

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *Z.R. v. Saskatchewan Government  
Insurance, 2007 SKAIA 052*  
**Date:** 20070329  
**File:** 001 of 2005

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BETWEEN

**Z.R., Applicant**

and

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**David MacKay, for the Applicant**  
**Jane Wootten, for the Respondent**

**Before:** **Beverly Cleveland., Chair**  
**Peter Bergbusch, 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 Regina, Saskatchewan  
August 3, 2005

## DECISION

[1] The Appellant, Z.R., has appealed several decision letters from Saskatchewan Government Insurance (“SGI”) under Part VIII of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (the “Act”), including a letter dated November 2, 2004 (the “2004 Letter”). The 2004 Letter advised him that, effective July 30, 2004, his income replacement benefit would be reduced by the greater of his actual income earned and his deemed residual employment income of [amount].

[2] This case raises a jurisdictional issue not previously addressed squarely by this Commission. The issue is whether, in an appeal from a decision reducing an insured’s income replacement benefit on the one-year anniversary of the decision determining an employment for that insured, the insured is able to contest SGI’s earlier decision that he or she is capable of holding the determined employment.

[3] As the Appellant’s motor vehicle accident was in 1996, his claim is governed by the provisions of the Act then in force (the “Old Act”).<sup>1</sup> The provisions in the *Old Act* governing the procedure for determining an employment for an insured such as the Appellant and for reducing or terminating his income replacement benefit are as follows:

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;

(e) the victim holds an employment from which the gross yearly employment income is equal to or greater than the gross yearly employment income on which [sic] victim’s income replacement benefit is calculated; ...

(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). ...

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<sup>1</sup> *An Act to Amend The Automobile Accident Insurance Act*, S.S. 1994, c. 34, s. 18, amending *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35.

132 Following the second anniversary date of the accident, the insurer may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112 or 113 or determined pursuant to section 131.

134(1) 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) on a regular and full-time basis; or
  - (ii) if it would not be possible for the insured to hold employment on a regular and full-time basis, on a part-time basis;
- (e) any other prescribed factors. ...

139(1) Subject to the other provisions of this Division, the insurer shall reduce a victim's income replacement benefit pursuant to subsection (2) if:

- (a) the victim is able to hold an employment determined for the victim pursuant to section 132 or 133; and
- (b) because of bodily injuries caused by an automobile arising out of an accident, the victim earns a gross yearly employment income from the employment that is less than the gross yearly employment income used by the insurer to compute the income replacement benefit that the victim was receiving before the employment was determined pursuant to section 132 or 133.

(2) The insurer shall reduce the victim's income replacement benefit pursuant to subsection (1) by an amount calculated in accordance with the following formula:

$$\text{RIRB} = \text{FIRB} - \text{NI}$$

where:

- RIRB is the reduced income replacement benefit;
- FIRB is the former income replacement benefit the victim was receiving at the time the employment was determined pursuant to section 132 or 133; and
- NI is the net income that the victim earns or could earn from the employment determined pursuant to section 132 or 133.

[4] In this case, SGI determined an employment for the Appellant pursuant to section 132 and advised him of this decision by letter dated July 30, 2003 (the "2003 Letter").<sup>2</sup> This letter advised the Appellant that his determined employment was a "Food Product Sales Representative" and outlined some of the duties of this position. The letter explained how the

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<sup>2</sup> Letter dated July 30, 2003, from SGI to the Appellant.

Appellant's determined employment income of [amount], resulting in a biweekly benefit of \$963.50, had been calculated. SGI advised the Appellant that, in one year's time, the amount of this determined employment income or his actual earnings, whichever was greater, would be deducted from his then current income replacement benefit, which at that time was \$980.56 biweekly. During the intervening year, 75% of any income earned by the Appellant would be deducted from his income benefit replacement. The 2003 Letter also included standard paragraphs outlining the Appellant's right of appeal, right to request mediation, and so on.

[5] One year later, SGI sent the Appellant the 2004 Letter, which reads, in relevant part, as follows:

... As you are aware, the end of your one (1) year grace period was July 30, 2004, as outlined in my July 30, 2003 letter. Effective July 30, 2004 your income replacement benefit will be reduced by the greater of 100% of your actual income earned or by 100% of the Residual Employment of [amount], whichever is the greater. (please refer to your copy of Version 25)

In my October 20, 2004 letter I had referred to Section 131 (1)(e) which refers to *Termination of Benefits*, and when this would occur. Please note this is incorrect. The correct section is Section 129 (1)(e) of the Legislation that applies to your claim, which reads the same.

The last income replacement benefit paid was up to and including July 24, 2004. Please refer to Version 28 attached. This version calculates employment earnings for the period of July 25, 2004 to July 30, 2004, which falls within the 1 year grace period. The total amount payable for that period is \$138.39.

Effective July 31, 2004, SGI will deduct the greater of the yearly annual income of [amount] as listed under Version 25, or your actual income, annualized, if greater than [amount]. Based on the six (6) paystubs provided, your earnings annualized, are less than [amount] of the residual employment, therefore payment will be based on Version 25 of each bi-weekly period or 5.55 bi-weeklies for the period of July 31, 2004 to October 16, 2004. That is 5.55 bi-weeklies x \$18.44=\$102.34 payable under the Act and 5.55 bi-weeklies x \$112.82=\$626.15 payable under the Policy. I have processed payment today in the total amount of \$866.88. This cheque will be mailed directly to you from Head Office.

*Please continue to submit each paystub upon receipt from [employer one] for our review.*

Please advise me, as soon as possible, if there is any change in your employment status, since this will affect your income benefit. [Emphasis added]

[6] The 2004 Letter also included standard paragraphs advising that SGI might reconsider its decision if provided with relevant new information and explaining the claimant's right to appeal the decision and to request mediation.

### **JURISDICTION REGARDING THE 2003 AND 2004 LETTERS**

[7] The first question that we must address is whether the Appellant is entitled to challenge aspects of SGI's decision to determine him into employment, set out in the 2003 Letter, through an appeal of the subsequent 2004 Letter reducing his income replacement benefit. Many of the arguments advanced by the Appellant really concern the 2003 Letter which held his determined employment to be a "Food Product Sales Representative." In a written submission filed on his behalf, the Appellant alleges that SGI did not take into account his limitations at the time that deemed him capable of fulfilling the duties of this employment.

[8] SGI relies upon the statutory provisions governing appeals, particularly the prescribed limitation periods, and argues that the Appellant's present appeal related to the income replacement benefit is limited to contesting the matters specifically decided in the 2004 Letter. SGI contends that the Appellant is attempting to remedy an earlier failure to appeal the 2003 Letter. SGI referred the Commission to the decision of the Supreme Court of Canada in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, which addresses the purpose of limitation periods.

[9] We must first consider whether the 2003 Letter is a written decision within the meaning of the Act. The relevant sections of the *Act* are the following:

188 Notwithstanding any other Act or law, any decision made or action taken by the insurer pursuant to this Part is final and conclusive and may be reviewed only in accordance with this Division.

189(1) The insurer shall give every claimant a written decision respecting the claimant's entitlement to benefits.

(2) At the time the insurer sends a claimant a written decision, it shall give the claimant:  
(a) written reasons for the decision; and

(b) written notice of the claimant's right to ask for mediation or to appeal the insurer's decision pursuant to this Division.

[10] The 2003 Letter satisfied the requirements of Section 188 and 189. It is a written decision respecting the Appellant's entitlement to an income replacement benefit. It provides written reasons for the decision and advises the Appellant of his right to ask for mediation and to appeal. Pursuant to Section 188, the 2003 Letter is final and conclusive and can only be reviewed following the procedures prescribed in the *Act*.

[11] The mechanism for initiating a review of a decision of SGI is set out in the following sections of the *Act*:

190(1) If a claimant wishes to mediate his or her claim for benefits, the claimant shall provide the insurer with a written notice requesting mediation.

(2) A claimant shall:

- (a) provide the written notice mentioned in subsection (1) to the insurer within 90 days after the date the claimant received the insurer's written decision pursuant to section 189;
- (b) set out in the written notice the matters that the claimant wishes to mediate; and
- (c) pay any prescribed fee.

(3) Subject to this section, mediation is to be conducted in the prescribed manner.

(4) The parties shall agree on the appointment of a mediator within 30 days after the insurer receives a written request for mediation.

(5) If the parties are unable to agree on a mediator within the period mentioned in subsection (4), a mediator must be appointed in the prescribed manner.

(6) A mediator appointed pursuant to this section shall endeavour to assist the parties to resolve the issues that are the subject of the mediation.

(7) Except with the written consent of the mediator and all parties to an action who participated in the mediation, the following are not admissible as evidence in any appeal:

- (a) evidence arising from anything said in the course of the mediation;
- (b) anything said in the course of the mediation;
- (c) any oral or written admission or communication made in the course of the mediation.

(8) When the mediator determines that the mediation is completed, the mediator shall provide each party with a written statement declaring that the mediation is completed.

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. ...

It is common ground that the Appellant did not appeal the 2003 Letter nor did he request mediation of the decision.

[12] The jurisdiction of the Commission on an appeal is set out in subsection 193(7) of the *Act*:

193 ...

(7) On an appeal, 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.

The scope of an appeal to the Commission is confined to the matters decided by SGI in a written decision which is the subject of a timely notice of application. The Commission does not have jurisdiction to make decisions about an insured's entitlement to particular benefits unless the issues raised on appeal are expressly or at least by necessary implication decided in the written decision appealed from. This is consistent with the reasons given in *S.I. v. Saskatchewan Government Insurance*, 2004 SKAIA 026 at paragraph 30, and in *E.I. v. Saskatchewan Government Insurance*, 2005 SKAIA 052.

[13] When SGI sends an insured a decision letter that complies with Section 189, advising an insured that a certain employment has been determined for him or her, the time for the claimant to contest the insurer's decision has arrived. If the insured claims not to have the functional ability to perform the selected employment or denies its suitability in other respects, he or she must appeal that decision or request mediation within the time frames prescribed in the *Act*. A subsequent letter, on the one-year anniversary of the decision determining an employment for the claimant, advising the insured that his or her income replacement benefit has been reduced does not revive the right to seek a review of the earlier decision.

[14] The Appellant's counsel referred us to the Commission's decision in *C.B. v. Saskatchewan Government Insurance*, 2005 SKAIA 022. In that case, as here, the claimant had appealed the decision letter issued on the one-year anniversary of the decision determining him

into particular employment. After the employment of an auto parts clerk had been determined for him, C.B. and several of his physicians questioned whether he could fulfill the duties of this employment. However, it does not appear that he appealed this prior decision. Nevertheless, the Commission was not satisfied that SGI had taken into account C.B.'s physical limitations when it decided that he could hold the determined employment and set aside SGI's decision on the following terms:

[55] SGI's decision of August 26, 2003 reducing [C.B.'s] income by the amount of the employment income from the determined employment as an Automotive Parts Clerk is set aside. SGI is ordered to determine employment(s) for him taking into account **all** of the factors in section 134 of the Act, keeping in mind that this may require a current Functional (or Residual) Capacity Evaluation.

Although the circumstances in the *C.B.* case are very similar to the position advanced by the Appellant in this situation, we are unable to conclude that *C.B.* stands for the proposition suggested by the insured. The *C.B.* decision does not address the question of jurisdiction at all. We do not know whether the earlier decision letter in *C.B.* met the requirements of section 189, for example. If it did not, the Commission might have had jurisdiction to review the selection of an employment that the claimant could hold on the appeal of a subsequent decision reducing the income replacement benefit: see *I.S. v. Saskatchewan Government Insurance*, 2006 SKAIA 047, at paragraphs 3 and 4. At any rate, SGI does not appear to have objected to the Commission's jurisdiction in *C.B.* as it has done in this case.

[15] Accordingly, we conclude that the Commission does not have jurisdiction in this case to review the correctness of SGI's decision to determine the employment of Food Product Sales Representative for the Appellant.

### **SCOPE OF THE APPEAL**

[16] The next issue we must determine is the scope of the appeal from the 2004 Letter. SGI argues that the jurisdiction of the Commission in reviewing the 2004 Letter is very limited, since that letter simply involves a mechanical decision to reduce the Appellant's income replacement

benefit by either the gross yearly employment income of his determined employment, or his actual earnings, whichever amount is greater.

[17] The Appellant suggests that SGI has an obligation following the expiry of the one-year period to re-examine its decision regarding the determination of employment. The issue, according to the claimant, is “what SGI’s responsibility was in reviewing the IRB on November 2, 2004.” The Appellant submits that, at the one-year anniversary of the decision to determine him into employment, SGI’s responsibility is “not only to review the actual income but to review the determined income as part of the review process.” Presumably the Appellant contends that the Commission can review whether SGI fulfilled this alleged obligation.

[18] The Appellant also argues that SGI’s decision regarding the determined employment cannot be considered final. At the time that a decision regarding the claimant’s ability to perform a particular job is made, he submits, the decision is only speculative. Its correctness may only be ascertained once the claimant has actually attempted the determined employment. The Appellant says that an occupations evaluation prepared by Innovative Rehabilitation Consultants for SGI “was wrong but it took [the Appellant] the year to determine that.” He says that the selection of a determined employment is subjective and may be shown to be wrong only after the claimant has actually sought employment in the determined occupation. The Appellant submits that “to permit SGI to make a final decision to determine a victim’s occupation based on an evaluation that is speculative and in the face of evidence that the determined occupation is not within the victims [sic] limitations is contrary to the tenor of the Act.” The Appellant suggests that SGI’s decision was not really “final” until SGI sent the 2004 Letter. While the Appellant acknowledges that SGI’s decision to determine his employment was made on July 30, 2003, he says that “the impact thereof and the decision to reduce the IRB accordingly was not conveyed to the applicant until November 2, 2004.”

[19] Although these arguments have some attraction and practical appeal, they must fail because of the statutory provisions governing appeals from written decisions, including the limitation periods applicable to such appeals, outlined above. The Appellant had an opportunity

to appeal the 2003 Letter within the limitation periods set out in the *Act*. The fact that he may not have appreciated the impact or the import of the decision letter cannot somehow delay the running of the limitation period. The only written decision before us related to the issue of the income replacement benefit, and from which we derive our jurisdiction, is the 2004 Letter.

[20] There is a second reason why the Appellant's argument cannot succeed related to the way that the process of determining employment works. When SGI selects an employment into which an insured is determined (usually the insured has an opportunity to select from a number of choices), SGI is required to consider a number of factors, including the insured's education, training, and experience and the availability of the employment in the region in which the insured resides: section 134 of the *Old Act*. This is deemed employment – for a variety of reasons the insured may never actually attempt to work in the determined occupation. The Appellant argues, however, that the time period for appealing the decision to determine employment for an insured does not begin to elapse until the insured has had an opportunity to find out if he or she can actually fulfill the requirements of the employment. The expiry of the limitation period, and the Commission's jurisdiction, would be contingent in every case on the efforts made by the particular insured to obtain and perform the determined employment. That cannot be right.

### **REDUCTION OF INCOME REPLACEMENT BENEFIT**

[21] One matter raised by the Appellant's counsel is within the jurisdiction of the Commission on appeal from the 2004 Letter. The Appellant argues that under the *Act* SGI can only reduce his income replacement benefit by the amount of his actual earnings, not the gross yearly employment income of the employment determined for him.

[22] The provisions in the *Old Act* that authorize SGI to reduce or terminate an insured's income replacement benefit after an employment has been determined for that insured are confusing. Those that could apply to the Appellant have been cited above and can be paraphrased as follows:

1. SGI can terminate an income replacement benefit one year after an employment has been determined for an insured (s. 129(1)(d)) except if the insured meets the criteria in Point 2 (s. 129(2));
2. Notwithstanding Point 1, SGI shall *reduce* the income replacement benefit if the insured is able to hold the determined employment and, because of injuries suffered in the motor vehicle accident, the insured actually earns a gross yearly employment income from “the employment” that is less than the gross yearly employment income used by the insurer to calculate the income replacement benefit the insured was receiving *before* an employment was determined for him or her (s. 139(1)(a) and (b));
3. However, if an insured is earning income that is equal to or greater than his or her income replacement benefit, the income replacement benefit can be terminated (s. 129(1)(e)).

[23] The basis upon which SGI *reduced* the Appellant’s income replacement benefit effective July 31, 2004, is not clear. SGI cannot have been relying upon either subsection 129(1)(d) or (e), because SGI did not *terminate* the benefit entirely. Although the 2004 Letter refers to subsection 129(1)(e), this provision does not appear to apply because the actual income the Appellant was earning from employment was less than the amount of his income replacement benefit.

[24] The only provision that allows SGI to reduce the Appellant’s income replacement benefit, which is what it did, is subsection 139(1). That subsection has been the source of considerable consternation for us. Subsection 139(1) applies if two criteria are met: the insured is able to hold an employment determined for him or her, *and* because of injuries suffered in the motor vehicle accident, the insured actually earns a gross yearly employment income from “the employment” that is less than the income used by the insurer to calculate the income replacement benefit the insured was receiving *before* an employment was determined for him or her.

[25] The use of the definite article “the” suggests that SGI can only reduce an income replacement benefit where the insured is holding the determined employment but earns less from this employment than the amount of the income replacement benefit previously calculated for him or her. In this case, the Appellant does not hold the determined employment of Food Product Sales Representative; instead, he works at employer one, a large hardware department store. However, SGI has taken the position that it can reduce the Appellant’s income replacement benefit by either the amount of income he actually earns in employment other than the determined employment, or by the gross yearly employment income of his determined employment, whichever is greater.

[26] We note that the replacement provision for subsection 139(1) is much clearer. Subsection 135(1) in the *New Act*<sup>3</sup> allows SGI to reduce an insured’s income replacement benefit if one year has expired since an employment was determined for the insured. The insured’s income replacement benefit is reduced by the greater of his actual earnings or the gross yearly employment income of the determined employment. It appears to us that SGI is, in effect, applying this provision to the Appellant’s situation.

[27] If subsection 139(1) of the *Old Act* does not apply to the Appellant because of its peculiar wording, then he may be subject to subsection 129(1)(d). As the parties have not specifically addressed this question and given that the Commission retains jurisdiction over other issues raised by the Appellant in his appeal, we will invite counsel to consider their positions and make further submissions on this point.

## **CONCLUSION**

[28] The Commission does not have the jurisdiction to hear and determine the Appellant’s challenge to SGI’s decision that he is capable of holding the employment of “Food Product Sales Representative.” The Commission’s jurisdiction is limited to determining whether SGI erred in

reducing the Appellant's income replacement benefit on the one-year anniversary of the determined employment decision. We are prepared to hear further argument from counsel for the parties on this narrow issue, having regard for our comments above.

[29] Apart from the 2004 Letter, the Appellant has appealed a decision letter from SGI denying him an additional permanent impairment benefit consequent upon a second surgery; another letter advising him of the amount of his permanent impairment benefit; a decision letter advising that SGI would only continue to cover 50% of the Appellant's medication costs on the ground that his present medical condition is not entirely attributable to the motor vehicle accident; and, finally, a further letter that SGI would only cover 50% of any further costs related to the Appellant's condition.

[30] At the adjournment of the hearing, SGI's counsel had not had an opportunity to cross-examine the Appellant. The Commission would like to expedite the final decision in respect of the remaining issues. Accordingly, counsel for SGI is directed to advise the Commission, within 7 days of receipt of this decision, whether she intends to cross-examine the Appellant or call any witnesses. In addition, both counsel are directed to advise the Commission, within 7 days, whether they wish to proceed with closing arguments orally or by written submission. The Commission will then make arrangements with counsel for completion of this appeal.

**Dated** at Regina, Saskatchewan, on March 29, 2007.

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Beverly Cleveland, Chair

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Peter Bergbusch, Commission Member

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Al Knippel, Commission Member

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<sup>3</sup> *The Automobile Accident Insurance Amendment Act, 2002*, S.S. 2002, c. 44.