

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *P.U. v. Saskatchewan Government
Insurance, 2007 SKAIA 047*

Date: 20070327

File: 074 of 2004

BETWEEN

P.U., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

P.U., Applicant

Dale Brown, for the Respondent

Before: **Beverly Cleveland, Chair**
Joy Dobko, 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
February 2, 2005

DECISION

[1] The Appellant, P.U., was injured in a vehicle accident on October 8, 1998. He received various benefits under Part VIII (the no-fault provisions) of *The Automobile Accident Insurance Act*. Among these, he received income replacement benefits.

[2] In a letter dated September 3, 2003, Saskatchewan Government Insurance (SGI) advised that the Appellant's income replacement benefit had been inaccurately calculated since 1998. While SGI stated it would not seek to recover the amount that had been overpaid, he was not eligible for further IRB.

[3] As it generally does when advising claimants about decisions affecting benefits, the September 3 letter included information about review, appeal and mediation in the event that the claimant did not agree with the decision. The Appellant did not appeal that decision but instead, provided additional information for SGI's review. He thought this information would show that the reduced IRB calculation was in error.

[4] By letter dated February 12, 2004, SGI advised that it had completed its review of the additional information but that it had not convinced SGI to change its position. The September 3, 2003 decision was confirmed.

[5] The Appellant appealed the February 12, 2004 decision.

FACTS

[6] The Appellant and his brother have farmed together for many, many years. Over time, they have acquired significant land holdings and rent other land. Their total holdings are, we understand, about 16.5 quarter sections.

[7] In his evidence, the Appellant explained that the brothers operate the farm as a partnership under the name "Brothers". With the exception of their respective home quarters, each holds an undivided one-half interest in all of the land but, for administrative purposes such as permit books, each shows one-half of each quarter as his. The brothers own one set of equipment which is used for all farming operations. They share the work.

[8] Brothers has been a registered seed grower for more than 25 years. The partnership is operated through one joint account; whether generated jointly or separately by either brother, all income goes through that joint account, as do all expenses. At income tax time, each brother claims one half of the income, one half of the expenses and one half of all adjustments related to the farm. All pedigreed seed was sold under Brothers but the Appellant was the senior partner and responsible for nearly all of the farming decisions.

[9] The Appellant testified the only income he identified separately from the partnership was “on-board” wheat and oil seeds. We note however that in 1997, the Appellant also reported individual income for field peas (seed) and while it is not entirely clear to us, at least for that year, the Appellant reported sales from commercial crops as individual income compared to sales from the pedigreed crops as partnership income.

[10] The Appellant testified, and we accept, that growing registered seed is different from growing other crops. These crops are more labour-intensive and time-consuming. There is research required during the year to identify and source seed. Cultivation itself must be more carefully done, sometimes even involving hand weeding. At harvest, both equipment and the bins are cleaned so that the registered seed is clearly separate and not contaminated by other crops. There is a great deal of related paperwork throughout the year.

[11] After his accident in the fall of 1998 and still at the time of hearing, the Appellant says he was unable to work on the farm.

[12] Following the accident, the Appellant applied for no-fault benefits under *The Automobile Accident Insurance Act*¹. He was found eligible for income replacement benefits (IRB) and the amount thereof was determined by SGI’s calculation unit, based on the Appellant’s 1995, 1996 and 1997 income tax returns. The Appellant did not then, or in the course of the hearing, take issue with the calculation or the amount paid initially as IRB.

[13] IRB is adjusted in certain circumstances. By letter dated September 3, 2003, the Appellant was advised that his IRB had been adjusted to take into account his on-going

¹ Given that the Appellant’s accident occurred in 1998, his claim was subject to the *Act* as it was at the time. References, unless stated otherwise, are to the *Act* as it was in 1998 (the “old *Act*”). Reference to the “new *Act*” are to the act as amended in 2002.

income. SGI recalculated his IRB against his post-accident income tax returns and concluded that his on-going farm income was greater than the income that was used to calculate his IRB initially and had been for a number of years. SGI advised that consequently the Appellant had been overpaid for some time and that his IRB would be reduced to nil from that date forward.

[14] The Appellant thought that this decision was wrong. He provided additional information to SGI and asked them to reconsider. First, he noted that income from registered seed had been significantly reduced. He noted that the loss of his management skills had left “a vacuum in decision making and overall management which also show clearly in our financial picture.”

[15] The Appellant further identified changes that had been made to compensate for his inability to work, as follows:

- Friends and family had provided 545 hours of labour in seeding, spraying and harvesting;
- All grain hauling was contracted out;
- Maintenance, bookkeeping, banking and “day to day duties” were done by family members but not claimed as an operating expense;
- A bigger tractor and another combine were purchased to off-set the loss of the Appellant’s labour and to allow a family member to assist in the harvest on weekends and evenings; and
- A lot of work was not being done.

[16] SGI considered this information but maintained its decision and by letter dated February 12, 2004, the Appellant was so notified.

JURISDICTION

[17] The Commission derives its jurisdiction from section 191(1) of the new *Act* which provides as follows:

191(1) A claimant may appeal a decision of the insurer pursuant to this Part to either the Court of Queen’s Bench or the appeal commission within the later of:

- (a) 90 days after the date of insurer's written decision; and
- (b) if a claimant has requested mediation pursuant to section 190, 60 days after the date the mediator's written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[18] SGI's decision letter confirming the reduction in IRB is dated February 12, 2004 and the Appellant's Application to Appeal was received May 10, 2004. This is within the 90 day period prescribed by section 191(1)(a).

[19] However, in its effect, the February 12, 2004 letter confirmed the September 3, 2003 decision and an appeal of the February 12, 2004 decision therefore necessarily imports a review of the September 3, 2003 decision. SGI has conceded, quite correctly in our view, that the Commission will have jurisdiction regarding both decision letters. The Appellant's appeal is properly before us.

STANDARD OF REVIEW

[20] The Appellant's appeal involves IRB, benefits that are not discretionary but to which a claimant is or is not entitled. That being the case and in accordance with the Court of Appeal decision in *Allary v. Saskatchewan Government Insurance*², therefore, our standard of review is correctness.

LAW AND ANALYSIS

[21] The Appellant has essentially advanced two arguments against SGI's decision: first, that the farm income was in fact reduced after the vehicle accident and second, that he did not earn any income after the accident.

[22] We are not satisfied that the farm income is reduced as the Appellant has suggested. While there are various ways of reporting farm income for tax purposes, the Appellant has used the same method in all of his returns both before and after the accident and, therefore,

² 2006 SKCA 89 (CanLII)

the calculations by SGI are based on comparable information. The fact that the manner by which the farm earned the income was changed – relying on friends and family for unpaid labour, adding and replacing equipment, changing cropping decisions, selling stored registered seed etc. – did not change the fact that the operation earned the specified amount of income.

[23] This argument fails.

[24] Regarding earned income, however, the Appellant’s argument has merit.

[25] The Appellant testified that he has not worked on the farm since the accident. He said that he once managed about an hour on the air drill and even then, the part he had done had to be reseeded. As to managing and planning, the Appellant says he has basically withdrawn as he is not confident about his decision-making, given indecisiveness, fatigue and errors.

[26] In the course of the discussion following, it is important to note that little evidence was placed before us as to the Appellant’s injuries and rehabilitation or as to his ability to work since the vehicle accident; that issue was not before us. To our understanding, SGI has not challenged the assertion that the Appellant has not worked to any significant degree, or that he is unable to do so, since the accident. These reasons, therefore, do not address the Appellant’s capacity to work now or at any point after the vehicle accident but are premised on the basis only that he did not do so.

[27] The Appellant’s IRB was reduced in accordance with section 140 of the old Act which states as follows:

140(1) Subject to subsection (3), the insurer shall reduce a victim’s income replacement benefit pursuant to subsection (2) where the victim earns a gross yearly employment income that is less than the gross yearly employment income used by the insurer to compute the victim’s income replacement benefit.

(2) The insurer shall reduce the victim’s income replacement benefit by an amount calculated in accordance with the following formula:

$$\text{RIRB} = \text{IRB} - (75\% \times \text{NIE})$$

where:

RIRB is the reduced income replacement benefit;
IRB is the income replacement benefit before the reduction; and
NIE is the net income the victim earns from the employment.

[28] The intent of the section is to off-set earnings against IRB. The Appellant's initial IRB was calculated on the basis that, due to injuries from the accident, he was unable to earn any income and was based on his pre-accident income.

[29] However, if the Appellant was eventually able to return to his employment, even if not full-time or as a full participant and even if he was not able to earn as much as he did before the accident, his IRB would be reduced by a sum equal to 75% of the amount that he was able to earn.

[30] The intent of IRB is to compensate for the income a person has lost and if he or she is eventually able to earn some income, the amount of income lost has been reduced. The on-going, though reduced, IRB and the earned income together will replace the lost income.

[31] The provision, however, is premised on the fact that the claimant has earned income. The Appellant says he did not.

[32] The Appellant says that the farm operation was continued and the income was earned through the work of his brother, with significant help from friends and family. Certain adjustments were made, such as the acquisition of equipment, to compensate for the loss of the Appellant's labour. Some changes were made in the farm management such as the discontinuation of the registered seed operation.

[33] The question is whether it matters that others were producing the farm income and that for the Appellant, the income shown on his tax returns from 1999 and onward was in the nature of a gift or a kind of income from property or investment income, or both.

[34] "Earn" is defined by the Canadian Oxford Dictionary (2nd edition) as follows:

earn verb **1.** *transitive & intransitive* **a** (of a person) obtain (income) in the form of money in return for labour or services (*earn a weekly wage, happy to be earning at last*) **b** (of capital invested) bring in as interest or profit. **2.** *transitive* a deserve; be entitled to; obtain as the reward for hard work or

merit (have earned a holiday; earned our admiration; earn one's keep) b incur
(a reproach, reputation, etc.)

[35] On the facts before us, the Appellant did not earn, in the dictionary sense of the word, the income declared on his post-accident tax returns. However, he declared the income for tax purposes in 1999 and following, just as he had done prior to the vehicle accident.

[36] We believe that, where the word “earns” is used in the *Act*, it was intended to be given its usual meaning as set out in the definition quoted above. That is, the *Act* is referring to earned employment income.

[37] The scheme of the legislation appears to be that IRB will be calculated based on earned income, that IRB will be reduced if a claimant earns income that is less than that on which IRB were based and that IRB will be discontinued if a claimant is able to return to his or her pre-injury employment or take on other employment where he or she will earn income that equals or exceeds the income on which IRB was based.

[38] We are supported in this conclusion by reference to the *Act* itself. Division IV sets out the circumstances in which IRB will be provided for full-time earners, temporary earners, part-time earners, non-earners, students and youth. The pre-conditions to entitlement to IRB respecting full-time, temporary and part-time earners³ relate directly to employment held at the time of the accident and the calculation of IRB is based on “gross yearly employment income”.

[39] Consider section 129 which provides for termination of IRB, by subsection (a), when a claimant is “able to hold the employment that he or she held at the time of the accident” or by subsection (e), when a claimant “holds an employment from which the gross yearly employment income is equal to or greater than the gross yearly employment income” on which a claimant's IRB was calculated.

[40] The *Act's* intention is clearly to compensate for lost *employment* income.

³ The term “earners” is used throughout Division IV.

[41] It is telling that the decision appealed is based in section 140. While the Appellant's on-going income exceeded his IRB entitlement, SGI relied on a section that, significantly, is titled "Reduction where victim earns *reduced* income" (italics ours). We note that subsection (1) operates when a claimant "earns a gross yearly employment income that is *less* than the gross yearly income used by the insurer" (italics ours) to calculate his initial IRB. The Appellant's circumstances do not, by SGI's own calculations, fit within this premise as SGI's position is based on a conclusion that the Appellant has earned *more* yearly income in subsequent years than he earned at the time of the vehicle accident.

[42] However, the Appellant's circumstances did not better fit any other section of the legislation. Usually, when a claimant's on-going income exceeds IRB, the benefit is discontinued under section 129 but that was not applicable in the Appellant's case either. That section applies when, *inter alia*, a claimant is able to return to his pre-injury employment. But the Appellant had not done so.

[43] The fact that the Appellant's circumstance of having income that was not earned did not fit any provision of the *Act* and forced SGI's use of section 140, apparently inappropriately given its repeated references to earned income, reinforces our conclusion that non-earned income, in the usual sense, is not contemplated in the calculation or adjustment of IRB.

[44] There is nothing in the legislation that provides for the adjustment of IRB by reason of income other than income earned from employment; nothing allows SGI to consider or include, for example, gifts or investment income when calculating IRB. But this is what, in effect, it has done in the Appellant's case.

[45] An overview of the implications of SGI's position further reinforces our view. In this case, the Appellant's partner decided to "carry him" despite his alleged inability to work. There are many reasons why a partner might do this – personal, business or both. It seems unlikely that the *Act* intended that a claimant's entitlement to and SGI's responsibility regarding IRB could be dependent on the actions and effectiveness and even largesse of a third party. Yet that is exactly the result if non-earned partnership income is included for purposes of IRB: If the Appellant's brother works hard and does well, the Appellant's IRB

is decreased but if he has a bad year, the Appellant's IRB is increased. Instead, the *Act* intends that the Appellant's IRB will be dependent on his disability, his progress in rehabilitation and his ability to work and earn income.

[46] We are not satisfied that the fact that the Appellant declared these monies as income for tax purposes changes the character of the income and believe that SGI's reliance on the Appellant's income tax returns for purposes of determining income was, in this case, not appropriate.

[47] People secure money from various sources and what is income for one purpose will not necessarily be income for another. For example, the *Income Tax Act*⁴ itself is amended frequently and therefore, monies declared as income or as taxable income in one year may not be considered such in another; money received is income for tax purposes not necessarily by reason of its nature or source but only because *The Income Tax Act* says it is.

[48] Further, taxpayers are entitled to lawfully apportion income in many ways – between or among individuals, between or among years. In extreme cases (and we are certainly not suggesting that this is one), income on tax returns may be dishonestly presented. In such cases, tax returns may not accurately reflect a person's actual annual income.

[49] Tax returns are nonetheless a fair starting point for SGI when it is required to determine a claimant's income. In the majority of cases – particularly for wage and salary earners – the tax return will provide an accurate reflection of earned income. But information provided in the tax return, while perhaps presumptive, is not conclusive and can be rebutted by other evidence. When evidence is put forward and accepted that suggests the income tax return is not an accurate reflection of income, SGI cannot rely on income tax returns alone or, in some cases, at all in the calculation of IRB.

[50] In this case, there is evidence that the Appellant did not work at all after October 1998 and some evidence that he was unable to do so or, if able, was able only to a limited degree. SGI's obligation pursuant to section 140 is to determine the amount of income that

⁴ R.S.C. 1985, c.1 (5th supp.)

the Appellant in fact earned by his labour. His income tax returns reflect income but not earnings.

[51] There is nothing in the *Act* that allows for the adjustment or discontinuation of IRB when the claimant has not earned income, whatever the source of his other income. SGI's decision to reduce the Appellant's IRB in these circumstances is, therefore, wrong.

MISCELLANEOUS

[52] In the course of these proceedings, the Appellant raised two matters that appeared to have been very troubling to him.

[53] First, he said that he does not recall ever having been advised that he had an option to receive benefits for replacement labour instead of IRB. In this regard, we note that the letter setting out the calculation of his initial IRB stated, "This will confirm that we discussed the option of receiving replacement labour and you chose not to take this option."

[54] Whether the option was in fact discussed or not, the Appellant was expressly notified that the option had been available. Had he believed that the option was not discussed or that he had preferred that option, he could have appealed at that time but did not. This issue is not before us.

[55] Second, the Appellant stated that he and SGI had "agreed" as to the amount of his IRB and that it was wrong and unfair for SGI to subsequently alter them. The fact is that the *Act* allows and requires the adjustment of IRB as a claimant's earnings and capacity to earn change in the course of his or her recovery; there was not and could not be an agreement that they would continue unchanged irrespective of the Appellant's circumstances.

[56] The Appellant is presumed to be aware of the provisions of the *Act* and, in addition, would normally be provided a booklet setting out the nature of benefits available to an injured person and an overview of the manner in which they would be administered. On the other hand, it would not be particularly inconvenient to include a sentence in each letter respecting IRB stating that the amount calculated will be reviewed and revised in the event

of a change in the claimant's ability to earn income. SGI might consider adding such a sentence in future correspondence.

CONCLUSION

[57] SGI's decision letters February 12, 2004 and effectively, September 3, 2003, are set aside. The Appellant's income replacement benefits shall be recalculated to include only *earned* income.

[58] As the Appellant has been successful in his appeal, he shall be reimbursed for his reasonable expenses and costs (eg. meals, travel and lodging) to attend the appeal in accordance with section 193(11) of the current *Act* and section 96 of the current regulations. In addition, he shall be refunded his appeal fee.

Dated at Regina, Saskatchewan, on March 27, 2007.

Beverly Cleveland, Chair

Joy Dobko, Commission Member

Al Knippel, Commission Member