

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *O.R. v. Saskatchewan Government
Insurance, 2007 SKAIA 034*
Date: 20070307
File: 034 of 2004

BETWEEN

O.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Robert Skinner, for the Applicant
Joan Eremko, for the Respondent

Before: **Beverly Cleveland, Chair**
Stan Loewen, Q.C., 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**

Heard at Saskatoon, Saskatchewan
April 21, 2005

DECISION

[1] The Appellant, O.R., is appealing the December 5, 2003 decision of Saskatchewan Government Insurance (SGI) that terminated all benefits under “No-Fault Coverage” based on his having completed a graduated return to work.

BACKGROUND

[2] The Appellant was injured in a motor vehicle accident on January 16, 2003. He was traveling with his brother (passenger) on their way to work on the oil rigs. The Appellant was driving through thick fog and did not see a train that was proceeding at a level crossing. He attempted to swerve but slid on the ice and struck the moving train that dragged their vehicle before it came to a stop. Both individuals were belted and both air bags deployed. The Appellant does not think he lost consciousness but he did hit his head probably on the windshield. He was able to get out of the vehicle and wave down another vehicle. He was taken to hospital at Oyen, AB (x-rays, suturing) and then transported to Royal University Hospital in Saskatoon because of a suspicion of a head injury (CT scan - normal).

[3] The Appellant suffered facial lacerations (bridge of nose and right eyelid requiring 26-27 stitches), bruising along the entire right side (arm, torso and leg) and pain of the right arm, chest and shoulder from the seatbelt and swelling of the right knee and shin but he was able to exit the vehicle independently.

[4] He attended Dr. Oladipo on January 27, who noted in a Physician’s Report to SGI his primary diagnosis as mild head injury, right knee contusion, facial laceration, right subconjunctival hemorrhage, bruised tender right knee, headache and low back pain. He removed the sutures and prescribed anti-inflammatory medication. The Appellant commenced treatment for Grade 1 low back pain.

[5] The Appellant applied for injury benefits on January 20. He returned to Dr. Oladipo on February 3 with complaints of headache and low back pain as well as pain in the right

knee. Dr. Oladiipo did not find any objective evidence of major problems and he advised the Appellant rest for one week. The Appellant returned to Dr. Oladiipo on February 10 and 18 and March 12 with the same complaints. During this time, the Appellant attended for massage and chiropractic treatments and physical therapy all that provided him with temporary relief only.

[6] At the date of the accident the Appellant had worked on the oil rigs for the past four years eventually becoming a derrick hand. Initiated by Dr. Oladiipo, he attempted a return to work on February 25 at [the rig] for one week at light duties. Apparently his employer was unable to provide light duty and he found the symptoms increased to the point he could not work.

[7] The Appellant was referred for a secondary assessment at Pinnacle Multidisciplinary Assessment Group (Pinnacle) on April 7. The mandate of the multidisciplinary team was to assess the Appellant with respect to medical, physical, functional, and psychosocial status and:

- a) confirm diagnosis (SGI noted different areas of injury reported by MD and DC);
- b) review management to date;
- c) identify barriers to recovery;
- d) determine return to work status.

[8] His subjective complaints were as follows:

- Low back pain with tingling and some numbness in the legs and soles of feet.
- Occipital headache with frontal radiation, associated with dizziness
- Neck, upper back and shoulder pain
- Right shin pain
- Right arm, chest and shoulder bruising with tingling in all fingers
- Right eyelid laceration with 23 stitches
- Vertigo with certain head movements

[9] The secondary team diagnosed the following as being injury (accident) related:

1. WAD II of the cervical, thoracic, and lumbar spine
2. Post traumatic stress syndrome
3. Benign positional vertigo

4. Cervicogenic headache

[10] During the assessment, the Appellant did not functionally meet the majority of his generally heavy job demands. He demonstrated some position tolerances but his overall function was limited by reported increase in symptoms (of pain). It was documented that the Appellant likely gave a full effort throughout the functional testing.

[11] They recommended tertiary care with regional, global and functional conditioning to assist him in returning to pre-accident physical condition. The team also felt the Appellant's psychological symptoms were a "greater factor in delay of recovery at this point in time and therefore recommended the treatment team emphasize this aspect of treatment, at least initially."

[12] Based on the secondary assessment team's recommendation, SGI advised the Appellant that a 12 week treatment plan at FIT for Active Living (FIT) in Saskatoon and a graduated return to work with his employer, when appropriate, would be funded by SGI.

[13] SGI hired Kerry Walker, Rehabilitation Consultant, with Innovative Rehabilitation Consultants (IRC) to co-ordinate and develop the graduated return to work (GRTW) plan. She met and interviewed the Appellant prior to his attending tertiary programming and reported he was willing to participate in the treatment plan and that he was eager to return to his pre-accident level of function, including his work as a derrick hand.

[14] The Appellant attended for tertiary assessment at FIT on May 14 and 15. The clinical assessment team consisted of a physical and occupational therapists, chiropractor, medical doctor (physiatrist) and a registered psychologist. Their summary opinion of accident related injuries was similar to the Pinnacle team. The FIT assessment team recommended tertiary treatment within the streamed resource program for 12-16 weeks. It was felt this was an appropriate plan given the psychological barriers present and the pain, which seemed out of proportion with the stage of healing. The goals of treatment were

stated as return to function with improved coping with pain and stressors and also an attempt to adjust the psychological barriers to recovery.

[15] The Appellant's attendance at programming was rated excellent and he was consistently on time and ready to participate. A mid conference progress report in July indicated he continued to complain of sharp, shooting type pain from his low back down to his legs and occasional upper thoracic and shoulder blade pain.

[16] Objectively, the physical therapist reported he presented with L5-S1 flexion stiffness, thoracic spine segmental extension stiffness, tenderness and hypertonicity. The psychosocial staff noted the post traumatic stress symptoms were reduced but that he appeared to be struggling with his slower than anticipated physical progress that to some degree affected his mood. Because his progress was a bit slower than anticipated, his program was extended to 16 weeks with an expected discharge date of September 26.

[17] A second mid conference report in August again confirmed the Appellant's attendance was excellent and generally, his effort in program was appropriate. Some fear of re-injury was noted that was reported to at times cause him to hold back a little but otherwise his performance was steady and consistent.

[18] The team felt the Appellant was very close to maximum medical improvement and it was anticipated he would be approaching pre-accident level of function at discharge. The Appellant participated in two 12 hour simulated work days in program and completed two 8 hour days on the oil rig on September 18 and 19.

[19] Curtis Hilton, occupational therapist with IRC, attended the rig on September 19 to conduct a worksite assessment respecting the Appellant's job demands as a derrick hand. While at the job site he met with the rig supervisor, F.V., who stated that the Appellant seemed to be performing well and didn't appear to have limitations although he said that he hadn't talked with the Appellant to know how he was feeling after the previous day of work.

[20] Mr. Hilton stated at the outset of his report that he was not able to observe the Appellant performing all of the tasks normally associated with his job as a derrick hand because the drilling rig was in the process of being dismantled and moved to another site. Because of this, the Appellant was performing activities that he wouldn't ordinarily be doing.

[21] In reply to whether there could be lighter duties at the end of a shift that the Appellant could do, [the rig supervisor] said that when the rig is operating, employees may have periods of less heavy work throughout the day rather than be able to schedule or arrange for light duties at the end of the shift.

[22] The rig supervisor said he would hire the Appellant back as long as he was "pulling his weight" but that it was up to him whether or not he wanted to come back. The Appellant was unsure if he could tolerate the heavy work but also indicated that he might want to pursue some education so he could get a less physically strenuous job.

[23] Mr. Hilton reported the most strenuous job duties of a derrick hand were:

- Carrying bags of gel – bags of powered gel are carried 15 feet to the hopper where they are mixed. Approximately 70 – 100 pound bag are carried and dumped in the hopper each day.
- There are two derrick hands on each crew and this task can be shared between them but often this is done by one person. In addition, there are other bags of chemical or additives which need to be carried ranging in weight from 50 pounds to 80 pounds. It was estimated that the task of carrying gel takes 3-5 hours daily.
- Pulling collars – [the Appellant] advised that the rig he worked on was a double rig and had two collars hooked together. Each collar is made up of a long pipe with cast iron "nubbins" at the top. Each nubbin weighs 75-120 pounds. The person pulling must be anchored to the top of the derrick by a harness. Each stand was must be pulled backwards by the derrick hand though the use of his body weight. As the drill was "rigging out" at the time of the assessment, it was not possible to observed or quantified.
- Pump house – a derrick hand must manage the pump house. Pump rods must be inserted and removed into/from a horizontal port. Each pump rod must be carried 6 feet from holding rack to its port. A pump rod weighs 75 pounds.

- Cleaning water tanks – Dirt is removed from the earth during the drilling process and washed with fresh water through two large tanks underneath the grated working surface to the side of the oil rig. Before moving to a new site, these tanks must be cleaned out. There is usually a thick layer of mud and clay at the bottom of the tank and as the tanks are shallow, the worker must crouch and bend during the duration of the activity. Mr. Hilton observed a worker performing this task and advised [the Appellant] that although there was no ideal positioning for this task. [The Appellant] advised that he had performed this task the previous day and experienced a great deal of pain especially in his neck.

[24] After the first day, the Appellant reported he had experienced a great deal of pain in his upper and lower back that he attributed mostly to carrying gel powder bags and pulling collars but also prolonged activity. Mr. Hilton did not observe the Appellant performing these tasks or cleaning the tanks. The Appellant was concerned that he might not be able to handle the work and also the perception of his co-workers about whether he could do the work. Comments made to Mr. Hilton though indicated that his co-workers thought a great deal of him and made no negative remarks.

[25] Mr. Hilton reported the Appellant was willing to attempt a return to work despite his concerns whether or not he could handle the heavier work. Mr. Hilton felt as long as he utilized proper body techniques, took breaks when he could, avoided unnecessary heavy work (eg. delegate where possible) there was a good chance the Appellant could do his job.

[26] He felt it would take time for the Appellant to tolerate full 12 hour shifts and it was reasonable to expect that he would continue to experience some pain while increasing muscle strength, as well as at his injury sites, for some time. Mr. Hilton recommended a follow-up and/or job site monitoring to reinforce proper body mechanics if the Appellant had on-going difficulties with a full return to work.

[27] The Appellant was discharged from FIT on September 26 having demonstrated, in program, safe abilities to work for 12 hours and met required job demands. The Appellant however expressed concerns about on-going pain and fear of re-injury and his ability to sustain 12 hour shifts on a daily basis. On discharge from FIT, it was recommended he participate in a graduated return to work starting at 8 hours per day and progressing to full

duties. Usual shifts were 12 hr/day for 14 days and then 7 days off. The eight week¹ GRTW plan started at 8 hr/day for 14 days, 7 days off; 10 hr/day for 14 days, 7 days off; 11 hr/day, 7 days off. Thereafter, the Appellant would work a regular 12 hour day for 14 days.

[28] It was agreed with the employer that during the GRTW plan that the Appellant would work as an extra derrick hand on the regular shift crew. The Appellant was to participate in only those work tasks considered to be his duties, strongly discouraged from participating in other activities and to delegate heavier tasks where possible.

[29] On October 2, the Appellant was advised that SGI would pay a supernumerary income replacement benefit during the GRTW. As well, Ms. Reilly, the personal injury representative (PIR) emphasized that if he suffered a relapse, it must be related to his particular job duties otherwise SGI might not be responsible. She further explained SGI would cover the cost of any treatment for any work-related injury (eg. dropped a hammer on his foot) but that to be eligible the injury must be related to his job duties.

[30] Ms. Walker developed an individual written rehabilitation plan and in it, stated that it was “crucial” that the Appellant perform all his regularly assigned work duties and tasks not be “shared” or “slip up” with extra staff; he was advised to only perform those tasks in his job duties, not participate in tasks not normally assigned to him and to take regular breaks.²

[31] On October 15, SGI advised the Appellant that the FIT team had recommended: a GRTW plan, additional sessions with a chiropractor with funding ceasing January 26, 2004, 10-12 counseling sessions (est. 3-6 mos.) to deal with the post traumatic disorder caused by the accident, a home exercise program, Pilates video, a set of dumb bells, gel innersoles, back belt foam for his mattress at work, as well as theracane and gel ice packs.

¹ Oct 9 – Dec 11 2003; but see also (rotations 1 – 4)

² no formal breaks are provided

[32] Mr. Walker prepared a comprehensive progress report to SGI dated October 21. She noted that on October 16, the Appellant had said he was doing well at work. Her recommendation at the end of this report was to “encourage the client to follow through with recommended ongoing counseling, and monitor his progress.”

[33] Ms. Walker next talked to the Appellant on October 23. He advised that the rig had been shut down since October 19 and he was not sure when he would be recalled to start work. He said that work was going OK but that he was having a lot of “ups and downs”. She encouraged him to look ahead and remember that if he took care of himself now he would be better off in the future.

[34] The Appellant went back to work on November 6. Ms. Walker contacted the rig supervisor on November 13 who advised he didn’t have any concerns with the Appellant’s performance, that he seemed to be doing OK and hadn’t brought any concerns to him. He advised the Appellant was working 10–10 ½ hr/day as per the GRTW and that he didn’t expect any further rig shut downs. Between November 6 and 26 Ms. Walker was unable to contact the Appellant but she assumed he had no concerns because he had not called her or SGI or FIT Outreach.

[35] On November 26, the Appellant left a message that he was starting his next rotation and working 11 hr/day at a different rig. Mr. Walker reported she would continue to monitor his GRTW through regular contact with him and his employer to ensure a successful return to full duties.

[36] Ms. Walker contacted the rig supervisor on December 1 to follow up on the Appellant’s performance during the GRTW. He stated the Appellant was doing well and did not seem to have any problems. He confirmed the Appellant was working 11 hr/day as per the plan. She reminded him that the Appellant would be returning to full hours and his payroll on December 18. Mr. Walker also reported that she contacted the Appellant on December 3. He said work was very busy and he was doing OK.

[37] SGI advised the Appellant by letter dated December 5 that as a result of his successful completion of the GRTW plan that funding for all benefits would cease effective December 11.

[38] In a progress report to SGI dated December 28, Ms. Walker confirmed that Ms. Mauer, FIT Outreach worker, had called her on December 16 and reported the Appellant had called her the day before saying he had a great deal of pain and discomfort and was discouraged; that he didn't think he could continue his current job and was seeing his family doctor, Dr. Bowman, about this.

[39] Ms. Walker contacted the rig supervisor on December 19. He said the Appellant told him he had "things to finish at home" and he would not be returning to work on December 18 as scheduled. He also indicated the Appellant said he had "things to do with his therapist" but he wasn't sure if this was true. She advised him SGI will no longer fund the Appellant's salary as he had successfully completed the GRTW plan and further as it was the Appellant's choice not to return to work that he should deal with it as employer/employee issue.

[40] Ms. Walker also reported³ Ms. Mauer had met with the Appellant on December 22 and that he was looking into counseling and not returning to work because he didn't have enough strength and had too much pain. She noted that he advised Dr. Bowman was referring him to a neurologist in addition to a plastic surgeon (re facial scar).

[41] In her FIT tertiary Outreach Discharge Report to SGI dated January 7, 2004, Ms. Mauer stated she had spoken to the Appellant on December 15 and 22 and that he advised he was not managing very well and that by favoring his problem areas, he was experiencing new problem areas. He explained that he was very discouraged, depending on painkillers and was "coming up short". He advised that he did not plan to return to work and would seek alternate employment because he was experiencing too much pain and didn't have the

³ Feb. 04 progress report but included here for chronology

strength to continue. He indicated that with the increased hours at the end of the GRTW, he just could not manage the job.

[42] The Outreach Discharge Report also indicated that the Appellant saw his doctor in mid December who planned to discuss his ongoing physical symptoms with SGI. The Appellant was receiving some chiropractic treatments and was waiting for a list of counselors from FIT staff.

[43] Ms. Reilly detailed a lengthy telephone conversation with the Appellant on January 8 in which she asked him why he didn't report he was having all these problems earlier and why did his supervisor not say he couldn't do the job when he talked to Kerry Walker. Mr. Reilly noted these questions, and others, needed answers. She advised the Appellant that unless he can provide objective medical evidence substantiating his inability to return to work that SGI's responsibility had ended on December 10.

[44] Ms. Reilly then asked Mr. Walker to follow up with the employer to see if there were any changes to their last conversation and also to contact the rig payroll department for a copy of the rig supervisor's record of employment. Both women agreed it was "odd" that the Appellant's not returning to the rigs has occurred at the same time as his brother (injured in same accident) decided to work in the construction industry instead of on the rig.

[45] On January 12, Ms. Walker submitted a prepared letter to the rig supervisor confirming their previous conversations that he had not reported any problems respecting the Appellant's work performance nor did the Appellant complain to him about any difficulties he was having although he was often seen rubbing his muscles by his co-workers while at work. A signed copy of the letter by the rig supervisor was stated to have been sent to SGI on January 3 but it was not included in the document book.

[46] By letter dated January 20, Ms. Reilly advised the Appellant that the recent note received from Dr. Bowman did not provide any evidence to substantiate his inability to functionally perform his job duties on the oil rig. She confirmed SGI's position that his

benefits are concluded as previously advised. As well, she reminded him the FIT recommendation for counseling was valid for 6 mos. after his discharge (September 26) and asked him to advise when he has selected a psychologist.

[47] On February 6, the rig supervisor faxed SGI a detailed letter respecting the rig supervisor's performance during the GRTW. The letter stated that the Appellant had experienced difficulty during the heavy lifting required by the job, his frustrations about not being able to meet his job demands, and his concerns that he was relying on pain medications while working that could be dangerous himself and others on the rig. He stated he has worked with the Appellant before and after the accident and he always showed a strong work ethic which encouraged the rest of his crew. After the accident, he said it was clear that the Appellant could not handle his work and his dependency on others increased. As a result, in his opinion, the Appellant did not fulfill his job duties and requirements as a derrick hand.

[48] It doesn't appear that Ms. Reilly, Ms. Mauer or Ms. Walker followed up with the rig supervisor to inquire why he now stated that the Appellant had problems and was not able to do his job duties compared to what he had previously reported and signed in the reiteration letter.

[49] In an undated letter to SGI by Dr. Paull, chiropractor, he advised the Appellant reported to him that he failed his GRTW. Dr. Paul stated partly "(H)e found it difficult to return to the oil patch and had difficulty with the fall arrest harness that he had to wear. He stated that due to his back pain, he was afraid that he would put his life, or the life of others in jeopardy, so he ceased work."

[50] Dr. Paull last examined the Appellant on February 24 with the following observations: "(L)umbar spine exam was mildly restricted in flexion only, but painful at the end of range of all lumbar spine ranges of motion....There was diffuse irritability throughout the muscles of the lumbar spine and gluteal region. There was mild stiffness and irritability to palpation of the lumbosacral junction, as well as the mid thoracic spine. A

diagnosis of LBP 1 was assigned, and treatment to the lumbar spine and mid thoracic spine was completed....”

[51] A further CT of the head was normal and MRI of the spine showed minimal disc bulge at L5-S1 with mild right neural foramen narrowing. The conclusion was mild degenerative change at L4-5 and S5-S1. Nerve conduction tests revealed carpal tunnel syndrome that was particularly symptomatic on the right. SGI medical consultant, Dr. Bernacki concluded the latter was unlikely MVA related. It was also recorded that a review of the Appellant’s previous medical history did not reveal any history of back problems.

[52] In April 2005, Dr. Taillon, SGI’s medical consultant did an extensive review of the Appellant’s medical file. Dr. Taillon noted that the Appellant was capable of performing medium level work for an 8 hour day as per the physical work performance evaluation in August 2003. He said it was difficult to reconcile the conclusion by FIT that the Appellant was at medical maximum improvement with their recommendation that he access chiropractic therapy, the need for ongoing psychotherapy and the need for an ENT and psychiatrist review.

Dr. Taillon stated in part:

It’s my opinion that these latter deficiencies did not prepare [the Appellant’s] graduated return to work to an environment with very heavy physical demands. Furthermore, there was no investigation into [the Appellant’s] psychological past....Later on when the FIT Outreach person contacts (him) to ascertain his progress, he is frustrated and discouraged with his on going pain plus has not had contact with a psychotherapist. He later receives a list of psychotherapists and is told it is his responsibility to contact the same.

I believe the combination of his original family physician leaving the area associated with delayed referral to psychiatrist (possibly yet undone), ENT (no report on file) and the possible incomplete understanding of this young man’s psychological history all contributed to a difficult graduated return to work process.

[53] Dr. Taillon further offered his comments about the Appellant’s complaints of ongoing pain as the main reason for his inability to negotiate the return to work and to sustain work as a derrick hand:

...the original injury would have caused mechanical neck and back pain. Throughout the early documents from different caregivers there was reasonable range of motion and no neurological findings. This is consistent with a young person's response to such a vehicular crash. Later on the examination would also show preserved range of motion and repeat imaging including a CT head and MRI lumbar spine again do not demonstrate nerve root or other neurological compromise. In my opinion, the persistence of pain is more so due to psychological factors. By this I mean that the pain is real and localized to certain anatomical parts but the volume and intensity of the pain is related to mood disorder and other psychological elements. Note that this is not "pain behavior" as this young man demonstrated a superior work ethic, other centeredness in his helping other recovery clients and finally was well motivated....

[54] The Appellant testified he returned to work in June 2004 [at a second rig] for a couple of months as a lease hand. In August 2004 he obtained employment at [a third rig] and at the date of the hearing had been steadily employed as a lease hand with that employer. He testified that a lease hand is a less strenuous job than a derrick hand. As a result he claims that he suffered about a \$10/hr wage loss from his previous derrick hand job that paid \$25-27/hr. He viewed his inability to work as a derrick hand was the result of the accident and felt that he needs more rehabilitation to help him get back to where he was before the accident.

[55] In January 2004, the PIR noted on pay stubs from [the first rig employer] that a lease hand was paid \$17.50/hr and a derrick hand was \$24.00+ /hr. Effective October 2004, [the second rig employer] confirmed the crew rate for a lease hand was \$18.50/hr and a derrick hand \$28.00. The latter wages applied to both 8 and 12 hr shifts with overtime paid according to provincial labour regulations. As well, subsistence rates of \$100/day for non-camp and \$25.00/day for camp are payable.

[56] The Appellant stated that he has more experience than the driller on the current rig he is working on and more education than the other lease hands. He said he is a "stand-out" on paper respecting his credentials and has training in CPR/First Aid and "tickets" in transport of dangerous goods, (lethal) hydrogen sulfide gas and confined space and rescue but is only physically capable of work as a lease hand.

[57] On cross-examination the Appellant acknowledged he typed the second letter that the rig supervisor sent to SGI but that they sat down first and discussed it. The Appellant said that he definitely told the rig supervisor during the GRTW that he was having difficulty and didn't know why he would have signed the reiteration letter. He denied the first time he told the rig supervisor about his problems was when he talked to him about the second letter. He acknowledged that the rig supervisor was a life-long friend but that he hasn't had any recent contact with him.

[58] The Appellant testified that when he was discharged from FIT he was still experiencing pain radiating from his neck and lower back to his arms and legs and that he was never pain free. He commented there was no similarity to what he was doing in the tertiary program to what he did on the rigs and so, in that sense, it wasn't helpful.

STANDARD OF REVIEW AND ONUS OF PROOF

[59] In reviewing a decision of SGI, the Commission has jurisdiction under section 193(7) of the *Act* to:

“set aside or vary the insurer’s decision; or make any decision that the insurer is authorized to make pursuant to this Part.”

[60] Where, as in this case, the claimant places the facts in issue and challenges SGI's decision in respect of a benefit that SGI is obligated to pay, the standard for our review will be correctness. That is, after considering the record and any new evidence, the Commission will decide the matter on the basis of what it thinks is the correct decision in the circumstances.

[61] As well, where SGI terminate benefits to an accident victim it the onus to prove, on a balance of probabilities, that the benefits are no longer payable under the *Act*.⁴

ISSUE

⁴ *Gerald Job v. Saskatchewan Government Insurance* 2004 SKCA 164

[62] Was SGI correct in terminating the Appellant's benefits because he had successfully completed his GRTW plan?

LAW

[63] SGI is entitled to terminate income replacement benefits where the insured is able to substantially perform the essential duties of his or her previous employment as per s. 131 of *The Automobile Accident Insurance Act* and s. 14 of the *Personal Injury Benefit Regulations* in place at the date of the accident.

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;

Meaning of unable to hold employment

14 For the purposes of the Act, an insured is unable to hold employment if a bodily injury that was caused by the accident renders the insured entirely or substantially unable to perform the essential duties of the employment that the insured:
(a) performed at the date of the accident; or
(b) would have performed but for the accident.

ANALYSIS

[64] SGI's position is that the Appellant was no longer entitled to income replacement benefits (IRB) because he successfully completed a GRTW. Further, SGI takes the position that there is no medical objective evidence that the Appellant was unable to perform his job duties. SGI bears the burden of proof to show that the decision to terminate the Appellant's benefits was correct.

[65] The Appellant testified that he had commenced his employment in the oil field in 2000, starting as a lease hand and working his way up to a derrick hand. At the time of the accident he was working towards (and sometimes in an acting capacity) as a driller. He worked a rotational shift of 14 days straight for 12 hr/day, 7 days off, and the cycle repeated.

[66] After the accident, he worked diligently at his rehabilitation wanting to physically get back to his pre-accident condition so he could return to the oil rig. He faithfully attended 16 weeks of tertiary treatment at FIT in Saskatoon and worked hard at keeping a positive attitude and strived to do his best despite not progressing as well as he expected and still experiencing a lot of pain.

[67] In October 2003, he commenced a rotational RTW plan starting at 8 hr/day. He got up earlier than the rest of the crew to do range of motion and stretching exercises, practiced good body postures taught to him but despite this the pain persisted and was accelerated by days end. He used “painkillers” that likely (or obviously) masked some of his symptoms but was, as he put it, “coming up short”. Even though he was working reduced hours and was an extra man on the regular work crew, particularly as the hours increased, the Appellant felt he could do the job and/or was a danger to others.

[68] He did not return to the oil rig after December 18 because he felt he couldn’t physically handle the work and 12 hr shifts because of pain. While it was reported he occasionally expressed a desire to further his education, he also stated directly that he wanted to, and in fact did, return to working on the oil rigs. To his credit, he returned to work with another rig⁵ as a lease hand for a couple of months in June 2004.

[69] Thereafter, The Appellant started working with a third rig employer as lease hand and has been employed with them since August 2004 although the rig was temporarily shut down because of the road bans at the date of the hearing. He testified that a lease hand is less strenuous work than a derrick hand and it also pays about \$10/hr less. He attributes his problems to the accident and claims a wage differential between the two positions.

[70] He submitted a letter from his rig supervisor, D.V., who stated that although the Appellant was well qualified to work as a derrick hand, he could not perform the duties of a derrick hand, motor hand or floor hand because of his “condition”. He wrote the more strenuous work puts him in enough pain that he cannot continue. Pay rates from the third

rig employer list a lease hand earns \$18.50/hr, a floor hand \$22.00/hr, motor hand \$24.00/hr and a derrick hand \$28.00/hr.

[71] The Appellant testified that he starts work one hour earlier than others so he can do stretching and other exercises to maintain his range of motion. He stated that the pain increases throughout the day and radiates to his lower back and legs as well as pain to his neck and shoulders and down to his arms and legs. He said that during his off week that he receives regular chiropractic and massage treatments that provides relief but that the pain and soreness return after he goes back to work.

[72] The Appellant testified in a frank and candid manner and we find that he was a credible witness. Reports from his rehabilitation and health care workers and from his previous employer speak positively of his strong work ethic and positive attitude.

[73] SGI relies largely on the reiteration letter by Ms. Walker and signed by the rig supervisor as the basis for concluding the Appellant had successfully completed his GRTW. As well, SGI relies on the reports by Ms. Walker that the Appellant had not indicated or contacted her during the GRTW indicating he was experiencing difficulties.

[74] In fact, the Appellant told Ms. Walker that he was having a lot of ups and downs when she contacted him on October 23 and learned that the rig had shut down on October 19 (he had only started the GRTW on October 9 at 8 hours per day) and was not sure when he would be recalled back for work.

[75] Ms. Walker had difficulty contacting the Appellant and the rig supervisor during the month of November. She learned that the Appellant was called back from layoff on November 6 and received a voice message from the Appellant on November 26 stating he was returning to a new rig and would be working 11 hours per day as per the rotation. Despite their limited communication, she *assumed* he had no concerns because he hadn't contacted her, SGI or FIT Outreach.

⁵ second rig employer

[76] Ms. Walker contacted the rig supervisor on December 1 (the Appellant would have been working the 11 hours per day for a maximum 4 days) who reported that the Appellant didn't seem to be having any problems. No information was provided nor do we know the context or background of his comments, for example, whether the rig supervisor had actually observed the Appellant performing his job, if he had spoken to the Appellant or to the crew that he was working with. What is clear is that when the Appellant contacted Ms. Maurer on December 15, he was having sufficient problems that he was seeing his doctor and did not think he could continue with his job.

[77] In preparation for the GRTW, Mr. Hilton attended the rig on the second day of a two day (8 hr) work trial to complete a worksite assessment but was unable to observe the Appellant perform the usual duties of a derrick hand because the drill was being "rigged out". In fact, Mr. Hilton *never* observed the Appellant do any of what he called the most strenuous job demands of a derrick hand that he identified (carrying bags of gel, pulling collars or cleaning water tanks). We think it is reasonable that these job demands can be considered as essential job duties.

[78] We accept the Appellant's testimony that he could not carry out the job duties of a derrick hand for 12 hr/day on a sustainable basis and that he did not successfully complete his GRTW plan. Ms. Walker did not attend the rig and observe the Appellant while he was working. In fact, she had difficulty in contacting both the Appellant and the rig supervisor at times because of the long hours and the rig changed locations.

[79] Although the Appellant reported the rig was shut down for a period of time, we don't know if this affected the rotation of his GRTW plan. It also doesn't appear that the Appellant ever completed a 12 hour shift on his own as was indicated in the last rotation of the GRTW plan. As well, we are mindful that throughout the Appellant worked a sixth man on a (usual) five man crew.

[80] It is reasonable to think in that circumstance each crew member did less work than would otherwise be required if there were only five crew members working on the rig. That is not to imply that the Appellant didn't comply with the GRTW plan and "shared" his responsibilities but that practically at the worksite, the job "gets done", and if there are six people available to do the work, then six people did the work.

[81] We find Dr. Taillon's comprehensive medical review and opinion is convincing. He indicated that the Appellant's neck and back pain would be 100% related to the motor vehicle accident and although the motor vehicle is responsible for the Appellant's pain, the pain intensity is significantly influenced by a number of factors such as mood, job satisfaction, fear and guilt.

[82] We accept Dr. Taillon's comments that it is difficult to reconcile that the Appellant was in fact at medical maximum improvement with the FIT discharge recommendation that he have access to on-going therapy and treatment. We find his opinion is compelling that these "deficiencies" did not prepare the Appellant for a graduated return to work to an environment with very heavy physical demands. We further accept Dr. Taillon's statement that the Appellant's complaints of ongoing pain and difficulty with the harness that he was wearing that led him to believe he would either injure himself or others and therefore he stopped work is one that is easily, if at all, able to be objectively contradicted.

[83] While not specifically mentioned by either party at the hearing, dealing with the post traumatic stress which was identified as an important factor in the Appellant's healing was also emphasized by Dr. Taillon and that he would still benefit from optimal care in that regard.

[84] Having regard to all the evidence, we find that the Appellant was not at medical maximum improvement and minimally the post traumatic stress that was identified as an important factor in his recovery had not been addressed. He is a young man with the credentials and desire to return to his former level of function and employment. We find

that the Appellant was unable to hold the last employment he held at the date of the accident. He has however, to his credit, returned to work in the oil industry but at a lesser job and earning a reduced income.

CONCLUSION

[85] We find that the Appellant did not successfully complete a GRTW plan as a derrick hand nor was he at medical maximum improvement and as a result, he was unable to return to work at his former employment. We are satisfied the decision by SGI to terminate his benefits was in error and it is set aside.

[86] All of the Appellant's benefits are reinstated, including rehabilitation and income benefits from December 5, 2003 together with prejudgment interest (where applicable). The Appellant has returned to work as a lease hand though and SGI is ordered to calculate his entitlement to a reduced income benefit. It appears to us the calculation of his entitlement to an IRB is per s. 126 of the Act but we refer the calculation back to SGI.

COSTS

[87] As the Appellant has been successful in his appeal, he is entitled to a refund of his appeal fee and his reasonable costs and expenses (meals, hotel, and mileage), for attendance at the hearing, capped at \$2,500 as well as reimbursement for practitioner's reports as per s. 169 of the Act and s. 69 of the Regulations.

Dated at Saskatoon, Saskatchewan, on March 7, 2007.

Beverly Cleveland, Chair

Al Knippel, Commission Member