

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *N.R. v. Saskatchewan Government Insurance,*
2007 SKAIA 053

Date: 20070329

File: 116 of 2005

BETWEEN

N.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Douglas Racine, for the Applicant

Allan McLeod, for the Respondent

Before: **Joy Dobko, Chair**
Carol Olson, Commission Member
Stephanie Pfefferle, 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
August 15, September 5, 6 and September 19, 2006

DECISION

[1] This is an appeal by N.R., the Appellant, of several decisions made by Saskatchewan Government Insurance (“SGI”). The following issues were raised at the appeal, although not all were plead in her Appeal Applications:

Preliminary Matters

- a) Whether the Commission has jurisdiction to review the decision letters issued by SGI dated October 25, 2000 regarding the Appellant’s promised employment; and December 5, 2001 regarding the calculation of the Appellant’s income replacement benefits?

Substantive Issues

- b) Whether the decision letter dated August 19, 2004 addressing permanent impairment benefits should be upheld?
- c) Whether the decision letter dated August 26, 2005 with respect to the Appellant’s determined employment should be upheld?

[2] The Appellant was involved in two separate motor vehicle accidents. The first accident occurred on June 21, 2000 (the “June 2000 accident”) and the second accident occurred on June 30, 2001 (the “June 2001 accident”). The basis upon which SGI provided Part VIII – No Fault Benefits to the Appellant is set out in *The Automobile Accident Insurance Act* (the “Act”)¹ and *The Personal Injury Benefits Regulations* (the “Regulations”)² in force at the time of the Appellant’s accidents.

[3] Given the complex nature of the jurisdictional and other issues before the Commission, it was our opinion that we needed to hear all of the evidence prior to deciding the issues raised by legal counsel. Further, due to the claim by the Appellant that she was under a mental disability under *The Limitations Act*, which could potentially suspend or postpone appeal timelines, it was

¹ RSS 1978, c. A-35 (1995)

² Chapter A-35 Reg 3

clear that we needed to hear all of the evidence before making a decision on the jurisdictional issues.

FACTS:

[4] In the June 2000 accident, the Appellant was the driver of a motor vehicle that was struck on the driver's side by another vehicle. There are no hospital or emergency records available to us with respect to the Appellant's injuries other than her Application for Benefits. The Appellant completed her Application for Benefits on July 27, 2000. The Appellant reported injuries to her head, neck and shoulders, arms and legs. She attended Royal University Hospital and reportedly remained in hospital for four days. The Appellant reported hitting her head and losing consciousness following this accident. In the "work" section of her Application for Benefits, the Appellant reported that she was receiving employment insurance benefits since February 2000 at \$553.00 every two weeks. In the section titled "About your Work Status", there is a box to check which reads: if you are "unemployed at time of accident, but have been promised employment (complete page 18)". The Appellant did not check this box nor did she complete anything on page 18 with respect to any promised employment. The Appellant also reported that she was income tax exempt. We are satisfied that at the time of the accident, the Appellant was receiving unemployment insurance benefits.

[5] Sometime after completing her Application for Benefits, the Appellant advised SGI that she had promised employment with [Employer A]. Ms. Brown from Arthur Grey Consulting Services, met with Employer A on August 31, 2000. During this meeting, Employer A advised that the Appellant was to begin work with her company on July 3, 2000 as a Program Researcher and Developer. Employer A also advised that the Appellant's gross annual salary would have been \$XX,XXX. Employer A advised that although she had not replaced the Appellant, another individual was temporarily assisting her and when the Appellant was able to return to work she could return to the position of Program Researcher and Developer. Employer A also sent a letter to SGI on August 25, 2000 reporting that the Appellant had promised employment. Employer A testified at the appeal hearing with respect to the Appellant's promised employment. We do note that in January 2001, there is a report from Arthur Grey which stated that the Appellant contacted Employer A in January 2001 with respect to this position and was advised that a

replacement had been hired for the Appellant's position of promised employment. Employer A's evidence at the appeal hearing was that she hired someone temporarily to assist her. She was never directly asked whether she permanently filled the Appellant's position and, if so, when.

[6] In October 2000, a personal injury representative note³ indicated that the Appellant had applied for a job with the Health and Social Director for the [Band] which paid \$XX,XXX per year.

[7] On October 25, 2000, SGI wrote to the Appellant and advised her that she would not be receiving income replacement benefits ("IRB") at that time. Specifically, the decision letter stated:

Your file has been reviewed for the purpose of benefits regarding the promised employment issues we have discussed.

I must advise now that the review is complete. I am unable to pay any Income Replacement Benefits at this time. Further to our discussions via the telephone, it was not felt by the review panel that there was sufficient evidence regarding the promised employment to warrant this benefit.

SGI may reconsider its decision if any relevant new information is presented. If you have any new information which we have not considered in our assessment, please contact me.

[8] According to SGI's policies, the three criteria necessary to establish promised employment are: a written job offer from a person at arm's length; a history of working for the employer; and whether the employer hired a replacement worker.

[9] In its decision letter, SGI did not disclose the three policy criteria necessary for establishing a position of promised employment nor did they, in our opinion, provide sufficient reasons to the Appellant as to why she was denied the benefit. The decision letter provided notice of the 90 day appeal to the Court of Queen's Bench. **This decision was not appealed by the Appellant in accordance with those appeal provisions stated in the decision letter.**

³ A personal injury representative note is a narrative completed by the personal injury representative of their recollection of a telephone conversation or meeting with the Appellant.

[10] It was determined at the appeal hearing that the Appellant's IRB commenced in December 2000, which is in accordance with the 180 days outlined in Section 116 and 117 of the *Act*, however, a decision letter advising the Appellant of this was not sent to her until December 2001. At the appeal hearing, we were advised that the decision setting out the Appellant's entitlement to IRB was sent a year later because the new personal injury representative (PIR)⁴ assigned to the Appellant's file after her June 2001 accident, discovered that the former PIR had not sent a decision letter when he commenced payment of the IRB. As a result, when the new PIR took over the file, she requested that the original PIR send the decision letter.

[11] On December 23, 2000, Dr. Vrbancic completed a neuropsychological evaluation on the Appellant to determine if she sustained a significant brain injury in the June 2000 motor vehicle accident. Dr. Vrbancic's opinions were:

...The current neuropsychological assessment indicates that [the Appellant] is an individual of average intelligence with generally intact cognitive skills. On specific tests of cognitive functioning, she demonstrated strengths in psychomotor speed and cognitive flexibility. Conversely, she demonstrated poorer than expected sustained attention, naming, and semantic fluency. She demonstrated adequate learning and memory of novel information. Psychological testing indicated the presence of mild to moderate levels of depression characterized by poor self-esteem, irritability, indecision and social withdrawal.

...

1. The medical evidence suggests that [the Appellant] may have sustained a mild brain injury as reflected by reported altered consciousness at the scene of the accident and altered memories for the subsequent few days post-injury. However, the neuropsychological assessment indicates that [the Appellant] has made a good cognitive recovery and does not present with clear evidence of a significant brain injury at the current time.
2. By best estimates, it can be concluded that [the Appellant] was functioning within the average range premorbidly.

...

4. The accident may have resulted in mild concussive effects that have subsequently resolved as [the Appellant] does not evidence any consistent cognitive impairments currently with the exception of impaired semantic fluency and poor naming, both of which require effort and may also reflect a mild retrieval difficulty of uncertain etiology.

⁴ The first personal injury representative to administer the Appellant's benefits was L.M. The new PIR took over administration of the file after the June 2001 accident because she is a personal injury representative specialist who is responsible for administration of benefits for brain and spinal cord injured claimants.

5. There was no definitive empirical evidence of non-accident related cognitive deficits.
6. There is no clear evidence of current cognitive deficits but her functioning generally may be affected by exacerbation of her pre-morbid psychiatric condition.
7. [The Appellant] presents with generally intact cognitive skills, but does report altered cognitive functioning, which may reflect mild alterations in functioning slightly below clinical levels and changes secondary to her depressed mood. It is anticipated that [the Appellant]'s physical and psychological needs will be addressed in the tertiary programs such that a good recovery is anticipated in all levels of functioning within the next six months. There is no clear evidence of non-accident induced cognitive deficits.

[12] On May 31, 2001, a PIR note, reported that the Appellant was continuing to complain of neck and back pain, especially associated with her schooling. She was reportedly taking Tylenol and Celebrex for the pain. The PIR note further stated that the Appellant reported receiving cash amounts for contracts prior to the June 2000 accident but that she was having difficulty living on the IRB she was receiving from SGI. She was reportedly also on welfare prior to the accident. Around this time, the Appellant was enrolled in a Basic Keyboarding and Keyboard Skill Building course which she commenced in March 2001 and completed in June 2001, receiving 95% on the written exam.

[13] In the June 2001 accident, the Appellant was a pedestrian and was struck from behind by a motor vehicle while walking down the side of the street. As a result of this accident, she sustained significant injuries. She has no memory of the accident and believes that she was unconscious. She reported that her memory did not return until July 13, 2001. She was admitted to Royal University Hospital and assessed by a trauma team. Her Glasgow Coma Scale was reportedly 14/15. The Glasgow Coma Scale noted by the ambulance attendants was 12/15. A CT scan of the head indicated small bifrontal contusions with no marked mass effect or shift. X-rays of the cervical and thoracic spine noted no abnormalities. She had a single generalized seizure shortly after admission and was treated with Phenytoin. She had otorrhea from her left ear, which gradually cleared and she was discharged from hospital on July 13, 2001. The discharge summary noted that the discharge from the Appellant's left ear which was originally believed to be cerebrospinal fluid was the result of otitis media or external. Dr. Spafford completed an examination of the Appellant on July 16, 2001 in which he diagnosed moderately severe left ear hearing loss and mild to moderate loss of hearing in the right ear. Dr. Spafford reported the left ear examination revealed a tympanic membrane perforation and chronic infection and

cerebrospinal fluid leak. There is also a notation of a basal skull fracture made by the hospital physiotherapist. This may be consistent with a medical imaging report dated June 30, 2001 which noted “of a horizontal linear lucency through the occiput, likely representing a skull fracture” and the report of Dr. Spafford which refers to a skull fracture. However, on July 16, 2001, a CT scan of the Appellant’s head referred to a left mastoid air cell fracture. The CT scan specifically stated:

IMPRESSION

Left frontal contusion shows radiographic resolution. Right frontal resolving contusion but a cerebritis or perhaps early abscess cannot be completely excluded.

Fracture through the left mastoid air cells and fluid within.

[14] There was no medical evidence presented on whether the fracture through the left mastoid air cells is the same as the basal or occiput skull fracture referred to in other medical documents.

[15] A second CT scan of the Appellant’s head completed on July 16, 2001 stated:

IMPRESSION

Low density area within the right frontal lobe is unchanged since previous examination of July 16 and is consistent with a right frontal contusion. There is no evidence of an abscess at this time.

[16] The Appellant completed her Application for Benefits on July 10, 2001. The Appellant reported pain in her head, legs, neck, arms and ear. She also reported being unconscious from the date of the accident until July 7, 2001. However, the physiotherapy medical records indicate that on July 3-4, 2001, the Appellant was alert and orientated to month and year, person and place. The Appellant also reported in her Application for Benefits that she was a student at the time of the June 2001 accident with the Academy of Learning⁵ and that because of the June 2001 accident she was unable to look for employment.

⁵ This is the Keyboarding class referred to above.

[17] On July 26, 2001, an occupational therapist completed a home assessment on the Appellant. Her summary and opinion was:

[The Appellant] is a [woman in her forties] who was a pedestrian involved in a MVA in June 2001. She reported the following ongoing problems: memory difficulties, dizziness with neck movements, decreased hearing, vision problems, headaches, irritability, and fatigue.

At present, [the Appellant] is independent with self-care such as toileting and getting in/out of bed. She requires partial assistance with washing her hair to keep water out of her ear and because of dizziness. She receives stand-by assistance with (un)dressing due to unsteadiness. She needs to take her medications with food and is independent feeding herself but requires reminders, as she would otherwise forget to eat or take her medications. She reported taking about 10 different medications, and cannot remember when and how much of each to take.

The writer recommends stand-by assistance for tub transfers, outdoor walking, and stairs due to balance problems with reported dizziness. [The Appellant] is currently dependent for transportation.

With respect to home management, [the Appellant] reported her daughter cooked and they shared the housekeeping and laundry before the accident. She stated she usually grocery shopped. At present [the Appellant] is doing some dishes, making her bed and putting away her laundry. Otherwise her daughter and friend are doing the light and heavy housekeeping, laundry and grocery shopping reportedly due to general weakness and dizziness.

In terms of supervision, [the Appellant] has difficulty with memory and requires help in certain situations such as attending appointments to remember what the practitioner tells her. She also receives help to follow a schedule and keep appointments. She had difficulty with word-finding. [The Appellant] did not appear to have problems with spatial orientation, following simple directions, or self-control.

[18] On July 26, 2001, the Appellant saw Dr. Pekush, ophthalmologist. Dr. Pekush diagnosed her to be suffering from an optic nerve head edema related to her head injury in the June 2001 accident. On August 9, 2001, Dr. Patel, ophthalmologist, noted that the Appellant's optic nerve edema was resolving and no further treatment was required. On August 10, 2001, Dr. Donat noted resolution of the Appellant's papilledema. Ms. Brown, of Arthur Grey Consultants, advised SGI that Dr. Donat reported that the swelling behind the Appellant's eyes had decreased and no abnormality was noted. Ms. Brown also noted that the Appellant's hearing loss and loss of smell were permanent injuries confirmed by Dr. Spafford.

[19] On September 7, 2001, Ms. Brown reported to SGI with respect to the Appellant's progress. She noted that assistance with appointments was recommended and that the Appellant should have Employer A accompany her on outings. This is also consistent with findings made

by SGI in August 2001, that the Appellant needed supervision which was being provided by Employer A and paid for by SGI.

[20] The Appellant attended upon Dr. Vrbancic in September 2001, for a repeat neuropsychological evaluation following the June 2001 accident. Dr. Vrbancic reiterated that, following the June 2000 accident, beside noted mood and behavioral changes, the Appellant did not present with cognitive deficits suggestive of a significant brain injury. Dr. Vrbancic's findings with respect to the June 2001 accident were:

[The Appellant] was referred for neuropsychological re-testing to determine her current level of cognitive functioning secondary to sustaining a second brain injury in a motor vehicle/pedestrian accident on June 30, 2001. [The Appellant] had sustained a mild concussion one year earlier, in a motor vehicle accident on June 21, 2000.

The current neuropsychological assessment indicates that [the Appellant] has sustained a global drop in cognitive functioning relative to findings on assessment nine months earlier. She now demonstrates globally depressed cognitive skills with the exception of intact reasoning and problem solving skills and good psychomotor speed. She demonstrates the most significant drop relative to earlier testing in her ability to retrieve previously acquired verbal information from memory, in her ability to learn novel complex verbal material, and in speed of information processing. These current difficulties are consistent with subcortical pathology and also are considered to reflect her currently very high level of psychological distress, anxiety and lack of confidence in her own abilities.

...

1. ...

The current neuropsychological assessment indicates a global decline in overall cognitive functioning with relative sparing of reasoning and problem solving and psychomotor speed. Conversely, she demonstrates the most significant decline in complex verbal learning and retention, speed of information processing and in her ability to retrieve previously acquired information from memory. Her performances were suggestive of acquired subcortical pathology but also given their severity, they are considered to also be negatively impacted by her high level of psychological distress and anxiety. Overall, her neuropsychological performance is functionally indicative of an individual with a moderate brain injury.

...

4. The accident likely has resulted in cognitive deficits, but given the high overlay of psychological distress, it is not possible to validly determine the pattern or severity of these cognitive difficulties at the current time.

5. On the basis of the earlier neuropsychological assessment, [the Appellant] likely had no premorbid deficits, but was noted to have impairments in semantic fluency and naming

- following the last accident and assessment. These tasks require effort and were thought to also be possibly reflective of a mild retrieval difficulty of uncertain etiology.
6. As already noted, [the Appellant]'s current cognitive deficits/difficulties are considered to be a reflection of recently acquired neuropathology as well as due to exacerbation of her pre-morbid psychiatric condition as a result of the said accident.
 7. [The Appellant] is still early in the recovery process post-injury, and her high level of psychological distress is clearly significantly impacting her functional level. There is no reason to not expect an improvement in cognitive functioning over the next 12-18 months, particularly if [the Appellant] is able to achieve emotional stability and control her diabetes.
 8. There were no clearly identifiable non-accident induced cognitive deficits.
 9. Of most concern at the current time to [the Appellant]'s ongoing functional level and recovery is her perceived level of disability, high level of psychological distress and anxiety, headaches and perceived and likely cognitive difficulties.
 10. It is not possible to determine if [the Appellant] will be able to return to all of her pre-injury activities at the current time as she is still in the early stages of recovery as indicated by the level of cognitive difficulties noted on assessment and significant, high level of depression and anxiety. She is not functionally capable of employment at the current time.
 11. [The Appellant] presents as needing to improve her physical conditioning, emotional stability, and additional support and education about pain and stress management. She continues to present with a lack of personal resources such that support and guidance needs to be provided on a regular basis to achieve better pain and mood control. Her medications may also need to be evaluated and adjusted to augment necessary psychotherapy. The health care practitioners involved in her care will be best able to gauge necessary intervention and time lines for the same.
 12. It is not possible to validly assess permanent restrictions in cognitive functioning at the current time as [the Appellant] is still early in the recovery process and psychologically unstable.

[21] On October 18, 2001 and November 8, 2001, an ABI Coordinator with the Acquired Brain Injury Outreach Team met with the Appellant at her home. She reported that the Appellant was able to play 15 Bingo cards at one time. It was also reported that the Appellant's reported difficulties were consistent with her neuropsychological evaluation. A subsequent meeting with the ABI Coordinator and a PIR from SGI was made for December 4, 2001 to explain SGI benefits and expectations to the Appellant.

[22] On December 5, 2001, SGI sent correspondence to the Appellant with respect to the calculation of her IRB based on a yearly employment income of \$XX,XXX.XX. This resulted in a biweekly income replacement benefit of \$396.36. Specifically, the decision letter stated:

I have now completed a review of your claim for Income Replacement Benefits. I would like to take this opportunity to explain how we calculated your benefits. Based on the information you provided, you will receive an Income Replacement Benefit (IRB) of \$369.36, which is payable every two weeks.

We have considered the following information:

1. Your Application for Benefits;
2. FIT Assessment Report dated October 15 & 16, 2001; and
3. Income tax returns provided by yourself for the past five years.

As a temporary or part-time earner, we calculate your IRB on the basis of the greater of:

- (a) your earnings for the pay period at the date of the accident;
- (b) your earnings for the 12 months before the accident with respect to the employment you held at the time of the accident; or
- (c) your earnings from employment you would have held in the 180 days following the date of the accident.

In your case, your greatest annual income is \$XX,XXX as per (b) above.

As a temporary or part-time earner you will receive an IRB for the time you would have been employed during the first 180 days following the accident. Please be sure to provide me with all the details of your employment schedule for these 180 days. (For example, increased or decreased hours of work, layoffs, etc.). This category was chosen as it was shown by reviewing the above income tax that you worked approximately 50% of the year, each year filed.

As we discussed, the IRB is based on 90% of your net earnings. Your benefit was determined using your gross income less income tax, CPP and EI calculations. Please refer to the attached sheet which sets out in detail how the benefit has been calculated. Your IRB will start seven days following the accident.

Please advise me, as soon as possible, if there is any change in your employment status, since this will affect your IRB.

SGI may reconsider its decision if any relevant new information is presented. If you have any new information which we have not considered in our review, please contact me.

[23] At the appeal it was shown that the Appellant started receiving her IRB in or around December 28, 2000, although she was not provided with the decision letter until one year later. In any event, **this decision was not appealed by the Appellant in accordance with the appeal provisions stated in the decision letter.**

[24] Mr. Ross Teneycke, manager of SGI's calculator unit, testified at the appeal. His evidence was necessary in order to understand how the Appellant's IRB was actually calculated. It is particularly important when we see the decision letter dated December 5, 2001, which advised the Appellant that she had been classified as a temporary or part-time earner and that her IRB was calculated using her previous 12 months income with her greatest annual income being \$XX,XXX. We know from the evidence at the appeal hearing that this is clearly incorrect but this is the only information given to the Appellant. The Appellant's legal counsel was later advised by a different PIR that the Appellant was being paid as a minimum wage earner. In fact, Mr. Teneycke testified that this figure of \$XX,XXX is what minimum wage would have been at the time of doing the IRB calculation.

[25] Mr. Teneycke further stated that SGI determined that because there was no promised employment, the Appellant was classified as a non-earner at the time of the June 2000 accident. She should have received an income replacement benefit in the first 180 days that was equivalent to her lost unemployment insurance benefits so long as they would have continued⁶ in accordance with section 116⁷ of the *Act*. After 180 days following the accident, her income

⁶ The evidence shows that these benefits would have expired around August or September 2001.

⁷ 116(1) For the first 180 days after an accident, a non-earner is entitled to an income replacement benefit if, as a result of the accident, the non-earner:

- (a) is unable to hold an employment that he or she would have held during the 180-day period if the accident had not occurred; or
 - (b) is deprived of a benefit pursuant to the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada), or any other prescribed benefit, to which he or she was entitled at the time of the accident.
- (2) If a non-earner is entitled to an income replacement benefit pursuant to either clause (1)(a) or (b), the non-earner is entitled to the greater income replacement benefit.
- (3) Subject to the regulations, the insurer shall calculate the income replacement benefit pursuant to clause (1)(a) on the basis of the gross yearly employment income the non-earner would have earned from his or her employment.

replacement benefit would be determined in accordance with section 117⁸ and section 131⁹ of the *Act*.

[26] Mr. Teneycke explained the income replacement benefit calculation with respect to Section 117 of the *Act* (the “180-day-determination”). Mr. Teneycke testified that the old *Act* looked at the employment earnings for the five years prior to the accident, specifically 1995 through 1999. SGI determined that the Appellant would likely have worked as a Researcher in Social Work or Related Fields (“Researcher”) and relied upon the Appendix in coming up with a

(4) The insurer shall calculate the income replacement benefit pursuant to clause (1)(b) on the basis of the benefit that would have been payable to the non-earner.

⁸ 117(1) Subject to subsection (5), if on the 181st and subsequent days following an accident a non-earner is unable to hold the employment he or she could have held at the time of the accident, the non-earner is entitled to an income replacement benefit calculated pursuant to this section

(2) For the purposes of calculating an income replacement benefit pursuant to this section, the insurer shall determine an employment for the non-earner pursuant to section 131.

(3) Subject to subsection (4), the insurer shall calculate the income replacement benefit on the basis of the gross yearly employment income that the insurer determines the non-earner could have earned from the employment mentioned in subsection (2), considering the following factors:

- (a) whether the non-earner would have held the employment on a full-time or part-time basis;
- (b) the work experience and earnings of the non-earner in the five years before the accident; and
- (c) any prescribed factors.

(4) An income replacement benefit pursuant to this section is not to be less than the income replacement benefit the non-earner received pursuant to section 116.

⁹ 131(1) Where the insurer is required pursuant to this Division to determine an employment for a victim from the 181st day after an accident, the insurer shall consider:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any other prescribed factors.

(2) An employment determined by the insurer must be an employment that the victim could have held:

- (a) on a regular and full-time basis immediately before the accident; or
- (b) if it would not have been possible for the victim to hold employment on a regular and full-time basis, on a part-time basis immediately before the accident.

gross annual salary or value of employment of \$XX,XXX. SGI quoted the occupation description as “Social Work”, however, it was explained by Mr. Teneycke that there was not room to fit the entire title of Social Work and Related Fields in the description, so the term “Social Work” was used.

[27] Mr. Teneycke explained SGI’s determination was based upon the following: “if the customer would have started work with Employer A’s company she would have been a Researcher, attempting to find funding for [an injury prevention program]. This would have involved lots of researching of available funding programs and computer work”. SGI did not consider the annual income of \$XX,XXX specified by Employer A’s company for the position of Program Researcher and Developer. The evidence is clear that the Appellant’s work with the injury prevention program was entirely unrelated to the position with Employer A’s company. SGI used the value of employment of a Researcher and adjusted for the Appellant’s “presence at work” or, in other words, the Appellant’s work history, being the number of months worked in the past divided by the total number of months. Mr. Teneycke testified that once you determine the months worked, you would use the greatest of the three options provided in section 27 of the *Regulations*. The first option is the number of months worked in the prior calendar year over 12; secondly, the total number of months worked in prior five calendar years divided by the total number of months for five years and thirdly; you take the sum of the months going back to the first break in working in 1997 and you use the 14 months divided by 28 months which give a ratio of 0.5833. Therefore, Mr. Teneycke stated that the Appellant worked approximately 58% of the time and 58% of \$XX,XXX would be \$XX,XXX. The legislation requires SGI to pay at least minimum wage and because the calculations are less than minimum wage, her IRB was calculated using minimum wage of \$XX,XXX.

[28] SGI’s calculations are summarized as follows:

Regulations – Section 27	Year	# of Months	Divisor	Ratio
(i) # of months at work in prior calendar year divided by 12	1999	7	12	0.58333
(ii) # of months at work in prior 5 calendar years divided by 60	5 YRS	18	52	0.34615
(iii) sum of # of months in each prior consecutive calendar year period, to a maximum of 5 years, divided by the product resulting from multiplying the # of years by 12	1999	7	12	0.58333
	1998	7	24	0.58333
	1997	0	36	0
	1996	4.5	48	0.37500
	1995	0	52 ¹⁰	0
		18		0.58333
GYEI based on Appendix A Level 1 – Research in Social Work or Related Fields	\$XX,XXX			\$XX,XXX – represents minimum wage

¹⁰ The total number of months would usually be 60 months, however, in this case, SGI used 52 because the Appellant was attending school for 8 months in 1995.

[29] The Appellant saw Dr. McMahon on May 23, 2002, with respect to complaints of occurrent vertigo.¹¹ In follow-up, Dr. Spafford examined the Appellant on May 31, 2002, for complaints of acute vertigo and further hearing loss. Dr. Spafford's left ear exam was normal and opined that her symptoms were due to left ear Meniere's Syndrome exacerbation. He recommended salt and caffeine avoidance.

[30] The Appellant reportedly fell down her front steps on August 20, 2002 and sustained another concussion. We have not been provided with any details surrounding this incident.

[31] On September 7, 2002, the Appellant completed her Emergency First Aid course and was certified in Emergency First Aid.

[32] In 2002, the Appellant participated in a work placement program with [Employer B] working on [a respect program].¹² This work placement resulted in a reference letter written by Ms. Begg. On October 30, 2002, Ms. Begg reported:

Most recently I have had the opportunity to directly supervise [the Appellant] in a work placement program. For the past seven months [the Appellant] has worked half-time as support staff in the [...] department. [The Appellant] has demonstrated exceptional qualities in this capacity. She has proven to be punctual, reliable, and efficient. [The Appellant] has worked effectively with all office equipment including Microsoft Word 2000. In addition to the clerical duties which [the Appellant] performed, she was responsible for analysis and evaluation of the revised [...] program. [The Appellant] developed an information piece and registration form for [...].

When the need for front reception support arose, [the Appellant] demonstrated initiative in stepping forward to offer assistance in that regard. She has capably fulfilled afternoon front reception duties for the past eight weeks. [The Appellant] is excellent with walk-in clients and has a pleasant telephone manner. [The Appellant] has proven her capabilities in this area as well.

[The Appellant] has quickly become a valued member of the [Employer B] office team. [The Appellant's] assistance has been invaluable both to [the department] and the office as a whole. I wish [the Appellant] every success in her future endeavors and can recommend her to you without hesitation.

[33] Following her work placement with Employer B, in October 2002, the Appellant took a position with the [Safe House] which consisted of three 8 hour shifts per week, but she

¹¹ This information is taken from a report of Arthur Grey which is not signed by the physician but is considered to be an accurate representation of a conversation with the Appellant's physician, Dr. McMahon.

¹² S147-148

terminated the position due to reported fatigue and her perceived inability to pull information together to counsel a person in distress.

[34] A third neuropsychological evaluation was completed on the Appellant by Dr. Sarah Hillis in November 2002. Dr. Hillis concluded that the Appellant had made significant gains from the time of her neuropsychological assessment with Dr. Vrbancic in September, 2001. She demonstrated good word knowledge, and average ability to think flexibly, process information rapidly, and sustain attention. Relative to her performance in December 2000, the Appellant improved on most measures with the exception of learning and memory. Dr. Hillis concluded that “memory and fatigue will be the limiting factors with regard to the Appellant’s ability to make good decisions.” Dr. Hillis felt the client would continue to make gains, as she was within two years of her injury date, and particularly if she worked in a supported environment that was not overwhelming. Dr. Hillis also offered the opinion, based on the severity of the brain injury and ongoing presence of learning and memory deficit, that the client would likely always have some problems with learning, memory and fatigue. Dr. Hillis specifically recommended that the Appellant: (1) have information repeated several times; (2) be supported in informing her employer of her disabilities; and (3) work reduced hours to avoid excessive fatigue, which exacerbated her cognitive difficulties. Dr. Hillis concluded that the Appellant suffered a brain injury within the moderate to severe range giving consideration to her post traumatic amnesia, the CT scan showing contusions and the seizure suffered the day after the accident. Dr. Hillis did not find the Appellant to be clinically depressed at that time.

[35] Specifically, Dr. Hillis reported:

1. Has a brain injury occurred? If so, what information was used to conclude a brain injury occurred? Please indicate whether the injury is mild, moderate or severe, and what criteria you used to make this designation?

[The Appellant] suffered a brain injury within the moderate to severe range. This opinion is based on medical information, including GOAT score results indicating she was in post traumatic amnesia for four days, and the CT scan of the head interpretation of bifrontal contusions (Dr. Griebel, Discharge Summary, July 13, 2001). Also, [the Appellant] suffered a seizure the day of the injury.

...

6. Other than the accident, what are the other factors contributing to any observed deficits in cognitive functioning? Please list in order of important (e.g. previous history of head injury, learning disorder, mental disorder, substance abuse, and concurrent depression).

The concussion sustained in an MVA in June 2000 may have made [the Appellant] more susceptible to developing cognitive deficits following the second injury. [The Appellant] has a bipolar mood disorder that is controlled with Prozac. However, [the Appellant] is not clinically depressed at present. Problems with mood do not account for the severity of her cognitive deficits.

[The Appellant] reported a five-month period of substance abuse in 1998 and 1999. She apparently functioned well cognitively and was actively employed prior to the initial accident in 2000. Thus, the period of substance does not account for the present problems with cognitive functioning.

7. What is the client's prognosis regarding recovery from the deficits attributed to the accident? Approximate time frames?

[The Appellant] has made significant gains from the time of the last assessment. She will likely continue to make gains. I base this opinion on the fact that [the Appellant] is still within the two-year time frame in which people make the most gains (although people can make improvements for many years). [The Appellant] will also continue to make gains if she works within a supported environment that is stimulating and encouraging and not overwhelming. It is my opinion that she will always have some problems with learning, memory, and fatigue. This opinion is based on the severity of her brain injury and the ongoing presence of a learning and memory deficit.

...

9. List all current and foreseeable factors that may be affecting recovery?

Fatigue and stress may interfere with her recovery. [The Appellant] needs to strike a balance between remaining active (she should be commended for attempts to secure gainful employment) and become overly stressed and fatigued. Becoming depressed will also interfere with her recovery.

10. Can the individual ever return to their pre-injury involvements (i.e. work, school, home responsibilities), and if so, when? If not, what are the underlying circumstances of why she isn't able to return to pre-accident employment? As [the Appellant] was determined as a General Office Clerk, NOC #1411 is she able to return to those duties?

[The Appellant] can return to pre-injury involvements, but in a supported capacity. I am not aware of the specific job requirements for a General Office Clerk, NOC#1411. However, [the Appellant] has the ability to process information rapidly and make decisions. Her limitations are learning and memory. She will require support in this regard. She will need to be given instructions more than once and be comfortable asking questions about procedure, etc. She is able to learn and she is able to retain information with the appropriate support. She will need to work reduced hours.

11. If the individual is not currently able to return to their previous duties and responsibilities, what kind of rehabilitation would be required (i.e. try to be as specific as possible including time lines).

Support should be put in place to help [the Appellant] become as functional and independent as possible. She has found gainful employment and she should be supported in this.

- [The Appellant] must have information repeated several times to ensure it is learned.
- She should have some method of determining whether or not she is meeting the expectations of the job and whether she is making good decisions on a regular basis. She is insightful and will benefit from feedback.
- [The Appellant] should be supported and supervised initially to ensure that she has acquired and retained all the information necessary to make adequate decisions on the job.
- She should be supporting in informing her employer of her disabilities. Of particular importance is her severe olfactory deficit as she will not be able to smell smoke or fire. Also of importance are her learning and memory deficit and the exacerbation of this problem with fatigue.
- [The Appellant] will have to work reduced hours in order to avoid becoming exhausted. She should not work to the point of being exhausted as she is more likely to make errors at that point.

[36] Dr. Hillis referred to the Appellant being determined as a General Office Clerk. We do not understand this statement at this time because the Appellant's income replacement benefit was calculated using the salary of a Researcher for the purposes of her 180-day-determination.

[37] A Psycho-vocational assessment was conducted by Dr. Shepel, Registered Psychologist, in July 2003. Dr. Shepel identified a number of potential career/vocational areas that might fit for the Appellant, specifically; sales, merchandising, social/community services, office practices, clerical/clerking, protective services, computer activities, manual/skilled trades, and agriculture. Dr. Shepel noted that the Appellant's fatigue was a factor. He stated that "[i]f [the Appellant] takes care of herself, in particular if she gets sufficient rest, is motivated and in turn applies herself (as she did during the second assessment session), the Appellant functions quite adequately with no physical or cognitive complaints." Dr. Shepel reported that with proper rest, the Appellant would be capable of functioning in a work environment. He placed her within the "**Somewhat Below Average**" range of intellectual functioning, however, he noted that this may be *an underestimate* of her skills because the Appellant was assessed at a higher level in the 2002 assessment. Dr. Shepel reported:

...It was noted that [the Appellant]'s performance on tasks was dependent on her mood which, in turn, was influenced by the amount of rest she received suggesting that life style issues may result in fluctuations in her functioning at any point in time. When rested, her motivation and confidence was up and [the Appellant] demonstrated more persistence on tasks and her functioning was notably improved. Thus, the upper range of the confidence interval may more accurately reflect her actual skills (e.g., 32nd percentile). This suggested ability level is more consistent with previous results.

[38] In June 2004, Dr. Hillis, completed her second neuropsychological examination on the Appellant. Dr. Hillis opined that the Appellant suffered a brain injury in the severe range. Her previous diagnosis had been a brain injury in the moderate to severe range. Dr. Hillis reported that the Appellant's performance was markedly different across the two days of the assessment, due to fatigue. The Appellant's performance was stronger on the second day because she was more rested. Dr. Hillis stated that she felt that the Appellant's performance on the second day was a more accurate reflection of her cognitive abilities. Dr. Hillis stated "I don't think [the Appellant's] abilities have actually deteriorated" relative to neuropsychological testing two years earlier." Dr. Hillis opined that the Appellant's functioning appeared to deteriorate because she was tired all the time and this had a direct effect on her cognitive performance. Dr. Hillis concluded the Appellant had permanent learning and memory deficits, and problems with psychomotor speed when fatigued. Dr. Hillis also stated that several indicators in this assessment suggested that the Appellant may be depressed and she explained that depression would impede the Appellant's recovery by causing an increase in symptoms of fatigue. **Dr. Hillis was of the opinion that the Appellant's problem with fatigue may be quite pervasive which would likely result in her functioning at the lower end of her abilities most of the time.**

[39] Specifically, Dr. Hillis reported:

In summary, [the Appellant] continues to have good cognitive abilities when rested (although lower than prior to the accident). She can reason and think flexibly which is a good indicator for decision-making ability. She has adequate visual processing skills and she can sustain attention when rested. She has learning and a memory problem that is worsened when tired. Her processing speed also deteriorated significantly when she is tired. While it appears that her actual abilities have not worsened over time, her functioning appears to have deteriorated because she is tired much of the time and her cognitive performance is affected by fatigue.

Specific Questions for the Referral Agent

1. Has a brain injury occurred? If so, what information was used to conclude a brain injury occurred? Please indicate whether the injury is mild, moderate or severe, and what criteria you used to make this designation?

[The Appellant] suffered a brain injury within the severe range. This opinion is based on medical information, including GOAT score results indicating she was in post traumatic amnesia for four days, and the CT scan of the head (July 20, 2001) which is consistent with a right frontal contusion. Also, [the Appellant] has symptoms consistent with a frontal injury, i.e. loss of a sense of smell and taste.

6. Other than the accident, what are the other factors contributing to any observed deficits in cognitive functioning? Please list in order of important (e.g. previous history of head injury, learning disorder, mental disorder, substance abuse, and concurrent depression).

[The Appellant] suffers from intense fatigue and her cognitive performance is greatly worsened by fatigue.

[The Appellant] has a bipolar mood disorder that is controlled with Prozac. Depression may affect her performance.

7. What is the client's prognosis regarding recovery from the deficits attributed to the accident? Approximate time frames?

[The Appellant] has not made any cognitive gains from the time of her previous assessment in 2002. In fact, her functioning has worsened likely to due to problems with fatigue. She has been tested on two occasions when her processing speed was significant lower than in 2002, likely due to fatigue. Gains from this point on will come in the form of managing her fatigue and her mood.

...

9. List all current and foreseeable factors that may be affecting recovery?

Fatigue is interfering with her recovery. Depression will interfere with her recovery.

10. Can the individual ever return to their pre-injury involvements (i.e. work, school, home responsibilities), and if so, when?

[The Appellant] has cognitive deficits that are worsened greatly when she is fatigued. It seems from her file that she has had opportunities for employment and that they have not worked out because of problems coping with fatigue and worsened cognitive symptoms when fatigued. The current test results confirm that she has serious problems with processing speed when she is tired. Consequently, she will not be able to return to pre-injury employment and will only return to employment at all if the fatigue can be managed and the appropriate support is in place.

11. If the individual is not currently able to return to their previous duties and responsibilities, what kind of rehabilitation would be required (i.e. try to be as specific as possible including time lines).

[The Appellant] should see Dr. Baetz to monitor her mood. There are several indicators that [the Appellant] may be depressed. She scored within the range for severe depression on a self-report measure of depression. She is having problems sleeping and her fatigue has increased. Depression will result in an increase in symptoms of fatigue. [The Appellant] needs to strike a balance between remaining active and becoming overly stressed and fatigued.

[40] On July 27, 2004, Dr. Howlett, medical consultant for SGI, completed a permanent impairment assessment with respect to the Appellant's injuries. Dr. Howlett awarded permanent impairment for hearing loss (23%); alteration of higher cognitive function (15%); anosmia (4%); and alteration of brain tissue (3%). Using the Table of Successive Remainders, Dr. Howlett calculated a total whole body impairment of 42%.

[41] On August 19, 2004, SGI wrote to the Appellant with respect to her entitlement to permanent impairment benefits in accordance with Dr. Howlett's medical report. The Appellant received permanent impairment benefits in the amount of \$58,199.82 which is 42% of \$138,571.00, the maximum amount of benefits for 2001. **This decision was appealed by the Appellant.**

[42] The Appellant underwent a Residual Capacity Evaluation ("RCE") in December 2004. The Physical Work Performance Evaluation ("PWPE"), which is part of the RCE, was completed in February 2005 due to the Appellant having a fractured foot in December 2004. It was the opinion of Mr. Sandeep Sharma, the occupational therapist that completed the PWPE, that the Appellant should be provided with an opportunity to explore 3.5 to 4 hours per day of "light" level work. Mr. Sharma noted fatigue as being a limiting factor in returning to work.

[43] Excerpts from the RCE have been reproduced below:

Summary of Functional Status

...

[The Appellant] reported that she was not working at the time of her motor vehicle accident. She was involved in setting up [an injury prevention program]. According to her, she wrote the proposal for funding and [Employer B] is presently running the program.

[The Appellant] participated in functional capacity evaluation on February 14, 2005. Though she participated in 21 tasks, she did not complete the functional testing. She reported inability to continue because of fatigue. Based on the information summarized in the Dynamic Strength,

Position Tolerance, and Mobility sections of the evaluation, the client is capable of performing physical work at the **light level**. Based on the limited testing, it is difficult to predict tolerance to an eight hour work day as client refused to attempt 3 of the 3 endurance tasks. It may be reasonable to allow the client to work at the light level of work for 3.5 to 4 hours and gradually work up to the 8-hour days as tolerated. Alternatively, if allowed to work at a lower level, the client may be able to tolerate a full 8-hour day.

Based on the neuropsychological assessment reports by Dr's Vrbancic and Hillis, and the psychovocational assessment report by Dr. Shepel, there is no reason why [the Appellant] cannot participate in some kind of gainful employment. Dr. Sheckter, Psychologist felt "Indeed, the activity, social contact, and income would all be conducive to an improvement in her mood." However he cautioned that "it will be important for her to find the right job with the right work hours." Dr. Sheckter further reported that "In the present psychology interview, she estimated that she could manage four hours every other day, or two to three hours every day. This is another area in which an ABI case worker could be helpful".

In view of client's previous difficulties to sustain work no more than 4 hours, complaints of fatigue which are well documented and addressed in various Neuro-Psychological reports and abilities demonstrated on present functional testing, it is this writer's opinion that exploring work at up to "light" level for to 3.5 to 4 hours per day would be reasonable to provide the client with the best opportunity for success. [The Appellant] would benefit from support from her Psychologist and Occupational Therapist during the transitional period to help her cope with work demands.

Summary of Psychosocial Status:

[The Appellant] has a positive psychiatric history (pre-MVA), including bipolar disorder and addictions. Her bipolar disorder has been well managed medically for some time via Prozac, and she has abstained from cocaine since the late 1990's. Presently, her biggest challenges are cognitive behavioral sequelae secondary to brain injury sustained in her 2001 MVA, and clinical depression. She has very few practical strategies to cope with either of these problems. She had brief contact with ABI Saskatoon three years ago, but has no recollection of this. Her involvement with ABI ended when she failed to maintain contact. She also had brief psychotherapy with Dr. Zolner for depression and loss/adjustment issues two years ago, but this treatment ended when the client self-terminated, as she felt "no connection" with Dr. Zolner. More recently, she has likely (unwittingly) contributed to perpetuation and exacerbation of her depression by curtailing her activities and social contact; she reportedly has very few social outlets, and rarely leaves her residence. Her decision to be less active may be in response to fatigability, as too much stimulation leaves her feeling tired, sore, and mentally drained. However, if this is the case, she has gone too far, and needs to reactivate herself to the extent her daily reserves of energy will permit.

The team noted that the Appellant had been diagnosed with moderate to severe brain injury, with permanent limitations. The team also believed that the Appellant presented with permanent cognitive-behavioral sequelae secondary to brain injury and clinical depression. Both conditions were considered to be MVA-related. It was noted at the appeal hearing that Dr. Howlett was never provided with the RCE report. The RCE is a very comprehensive report that was prepared using the Appellant's entire medical file, including all of the neuropsychological and

psychological opinions. It is our opinion that the RCE is an important medical report and it should have been provided to Dr. Howlett when it was received by the PIR.

[44] In arriving at the Appellant's two year determined employment, Mr. Sharma opined that based on the Appellant's PWPE, her ability to meet physical job duties was appropriately matched to three job categories: General Office Clerk, Pharmacy Assistant and Food and Beverage Servers. He reported that his opinion was based upon present functional testing, previous reported difficulties in sustaining work of no more than four hours and complaints of fatigue which were well documented.

[45] In August 2005, SGI arranged a work placement with Employer B for the Appellant working 3 hours every second day. A report completed in September 2005 stated that the work placement was not going well due to issues of stamina, absences and lack of skills. Vertigo was also reportedly a problem in September 2005. The work placement was terminated for reasons not related to those listed above.¹³

[46] On August 26, 2005, SGI sent the Appellant a decision letter with respect to her determined employment. **This decision was appealed by the Appellant.** It stated:

If you are unable to hold your original employment or your determined employment at 180 days, you may have some capacity for employment. At maximum medical improvement and at least 2 years after the motor vehicle accident, if you are capable of employment, we will reduce your income benefit accordingly.

I have completed your employment determination, with your assistance, based on:

- your education, training, work experience and abilities at the time of determination
- any knowledge or skill acquired in a rehabilitation program
- availability of the employment in the region in which you reside, meaning either the employment is being performed or is about to be performed by you, or the employment or category of employment exists and is likely to continue to exist within the foreseeable future
- whether you are able to hold the employment on a full-time or part-time basis performing clerical duties

¹³ The Appellant's work placement was terminated due to a criminal record.

Your determined employment is a General Office Clerk whose main duties include processing applications, receipts and form, etc. as outlined by the National Occupational Classifications Guide, a guide produced by Stats Canada, or as outlined by an employer form your region.

Your determined employment was calculated using Appendix A of our Regulations, which is a table of employment income by class of occupation.

The Yearly Employment Income of your determined employment is \$XX,XXX, although your residual capacity assessment advised you are capable of working at a 50% capacity we have utilized \$XX,XXX as your Gross Yearly Employment Income resulting in a biweekly Income Replacement Benefit of \$366.56.

One year from the date of this determination, on August 18, 2006, this income benefit amount, or the amount of your actual net income earned from employment, whichever is greater, will be deducted from your current income benefit of \$407.36.

[47] The Appellant filed two Appeal Application Forms on September 22, 2005. On the first, with respect to her determined employment, she stated that she was applying because she did not agree with: her determined employment as a General Office Clerk; the calculation of her determined employment income; and her ability to perform her determined employment at 50% capacity. On the second appeal form, she stated that her permanent impairment was improperly assessed.

[48] On February 7, 2006, Dr. Howlett provided further comments with respect to his assessment of the Appellant's permanent impairment benefits. He reported:

...

The Regulations (1995) provide for permanent impairment for "organic cerebral syndrome, dementia, and neurological deficiencies." As outlined in the Regulations, Appendix B, Part 1, Division 2, Sub-Division 3, Item 13(k), permanent impairment for alteration of the higher cognitive or integrative mental functions is based mostly on the ability to perform tasks necessary for every day life. These tasks necessary for every day life would traditionally be defined medically and from an occupational therapist perspective as activities of daily living. These would include mobility and self-reliance activities, i.e., personal hygiene, dressing, toileting, feeding oneself, etc. Over time, some have included occupational pursuits as being included in the tasks necessary for everyday life.

The basis for my opinion in the July 27th, 2004 Permanent Impairment Assessment derived mostly from Dr. Hillis's neuropsychological report of December 16th, 2002. Several excerpts are pertinent in my assessment opinion. On page 4 of her report, Dr. Hillis indicates that, "The ABI report, November 27th 2001, indicates that [the Appellant] is able to manage all of her household tasks and finances independently. [The Appellant's employer at Employer B] also confirmed that [the Appellant] is organized and makes good decisions. She said [the Appellant] was able to go through documents independently and pull out the relevant information. She was able to answer

the phone and greet people and make decisions independently...She was always friendly and able to think quickly". Further on page 5 of Dr. Hillis's report, she indicates, "[the Appellant] has made significant gains from the time of her neuropsychological assessment in September 2001. On the present occasion, she demonstrated good word knowledge and average ability to think flexibly, to process information rapidly, and sustain attention. In fact, her performance improved to the average range or to her premorbid level of most measure with the exception of learning and memory. Her current deficits are quite specific to learning and memory. Her ability to organize is also a little worse than prior to the accident. However, her organizational skills are adequate as they fall within the low average range."

Also based on my general review of the documentation in preparation for my Permanent Impairment Assessment of July 27th, 2004, I was not impressed that the customer required any supervision for the performance of any of her activities of daily living.

To achieve a permanent impairment of 20% or greater based on the Regulations (1995), one would have to have alteration of the higher cognitive or integrative mental functions which moderately impair the performance of the tasks necessary for every day life. Additionally, the individual would require occasional supervision for the performance of such tasks. Based on my review of the medical information provided as of July 2004, the customer did not meet this criteria. My impression was that the customer had alterations of higher cognitive function which slightly impaired the performance of tasks necessary for every day life.

The Appellant's Work History

[49] In June 1999, prior to her motor vehicle accidents, the Appellant was involved with setting up the injury prevention program. The program's goal was to set up a conference for May 2000. The Appellant was deemed chairperson of the injury prevention program in August 1999 and was also given co-signing authority of the injury prevention program's bank account. During this period of time she was also employed as a family violence counselor with the [Friendship Centre] until January 2000. In April 2000, the Appellant was seeking funding for the injury prevention program for a Coordinator's position, which she hoped she would be awarded. In the meantime she indicated that she would work on a contract basis on her own and keep the injury prevention program going. In May 2000, the Appellant billed the injury prevention program for her work but there was no evidence presented that showed that she was ever paid by the injury prevention program. We are satisfied that the evidence shows that the Appellant was attempting to create a position with the injury prevention program at the time of her June 2000 accident. This was also indicated by her legal counsel and also by letters of reference from members of the injury prevention program board. The Appellant's involvement with the injury prevention program declined significantly in June 2000. We are unable to

determine if this was due to the non-payment of her invoice by the injury prevention program or because of her June 2000 accident.

[50] We have concluded the following with respect to the Appellant's work history:

- a) The Appellant's resume and investigations completed by Arthur Grey in July 2003 show that the Appellant worked as a family violence counselor from May 3, 1999 to January 28, 2000. This was a full time position working 35 hours per week and she was paid \$X,XXX per month.
- b) From November 4, 1996 – July 31, 1998, she worked as a Social Worker with [Employer C]. We note that a report prepared by Arthur Grey on July 27, 2003 confirmed that the Appellant was employed as a social worker from November 1996 to July 31, 1998 with Employer C. In her Application for Benefits, the Appellant reported income of \$X,XXX per month from this position. Arthur Grey reported the Appellant's monthly employment income from Employer C ranged between \$X,XXX to \$X,XXX. She was required to work approximately eight hours per day and had every third Friday off. SGI did not assess any income for the Appellant in 1997 despite information from Arthur Grey that she earned income from her social work position with Employer C in 1997. The Appellant provided SGI with a T4 slip for 1998 for \$XX,XXX.XX issued by the Province of Saskatchewan. This T4 slip would be consistent with her reported monthly income of approximately \$X,XXX per month for a seven month period in 1998.
- c) In 1995, she worked as an Intake/Outreach Work Counsellor.
- d) In 1994, the Appellant worked as a Counsellor/Child Care Worker.

[51] The Appellant's income based upon her tax returns, T4's and information provided by Arthur Grey is as follows:

YEAR	1999	1998	1997	1996	1995
Employment Income	\$XX,XXX ¹⁴	\$XXX.XX	~ \$X,XXX per month	\$X,XXX	\$XXX
Employment Insurance	\$X,XXX	\$X,XXX			
Social Assistance				\$X,XXX	
Other Income		\$XX,XXX ¹⁵			
Our calculations of approximate Total Income	\$XX,XXX	\$XX,XXX	~XX,XXX	\$X,XXX	\$XXX

[52] We are not sure when the Appellant actually retained legal counsel, however, in July and September, 2003, the Appellant's legal counsel made a request for a review of the 1997 income information. On July 23, 2003, the PIR indicated to the Appellant's legal counsel that SGI's position with regard to IRB would remain unchanged unless she received additional information. Further, on September 22, 2003, the PIR wrote to the Appellant's legal counsel addressing several concerns. The correspondence stated:

...

Regarding the income benefit and the promised employment from [Employer A's company], this employment was not promised at the time of the motor vehicle accident, which is our criteria for considering such a benefit. She was unable to substantiate this employment. When [the Appellant] completed the application for benefits she indicated that she did not have any promised employment at the time of the accident. As well, [Employer A] was [the Appellant]'s care provider after her motor vehicle accident.

¹⁴ This is income earned from the Friendship Centre.

¹⁵ The Appellant produced a T4 slip for the Province of Saskatchewan with this amount of income for 1998.

You have also commented on specific sections of our legislation. I wish to advise you that while it is SGI's mandate to advise clients on their entitlement, it is the client's responsibility to obtain the information. We have extended the vocational provider resources to assist [the Appellant] in obtaining information but it is not SGI's responsibility to write to previous employers to obtain the prior 5 year work history and income earned. We have access to her current employers only, and at the time of [the Appellant]'s motor vehicle accident she was not employed.

[53] We note a very important inconsistency in this correspondence. At the time this correspondence was written, SGI did have information about the Appellant's 1997 employment income from Arthur Grey Consulting. It is difficult to understand why the PIR would state that it is not SGI's responsibility to write to previous employers when they had in fact obtained this information. Also, section 169 of the *Act*, specifically provides that an insured's employer or former employer shall provide SGI with proof of earnings while the insured was employed with them within six days after receiving a written request from SGI.

[54] On November 10, 2003, the PIR wrote to the Appellant's legal counsel as follows:

This letter is written in follow-up to your recent inquiry regarding your income replacement benefit. It is my understanding that you feel the amount being paid is not sufficient. I have had an opportunity to review this matter, and wish to offer some information in response. You will note that I am providing a copy of this letter to your lawyer. Because you have legal representation, SGI is obligated to conduct all communication through him.

At the time of the motor vehicle accident you were not employed, and therefore, not entitled to an income replacement benefit (IRB). However, because after 180 days your injuries from the motor vehicle accident still prevented you from obtaining employment, you then were eligible to receive an IRB. SGI is required to determine this benefit level in consideration of your work history and earnings history. Regrettably, we have not yet received the necessary information to establish this history. As a result, your benefit level has been set at that of a minimum wage earner. If you are able to obtain information to support your work history and earnings history, we would be pleased to review it.

You also expressed concern with our decision to decline your request for consideration of promised employment. We have recently written to your lawyer regarding the same concern. The criteria to be met when considering promised employment are specific. The information that you provided does not support that there was a position promised to you at the time of the accident, nor that the position was instead filled by another individual. Our decision to decline your request was provided in our letter of October 25, 2000. This letter also advised of your appeal options, the time limits for which have long since expired.

[55] The PIR stated that she did not have the necessary information to establish a work and earnings history or information that established that the position of promised employment was filled by another individual. At this point in time, this information was clearly available to her

and it does not appear that she reconsidered it and/or advised the Appellant why the new information did not change SGI's original decisions regarding promised employment and the calculation of IRB. It is our opinion that the 1997 income information¹⁶ and the information regarding the promised employment position being filled¹⁷, once obtained, was likely never reconsidered by SGI.

[56] SGI did not appear to note that the Appellant was a First Nations person and therefore may not be required to claim income on her income tax returns. Income information became available to SGI in 2003 with respect to the Appellant's income in 1997. The PIR repeatedly replied to the Appellant's legal counsel that SGI's position remained unchanged despite her indication that if new evidence became available it would be reviewed. Specifically, in November 2003, the PIR stated that she had reviewed the matter of IRB and reported that she had not received the information necessary to establish the Appellant's work and earnings history. In our opinion she placed too much emphasis upon the Appellant providing T4 information or income tax returns, specifically when the Appellant is income tax exempt. Further, SGI had reliable information available to them provided by Arthur Grey Consulting.

[57] At the time of the appeal hearing, the Appellant was still unemployed.

LAW AND ANALYSIS

[58] The Commission's jurisdiction to review a decision of SGI is set out in subsection 193(7) of *The Automobile Accident Insurance Act* (the "Act"). The Appeal Commission may:

- (a) set aside, confirm or vary the insurer's decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part.

¹⁶ This information was acquired through Arthur Grey Consulting in July 2003.

¹⁷ There is a notation in Arthur Grey's report that the Appellant had contacted Employer A in January 2001 and she was advised that the position had been filled.

PRELIMINARY MATTERS

Whether the Commission has jurisdiction to review the decision letters issued by SGI dated October 25, 2000 regarding the Appellant's promised employment and December 5, 2001 regarding the calculation of the Appellant's income replacement benefits?

[59] There is no dispute that the Appellant failed to file her appeal application within the 90 day time limit set out in the decision letters above. In fact, no proper appeal application has ever been filed with respect to the above two decisions, however, these issues were raised by legal counsel for the Appellant at the appeal hearing. Legal counsel for SGI argued that the Commission has no jurisdiction to review these two decision letters. Although we made the decision to hear evidence and argument with respect to these issues, we are cognizant that an appeal has never been properly filed by the Appellant's legal counsel in accordance with subsection 193(2) of *The Automobile Accident Insurance Act*¹⁸ (the "2002 Act") and section 86 of the *Personal Injury Benefits Regulations*¹⁹ (the "2002 Regulations").

[60] The October 25, 2000 decision letter with respect to promised employment and the December 5, 2001 decision letter calculating the Appellant's initial IRB were made prior to the amendments to the *Act* which took effect in August 2002. Prior to these amendments, all appeals of SGI's decision were to be made to the Court of Queen's Bench. After the amendments, the claimant had the option of appealing SGI's decisions to the Court of Queen's Bench or the Appeal Commission. Section 197 of the *Act* in place at the time of the Appellant's accidents stated:

Application for Appeal

- 197 A claimant may appeal the insurer's decision on review to the Court of Queen's Bench:
- (a) subject to clause (b), within 90 days after receiving the insurer's written reasons pursuant to section 195; or
 - (b) if a claimant has requested mediation pursuant to section 196, within 90 days of the termination of mediation."

¹⁸ RSS 1978, c. A-35 (2002)

¹⁹ Chapter A-35 Reg 3

[61] Legal counsel for the Appellant submitted that the time limitations should not apply because the Appellant was suffering from a head injury which impacted her ability to understand what was in the decision letters with respect to the appeal time lines. He relied upon *The Limitations Act* in effect for the relative period concerning this appeal. He submitted that the section provided:

- (1) The operation of any limitation period established by this Act or any other Act or regulation is suspended during any period in which the claimant:
 - (a) is a minor; or
 - (b) is a person who, by reason of a mental disability, is not competent to manage his or her affairs or estate and is not represented by a personal guardian or property guardian pursuant to The Public Guardian and Trustee Act or a decision-maker pursuant to The Adult Guardianship and Co-decision making Act who:
 - (i) is aware of the claim; and
 - (ii) has the legal capacity to commence the proceeding on behalf of that person or the person's estate.
- (2) A claimant is presumed to have been capable of commencing a proceeding with respect to a claim at all times unless the contrary is proved.

[62] Legal counsel for the Appellant submitted that “disability” is defined as “disability arising from infancy or unsoundness of mind”. He further submitted the Appellant fit into the definition of “mental disability” as defined because she suffered from a bi-polar disorder, diagnosed in 1999, and a head injury impairing the mind in June 2000. He also submitted that the Appellant likely suffered an occipital skull fracture in the June 2000 accident in light of her reported symptoms of severe headaches and attendance at emergency for those headaches. The Appellant’s legal counsel submitted that she was under a mental disability from her June 2000 accident up to the present or at least at the time her income replacement benefit decision letter was sent to her on December 5, 2001.

[63] Legal counsel for SGI stated that both decisions were issued prior to the existence of the Commission and that neither of the decisions were appealed to the Court of Queen’s Bench. He further submitted that a missed appeal period is fatal to the appeal. Counsel for SGI also took the position that *The Limitations Act* has no applicability because it did not take effect until May

1, 2005. It was further stated that the statutory revival of a limitation period which has long since expired is substantive in nature and that unless the *Act* specifically were to make such retrospective in nature, there is a presumption that the *Act* is not retrospective. Moreover, he stated that the onus is upon the Appellant to establish incompetency and there is no medical evidence to suggest she was not capable of managing her affairs. He argued that she continued to manage her financial affairs and that reference letters on the file indicate that the Appellant was very efficient in working in an office environment. Finally, counsel for SGI took the position that the Appellant failed to provide adequate evidence of promised employment to satisfy the three criteria used by SGI in establishing promised employment and further that the original calculation of IRB was fully supported.

[64] Pursuant to the old *Automobile Accident Insurance Act*, a claimant had 90 days after *receiving* the decision or the termination of mediation to file their appeal to the Court of Queen's Bench. The Court of Appeal and the Court of Queen's Bench in *Mintzler v. SGI*²⁰ have considered and decided that failure to file an appeal under section 197 of the old *Act* is fatal. It is not subject to relief under the "imperfect compliance" provisions of the *Act*,²¹ since these only apply to proofs of claim or loss or an application for benefits. The Court concluded that the failure to launch an appeal amounted to non-compliance (from which relief could not be given) rather than "imperfect compliance". The Commission, in several decisions²², has held that a failure to appeal a decision of the insurer within the prescribed time limit is considered non-compliance with the appeal provisions and there is no provision in *The Automobile Accident Insurance Act* allowing for an extension of time. The Commission has determined that the failure to file is fatal to an appeal made after the time limit has expired. However, in *K.F. v. Saskatchewan Government Insurance*²³, the Commission expressed concern over whether *The Limitations Act* could postpone the running of time for persons who by reason of mental disorder are not competent to manage their affairs or estate. Therefore, if the Appellant is able to prove that the provisions of *The Limitations Act* apply to her, then the time limitations may be

²⁰ 2000 SKQB 104 and 2001 SKCA 54.

²¹ Section 65: "Where there has been imperfect compliance with the statutory conditions as to the proof of claim or proof of loss to be given by an insured or other claimant or as to any other matter or thing required to be done or omitted by an insured or other claimant with respect to a loss, and a consequent forfeiture or avoidance of the benefits or insurance money, in whole or in part, and the court considers it inequitable that the benefits or insurance money should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it may consider just.

²² *K.F. v. Saskatchewan Government Insurance*, 2004 SKAIA 006; *N.A. v. Saskatchewan Government Insurance*, 2004 SKAIA 007

postponed or suspended and her failure to file her appeal application in respect of both decision letters may not be fatal to her appeal.

[65] We have reviewed the provisions of *The Limitations of Actions Act*²⁴ (hereinafter referred to as the “repealed *Limitations of Actions Act*”) as it existed at the time the decision letters were issued in 2000 and 2001 and *The Limitations Act*²⁵, (referred to as the “effective *Limitations Act*”) as it existed at the time of this appeal. Legal counsel for the Appellant referred to Section 8 of the effective *Limitations Act* but relied upon the definition for disability as stated in the repealed *Limitations of Actions Act*. Legal counsel for SGI argued that the effective *Limitations Act* has no applicability to the Appellant because it became effective May 1, 2005. He made no mention of the repealed *Limitations of Actions Act* which contained similar provisions dealing with mental disorder. Neither counsel referred us to the transitional provisions, which are relevant.

[66] We note the following provisions from the repealed *Limitations of Actions Act*:

2 In this Act:

(c) “**disability**” means disability arising from infancy or unsoundness of mind;

Time in case of disability

6 The running of time with respect to a limitation period to bring an action fixed by this or any other Act is postponed for a person who is entitled to bring such an action for so long as he is an infant or:

- (a) he is by reason of mental disorder not competent to manage his affairs or estate; and
- (b) he is not represented by a personal guardian or property guardian appointed pursuant to *The Public Guardian and Trustee Act* or *The Adult Guardianship and Co-decision making Act* who:
 - (i) is aware of the cause of action; and
 - (ii) has the legal capacity to commence the cause of action on behalf of that person or his estate.

²³ 2004 SKAIA 006

²⁴ RSS 1978, c. L-15 (effective February 26, 1979)

²⁵ SS 2004, c. L-16.1 (effective May 1, 2005)

[67] We note the following provisions from the effective *Limitations Act*:

2 In this Act:

(e) “**mental disability**” means:

- (i) an intellectual disability or impairment; or
- (ii) a mental disorder;

Persons under disability

8(1) The operation of any limitation period established by this Act or any other Act or regulation is suspended during any period in which the claimant:

- (a) is a minor; or
- (b) is a person who, by reason of a mental disability, is not competent to manage his or her affairs or estate and is not represented by a personal guardian or property guardian pursuant to The Public Guardian and Trustee Act or a decision-maker pursuant to The Adult Guardianship and Co-decision making Act who:
 - (i) is aware of the claim; and
 - (ii) has the legal capacity to commence the proceeding on behalf of that person or the person’s estate.

(2) A claimant is presumed to have been capable of commencing a proceeding with respect to a claim at all times unless the contrary is proved.

...

Transitional

31(1) In this section:

- (a) “**effective date**” means the day on which this Act comes into force;
- (b) “**former limitation period**” means, with respect to a claim, a limitation period that applied with respect to the claim before the effective date;
- (c) “**new limitation period**” means, with respect to a claim, a limitation period established by this Act that would apply if the claim were based on an act or omission that took place on or after the effective date.

(2) This section applies to claims:

- (a) that are based on acts or omission that took place before the effective date; and
 - (b) with respect to which no proceeding has been commenced before the effective date.
- (3) No proceeding shall be commenced with respect to a claim if the former limitation period expired before the effective date.
- (4) If there is no new limitation period with respect to a claim and the former limitation period did not expire before the effective date, this Act applies as if the act or omission had taken place on or after the effective date.

[68] In our opinion, the transitional subsection 31(4) in the effective *Limitations Act* would operate to suspend the limitation period so long as the Appellant was by reason of a mental disorder, not competent to manage her affairs or estate, regardless of the effective date of the Act. In our opinion the “former limitation period”, as defined in subsection 31(1)(b) would not expire so long as a claimant is not competent to manage their affairs or estate due to a mental disorder. Therefore, in our opinion the effective *Limitations Act* is applicable so long as a claimant continues to suffer from a mental disorder or mental disability such that they are incompetent to manage their affairs or estate. The Appellant must prove that, by reason of a mental disorder in existence in June 2000, or alternatively in June 2001, she was incapable of managing her affairs or estate and that this continued until the date of the appeal hearing.

[69] With respect to the Appellant’s submission that the time limitations in SGI’s decision letter regarding promised employment should be suspended because she was suffering from a mental disability or disorder in June 2000 which made her incompetent to manage her affairs and estate, we note the following:

- a) There is no objective medical evidence before us to support a finding of an occipital skull fracture suffered in the June 2000 accident.
- b) The Appellant was diagnosed with bipolar disorder in 1999 which was well controlled at the time of the accident. The diagnosis of bipolar disorder is not enough to consider her mentally disabled under the Act; the mental disorder must render her incompetent to manage her affairs and estate. Prior to the June 2000 accident, the Appellant was capable of holding employment from May 1999 to January 2000 and was also creating a position

with the injury prevention program during the period of time that she was suffering from her bipolar disorder. Her bipolar disorder did not prevent her from managing her affairs and applying for employment in the past and therefore the existence of the disorder is not sufficient to bring her within the provisions of *The Limitations Act*. It must be proven that the mental disorder renders her incompetent to manage her affairs or estate.

- c) The Appellant received the decision letter in October 2000. The neuropsychological assessment completed by Dr. Vrbancic in December 2000 noted that the Appellant's cognitive skills were generally intact and that she suffered a mild head injury/concussion in the June 2000 accident.
- d) The Appellant reported to her PIR that she had applied for a job in October 2000 with the Health and Social Director for the Band which paid \$XX,XXX per year.
- e) Information from Ms. Brown of Arthur Grey reported that the Appellant was applying for several employment positions and had also expressed interest in obtaining a Master's Degree in Social Work.
- f) The Appellant completed a Keyboarding and Keyboard Skill Building course in June 2001. She received 95% on her written exam.

[70] It is our opinion that the above evidence demonstrates that the Appellant had the ability to manage her affairs and estate from June 2000 to June 2001. The Appellant has not satisfied us on a balance of probabilities that she suffered from a mental disorder or disability such that she was not competent to manage her affairs or estate following the June 2000 accident. To the contrary, she was searching for employment and completed a typing course with very high marks.

[71] Accordingly, the Appellant's failure to file an appeal to the October 25, 2000 decision letter respecting promised employment is fatal to her appeal and the time limitation can not be suspended or postponed. **Therefore, we have no jurisdiction to review the decision of SGI dated October 25, 2000 regarding promised employment.**

[72] With respect to the decision letter of SGI calculating IRB, we note that although the Appellant started to receive her IRB in December 2000, she did not receive the decision letter outlining these benefits until December 2001 even though it related to her June 2000 accident. Therefore, we need to assess the Appellant's mental disability following her June 2001 accident to determine whether the time limitations in that decision letter should be postponed or suspended.

[73] With respect to the Appellant's submission that the time limitations in SGI's decision letter with respect to her IRB should be suspended because she was suffering from a mental disorder or disability in June 2001 which made her incompetent to manage her affairs and estate, we note the following:

- a) Following the June 2001 accident, in September, 2001, Dr. Vrbancic reported that due to cognitive difficulties and depression, the Appellant was not functionally capable of employment at that time. However, Dr. Vrbancic specifically stated "she now demonstrates globally depressed cognitive skills with the exception of intact reasoning and problem solving skills and good psychomotor speed". Dr. Vrbancic was concerned over her high degree of psychological distress and diagnosed her with a moderate brain injury.
- b) The July 26, 2001 home assessment noted that the Appellant required reminders to eat and take her medications. She also required supervision while attending appointments to assist her with remembering what she was told. In September, 2001, SGI provided Employer A with a caregiver benefit for the supervision and care that she was providing to the Appellant. Also, at that time, SGI was aware that the Appellant was being accompanied to all appointments in accordance with recommendations made by the occupational therapist in July 2001.
- c) On December 4, 2001, one day prior to receiving the decision letter, it was noted that her difficulties were consistent with Dr. Vrbancic's report. The coordinator and a PIR were going to meet with the Appellant to explain her benefits and SGI's expectations.

- d) In September 2002, the Appellant completed her Emergency First Aid. By October 2002, Ms. Begg wrote a reference letter on behalf of the Appellant stating that the Appellant had worked half-time as support staff for Employer B the past seven months and had “capably performed these duties” and “demonstrated exceptional qualities in this capacity”.
- e) In October 2002, the Appellant applied for and obtained a position with the Safe House working three eight hour shifts per week.
- f) The Appellant has continued to manage her financial affairs throughout the period of time of both accidents and up to the date of the appeal hearing. Employer A testified that supervision would be an intrusion as the Appellant is a very proud and independent woman.
- g) The Appellant was in contact with her PIR regarding her benefits and on occasion requested an advance on her benefits.

[74] We are very concerned that in the initial stages of the Appellant’s brain injury following the June 2001 accident she required supervision and may not have been capable of managing her affairs. This may have coincided with when she received the December 2001 decision letter, however, the evidence is not clear as to how long Employer A provided supervision and assistance. It would also have been completely confusing to the Appellant as to why she was receiving the letter in December 2001 when she had been receiving the benefits for one year. However, despite our concerns, the evidence is clear that in or around February 2002, she was capable of employment, able to find other employment and, therefore, capable of managing her financial affairs and estate. There is no sufficient and reliable evidence that she was unable to manage her affairs and estate beyond February 2002, as a result of the June 2001 accident. Therefore, we are unable to conclude on a balance of probabilities that she suffered from a mental disorder or disability which made her incompetent in managing her affairs and estate up to the date of this appeal.

[75] Accordingly, the Appellant's failure to file an appeal to the December 5, 2001 decision letter respecting IRB is fatal to her appeal and, thus, **we have no jurisdiction to review the decision of SGI dated December 5, 2001 regarding income replacement benefits.**

Permanent Impairment Benefits

Whether the decision letter dated August 19, 2004 addressing permanent impairment benefits should be upheld?

[76] The relevant sections of the *Act* which apply to permanent impairment benefits are:

153 In this Division, 'permanent impairment' includes a permanent anatomical or physiological deficit, a permanent disfigurement, a permanent acquired brain injury or any other permanent impairment prescribed in the regulations.

154 Subject to this Division and the regulations, a victim who suffers a permanent impairment because of an accident is entitled to a lump sum benefit for the permanent impairment.

156(1) The insurer shall evaluate a victim's permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

(2) If a victim's permanent impairment is not listed on the prescribed schedule of permanent impairments, the insurer shall determine a percentage for the permanent impairment using the prescribed schedule as a guide.

Section 36 of the *Regulations* also applies to permanent impairments and states:

"36. Compensation for permanent impairments is to be determined on the basis of Appendix B."

[77] With respect to the standard of review applicable to SGI's decision regarding permanent impairment benefits, we are of the opinion that there is no discretion on SGI's part with respect to the benefits in section 154 of the *Act*. The wording and intent of the above provisions with respect to permanent impairment benefits state that a claimant is entitled to a permanent impairment benefit if they suffer a permanent impairment because of the accident. The wording of the legislation is not discretionary and therefore the appropriate standard of review is correctness. The Commission must determine if SGI's assessment of permanent impairment benefits was correct having regard to all of the evidence.

[78] In accordance with the legislation, permanent impairment benefits (“PIB”) are assessed and awarded pursuant to Appendix B of *The Personal Injury Benefits Regulations* (hereinafter the “*Regulations*”). PIB are assessed by SGI’s medical consultants who have been trained in the area. In this case, the Appellant was awarded a total of 42% whole body permanent impairment as set out in the decision letter, dated August 19, 2004. Dr. Howlett, medical consultant for SGI, completed a permanent impairment assessment with respect to the Appellant’s injuries. Dr. Howlett awarded permanent impairment for hearing loss (23%); alteration of higher cognitive function (15%); anosmia (4%); and alteration of brain tissue (3.0%). Using the Table of Successive Remainders, he calculated a total whole body impairment of 42%.

[79] In his legal brief, counsel for the Appellant agreed with the assessment for hearing loss and anosmia. He argued that the PIB assessment for the alteration of cognitive function was too low. He was of the view that the alteration of cognitive function should have been assessed under Part 1, Division 2, Subdivision 3, Item 13(k) (iii) of the *Regulations*, which would have resulted in a PIB assessment of between 20-45%. However, Dr. Howlett assessed the PIB for alteration of higher cognitive function at 15% in accordance with Part 1, Division 2, Subdivision 3, Item 13(k)(iv) of the *Regulations*.

[80] As indicated above, alteration of higher cognitive function is dealt with in Part 1, Division 2, Subdivision 3, Item 13(k) of the *Regulations*. Item 13(k)(iii) and (iv) of that Part read as follows:

(iii) alteration of the higher cognitive or integrative mental functions which moderately impair the performance of the tasks necessary for every day life and require occasional supervision for performing such activities, including any side effects of medication: 20-45%

(iv) alteration of the higher cognitive or integrative mental functions which slightly impair the performance of the tasks necessary for every day life, including any side effects of medication: 7-15%

[81] Dr. Howlett testified at the hearing. He was of the view that in order to fall under Part 1, Division 2, Subdivision 3, Item 13(k) (iii) of the *Regulations*, there must be a medically indicated need for supervision of the tasks necessary for every day life. Dr. Howlett advised that traditionally these tasks have been defined as activities of daily living and have been expanded

over time to include occupational pursuits. It is our opinion that the wording of the *Regulations*, is intended to include activities of daily living and occupational pursuits of the claimant being assessed. If that claimant normally works, then the ability to complete work, either in a supervised or non-supervised capacity should also be considered.

[82] We have reviewed all documents available to us at this time and we are of the view that there is no medical documentation to support the Appellant's need for supervision in respect of the activities of daily living. The Appellant reported during her residual capacity evaluation that she "could do everything now". She reported at the appeal that she was capable of living independently and had always maintained controlled over her finances.

[83] However, when one considers Dr. Howlett's testimony that the definition has been expanded over time to include occupational pursuits then we are of the opinion that the Appellant does require some supervision. Dr. Howlett identified that the critical distinction between the categories in Item 13(k) was the need for supervision and concluded on the basis of Dr. Hillis's 2002 neuropsychological evaluation, that the Appellant did not require supervision. We disagree. In 2002, Dr. Hillis specifically indicated that the Appellant would need: information repeated several times to ensure it is learned; to be supported and supervised initially in her work environment to ensure that she has acquired and retained all the information necessary to make adequate decisions; and to work reduced hours. Dr. Hillis also stressed that her learning and memory deficits would be exacerbated by fatigue and exhaustion would likely lead to errors. In our opinion, there is a definite indication that the Appellant would require occasional supervision at least initially.

[84] In 2004, Dr. Hillis changed her diagnosis from "moderate head injury" to "severe head injury". Although she did not specifically comment on supervision in the workplace, she found the Appellant to be functioning worse than in 2002. In our view, if she required supervision in 2002 and her medical condition was more severe in 2004, then she would continue to require at least some supervision in the performance of her job duties in 2004. It is our opinion that the need for occasional supervision would still be necessary and possibly increased. Unfortunately, Dr. Howlett was not in possession of the 2004 neuropsychological report at the time that he

performed the PIB assessment. In fact, Dr. Howlett was not in possession of several critical medical reports at the time of his PIB assessment, namely:

1. the Neuropsychological Assessment Report, dated July 8, 2004 of Dr. Sarah Hillis,
2. the report of Dr. McMahon, dated July 4, 2002;
3. Kinetik Physical Work Performance Evaluation of February 15, 2005; and
4. the RCE assessed by Kinetik Rehabilitation Services on December 7 and 8, 2004.

[85] In our opinion, the above medical documents would be critical in making findings regarding permanent impairments. Therefore, we are of the view that the PIB assessment with respect to the alteration of cognitive function can not be correct and must be set aside on the grounds that Dr. Howlett failed to consider Dr. Hillis' comments in 2002 that indicated the need for supervision in the workplace at least initially and his failure to review and consider critical medical opinions, specifically but not limited to, Dr. Hillis's 2004 neuropsychological evaluation and the RCE.

[86] In light of our conclusions, SGI is directed to review the need for occasional supervision and place the Appellant within the appropriate range of Part 1, Division 2, Subdivision 3, Item 13(k)(iii), having regard to the 2004 neuropsychological evaluation, the RCE and any other relevant information. SGI is ordered to issue a new decision letter regarding their assessment of her cognitive function.

[87] Counsel for the Appellant also argued at the hearing that several of the Appellant's MVA-related injuries were not included in the PIB assessment. These injuries include:

1. Communication disturbances and/or difficulties as defined by Part 1, Division 2, Subdivision 3, Item 13(h)(iv). This should be assessed by an appropriate medical specialist capable of making this assessment.
2. Fractured left mastoid air cell. Dr. Howlett admitted that compensation should be considered in this area.
3. Vertigo or an impairment of the vestibular function or possible exacerbation of Meniere's Disease/syndrome. The Appellant admitted to intermittent vertigo. This

area should be reviewed by the medical consultants. It is not clear to us whether this would be considered a permanent condition or whether the vertigo will resolve. If the intermittent vertigo is considered to be permanent in the sense that it will come and go for the rest of her life, then in our opinion the Appellant may be entitled to compensation under the *Regulations*.²⁶ With respect to Part 1, Division 9, Subdivision 2, Item 6(d), we note that the evidence at the hearing was that the Appellant was still driving an automobile, although she was advised not to climb ladders or perform activities that required balance.

4. A subaracknoid fistula. In our opinion, the injury must be permanent to be awarded benefits under Appendix B of the *Regulations*. We are unable to determine if the injury suffered by the Appellant was permanent or falls within Part I, Division 2, Subdivision 1, Item 4(b). It should be determined by an appropriate medical specialist whether the leakage of cerebrospinal fluid suffered by the Appellant following the June 2001 accident is considered to be a permanent impairment which is compensable under the *Regulations*.

[88] Subsequent to the hearing, counsel for the Appellant argued that a fractured occipital bone was missed either in the June 2000 accident or the June 2001 accident. The Appellant should seek clarification of this injury through her medical practitioners and if further assessments are necessary to clarify this issue then those should be undertaken. Depending on the outcome of that clarification, this may also be an area which should be re-examined by the medical consultant. Legal counsel for the Appellant submitted in his legal brief that this may change the percentage allocated for alteration of brain tissue. In the event the fractured occipital bone is different from the mastoid bone, then this should be addressed by SGI in their permanent impairment re-assessment.

[89] At the hearing, counsel for SGI conceded that the communication disturbance and the vertigo issue should be re-examined in the context of a PIB assessment and that a new decision letter be issued. In light of the above, we set aside the PIB assessment and order that SGI proceed with a PIB assessment on an expedited basis, such assessment to address all of the issues

²⁶ The evidence was that there were episodes of vertigo but it did not address the permanency of the condition.

outlined above, as well as the alteration of cognitive function. We order that the medical consultant performing the PIB assessment be provided with all relevant medical information, including the afore-mentioned documents. Once the decision letter has been issued, the Appellant may appeal SGI's decision if desired.

[90] It would have been very helpful if Dr. Howlett would have identified all medical documentation reviewed in his assessment so that counsel for the Appellant would have been able to identify what had been considered and what medical assessments had not been reviewed by Dr. Howlett. It would assist this Commission tremendously if SGI's medical consultants adopted a practice when writing medical reports to list all documents reviewed by them in their opinions.

Determined Employment

Whether the decision letter dated August 26, 2005 with respect to the Appellant's determined employment should be upheld?

[91] SGI has the authority to determine an employment for the Appellant pursuant to Section 132 of the *Act* (the "two-year-determination). Factors to be considered are set out in Section 134(1). Specifically, they state:

Determination of employment after second anniversary of accident

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

...

134 In determining an employment pursuant to section 132 or 133, the insurer shall consider the following factors:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved pursuant to this Part;

(c) whether the employment is available in the region of Saskatchewan in which the victim resides;

(d) the employment that the victim is able to hold:

(i) on a regular and full-time basis; or

(ii) if it would not be possible for the victim to hold employment on a regular and full-time basis, on a part-time basis;

(e) any other prescribed factors.

[92] With respect to the standard of review applicable to SGI's decision regarding determined employment, we are of the opinion that SGI's decision that the Appellant is capable of performing the duties of a General Office Clerk, four hours per day, must be correct.

[93] Legal counsel for the Appellant took the position that there was no medical evidence that the Appellant was able to work at 50% capacity and requested that her full IRB be reinstated.

[94] Legal counsel for SGI argued that the Appellant had demonstrated an ability to perform office work in the past and as a General Office Clerk was one of the occupations that the occupational therapist opined that the Appellant could do for four hours per day, SGI determined that it was an appropriate determined employment. SGI conceded that fatigue would prevent the Appellant from performing a full day of work but that the testing completed by the occupational therapist confirmed that she could perform 4 hours of light level work per day.

[95] Mr. Sandeep Sharma, occupational therapist, testified at the appeal hearing. He stated that it was his opinion, and that of Dr. Hillis, Dr. Vrbancic and Dr. Shepel, that the Appellant would be able to participate in some kind of gainful employment. The Appellant was unable to complete all of the physical testing due to fatigue, therefore, Mr. Sharma was unable to conclude exactly what her limitations were. As a result, Mr. Sharma stated that fatigue would be a limiting factor for the Appellant. On that basis, he recommended that 3.5 to 4 hours of light level work should be explored, with the support of her occupational therapist and psychologist. Mr. Sharma provided three categories of employment that the Appellant would, in his opinion, physically be able to perform: General Office Clerk, Pharmacy Assistant and Food and Beverage

Server. The Appellant had performed the duties of a General Office Clerk in October 2002, therefore, on that basis SGI determined her into the category of a General Office Clerk.

[96] Dr. Shepel identified career/vocational areas that might fit such as: sales, merchandising, social services, office practices, clerical/clerking, computer activities, manual/skilled trades. Dr. Shepel's report was prepared in July 2003. Dr. Hillis reported in 2004 that the Appellant had declined in function since 2002; and, therefore, it is our opinion that Dr. Shepel's recommendations may have been outdated. In any event, we do note that Dr. Shepel and Dr. Hillis both reported a difference in performance over two days of testing. When the Appellant was rested, it was noted her confidence and motivation were better and she demonstrated more perseverance on tasks and her functioning was improved. However, in our opinion, it is critical to note that Dr. Hillis reported in 2004 that the Appellant's function had deteriorated and that it was likely due to the fact that she was tired most of the time, therefore affecting her cognitive performance. This is a critical finding for the purposes of selecting her determined employment. The Appellant's cognitive performance is affected by her fatigue and depression which were prevalent at the time that SGI completed their two-year-determination.

[97] In 2004, Dr. Scheckter specifically stated that the Appellant was capable of some form of employment but it must be the "right employment", meaning within the right parameters with respect to hours and nature of employment. Dr. Scheckter reported "[m]ore recently, she has likely (unwittingly) contributed to her perpetuation and exacerbation of her depression by curtailing her activities and social contact; she reportedly has very few social outlets, and rarely leaves her residence. Her decision to be less active may be in response to fatigability, as too much stimulation leaves her feeling tired, sore and mentally drained. However, if this is the case, she has gone too far, and needs to reactivate herself to the extent her daily reserves of energy will permit."

[98] We are cognizant that in October 2002, the Appellant's employer at Employer B, indicated in a reference letter, that the Appellant was able to perform the office duties on a part time basis without any difficulty. We know that the Appellant worked 4 hours per day in October 2002. However, the Appellant's work placement with Employer B in 2004 was

terminated for reasons other than her fatigue. It is clear from a review completed by the employer in September 2004 that the Appellant was having difficulty completing her tasks due to stamina, skills and absences due to vertigo. Mr. Sharma stated specifically that “3.5 to 4 hours should be explored”. This is supported by the opinion of Dr. Scheckter which was that the Appellant was capable of employment but only with the right job and the right hours. The evidence in 2004 suggests that the Appellant’s fatigue and vertigo were causing her difficulty with completing 4 hours per day of general office duties. This is consistent with the neuropsychological opinion of Dr. Hillis which reported that the Appellant was functioning at a lower level in 2004 due to being fatigued most of the time. It is conceivable that this fatigue would lead to errors which would lead to the poor performance of skills by the Appellant as noted by the employer in September 2004.

[99] We accept Dr. Hillis’s opinion that the Appellant’s actual abilities would not worsen with her head injury, but we find on a balance of probabilities that the Appellant was having difficulty working 4 hours per day as a general office clerk due to extreme levels of fatigue which impacted her ability to perform the skills necessary for a general office clerk. Dr. Hillis altered her diagnosis of the Appellant’s head injury to “severe” in 2004. This is substantial. Dr. Hillis further opined that fatigue levels likely resulted in the Appellant “performing at the lower end of her abilities most of the time”.²⁷ Mr. Sharma expected the 3.5 to 4 hours per day to be explored with proper supports in place, specifically her psychologist and occupational therapist. Although, Mr. Sharma did not say that she required supervision, Dr. Hillis, in 2002, noted the necessity of supervision initially in a work environment. In our opinion, the conclusion in the RCE was that 3.5 to 4 hours should be explored, not that the Appellant would be able to do it. Clearly the indication by Mr. Sharma for support, Dr. Hillis’s concern over supervision initially, and Dr. Shekter’s concern that it be the right job with the right hours, should not be seen by SGI to be conclusive opinions that the Appellant would physically and intellectually be able to perform the duties of a General Office Clerk for four hours per day.

²⁷ We witnessed her fatigue during the appeal hearing, although we are in agreement that she did not display significant cognitive problems or difficulties with word finding. However, it is important to note that she was provided with many opportunities to rest during periods of the hearing.

[100] We are not satisfied that the Appellant would be able to successfully complete a work placement of 3.5 to 4 hours per day as a General Office Clerk. Although the Appellant may have been able to perform the work in 2002, her fatigue and vertigo were making it difficult to complete her work placement in 2004, even before the placement was terminated. There is not sufficient evidence for SGI to conclude that the Appellant can perform the duties of a General Office Clerk for 4 hours per day.

[101] It is also our opinion that the RCE and the PWPE focused primarily upon the Appellant's physical abilities to perform light level work for four hours per day. We are not convinced that given the Appellant's severe brain injury and fatigue levels, that she would have the cognitive skills or physical abilities necessary to complete the duties of a General Office Clerk for four hours per day. In our opinion, SGI's determination that the Appellant can perform General Office Duties for four hours per day was based on outdated reports of Dr. Shepel and the erroneous assumption that because she performed office duties in 2002 she must be able to perform them in 2004.

[102] Therefore, we recommend that the Appellant's ability to perform the duties of a General Office Clerk for 3.5 to 4 hours per day be reassessed, specifically reviewing the impact that her fatigue and depression are having on her ability to function cognitively in that position, and for how many hours she would be able to successfully complete these duties.

[103] We are cognizant that the Appellant's own testimony was that she did not like office work and did not want to do it. Unfortunately, the provisions of the *Act* which deal with determined employment do not consider whether the insured enjoys the determined work, only whether they have the ability to perform the work.

[104] Therefore, the Appellant is entitled to her full IRB for her determined employment as the medical evidence does not satisfy us on a balance of probabilities that she is physically or intellectually capable of performing those duties for four hours per day.

Recommendations and Concerns with File Administration

[105] We are without jurisdiction to review the decision letters of SGI with respect to promised employment and IRB because the Appellant has missed the appeal timelines.

[106] However, we are all in agreement that if the Appellant had not obtained legal counsel, she would likely never have received some benefits to which she is rightfully entitled despite SGI's positive duty prescribed in section 176 of the *Act* to ensure that she receives these benefits. Furthermore, an insurer has a duty to act in utmost good faith and we all agree that SGI has failed the Appellant in the administration of some of her benefits and, whether it was unintentional or due to a lack of understanding of the legislation by the PIRs, it does not absolve the insurer of their duty to ensure that the Appellant received the benefits to which she was entitled. We are also of the opinion that the duty under section 176 is heightened for brain injured claimants.

[107] Even though we are without jurisdiction to review the decisions with respect to promised employment and IRB, we have reviewed the decisions respecting permanent impairment benefits and determined employment. In the course of doing so, we have noted several problems with the administration of the Appellant's file that cause us concern. We have mentioned them in an effort to prevent similar conduct in the future. Some of our concerns are as follows:

- a) The Appellant was paid an income replacement benefit pursuant to her 180-day-determination, however, her decision letter respecting this benefit along with the applicable appeal periods was not issued until one year following the administration of that benefit.²⁸ The facts and reasoning in the decision letter is inconsistent with how her IRB was actually calculated. In fact, one could only understand how this decision was made after hearing the evidence of Mr. Ross Teneycke, as both PIRs assigned to the Appellant's file, reported it was arrived at for different reasons.²⁹ The decision letter respecting promised employment does not specify the three criteria necessary to establish

²⁸ This is particularly troubling that the PIR was aware that the Appellant did not agree with the calculation and advised her in February 2001 that she would receive the decision letter with appeal options shortly.

²⁹ In addition, the vocational rehabilitation consultant assigned to the Appellant's file was also advised that she had been determined as a Social Worker .

promised employment. Furthermore, the issue of promised employment was not reviewed again in January 2001 when SGI was provided with new information by Arthur Grey that Employer A had filled the position that the Appellant allegedly had been promised prior to her June 2000 accident. It is difficult for claimants to appeal when they do not understand the basis or facts relied upon by SGI in arriving at decisions regarding the claimant's entitlement to benefits. It is our opinion that the decision letters of SGI with respect to promised employment and IRB did not satisfy the requirements of Section 192 of the *Act* which required SGI to provide written reasons. Written reasons must include the facts relied upon by SGI.³⁰ We believe that SGI's failure to identify their findings of fact and provide proper reasoning would have made it difficult for the Appellant to file a proper appeal even if she wanted to because she was not provided with any of the facts, or alternatively, because she was provided with inconsistent information upon which SGI based their decisions. We recommend that SGI provide as much detail about the facts and policies relied upon in making decisions so that claimants can accurately assess their appeal options.

- b) The Commission was advised at the appeal hearing by the PIR and legal counsel for SGI that Acquired Brain Injury Guidelines ("ABI Guidelines") do not exist despite the Commission's reference to these ABI Guidelines in *S.A. v. SGI*³¹ and *T.A v. SGI*³². This is of particular concern in light of the fact that the PIR is considered to be a PIR Specialist who specializes in file administration for brain and spinal cord injured claimants.
- c) The PIR failed to provide the SGI medical consultant with relevant medical information necessary for making a proper assessment of permanent impairment benefits. She failed to provide the RCE, the 2004 neuropsychological report of Dr. Hillis and the report of Dr. McMahon dated July 4, 2002; all very critical medical reports. Furthermore, she failed to forward a letter written by the Appellant's legal counsel which specifically addressed areas of concern for permanent impairment benefits. We do not understand this conduct

³⁰ The reason this is so is because section 98 of the *Regulations* states that the claimant's notice of motion when they appeal SGI's decision must set forth the insurer's findings of fact. There is a presumption that the insurer will do this in their decision letter.

³¹ 2004 SKAIA 019. These guidelines were not reviewed by the panel.

when legal counsel's correspondence would serve to assist a medical consultant in preparing his assessment and ensuring that all areas had been addressed that were raised by legal counsel. Therefore, we recommend that SGI review their policy regarding the type of information forwarded to medical consultants when provided by a claimant or their legal counsel. PIRs do not have the same degree of medical training that SGI's medical consultants have and they should not decline or neglect to forward to the medical consultant, critical documents provided by the claimant or legal counsel, particularly when a permanent impairment assessment is being completed. In our opinion, all medical documentation and a claimant's written request for certain benefits would be critical documents that should be reviewed by the medical consultant in completing a thorough assessment of permanent impairment benefits. In this case, Dr. Howlett clearly was not provided with all of the medical information necessary for him to make a proper permanent impairment assessment.

[108] In light of our concerns regarding file administration, we believe this may be an appropriate file for SGI to review in its entirety to ensure they have satisfied their duties pursuant to section 176 of the *Act*. A missed limitation period may prevent a review of a decision of SGI by this Commission but it does not prevent SGI from fulfilling their duties and obligations in ensuring that a claimant has received the benefits to which they are entitled. Due to the inadequate file administration by both PIR's assigned to the Appellant's file, we wish to make the following comments particularly with respect to the Appellant's IRB:

- a) SGI relied upon the evidence from Employer A's company to determine that the Appellant was going to be a Program Researcher and Developer. In arriving at their determination of \$XX,XXX they did not consider her past history of work as a Social Worker and her alleged promised employment income of \$XX,XXX. There is an indication by Arthur Grey that the Appellant's determined employment was that of a Social Worker.

³² 2005 SKAIA 004

- b) According to our calculations, the Appellant previously earned more annually in 7 months than SGI determined for her when classifying her as a Researcher employed 12 months of the year.
- c) Mr. Teneycke stated that SGI considers what work the Appellant intended on doing following the accident. We note that section 131 of the *Act* states that the insurer shall consider the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident. Sections 23 and 24 of the *Regulations* both refer to the five calendar years preceding the accident. Have these sections been referred to for the purposes of the Appellant's 180-day-determination? Is the 180-day-determination consistent with: what she had earned in the past; her history of employment positions; the type of employment she was actively seeking; and what she stated she could be earning (ie. \$XX,XXX)? Did SGI consider that in October 2000, two months prior to her 180-day-determination, the Appellant applied for a position that paid \$XX,XXX?
- d) Is the 1997 income information from Arthur Grey relevant to the calculation of her IRB with respect to presence at work? If section 24 of the *Regulations* is considered then does the 1997 income information of an approximate employment income of \$XX,XXX become relevant? Would this be the correct income amount to be adjusted in accordance with Section 27 of the *Regulations* or 58%?

[109] The above comments are only provided to SGI should they choose to conduct a review of the Appellant's entitlement to benefits. We wish to make it clear that we have not reviewed the decisions with respect to promised employment or income replacement benefits and make no findings with respect to the correctness of those decisions. Should SGI conduct a file review, we recommend they review our comments in paragraph [108] to assist them with that review.

[110] These recommendations are made due to the nature of the injuries suffered by the Appellant. She was injured in two motor vehicle accidents resulting in a severe brain injury. In those fact situations, we believe that SGI's duty to the insured is heightened in assisting and

providing benefits. It is unfortunate that the Appellant was forced to retain legal counsel to enforce her right to benefits under the Act and Regulations.

[111] It is also strongly recommended that the Appellant or her legal counsel, attempt to obtain a copy of her 1997 T4 from Employer C so that it can be provided to SGI. However, we note that the Appellant is a First Nations person and is not required to declare certain income on her tax returns and therefore this information may no longer be available. In our opinion, there is sufficient and reliable evidence from Arthur Grey Consulting that SGI could rely upon for the purposes of 1997 employment income should it become relevant.

CONCLUSION

[112] The Commission does not have the jurisdiction to review the decision letters issued by SGI dated October 25, 2000 regarding the Appellant's promised employment and December 5, 2001 regarding the calculation of the Appellant's IRB.

[113] The decision letter dated August 19, 2004 addressing permanent impairment benefits is set aside. SGI is ordered to complete a new permanent impairment assessment taking into account all of the Appellant's injuries and all of the critical reports on the Appellant's file.

[114] The decision letter dated August 26, 2005 with respect to the Appellant's determined employment is set aside. The Appellant is entitled to the full income replacement benefit for a General Office Clerk until it can be established that the Appellant is able to perform those duties for four hours per day.

Solicitor Client Costs

[115] We are of the view that subsection 193(12) of the Act is a taxing provision.³³ We rely on *Bear v. Saskatchewan Government Insurance*,³⁴ wherein Justice Ryan-Froslic found that the Act does not imply an automatic award of solicitor/client costs given that subsection 198(5) of the old Act, which provided for solicitor/client costs, was expressly repealed.

³³ See also *K.A. v. SGI*, 2005 SKAIA 013 and *H.L. v. SGI*, 2005 SKAIA 007

³⁴2004 SKQB 398.

[116] In *Bear, supra*, Justice Ryan-Froslic cited the Saskatchewan Court of Appeal case of *Siemens v. Bawolin*.³⁵ In that case, the Court of Appeal outlined four principles to be applied in considering an award of solicitor and client costs:

1. solicitor and client costs are awarded in rare and exceptional cases only;
2. solicitor and client costs are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible;
3. solicitor and client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;
4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred.³⁶

[117] Applying these factors to the case at hand, while we have noted some important concerns with the administration of this file, we are unable to find that SGI's conduct in this case constituted scandalous, outrageous or reprehensible conduct and we do not find SGI's conduct prior to or at the hearing to be scandalous, outrageous or reprehensible. We do not find any conduct on the part of SGI that should be censured, nor do we find any circumstance or conduct that would identify the case at hand as an exceptional one so as to warrant an award of solicitor/client costs. The request for solicitor client costs is, therefore, denied.

[118] As the Appellant has been partially successful in her appeal, she shall be entitled to all reasonable costs of the appeal, including travel expenses, meals, lodging, and legal costs on a party-party basis in accordance with column 3 of the Court of Queen's Bench Tariff of Costs. In accordance with the decision of the Commission in *N.N. v. Saskatchewan Government Insurance*, we allow the fee for hearing preparation, preparation of brief, and attendance at the hearing at double column three of the Tariff. The limitation set out in subsection 96(1) of the *Regulations* in the maximum amount of \$2,500 applies. The Appellant is also entitled to the reimbursement of her appeal fee in accordance with subsection 86(4) of the *Regulations*.

Dated at Saskatoon, Saskatchewan, on March 29, 2007.

³⁵219 Sask. R. 282 (CA).

Joy Dobko, Chair

Carol Olson, Commission Member

Stephanie Pfefferle, Commission Member

³⁶*Supra*, at para 118.