

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *U.T. v. Saskatchewan Government
Insurance, 2007 SKAIA 024*
Date: 20070212
File: 033 of 2006

BETWEEN

U.T., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
U.T., Applicant
Allan McLeod, for the Respondent

Before: **Jane Lancaster, Q.C., Chair**
Carolyn Jones, Commission Member
Carol Olson, 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
January 23, 2007

DECISION

[1] The Appellant, U.T., appeals a decision by Saskatchewan Government Insurance (SGI) dated February 23, 2006 on the basis that she was entitled to income replacement benefits as a result of her motor vehicle accident on January 20, 2005.

[2] Counsel for SGI advised that the letter dated February 23, 2006 was not a decision letter and but instead a conclusion letter setting out what benefits the Appellant had received from SGI as a result of her motor vehicle accident.

[3] Counsel for SGI further indicated that the Appellant had been sent a decision letter on April 12, 2005 which denied her income replacement benefits which the Appellant had not appealed. Counsel advised as a result of the fact that appeal information was erroneously included in the February 23, 2006 letter and that they had provided income replacement benefits for the Appellant while she was attending secondary assessment and should have provided a decision letter with regard to that benefit and did not, that SGI was prepared to agree that the Appellant was entitled to raise the issue of income replacement on this appeal.

[4] The Appellant had been involved in a motor vehicle accident on January 20, 2005. At the time of the accident, the Appellant was in receipt of Worker's Compensation Benefits. She had injured her knees in May 2004 in an accident while she was working for [the company].

[5] She was involved in a treatment program with Worker's Compensation and had been discharged on January 10, 2005 with recommendations of gradually increasing her hours of work over 2 weeks. Her expected return to work was February 5, 2005. The Appellant testified that Worker's Compensation was paying her \$1000 per month.

[6] After her January 20, 2005 motor vehicle accident, she experienced low back and neck pains as well as headaches. She visited her doctor, Dr. Dick on January 26, 2005 and was diagnosed with a whiplash associated disorder II (WAD II) and Grade 1 low back pain.

[7] She began physiotherapy treatment on February 7, 2005 with Daniel Kimber Physiotherapy. She attended twice per week for ultrasound, interferential manual traction, mobilization, stretching exercises and a gym program. She reported to the Secondary Assessment performed by Northern Assessment Services that she attended Daniel Kimber Physiotherapy for one hour twice a week.

[8] Elise Gray of Kimber's Physiotherapy reported on March 3, 2005 that the Appellant was still experiencing pain and discomfort with her injuries but that she was participating in activities of daily living and was not working. She advised that there was no medical reason why the Appellant could not participate in normal activity including work and recommended home exercises.

[9] On April 6, 2005, Ms. Gray reported that the Appellant continued "to have increased stiffness and pain in her cervical and lumbar spines. She finds prolonged sitting extremely difficult." Ms. Gray indicated that if there was no further improvement, she thought it prudent to request a secondary assessment.

[10] Dr. Dick, the Appellant's doctor, sent a report to SGI dated March 23, 2005 in which he advised there was minimal improvement and indicated that the Appellant was not working but left blank the section as to whether there was a medical reason not to participate in normal activity including work.

[11] As a result of this information, SGI sent the Appellant a letter dated April 12, 2005 in which they advised that as Ms. Gray had indicated that the Appellant was capable of performing her duties prior to the January 20, 2005 accident (based on the letter of Ms. Gray advising that she had been discharged from Workers Compensation on January 10, 2005 and was in a graduated return to work). Therefore, SGI advised that since the Appellant was capable of working, both prior to and after the accident, they were not in a position to pay income replacement but would pay benefits for attending medical appointments pursuant to section 143 of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35, as amended (hereafter referred to as the *Act*).

[12] The Appellant did not appeal this decision.

[13] On June 28, 2005, the Appellant entered a secondary treatment program which lasted half days from July to October 18, 2005. By policy, SGI paid the Appellant as a non-earner net minimum wage for the 4 hours she was in the program. SGI determined she was a non-earner based on the information that she provided to Northern Assessment Services that she had let her insurance license expire. This is confirmed again in her Initial Assessment Report dated July 27, 2005 where she stated that she is “not returning to work as she is retired at this time.”

ISSUES:

- (1) Was SGI correct in determining that at the time of the accident the Appellant was capable of returning to her self employment as an insurance salesperson and therefore was not eligible for Income Replacement Benefits?
- (2) Was SGI correct in determining that the Appellant was retired, and therefore not entitled to receive Income Replacement Benefits except pursuant to SGI’s policy of providing net minimum wage to non earners during the period of time spent in SGI approved rehabilitation programs?

LAW AND ANALYSIS

Relevant sections of the *Automobile Accident Insurance Act*, Chapter A-35

DIVISION 4

Income Replacement Benefits

- 113** (1) This section does not apply to a student.
- (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; or
- (3) The insurer shall calculate the income replacement benefit for the employment that the insured is unable to continue on the following basis:

b) subject to the regulations, if the insured holds an employment as a self-employed earner, the greater of:

(i) the yearly employment income determined in accordance with the regulations for an employment of the same class as the primary employment the insured held or would have held but for the accident in the first 180-day period after the accident; and

(ii) the yearly employment income the insured earned or would have earned from all his or her employments held at the date of the accident;

TERMINATION OF DIVISION 4 BENEFITS

Termination of benefits

131 (1) Notwithstanding any other provision of this Part, an insured ceases to be entitled to a benefit pursuant to this Division when any of the following occurs:

(a) the insured is able to hold the last employment that he or she held before receiving a benefit;

127 (1) In this section, “**income benefit**” means a benefit pursuant to section 113, 114, 115, 117 or 118, subsection 119(4) or section 122 or 123.

(2) This section applies only if an insured is 63 years of age or more and not more than 65 years of age at the date of the accident with respect to which an income benefit is payable.

(3) Notwithstanding any other provision of this Part, if an insured is entitled to receive an income benefit pursuant to this Division and, while that insured is receiving the income benefit, that person reaches 65 years of age, the insurer:

(a) shall not terminate or reduce that insured’s income benefit solely on the grounds that the insured has reached 65 years of age; and

(b) unless the insurer is otherwise entitled pursuant to this Part or the regulations to terminate or reduce the insured’s income benefit, shall pay the income benefit to the insured for a period of at least 24 consecutive months after the date the insured first became entitled to the income benefit.

(4) Notwithstanding any provision of this Part, an insured who is 65 years of age or older at the date of the accident is not entitled to income benefits unless that person was employed at the date of the accident.

143 (1) An insured is entitled to an income replacement benefit if, as a result of the accident, the insured is unavailable for work as a result of attending a medical appointment or treatment program authorized by the insurer.

(2) The insurer shall:

- (a) calculate the income replacement benefit pursuant to this section on the basis of the yearly employment income the insured earns from his or her employment; and
- (b) adjust the benefit calculated pursuant to clause (a) to take into consideration the number of hours of work missed.

[14] The Commission's jurisdiction to review a decision of SGI is set out in section 193(7) of the Automobile Accident Insurance Act. The Appeal 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 this Part.

[15] Recently, the Saskatchewan Court of Appeal addressed the standard of review applicable for appeals to this Commission in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In that 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 upon whether SGI has discretion to grant or deny the particular benefit claimed. 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.

[16] The Appellant argues that at the time of the accident she was receiving Workers Compensation (WCB) for an injury that she sustained while self employed selling insurance. She states that she was actively involved in a rehabilitation program with Kimber Physiotherapy and was discharged from a secondary WCB Program on January 10, 2005 with recommendations to gradually increase her hours of work over 2 weeks.

[17] She states that the January 20, 2005 automobile accident caused her to suffer from a WADII and Grade I low back pain delayed her return to work.

[18] SGI argues if she was employed at the time of the accident, her physiotherapist had advised that she could return to her employment while still taking treatment for her injuries.

[19] The Appellant disputes that she could have returned to her employment selling insurance as her injuries from the automobile accident prevented her from sitting for prolonged periods of time. The Appellant indicated that she sold insurance in an area

outside of Saskatoon. This required significant travel by car which she estimated as approximately 3000 kilometres a week spending 1 ½ hour to 3 hours travelling per day, 5 days per week and making approximately 5 insurance presentations per day. She advised that it was impossible for her to take her physiotherapy treatments and also to work because her physiotherapy treatments were 3 times per week and would interfere with her work commitments. In addition, the Appellant testified that she was not able to do her employment as she could not withstand the prolonged sitting which would have been required by her travel commitments. In addition, she gave insurance presentations which required her to stand for extended periods of time and her injuries precluded her from long periods of time standing.

[20] The Appellant advised that she had asked her employer for work within Saskatoon, but a change in work area was not available to her.

[21] The Appellant argues that the fact that SGI had sent her for a secondary assessment was an acknowledgement that she was not medically capable of returning to work.

[22] She provided an explanation as to why her doctor had not filled in the portion of his report as to whether there were reasons for her not to participate in normal activity including work as her doctor told her that it was up to her if she felt she was able to work.

[23] The Appellant did not provide an explanation as to why in filling out her application for benefits for SGI on February 5, 2005, she had not put in the name of her employer, and in particular had indicated that she was currently working without pay and was capable of doing the work at the time she signed the application.

[24] The Appellant admitted she had received the April 12, 2005 decision letter advising her that she was not entitled to Income Replacement Benefits. She advised that she did not appeal because she did not think she would be successful, but in talking to others, she felt that she had been entitled to these benefits.

[25] The Appellant was sent for a secondary assessment by SGI in June 2005 and advised Northern Assessment Services that she was retired and had let her insurance license expire.

After further questioning by the panel, she intimated that she used “retired” and “not working” or “unemployed” as interchangeable. She explained that her insurance license depended on her taking a number of hours of continuing education in order to keep it current and that she had not taken the continuing education. She advised the panel that she had let her license expire in April 2005. She further indicated that she had 2 years after the expiration of her license to bring her continuing education current, but she had not done so at the time of the hearing.

[26] SGI argued that the Appellant was capable of working February 5, 2005 pursuant to the medical report of her physiotherapist. In the alternative, SGI argued that the Appellant was retired and therefore, not entitled to income replacement.

[27] SGI explained that pursuant to policy, they paid the Appellant net minimum wage for the hours that she spent in rehabilitation pursuant to the secondary assessment. The Appellant took issue with the deductions to the amount she received and felt that she had been lead to believe from her personal injury representative that she would be paid for full days when taking treatment and not just the specific hours. There is no documentation which would assist the Appellant’s claim in this regard.

CONCLUSION:

[28] We accept the Appellant’s evidence that she was employed as a self employed insurance salesperson at the time of the accident. We also accept that the Appellant’s evidence that she was not capable of returning to her previous employment as Ms. Gray had indicated in her February 5, 2005 letter as she was not able to do the car travel which was a requirement of her employment. There appears to be no acknowledgement from her health providers that her employment required significant sitting, driving, and standing. It was acknowledged by Ms. Gray on April 6, 2005 that the Appellant had “increased stiffness and pain in her cervical and lumbar spines. She finds prolonged sitting extremely difficult.”

[29] We do not accept the Appellant’s explanation that she was still employed as an insurance salesperson for the company after she allowed her insurance license to expire. We do not accept that the Appellant used terms such as “unemployed” and “retired” as

synonyms. When she advised at the Secondary Assessment that she was retired and had let her licence expire, we find it highly improbable that she, as a result of her background in insurance and the requirement for accuracy in her profession of selling insurance would use terms such as “retired” when she meant to use the term “unemployed”.

[30] We, therefore, find that the Appellant was self employed at the time of the accident and as a result of the motor vehicle accident was not able to perform her work. We find that as of a specific date in April, 2005 when her insurance license expired, she was no longer employed, but retired and therefore, was not entitled to any income replacement.

[31] The Appellant was paid net minimum wage during the hours she was attending physiotherapy for her secondary assessment pursuant to a policy of SGI to reimburse non-earners such as the Appellant for her time. We do not have jurisdiction to review the policy decisions that SGI makes except where they are contrary to the *Automobile Accident Insurance Act* and its regulations. In this case, we note that SGI’s policy of providing the net minimum wage to non-earners enrolled in a rehabilitation program under the legislation provides a benefit greater than the legislation would provide. The Appellant takes issue with the fact that the policy provides for a net minimum wage instead of taking a gross minimum wage. Even if we had jurisdiction to comment on this policy, we note that SGI regularly considers net income as a reference point when calculating income replacement benefits under the *Act*.

[32] We recognize that the calculation of the Appellant’s entitlement for income replacement from when she ceased being the recipient of WCB and the date that her insurance license expired will require that the Appellant provide more detailed information regarding her income tax over the past 3 years including the calculations as to her business income or alternatively, using the table under the *Personal Injury Benefits Regulations* for a self employed insurance salesperson.

[33] We also note that the Appellant had received income replacement/caretaker benefit in the amount of \$1,272.81. We do not know what time frame this income replacement benefit covered or if it is the income replacement pursuant to the policy regarding non-

earners taking rehabilitation programs. Any adjustment that SGI makes to the Appellant's income replacement for the time period when she became eligible for income replacement to the date when the Appellant's insurance license expired, should take into consideration payments for income replacement that may have already been made by WCB or SGI.

COSTS

[34] As the Appellant has been partially successful in her appeal, she is entitled to the refund of her appeal fee of \$75 and reasonable costs of transportation and meals to a maximum of \$2,500.

Dated at Saskatoon, Saskatchewan, on February 12, 2007.

Jane Lancaster Q.C., Chair

Carolyn Jones, Commission Member

Carol Olson, Commission Member