

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *P.S. v. Saskatchewan Government
Insurance, 2007 SKAIA 058*
Date: 20070416
File: 013 of 2004

BETWEEN

P.S., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
P.S., Applicant
Dale Brown, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Joy Dobko, Commission Member
Al Knippel, Commission Member

**THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL AND HEALTH
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND
OTHER IDENTIFYING INFORMATION.**

Heard at Saskatoon, Saskatchewan
August 12, 2004, June 14, 2006 and March 13, 2007

DECISION

[1] This is an appeal by P.S., the Appellant, of decisions made by Saskatchewan Government Insurance (“SGI”) dated January 7, 2003 and May 27, 2005 with respect to his entitlement to income replacement benefits as a result of injuries sustained in a motor vehicle accident on September 26, 1998 (the “accident”).

PRELIMINARY MATTERS:

[2] The Appellant’s appeal was originally brought before us on August 12, 2004. At that time it was adjourned to allow SGI to complete an internal review of the claimant’s file to determine if the claimant was entitled to benefits both under the *Workers’ Compensation Act, 1979* and under Part VIII of the *Automobile Accident Insurance Act*¹ (“AAIA”) or whether section 206 of the AAIA would prevent him from receiving benefits under Part VIII.

[3] Section 206 of the AAIA states:

206(1) Notwithstanding any other provision of this Part, no benefits are payable to a person as a result of an accident if that person is entitled, with respect to that accident, to compensation pursuant to *The Workers’ Compensation Act, 1979*, or any other Act that relates to the compensation of persons who are victims of an industrial accident.

[4] Section 206 of the AAIA has been considered by the Court of Queen’s Bench in *Marsh v. Gates*² and *Lehrer v. Saskatchewan Government Insurance*³. Ball, J. held that the intent of section 206 of the AAIA is clear to the extent that no benefits are payable if the claimant is entitled to compensation for the same accident under *The Workers’ Compensation Act, 1979*⁴. It was held that section 206 was necessary to preclude the double payment of benefits for injuries suffered in the same accident.

[5] SGI completed a review of their file and determined that due to the unusual circumstances under which the Appellant was eligible for Workers’ Compensation benefits⁵,

¹ Part VIII Personal Injury Benefits, RSS 1978, c. A-35

² [1996] S.J. No 786

³ [2002] S.J. No. 50

⁴ S.S. 1979, c. W-17.1.

⁵ See paragraphs [7] and [20] below.

they would pay him an income replacement benefit in addition to the benefits that he was receiving from Workers Compensation despite section 206 of the AAIA as amended and in force at the time of the Appellant's accident.

[6] At the continuation of the Appellant's appeal on June 14, 2006, the Appellant confirmed that the only issues before the Commission were with respect to the calculation of the income replacement benefit. The Appellant advised the Commission that he was not challenging the time frame for which the benefits were paid or any medical expenses associated with his accident related injuries. Therefore, the three time periods for which the Appellant either received or was considered entitled to income replacement benefits and/or Workers' Compensation benefits were:

- a) October 4, 1998 to November 20, 1998;
- b) November 21, 2002 to December 31, 2002; and
- c) January 1, 2003 to November 14, 2003.

FACTS:

[7] The Appellant was involved in a motor vehicle accident on September 26, 1998 in which he suffered a serious fracture to his greater trochanter in his left hip. The fractured hip required surgery in November 2002 and October 2003. At the time of the accident, the Appellant was a volunteer with the RCMP as a special constable. He was working in his volunteer position (for which he received no remuneration, but only reimbursement for certain limited expenses) with the RCMP when he was injured in the accident which involved the pursuit of an impaired driver. The injuries suffered by the Appellant and the timelines relating to his three periods of disability mentioned in paragraph [6] are not in dispute.

[8] At the time of the accident, the Appellant was president and 51% owner of a seed farm being operated under a limited company called [the Seeds Company]. He was 51% owner of the Seeds Company and his wife owned 49%. The circumstances with respect to the calculation of the Appellant's income replacement benefits is rather complicated. Prior to the accident, in 1995

and 1996, the Appellant operated his seed farm as a sole proprietorship. In 1997, the Appellant formed a partnership with the Seeds Company and in 2000 the partnership between the Appellant and the Seeds Company was dissolved and all operations were rolled into the Seeds Company and the corporation continued to operate the seed farm from 2000 forward.

[9] The Appellant testified at the appeal hearing. He stated that he and his wife have very defined roles in the business of the Seeds Company. He is a certified seed grower and is responsible for the seed production. His wife is responsible for the bookkeeping aspect of the Seeds Company and also involved with yard maintenance. The Appellant testified that when he was injured he could no longer carry on the physical aspect of seed production. He further stated that his wife could not step in and assume his role because she would not have the knowledge or expertise to do his job.

[10] Mr. Ross Teneycke, Manager of SGI Injury Claims Calculation Unit, testified on behalf of SGI at the appeal hearing. Mr. Teneycke is a Certified Management Accountant and as part of his employment duties with SGI, he provides technical assistance to personal injury representatives and the Calculator Unit in calculating income replacement benefits. Mr. Teneycke advised that once a decision was made to pay the Appellant income replacement benefits to top up the Workers' Compensation benefits, presumably as an *ex gratia* payment under section 210 of the *Act*, he became involved in the calculation of those benefits due to the complexity of the Appellant's financial situation with the Seeds Company.

[11] Mr. Teneycke testified that in order to calculate the Appellant's gross yearly employment income in 1995 and 1996, SGI relied upon the personal income tax returns of the Appellant. In accordance with Section 21 of the *Personal Injury Benefits Regulations* ("*PIBR*"), Mr. Teneycke advised that the Appellant's net income from his proprietorship in 1995 and 1996 was used and the capital cost allowance was added back to arrive at a gross yearly employment in 1995 of [amount] and [amount] in 1996. These calculations are shown on a document produced by SGI entitled "Self Employment Worksheet for Loss Dates prior to July 1, 2002 completed on October 20, 2005 which is attached as Appendix A to this decision. Mr. Teneycke stated that in order to calculate the Appellant's gross yearly employment income for 1997, SGI went outside of the

provisions of the legislation in an attempt to provide the Appellant with a more accurate calculation of his gross yearly employment income for that year. As he was now technically an employee of the Seeds Company, his income should have been calculated on his salary or wages from the Seeds Company. However, he did not pay himself a salary even though the company earned substantial income. Mr. Teneycke advised that for 1997, SGI not only considered the Appellant's net income and capital cost allowance from his proprietorship shown on his personal income tax return but they also considered the net income, the capital cost allowance and the inventory adjustment of the limited company in calculating his 1997 gross yearly employment income. Mr. Teneycke advised that the consideration of the net income of the limited company is in direct contradiction of the provisions of the legislation which only considers income derived from proprietorship and partnership. In his opinion, this was an extreme measure taken by SGI.

[12] However, only 50% of that amount was considered: in effect, Mr. Teneycke says that SGI treated the limited company as a partnership due to the almost equal ownership of the Appellant and his wife. In that scenario, the revenues and expenses are allocated based on the partnership shares. In the Appellant's situation, Mr. Teneycke conceded the allocation should have been 51% for the Appellant versus 49% for his wife. He further stated that how the allocation is reported to Revenue Canada is how SGI determines their allocation for calculating income replacement benefits. Consequently, Mr. Teneycke advised that the Appellant's gross yearly employment income for 1997 was determined to be [amount].

[13] Mr. Teneycke stated that to arrive at the gross yearly employment income for the purpose of calculating the Appellant's entitlement to income replacement benefits he calculated a two year average and a three year average. The two year average produced the result most favourable to the Appellant with a gross yearly employment income of [amount] which was then used on the calculation sheets for calculating income replacement benefits.

[14] If SGI did not use the net income of the Seeds Company in 1997 and only used the Appellant's net income on his personal income tax return, then the 1997 net income for the Appellant would have been only [amount]. Mr. Teneycke advised that had SGI stayed completely within the provisions of the legislation and not considered the net income of the

limited company in 1997, the Appellant's three year average gross yearly employment income for the purposes of calculating income replacement benefits would have been [amount] and his two year average would have been [amount] as set out in a Self Employment Worksheet completed on January 4, 2005 and attached as Appendix B to this decision. As can be seen, these amounts are considerably less than the [amount]. It was SGI's opinion that the Appellant received a greater benefit by also using the net income from the limited company in 1997.

[15] The income replacement benefit under the no fault provisions pays 90% of the benefit⁶. However, the Appellant had an SGI Canada package policy which would pay not only the remaining 10% but any excess over the maximum yearly insurable earnings. Mr. Teneycke stated that the maximum yearly insurable earnings⁷ for each year was as follows:

Year	Maximum Insurable Earnings	Year	Maximum Insurable Earnings
1995	50,000	2001	57,788
1996	51,400	2002	57,788
1997	52,058	2003	57,825
1998	54,893	2004	59,062
1999	55,875	2005	61,139
2000	56,855	2006	63,043

[16] The Appellant's earnings, however calculated, were well over the maximum insurable earnings. Mr. Teneycke stated that the maximum benefit that the Appellant could get coverage for under no fault income replacement benefits at the time of his accident in 1998 was 90% of [amount]. He stated that his SGI Canada package policy would cover additional income replacement benefits for the 10% and the excess over the maximum insurable earnings up to his

⁶ Section 136 of the *AAIA* states that an income replacement benefit is equal to 90% of the victim's net income.

calculated gross yearly employment income. Mr. Teneycke stated that SGI's treatment of his 50% ownership of the Seeds Company only affected the calculations under the SGI Canada package policy which used the gross yearly employment income of [amount].

[17] At the resumption of the appeal hearing on March 13, 2007, new evidence was introduced with respect to gross yearly employment income. Mr. Kunz, accountant for the Appellant, reviewed the financial statements of the Seeds Company and the income tax returns and concluded that the three year average for 1995-1997, on a cash basis, was actually [amount] and the two year average was [amount] which is slightly less than the original gross yearly employment income of [amount] used by SGI. SGI had used the Seeds Company's financial statements (prepared on an accrual basis (when the income is earned and the expenses are incurred), according to generally accepted accounting principles). Farmers, however, are permitted to file tax returns on a cash basis, when the income is received, and the expenses are paid for. This difference in timing can sometimes have a dramatic effect. Mr. Kunz testified that the pre-accident cash and accrual income figures were fairly consistent, but it was the post-accident income figures that were different when calculated on a cash basis. In response to Mr. Kunz's recalculated amounts for the pre-accident years of 1995-1997, Mr. Teneycke advised that SGI would not complete a recalculation on the basis of the lesser income as SGI's original calculations were to the Appellant's advantage.

[18] In the initial hearing, Mr. Teneycke also explained that in order to calculate the Appellant's entitlement to income replacement benefits, SGI had to calculate the amount of income the Appellant earned from his return to work during the time periods that he was entitled to income replacement benefits. In accordance with the legislation, 75% of the return to work income would be deducted from his income replacement benefits in accordance with Section 140 of the *AAIA*. If the Appellant's return to work income exceeded his calculated gross yearly employment income or the maximum insurable earnings, then he was not entitled to receive an

⁷ Section 138 of the *AAIA* provides the maximum insurable earnings and the calculation to be used for the years following 1995 when the Act came into force.

income replacement benefit. Mr. Teneycke stated that the calculations for return to work income are completed using the same process as used to calculate gross yearly employment income.⁸

[19] SGI initially determined that the Appellant's employment income earned from his return to work was: [amount] in 1999; [amount] in 2000; [amount] in 2001; [amount] in 2002 and [amount] in 2003.⁹ Mr. Teneycke originally stated that because the Appellant's return to work income of [amount] in 2002 was greater than his gross yearly employment income of [amount], he would not be entitled to an income replacement benefit for that year. However, at the resumption of the hearing on March 13, 2007, new evidence was introduced by Mr. Kunz, which showed the return to work income to be [amount] in 2002 and [amount] in 2003. SGI accepted these figures to be accurate based upon their review of the new material supplied by Mr. Kunz, including corporate tax returns for the Seeds Company. The return to work income in 2002 and 2003 are the only relevant return to work income amounts for the purposes of this appeal as the Appellant's claim for income replacement benefits has been limited to three periods of time: 1998, 2002 and 2003. In 1998 there was no return to work so the income replacement benefit would not be reduced under the legislation.

[20] In accordance with our review of the documentation and the review of the testimony of Mr. Teneycke and Mr. Kunz, we have prepared a table with the Appellant's gross yearly employment incomes to be used for the purposes of calculating his income replacement benefits. We have taken into account Mr. Kunz's adjusted "cash basis" yearly employment income calculations. Our findings are as follows:

Year	Personal Taxes Gross Income	Personal Taxes Net Income	The Seeds Company Gross Income	50% Seeds Company Net Income	Gross Yearly Employment Income
1995	[amount]	[amount]	N/A	N/A	[amount] ¹⁰

⁸ One difference is that no two-year averages or three-year averages are used.

⁹ Obviously, any amounts over the maximum insurable earnings of approximately \$55,000 are simply not payable under no fault, although of course they may be eligible for compensation under SGI's package policy.

¹⁰ This is referred to as the adjusted business income on SGI's calculation sheet which is the total of the net income plus the capital cost allowance pursuant to Section 21 of the *Regulations*.

1996	[amount]	[amount]	N/A	N/A	[amount] ¹¹
1997	[amount]	[amount]	[amount] ¹²	[amount] ¹³	[amount] ¹⁴
1998¹⁵					0
2002¹⁶	[amount]	[amount]	[amount]	\$0	[amount]
2003¹⁷	[amount]	[amount]	[amount]	[amount]	[amount]

[21] In addition, Mr. Teneycke also advised that, in addition to the return to work reduction, the Appellant's income replacement benefits were also reduced by the benefits received from Workers Compensation in the amount of [amount]. The Appellant's entitlement to Workers Compensation Benefits was established using minimum compensation rules under Section 76 of the *Workers' Compensation Act*. As the Appellant was a voluntary or auxiliary policeman at the time of his injury there were no earnings from which to establish a wage base. The Workers Compensation policy provides that where there are no earnings for volunteer policeman or fire fighters, they are provided with the minimum compensation payable.

[22] As a result of his injuries, the Appellant received Workers Compensation Benefits as follows:

¹¹ this is referred to as the adjusted business income on SGI's calculation sheet which is the total of the net income plus the capital cost allowance pursuant to Section 21 of the *Regulations*.

¹² Statement of Income and Retained Earnings for the Seeds Company – Gross Sales

¹³ represents 50% of the Income before Income Taxes for the Seeds Company

¹⁴ This is calculated by adding the total of the Appellant's net income ([amount]) plus 50% Seeds Company net income ([amount]); subtracting the NISA payment(, and then adding back the capital cost allowance for the Appellant and 50% of the capital cost allowance for the Seeds Company; 50% of the inventory of the Seeds Company is deducted from the total to arrive at the adjusted business income of [amount]. Mr. Kunz arrived at a slightly lower income value of [amount], however, SGI did not wish to recalculate on the basis of the lower income because the Appellant received a greater benefit using their income value. We have accepted SGI's GYEI for 1997.

¹⁵ The Appellant did not have any return to work income for 1998 therefore a GYEI was not calculated. He received full income replacement benefits for his period of disability, where as in 2002 and 2003 his income replacement benefit was reduced by 75% of his return to work income in the respective years.

¹⁶ The income values used for 2002 are those which the Appellant and SGI agreed contains accurate calculations using the Appellant's personal income and 50% of the income derived from the Seeds Company.

¹⁷ The income values used for 2003 are those which the Appellant and SGI agreed contains accurate calculations using the Appellant's personal income and 50% of the income derived from the Seeds Company.

September 27, 1998 to November 20, 1998	55 days at [amount] per day = [amount]
November 21, 2002 to December 31, 2002	41 days at [amount] per day = [amount]
January 1, 2003 to November 14, 2003	318 days at [amount] per day = [amount]
Total Compensation Benefits Issued on this Claim was: [amount]	

Income Replacement Benefits – October 4, 1998 to November 20, 1998

[23] SGI completed an Income and Death Benefit Summary – Version 7 on March 16, 2005 with respect to the Appellant’s entitlement to an income replacement benefit for 1998. This Version shows that SGI used a gross income of [amount] for no-fault injury benefits, which was the amount of maximum yearly insurable earnings for 1998. SGI used [amount] as the gross income to calculate the Appellant’s entitlement to income replacement benefits under his SGI Canada package policy. SGI determined that the Appellant was entitled to a biweekly income replacement benefit of [amount] under the no-fault provisions and a biweekly income replacement benefit of [amount] under his SGI Canada package policy. This amounted to an IRB of [amount] payable for October 4, 1998 to November 20, 1998.

Income Replacement Benefits – November 21, 2002 to December 31, 2002

[24] SGI completed an Income and Death Benefit Summary – Version 8 on March 16, 2005 with respect to the Appellant’s entitlement to an income replacement benefit for 2002. This Version shows that SGI used a gross income of [amount] for no-fault injury benefits, which was the amount of maximum yearly insurable earnings for 2002. SGI used [amount] as the gross income to calculate the Appellant’s entitlement to income replacement benefits under his SGI Canada package policy. Originally, SGI considered the Appellant’s return to work income to be [amount]. SGI determined that the Appellant was not entitled to a biweekly income replacement benefit under the no-fault provisions or his SGI Canada package policy due to the fact that his return to work income exceeded his gross yearly employment income. On receiving Mr. Kunz’s correction from accrual income to cash income, SGI completed an Income and Death Benefit Summary – Version 12 on September 22, 2006 with respect to the Appellant’s revised return to work income in 2002 of [amount]. SGI determined that the Appellant was entitled to a bi-weekly income replacement benefit of [amount] under the no-fault provisions for an IRB of

[amount] payable for November 21, 2002 to December 31, 2002. He was entitled to [amount] under his SGI Canada package policy.

Income Replacement Benefits – January 1, 2003 to November 14, 2003

[25] SGI completed an Income and Death Benefit Summary – Version 9 on March 16, 2005 with respect to the Appellant's entitlement to an income replacement benefit for 2003. This Version shows that SGI used a gross income of [amount] for no-fault injury benefits, which was not the correct amount of maximum yearly insurable earnings for 2003. The maximum yearly insurable earnings for 2003 was [amount]. SGI used [amount] as the gross income to calculate the Appellant's entitlement to income replacement benefits under his SGI Canada package policy. SGI used the Appellant's return to work actual income of [amount] to reduce his entitlement to his income replacement benefits. At that time, SGI determined that the Appellant was entitled to a biweekly income replacement benefit of [amount] under the no-fault provisions and a biweekly income replacement benefit of [amount] under his SGI Canada package policy.

[26] However, using Mr. Kunz' corrections, SGI completed an Income and Death Benefit Summary – Version 13 on September 22, 2006 with respect to the Appellant's revised return to work income in 2003 of [amount]. SGI determined that the Appellant was entitled to a bi-weekly income replacement benefit of \$0 under the no-fault provisions and [amount] under his SGI Canada package policy. This amounted to an IRB of [amount] payable for January 1, 2003 to November 14, 2003 under his SGI Canada package policy only.

[27] Relying upon the income replacement benefit calculations completed in Versions 7, 8 and 9, and deducting the payment of benefits by Workers' Compensation, SGI calculated and paid IRB. Upon receipt of financial information from the Appellant's accountant, Mr. Kunz, SGI completed revised calculations as shown in Versions 12 and 13 and recalculated the Appellant's entitlement to IRB. Mr. Teneycke prepared a table which shows what income replacement benefits the Appellant received and what he should have received pursuant to the revised calculations. The summary of the Appellant's IRB for the relevant time periods is as follows:

SGI Initial Calculations	October 4, 1998 to November 20, 1998	November 21, 2002 to December 31, 2002	January 1, 2003 to November 14, 2003
	GYEI - [amount] RTW - 0	GYEI - [amount] RTW - [amount]	GYEI - [amount] RTW - [amount]
	Version 7		Version 9
No Fault (90% of net income)	[amount]		[amount]
SGI (10% net and excess)	[amount]		[amount]
Less WCB	[amount]		[amount]
Total Paid	[amount]	Nothing paid because RTW of [amount] exceeded GYEI of [amount]	[amount]
			Total IRB paid: [amount] ¹⁸

SGI Revised Calculations	October 4, 1998 to November 20, 1998	November 21, 2002 to December 31, 2002	January 1, 2003 to November 14, 2003
	GYEI - [amount] RTW - 0	GYEI - [amount] RTW - [amount]	GYEI - [amount] RTW - [amount]
	Version 7	Version 12	Version 13
No Fault (90% of net income)	[amount]	[amount]	0
SGI (10% net	[amount]	[amount]	[amount]

¹⁸ In addition to this amount, the Appellant received WCB benefits in 2002 of [amount].

and excess)			
Less WCB	[amount]	[amount]	[amount]
Total Payable	[amount]	[amount]	[amount]
			Total IRB payable: [amount]

[28] Therefore, based upon the revised calculations, Mr. Teneycke stated that the Appellant received income replacement benefits totaling [amount] when the total amount payable to him, taking into account his return to work income for 2002 and 2003, was actually [amount].

[29] SGI sent a decision letter to the Appellant outlining his entitlement to income replacement benefits on May 27, 2005. The letter stated:

We have now completed our review of your entitlement of SGI Income Replacement Benefits regarding your farming operation.

As a self-employed earner, your income benefits were calculated based upon the greatest of:

- (i) the yearly employment income determined by Statistics Canada for your class of employment; or
- (ii) the yearly employment income you earned from your employment [“yearly employment income” means your income less any expense that relates to the income and is allowed pursuant to the *Income Tax Act (Canada)* not including any capital cost allowance, any capital gain or loss, or any deduction or adjustment pursuant to sections 111 and 28 of the *Income Tax Act (Canada)*].

Number (ii) above means that SGI must look at your actual yearly employment income and take your greatest income from the following periods of time:

- (a) the 52 weeks before the accident;
- (b) the 52 weeks before your fiscal year end, preceding the date of the accident;
- (c) the 104 weeks before your fiscal year end, preceding the date of the accident divided by 2; or

- (d) the 156 weeks before your fiscal year end, preceding the date of the accident, (e) (*sic*) divided by 3.

In order to determine which of these options yields the greatest income to you, SGI compared the income from each of the relevant time periods as well as the income from the Statistics Canada figure. In your case, your greatest annual income is [amount]. (This is summarized in the Income Replacement Summary, which is enclosed.) As we discussed, the income benefit is based on 90% of your net earnings. Your net income calculated using your gross income less income tax, CPP and EI calculations. In the event that you do not pay EI premiums, this deduction does not apply.

Income Benefits begin seven days following an accident.

In conducting my review, I have considered the following information:

1. Your Application for Benefits;
2. Your complete Worker's Compensation File;
3. Income Tax Returns supplied;
4. Financial Statements supplied;
5. Information supplied by [MNP];

Your Income Replacement Benefit is based on your farm employment including proprietorship and 50% of Limited Company. It is payable for the periods while disabled and receiving Worker Compensation Benefits and less Worker Compensation Benefits received. Payment is as follows:

- Version 7 1998 Income Calculation. 48 days. October 4, 1998 to November 20, 1998 = [amount].
- Version 8 2002 Income Calculation. No Income benefit payable as income earned was greater than calculated yearly employment income of [amount].
- Version 9 Income Calculation. January 1, 2003 to November 14, 2003. 318 days = [amount].

This concludes our total Income Replacement Benefit calculation. Our cheque in the amount of [amount] is enclosed.

LAW AND ANALYSIS

[30] The Commission’s jurisdiction to review a decision of SGI is set out in section 193(7) of the *Automobile Accident Insurance Act*¹⁹ (the “new 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.

[31] The basis upon which SGI provides Part VIII – Income Replacement Benefits to the Appellant is set out in the *Automobile Accident Insurance Act* and the *Personal Injury Benefits Regulations* in force at the time of the Appellant’s accident. The relevant sections of the *AAIA* are:

112(1) A full-time earner is entitled to an income replacement benefit if, as a result of an accident, the full-time earner:

- (a) is unable to continue the full-time employment he or she held at the time of the accident;
 - (b) is unable to continue any other employment that he or she held at the time of the accident in addition to the full-time employment mentioned in clause (a); or
 - (c) 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) The insurer shall calculate the income replacement benefit pursuant to clauses (1)(a) and (b) on the basis of:

- (a) the gross yearly employment income the full-time earner earned from his or her employment, if the full-time earner holds employment in the employ of another at the time of the accident;

(b) the greater of:

(i) the gross yearly employment income determined in accordance with the regulations for an employment of the same class as his or her employment; and

(ii) the gross yearly employment income the full-time earner earned from his or her employment;

if the full-time earner is self-employed at the time of the accident; (*emphasis added*)

- (c) the gross yearly employment income earned from all employment that the full-time earner is unable to continue because of the accident, if the full-time earner holds more than one employment at the time of the accident.

¹⁹ RSS 1978, c. A-35 (2002)

(3) The insurer shall calculate the income replacement benefit pursuant to clause (1)(c) on the basis of the benefit that would have been payable to the full-time earner.

...

Reduction where victim earns reduced income

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

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

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

where:

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

[32] Section 21 of the *Personal Injury Benefits Regulations*²⁰ is used to calculate gross yearly employment income for self-employment. It reads:

GYEI derived from self-employment

21(1) In this section, "**business income**" means the income derived from self-employment, by way of a proprietorship or partnership interest, less any expense that relates to the income and is allowed pursuant to the *Income Tax Act* (Canada) and *The Income Tax Act* but does not include:

- (a) any capital cost allowance or allowance on eligible capital property;
- (b) any capital gain or loss;
- (c) any loss deductible pursuant to section 111 of the *Income Tax Act* (Canada); or
- (d) any mandatory or optional inventory adjustments pursuant to section 28 of the *Income Tax Act* (Canada).

(2) Subject to section 22, a victim's gross yearly employment derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that he victim received or to which the victim was entitled within the following periods:

- (a) the 52 weeks before the date of the accident;
- (b) the 52 weeks before the fiscal year-end preceding the date of the accident;

²⁰ Ch. A-35 Reg 3 (effective January 1, 1995)

(c) where the victim has operated the business for not less than two fiscal years before the date of the accident, the 104 weeks before the fiscal year-end preceding the date of the accident divided by two;

(d) where the victim has operated the business for not less than three fiscal years before the date of the accident, the 156 weeks before the fiscal year-end preceding the date of the accident divided by three.

[33] The sole issue before this Commission on appeal is with respect to the calculation of income replacement benefits as set out in SGI's decision letter of May 27, 2005. Income replacement benefits are not discretionary benefits under the *AAIA*; therefore, in accordance with the Court of Appeal's decision in *Allary v. Saskatchewan Government Insurance*;²¹ SGI's decision with respect to the calculation and payment of these benefits must be correct having regard to all of the evidence.

[34] The Appellant disputes the calculation in so far as SGI has reduced his coverage by approximately 50% because of his wife's share of ownership in the Seeds Company. The Appellant also argued that SGI stated in their policy booklets and on the internet that every Saskatchewan resident injured in a motor vehicle accident is entitled to benefits. He is asking for those benefits to which he is rightfully entitled.

[35] Mr. Brown submitted that the Appellant received the maximum amount payable for income replacement benefits under the no fault provisions of the *AAIA* as amended and in force at the time of the Appellant's accident. He further submitted that this Commission has no jurisdiction to review the payment of income replacement benefits as they relate to the Appellant's SGI Canada package policy. Mr. Brown took the position that the revised calculations show that the Appellant was paid a total of [amount] in income replacement benefits when the total amount payable to him pursuant to the *AAIA* was [amount]. He advised that SGI would not be seeking repayment of these benefits.

[36] We have concluded that the calculations completed by SGI with respect to the Appellant's income replacement benefits are correct and reasonable for the following reasons:

²¹ 2006 SKCA 89

- a) A strict interpretation of Section 206 of the AAIA would have precluded the Appellant from receiving income replacement benefits in addition to those benefits he was receiving from Workers' Compensation. SGI fairly and properly exercised its discretion in making supplemental income replacement benefits on an *ex gratia* basis;
- b) SGI went beyond the provisions of the legislation in taking into account the net income of the Seeds Company. This is not provided for in the legislation. The legislation does not normally take into account the income of a corporation in arriving at gross yearly employment income to be used to calculate income replacement benefits, SGI again fairly and properly exercised its discretion in making additional payments on an *ex gratia* basis;
- c) Our jurisdiction to review the Appellant's entitlement to income replacement benefits is limited to a review of the no-fault provisions of the legislation. The calculation of the Appellant's income replacement benefits under the no fault provisions was completed in 1998, 2002 and 2003 using the maximum yearly insurable earnings for the respective years. In 1998, the Appellant received 90% of the maximum yearly insurable earnings for the relevant time period. The Appellant is not entitled to any more than the maximum provided under the legislation. In 2002 and 2003, if the Appellant's return to work income was incorrect in that the amount used by SGI was too high, then it would have an effect on the amount of IRB the Appellant received pursuant to the no-fault provisions. However, his return to work income only accounted for 50% of the Seeds Company earnings and therefore if any more income from the limited company were imputed to the Appellant it would only further reduce the amount of IRB he would be entitled to in 2002 and 2003; and 2004.
- d) The Appellant's dispute regarding SGI's decision to allocate only 50% of the limited company earnings to him may alter his income replacement benefits paid to him under his SGI Canada package policy, however, we are all in agreement that this Commission has no jurisdiction to review payments made pursuant to the SGI Canada package policy.

[37] We have only one concern. We understand Mr. Teneycke's evidence to be that by using the net income treating the Seeds Company as a partnership between husband and wife, rather than a limited company with two shareholders, the Appellant is being provided with a greater benefit. In effect it provided him with a greater gross yearly employment income of [amount] rather than [amount]; however, we are unable to conclude with certainty that it produced a greater benefit when the net income from the Seeds Company increased his return to work income substantially in 2002 and 2003 thereby reducing his IRB. What was his employment income, as an employee, from the Seeds Company in all relevant years? Using the net income from the Seeds Company for 2002 and 2003 rather than his personal income when calculating his return to work income in 2002 and 2003 has significantly reduced his income replacement benefits for those years. Therefore, we respectfully recommend that SGI redo all their calculations using a gross yearly employment income of [amount] and remove the net income, capital cost allowance and inventory adjustments for the Seeds Company from all of the return to work calculation sheets. As Mr. Teneycke advised, it is not within the legislation to include net income from the company, therefore, the Appellant should be provided with a copy of these calculations strictly in accordance with the legislation so that he can see that he has been provided with the greater benefit. We expect that the Appellant has in fact received an enhanced benefit but feel it is proper to provide him with all of the information for his own review and consideration. Obviously, using the gross yearly employment income of [amount] will have a dramatic effect on what he received pursuant to his SGI Canada Package Policy but his return to work income in 2002 and 2003 is substantially less when you substitute his personal income from employment for the net income of the Seeds Company²². It may also be helpful to provide the Appellant with another spreadsheet to assist him with understanding what he received and what he should have received if the calculations were completed strictly within the confines of the legislation, meaning not taking into account any income for the Seeds Company. We acknowledge that there may be no effect at all under the no fault provisions of the *Act*, which provisions alone are within our jurisdiction, and that any effect may be outside this jurisdiction and under the contractual provisions of the Appellant's insurance policy.

²² We believe the Appellant's return to work income for 2002 would be [amount] and for 2003 it would be [amount]. These amounts, like the gross yearly employment income of [amount] may lead to a very different result when calculating income replacement benefits.

CONCLUSION

[38] The decision made by SGI dated May 27, 2005 with respect to the calculation of the Appellant's income replacement benefits is conditionally upheld. We find the calculations completed by SGI to be reasonable, however, for the reasons given in the previous paragraph we can not say with certainty that they are correct. We are hopeful that this decision has provided the Appellant with some clarification and appreciation that the income replacement benefits paid to him by SGI were not necessarily benefits that he may have been entitled to under the AAIA. In effect, it appears from a review of the Appellant's financial records that he may have been overpaid income replacement benefits, quite apart from SGI's *ex gratia* payments, which we note again were generous and reasonable.

[39] We are cognizant that the Appellant and/or the Seeds Company may have suffered a financial loss arising out of the Appellant's injuries, because the very significant revenue which he generated as a seed producer was not reflected in the income allocated to him under the corporate arrangement. His wife's work, while valuable to the enterprise as a whole, did not generate the revenue. As we pointed out in *O.L. v SGI*, the income splitting arrangements permitted under *The Income Tax Act (Canada)* are adhered to by SGI, so that only the income "received" or to which a person is legally entitled is replaced. The option of choosing replacement labour is usually not a practical option for most farmers and independent businessmen

[40] The Appellant has not been successful in his appeal, therefore, he is not entitled to his costs of the appeal. However, we have made a recommendation for SGI to recalculate the Appellant's entitlement to income replacement benefits strictly in accordance with the legislation, leaving out the income of the Seeds Company. If it is determined that those revised calculations would have provided the Appellant with a greater benefit under the no fault provisions, then he is entitled to the increased amount of income replacement benefits with applicable interest and the costs of this appeal.

Dated at Saskatoon, Saskatchewan, on April 16, 2007.

Ann Phillips, Q.C., Chair

Joy Dobko, Commission Member

Al Knippel, Commission Member