a CT scan of the neck was normal. A myelogram was planned but later cancelled by him and no further investigations were suggested or planned.

[7] In November 1999, Dr. Jutras, SGI's medical consultant, reviewed the medical file and stated that it appeared the Appellant had sustained a soft tissue injury (WAD 2 and LBP 2) and there didn't appear any medical impairment that supported her level of perceived disability. He suggested a review by a psychological consultant because the psychosocial and depression issues were not well characterized.

[8] In December 1999, Dr. Singh stated the Appellant wanted to go back to work when she was pain free but needed more psychotherapy and noted, at times, she felt threatened by sudden demands – "it's a conspiracy by SGI". Dr. Singh advised her to initially do volunteer work.

[9] On January 2000, SGI asked Dr. Pancyr, psychologist, to review the Appellant's file and advise if her current psychological/psychiatric problems were caused by the May 1999 accident and the extent to which her psychological/psychiatric history was preventing her from participating in normal activities including work. Dr. Pancyr recommended the Appellant be seen for a Mental Health Assessment.

[10] In May 2000, Dennis Morrison, Head of Counselling and Community Services reviewed the Appellant's file and reported she had recovered psychologically from the 1992 accident and her prior treatment ended satisfactorily in July 1997. He noted the therapist commented "(R)einforcement given to her new attitude of taking care of herself. If this lasts she will not need further assistance." The Appellant did not attend the clinic again until the May 1999 accident.

[11] In August 2000 the Appellant started physiotherapy at Bourassa & Associates and continued there twice weekly for six weeks. The treating physiotherapist reported the Appellant continued to complain of right sided pain, weakness and nausea on mobilizations to the right side. She also stated the Appellant had burning pain in the lumbar spine that radiated down into the right leg. The physical therapist recommended she continue with primary treatment pending a secondary assessment. The Appellant also reported symptoms of depression and was provided psychological services to assist her emotionally and with pain management.

[12] In September 2000 the Appellant was referred for a mental health assessment at Saskatoon Pain Clinic. The assessment team consisted of a psychologist, rheumatologist and psychiatrist. The team addressed several questions but notably: a) if there were any permanent work restrictions a direct result of the 1999 accident; b) if there are any temporary restrictions to work; and c) if her current injuries prevent her from participating in daily activities including working.

[13] The medical impression was that there was a discrepancy between her description of symptoms and those outlined in the reports. The Appellant indicated she was well prior to the May 1999 accident but the records reviewed indicate she had chronic widespread pain and was using substantial amounts of Tylenol. She testified taking 10 extra strength Tylenol at bed time for pain relief while she was working.

[14] The team felt the Appellant was physically able to return to her previous job as a short order cook, a recurrent major depression was not a significant barrier to her overall recovery or return to work and there were no permanent restrictions from this illness. The Appellant was advised to remain as functional as possible both in her lifestyle and work to prevent the

complicating effects of not working that she experienced from her first accident in 1992. It isn't explained what this was referring to but we assume it relates to depression and an exacerbation of her fibromyalgia symptoms.

[15] Temporary restrictions included an inability to effectively cope with her perceived overwhelming pain. It was felt that a gradual return to work (eg. two hour/day for weeks one and two, three hours/day for weeks three and four, four hours/day for weeks five and six) and concurrent counseling session would be appropriate to reinforce physical competence in the work place and help with self-motivation for work activities.<sup>3</sup>

[16] The team found no physical or emotional reason why the Appellant could not return to normal daily activities, including work. Her continued subjective reports of significant pain and stress due to family illness was acknowledged and a flexible routine was suggested so that tending to sick family members, social support, medical monitoring of medications and psychiatric support should result in a return to normal activities and work.

[17] The Appellant was discharged from treatment at Bourassa's on September 21, 2001 with no further treatment planned or required. The treating physical therapist was asked to comment on the Appellant's employability. She reported the Appellant does not meet her pre-injury work demands and her present functional ability is at a sedentary industrial level and noted the following issues affecting her full return to normal activity or recovery:

- (1) The attendance problems (due to pain and/or nausea) have significantly affected her ability to make gains;
- (2) No significant progress was made over the last period of rehabilitation. The therapist would have expected [the Appellant] should have seen a better level of function than before but a formal rehabilitation setting doesn't seem to help accomplish that goal;
- (3) [The Appellant's] significant pain level and nausea and her perception of high disability are a barrier to progression.

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<sup>3</sup> *Ibid*

[18] The psychologist observed that the Appellant's depressive symptoms and pain coping showed minimal improvement with extensive counseling and stated psychosocial services would be needed during any further rehabilitation if a return to work plan is developed.

[19] The Appellant was referred for vocational services in the September 2001 as she had reached functional maximum medical improvement. Jill Blom, disability management consultant, Arthur Grey Consultants Inc., conducted a transferable skills analysis (TSA) and hand dexterity or skills test.

[20] Ms. Blom testified the TSA was a self-reported and self-rated check list of skills. The Appellant reported she liked working with people and rated herself as having average skills in analyzing situations or data, counseling and motivating self and others. She commented the hand dexterity testing identifies problems with manual, gross or fine dexterity. .

[21] The vocational aptitude testing component was conducted by Dr. Shepel, psychologist, because of the Appellant's history of depression and symptom behaviors inconsistent with physical signs. In his February 2002 Psycho-Vocational Assessment report Dr. Shepel concluded she was not yet emotionally stable enough to work and stated:

While the cognitive findings suggest that [the Appellant] has the potential to be successful and point to areas of relative strength and weakness when considering training and employment or career direction, the psychological results indicate that [the Appellant] is not sufficiently emotionally stable enough to sustain employment at the moment. Psychological counseling and a review of medication that would assist therapy and her regaining the emotional fortitude to once again consider employment is recommended. At some appropriate point, consideration of a progression through volunteer work and eventually part time employment might be considered as a means to bolster [the Appellant's] self-esteem. Should this occur, suggestions as to career and employment considerations were made that essentially emphasize avoidance of work that would involve multi-tasking and a high speed component in favor of work that is people-oriented, structured, and not overly demanding yet rewardingly challenging to her.

[22] In May 2002, Dr. Pancyr addressed, among others, the following question: Is Dr. Shepel correct in concluding the customer is unemployable and should only be considered capable of voluntary work at a sedentary level? He replied:

The essential communication from Dr. Shepel's report is his use of the words, "At the moment". With this phrase he reminds the reader that his observation that her emotional state is making her unemployable was a time limited observation that could change. This change appears to have occurred. The assessment team (November 6, 2000) concluded she was fit to proceed with a gradual return to work. The assessment team concluded she could return to work in spite of finding the customer still had similar emotional problems to those observed by Dr. Shepel months earlier.

[23] When asked how the Appellant's accident-related complaints could be resolved, he suggested global conditioning and a graduated return to work. He further stated in part:

Unfortunately, the customer is continuing to suffer from a number of physical and mental symptoms only some of which can be reasonably attributed to the 1999 MVA. There is ample evidence that: 1) some of her emotional and psychological distress is due to factors other than the MVA of 1999; 2) her physical symptoms also appear to be mainly due to factors other than the 1999 MVA (i.e., preexisting mental and physical health problems); 3) she has had extensive treatment without much significant benefit (i.e., her mood improves, but little else changes). I support the recommendations made by the mental health team assessment report. A gradual return to work program should be implemented because a return to gainful employment is seen to be a part of her treatment, and still holds the best promise of increasing her overall level of health and functioning. A return to work might be facilitated with the aid of a rehabilitation consultant....

[24] Following Dr. Pancyr's report, the Appellant attended at Kinetik for a Residual Capacity Evaluation (RCE) also in May 2002. Doug Usher, occupational therapist, conducted the functional testing component of the RCE. He concluded that the Appellant demonstrated tolerances at a sedentary level with pain being a primary limiting factor.

[25] Because the Appellant self-limited on 10/11 tasks and discontinued testing after the eleventh task, Mr. Usher said it was difficult to make specific recommendations and further functional testing would not likely be useful. He stated overall that the Appellant performed at a sedentary level of work for strength tasks and noted her reported daily activities at home were consistent with sedentary level activities for longer than seen during the assessment (about 2 hours).

[26] The RCE psychosocial summary reported the Appellant derived a great deal of satisfaction in caring for sick family members and noted:

....While not a typical recommendation, the suggestion is made here that the client become involved in a volunteer program which is able to provide adequate training, supervision, structure and ongoing support. The client was encouraged to investigate the possibilities of volunteer involvement....This is perhaps the best possibility for [the Appellant] to become re-engaged in life and focused on people and issues outside of her own physical symptom experience. It may even be that a paid employment position may arise from initial volunteer work – this is not out of the question. She also reported having greatly enjoyed her time working alongside some mentally challenged individuals at the Saskatchewan Abilities Council.

[27] Following the RCE, Wendy Grey, disability management consultant, Arthur Grey Consultants Inc., carried out vocational testing in July 2002 to determine alternative occupations. Ms. Grey administered three interest inventories, self-reported check-lists completed by the Appellant, corresponding to the National Occupational Classification (NOC).

[28] Ms. Grey analyzed the various testing components including those done by Jill Blom, and took into consideration Dr. Singh's letter (May 2000) that stated she could do volunteer work, the Mental Health Assessment report (November 2000) that stated she was capable of returning to work as a cook, the initial FIT discharge report (October 1999) that recommended volunteer work, Dr. Shepel's report (February 2002) that she is unable to work as a cook and to pursue volunteer work and the latest RCE (May 2002) that she was capable of doing sedentary work.

[29] In reviewing the above reports and after analyzing the three interest inventories, Ms. Grey identified the following as suitable occupations for the Appellant: 1) occupational therapy assistant; 2) beauty salon attendant; 3) door attendant; 4) parking lot attendant and car jockey; 5) ticket taker.

[30] On August 14, 2002 Dr. Rajakumar wrote SGI:

[The Appellant] has tried several applications for the jobs which were suggested during assessment. I am enclosing copies of her job search. She is really trying hard but her symptoms are causing her a lot of pain...I am really disappointed the way her case has been handled, subjecting her to a lot of physical and mental trauma to prove that she is able to work. I have known her for 10 years. She is not the kind of person who would exaggerate her symptoms.

I strongly feel she should be on disability. I have seen her several times at the office with her symptoms. These are all related to her accident she had in the past.

[31] Included with her letter was a letter from Dr. Montgomery, chiropractor. He opined:

[The Appellant] has a constellation of difficulties....Contributing complicating factors for everything are multiple spinal and extremity subluxations. Degenerative disc disease also contributes to lower body dysfunction. Disuse atrophy appears to be involved as well, however the skin changes indicate compressive disorders of the cervical nerve roots.

[32] The Appellant advised SGI that she chose the occupational therapy assistant employment in late August 2002. The determined employment process was explained to her and SGI's responsibility was to find an occupation that was available in her geographic area based on her residual capacity but not to actually find her a job. Thereafter on September 17, 2002, SGI rendered a decision advising the determined occupation and the one year limit for payment of further income replacement benefits.

[33] SGI's medical consultant, Dr. Howlett, reviewed the Appellant's file in October 2002 and in particular the letters of Drs. Rajakumar and Montgomery above. He stated "I acknowledge the heartfelt pleas from her practitioners with regard to this customer's functional abilities. However, they have failed to provide any objective evidence that she is not able to perform in a job situation, as assessed in the RCE...."

[34] On November 14, 2002 SGI advised the Appellant how her income benefit would be calculated for the period September 2002 – September 2003. In fact, for the so-called determination year the Appellant received an income benefit (\$773.68 biweekly) that was nearly two times what she was receiving based on her actual employment (\$443.52 bi-weekly) at the date of the accident.

[35] SGI offered the Appellant vocational assistance through Arthur Grey Consultants Inc. (job searching, resume preparation, interview preparation) to help her look for work but she didn't contact them. There is no legal requirement for her to do a job search but the Appellant did what could best be described as a telephone survey of numerous work places in categories of employment identified by Ms. Grey as being suitable for her to do.

[36] The Appellant sought a review of the decision to determine her into employment. On March 14, 2003 SGI advised its decision remained unchanged and her income benefits would terminate effective September 16, 2003.

[37] Dr. Rajakumar provided two further letters to SGI in August and September 2003. She reviewed the treatment and programming carried out and stated the Appellant was not suitable for *any* kind of job due to persistent and severe neck pain and associated nausea caused by the (1999) accident, that the Appellant was not suffering from any psychological condition causing this pain, her problems were chronic and on going and that all these programs would help her due to its prolonged duration.

[38] In October 2003 Dr. Howlett's medical opinion remained unchanged after considering Dr. Rajakumar's above letters:

I don't believe there is any new objective evidence communicated in this letter that would change the findings of the (2002) Residual Capacity Evaluation....The most recent letter from Dr. Rajakumar does point out that there are many life stressors, which his (sic) customer has had to contend with. It would seem that these stressors contribute to the customer's dysfunction.

In my view of the medical information, there are several things that I think are important to keep in mind. Firstly, the original mechanism of injury was consistent with a Whiplash Associated Disorder Type II. As such, it is difficult to explain the customer's current symptoms from this injury which healed long ago. The second point is that on the CT scan that was done very early on after the ...accident, there was a tiny central disc bulge at C5-6. I think that Dr. Voll and any other practitioner would dismiss this as a coincidental finding and is in no way related to any of the arm symptoms that the customer has complained of.

[39] In January 2004 the Appellant had an MRI in Edmonton, AB. The results showed disc bulges at C5-6 and C6-7. In a letter to SGI in June 2004, Dr. Rajakumar reiterated her opinion that the Appellant suffers from chronic pain and depression, right arm weakness from disuse and that she is unable to work.

[40] In September 2004, the Appellant attended at Mackie Physiotherapy for an assessment of her current physical condition and capability. Jason Flaman, physical therapist, conducted a "short functional assessment" and made a number of summary findings and recommendations. Notably he commented in part:

Severe neural irritation of the right arm with accompanying loss of the C7 (tricep) reflex and fatiguable weakness of the tricep muscle. My understanding is this is going to be looked at by a neurologist. If not, I would strongly suggest a neurological follow up be implemented.

[41] Mr. Flaman generally concluded the Appellant was currently at a sedentary industrial capacity.

[42] Dr. Howlett reviewed the above report and MRI and replied to SGI that, if present, the neurological deficit in the right arm would be a new finding. He noted that neither Dr. Voll's assessment in September 1999 nor Dr. Sibley's assessment in November 2000 revealed any neurological deficit in the upper limbs and that it should be investigated. He stated however since the two previous specialist examinations failed to demonstrate the deficit it was unlikely related to the 1999 accident.

[43] Dr. Howlett preferred the findings of the STAR Rehab (Saskatoon Pain Clinic) examination in November 2000 over Mr. Flaman's report. He stated the STAR report was comprehensive and thorough, occurred approximately 18 months after the 1999 accident and in the chronology of this file gave more weight to it compared to one conducted more than five years later.

[44] Lastly, he opined that disc bulging is a normal finding on many CT and MRI scans and that probably no one could answer definitely what causes a disc bulge. Dr. Howlett said that general medical opinion is a bulge may precede a herniation but that a bulge doesn't normally cause neurological symptoms. He concluded that he saw no direct relationship between the disc bulge, which is asymptomatic and to the May 1999 accident.

[45] The Appellant testified she was scheduled for a second MRI the day after this appeal hearing.

## **STANDARD OF REVIEW**

[46] The Commission has the jurisdiction under section 193(7) of the 2002 *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*.

[47] The legal framework for the determination proves is set out below. The Court of Appeal for Saskatchewan addressed the standard of review applicable for appeals to this Commission in *Allary v. Saskatchewan Government Insurance*.<sup>4</sup> The Court in that case noted that more than one standard of review was indicated by the legislation and the appropriate standard of review depends on whether SGI has discretion to grant or deny the particular benefit claimed.

[48] SGI has discretion regarding when the process of determining an employment begins under s. 132, “...(F)ollowing the second anniversary of the date of an accident...” In fact, in the Appellant’s case, it was started about 3.5 years after the accident. However, once the determination process begins, SGI must comply with the legal framework as per sections 132, 134 and 129(1)(d) of the *Act* and sections 17 and 25 of the *Personal Injury Benefit Regulations* (the *Regulations*).

[49] There is no discretion with regard to this benefit and accordingly, the standard of review is correctness. As well, since SGI terminated the Appellant’s income benefits pursuant to the determination process, it has the burden of proof on a balance of probability.<sup>5</sup>

## LAW AND ANALYSIS

[50] 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

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<sup>4</sup> 2006 SKCA 89

<sup>5</sup> *Job v. Saskatchewan Government Insurance*, 2004 SKCA 164

who is unable because of the accident to hold the employment mentioned in section 112...<sup>6</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>7</sup>

[51] There are no specific “prescribed factors” applicable under the *Regulations*.

[52] Section 17 of the *Regulations* 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.

[53] Also, section 25 of the *Regulations* 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*...

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<sup>6</sup> Section 112 applies to a fulltime earner at the date of the 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>7</sup> Section 133 refers to determination of employment for a student or a youth.

(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.

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

[55] 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).

[56] The Appellant received an income benefit based on the table amount in Appendix A of the *Regulations* for an occupational therapy assistant (gross \$23,684). Her income benefit was terminated after the expiry of the one year “grace period” since the determined employment income of \$777.68 bi-weekly was greater than her original income benefit based on her actual employment of \$443.52 bi-weekly.<sup>8</sup>

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<sup>8</sup> Version 9 indicates a biweekly IRB \$451.98; we assume the difference from the IRB reported in the Sept 02 decision letter is because of annual indexing

[57] The position of SGI was it relied on the reports of its experts and the Appellant has been determined into an occupation pursuant to the determination provisions of the *Act*, and one year has passed since that determination, resulting in no further payment of income replacement benefits to her

[58] The Appellant's position was she remains disabled from the May 1999 accident and is unable to perform any gainful employment as a result of her injuries.

[59] The only basis upon which a person can challenge the "determination" is that SGI has not appropriately considered the factors set out in section 134 above. It is on that basis we must consider the Appellant's case.

[60] The Appellant was classed as a full-time worker as per the definition set out in s. 14 of the *Regulations* and income benefits were paid as per s. 112 of the *Act* and s. 20 of the *Regulations* commencing seven days after her accident in May 1999.

[61] Under the "no-fault" provisions of the *Act*,<sup>9</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 to "determine" what kind of occupation the person may be able to perform.

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

[63] The Appellant was tested in a number of areas prior to the determination. A Residual Capacity Evaluation took place at Kinetic in May 2002. The team was comprised of an occupational therapist, psychologist and medical doctor/physiatrist. At the conclusion of the

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<sup>9</sup> The new *Act* (Aug. 02) employs the same general scheme, but the language has been slightly changed, and the numbering is different

assessment, the team stated the Appellant demonstrated sedentary level tolerances on the functional capacity evaluation but that because she discontinued the assessment after about two hours, it was difficult to state definitively what activities she was capable of sustaining. Her description of daily activities was consistent with sedentary tolerances for longer periods than two hours. The team concluded that because the Appellant was pain focused it was difficult to make a more objective determination of her functional abilities.

[64] Rehabilitation consultants conducted transferable skills analysis and hand skills testing, followed by the Psycho-Vocational Assessment by Dr. Shepel, and interest inventories that resulted in various occupations identified in a Vocational Testing Report. Based on this report, the Appellant chose the occupational therapy assistant that was confirmed in the decision by SGI dated September 18, 2003 giving rise to this appeal.<sup>10</sup>

[65] Counsel for SGI submitted the evidence supports a finding that it has complied with s. 134 of the *Act*, the determination carefully considered these factors and the Appellant did not follow through on any employment suggestions, including volunteer work. As well, he argued the evidence indicated significant pre-existing health problems arising from an accident in 1992 for which she received a settlement under the former tort system and the injuries arising from the 1999 accident. The Appellant testified she didn't know if the settlement of her 1992 accident claim included compensation (damages) for loss of future earnings.

[66] He further submitted that if the Commission found the Appellant was entitled to further benefits the so-called crumbling skull rule applied and we consider apportionment of loss as per the case of *Bogdanoff v. Saskatchewan Government Insurance* and invited us to apportion between various contributing factors<sup>11</sup> at the percentages of liability set out in the Mental Health Assessment report.<sup>12</sup>

[67] Counsel for the Appellant submitted that SGI failed to consider her "real world" employability and failed to adequately consider the factors enumerated in s. 134. He referred us

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<sup>10</sup> Note - initial letter August 8, 2004 re Teacher's Assistant was later withdrawn as it was a light level category of work

<sup>11</sup> 2001 SKCA 35; 2001 SKQB 559

to this Commission's decision in *L.N. v SGI*<sup>13</sup> and argued the Appellant was at least partially physically disabled, even if the extent was in issue, and lacked the necessary education (partial grade 11) to do the determined employment of an occupational therapy assistant. Moreover, he submitted there were not many purely sedentary jobs that didn't require some form of manual labour or computer skills as identified by the Appellant's job search.

[68] We find the RCE did not conclude the Appellant was capable of performing sustainable sedentary employment for 8 hours per day which was the basis upon which her income benefit for the determined employment was calculated and subsequently terminated. We think the Appellant has capacity to work and we accept the strength testing conducted by Mr. Usher is some evidence she can perform at a sedentary level of work but there was little or no basis to reasonably conclude she was able to sustain a sedentary level of employment on a regular full time basis.

[69] Jason Flaman did not testify but we reviewed his September 2004 report. He concluded that the Appellant demonstrated sedentary industrial level tolerances for work. It wasn't explained, nor did we ask, what does the term "sedentary industrial" mean. Regardless, we accept his report is evidence that the Appellant has some functional capacity to work.

[70] We acknowledge the MRI done in January 2004 showed a disc bulge at C5-6 and Dr. Rajakumar's opinion it confirmed nerve impingement consistent with Ms. Mandizak's reports of pain in the neck and arm. We don't however agree that the Appellant is totally disabled and unable to work at any job and as confirmed by the RCE and Mr. Flaman's recent assessment. We accept that the Appellant demonstrated sedentary level tolerances for at least strength testing and her self-reported description of daily activities (eg. meal preparation and housekeeping) are consistent with sedentary tolerances.

[71] We find the vocational testing and research conducted by Arthur Grey Consultants Inc. was flawed. No evidence was presented that the employment exists and was available within 100 km of the Appellant's residence. Ms. Grey testified she doesn't use labour market surveys

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<sup>12</sup> 40% 1992 MVA; 20% 1999 MVA and 40% other

because, in her opinion, they are not objective or reliable. Rather, she stated that she relies on the NOC and then tries to find actual employment, or in the Appellant's case, a volunteer position within those classifications. Regardless of Ms. Grey's opinion or reasons in this regard, section 17 of the *Regulations* requires the employment exist and is available. This was not done.

[72] Ms. Blom testified on September 24, 2002 she provided the Appellant with information about volunteer work from local and internet sources (eg. regional health authority and St. Paul's hospital) and the contact person for volunteer services at City Hospital. Ms. Blom stated the RCE recommended looking at volunteer work and hopefully that would turn into a job offer. As a result, she provided the above information for the Appellant to review and if she wanted to proceed with volunteer work or looking for gainful employment this would be arranged.

[73] Section 100(1)(l) defines "employment" as any remunerative employment. Ms. Blom's efforts do not satisfy the elements of "employment exists" and "available" within the meaning of s. 134(c) of the *Act* and s. 17 of the *Regulations*. We also find SGI did not properly consider the Appellant's physical ability to do or to hold the determined employment on a full-time regular basis contrary to s. 134(a) and (d)(i).

[74] We find the decision September 17, 2002 was fatally flawed for the above reasons but we were also not convinced that the Appellant had the educational ability (partial grade 11 compared to completion of some post-secondary training) to do the determined employment. This concern however could have been overcome with actual job information from an employer, eg. labour market survey. In the circumstances however, it is unnecessary for us to comment any further.

[75] The sole issue before us is whether the decision of SGI to determine the Appellant into the employment of an occupational therapy assistant was correct. It was not and failed for several reasons noted in the preceding paragraphs.

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<sup>13</sup> 2004 SKAIA 004

[76] We were invited by counsel for SGI to consider apportionment, if we found she was entitled to other benefits. This issue arises in regard to causation and the extent to which one's injuries are caused or contributed to by a motor vehicle accident. In our view, causation is not an issue pursuant to a decision that is before us and we, therefore, have no jurisdiction to decide the matter and decline to gratuitously offer any comments in this regard.

## CONCLUSION

[77] SGI's decision to determine the Appellant into the category of an occupational therapy assistant is set aside.

[78] Her income replacement benefit is reinstated retroactive to the date it was terminated and payable together with prejudgment interest. Because the income benefit for the determined employment was nearly two times that which her then income replacement benefit was calculated, she will have, in effect, received an overpayment that SGI is entitled to deduct from the total income benefit owing to her as a result of this decision. In these circumstances, we strongly encourage her Personal Injury Representative and/or someone from the "calculator unit" at SGI to provide a detailed (perhaps even bi-weekly) breakdown of that calculation including overpayments, and adjustments for annual indexing.

[79] The Appellant is also entitled to a refund of her appeal fee and her reasonable costs per ss. 193(11) and (12) of the *Act* on double Column 3 of the Queen's Bench Tariff subject to the cap of \$2,500 set out in s. 96 of the *Regulations* and reimbursement for "practitioner's reports" under s.169 of the *Act* and s. 76(1) of the *Regulations*. We believe that when counsel is involved for the claimant that double Column 3 is generally suitable for proceedings before this Commission.

**Dated** at Regina, Saskatchewan, on December 11, 2006.

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Beverly Cleveland, Chair

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Darleen Topp, Commission Member

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Al Knippel, Commission Member