

**Automobile Injury Appeal Commission**  
**Province of Saskatchewan**

**Citation:** *K.V. v. Saskatchewan Government Insurance,*  
2008 SKAIA 006  
**Date:** 20080130  
**File:** 061 of 2006

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**BETWEEN**

**K.V., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**David K. Rusnak, for the Applicant**  
**Joan Eremko, for the Respondent**

**Before:** **Joy Dobko, Chair**  
**Beverly Cleveland, Commission Member**  
**Barbara Tomkins, Commission Member**

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

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Heard at Regina, Saskatchewan  
October 29 and December 14, 2007

## DECISION

[1] The Appellant, K.V., was involved in a vehicle accident on April 14, 1997 and suffered injuries. As a result, he applied for and received benefits from Saskatchewan Government Insurance (“SGI”) under Part VIII – the no-fault provisions – of *The Automobile Accident Insurance Act* (“the Act”).

[2] Eventually the Appellant, although improved, reached the point of maximum medical recovery. He was not fully recovered but no further improvement was anticipated. His remaining restrictions prevented him from resuming his pre-injury employment as a mixed farmer. SGI determined, however, that the Appellant could undertake the work of a Data Entry Clerk and provided a decision to this effect. As a result, following a period of one year after the determination, the Appellant’s benefits for income replacement would be reduced by the amount of a Data Entry Clerk’s yearly earnings.

[3] The Appellant disputed SGI’s decision and said that he is not suited to the work of a Data Entry Clerk and that it is not employment that is available to him. He therefore appealed SGI’s decision to determine him into that employment.

## JURISDICTION

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

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

(a) 90 days after the date of insurer’s written decision; and

(b) if a claimant has requested mediation pursuant to section 190, 60 days after the date [of] the mediator’s written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[5] SGI’s decision letter is dated August 17, 2007 and the Appellant’s appeal was signed on October 16, 2007 and was received at the Commission on October 17, 2007. This is

within the 90 day period prescribed by section 191(1)(a). This appeal is therefore properly before us.

## **FACTS AND FINDINGS**

### Documentary Evidence

[6] On April 14, 1997, the Appellant was involved in an accident where his vehicle was rear-ended by another with such force that the Appellant's truck was pushed into the ditch. He complained of neck and upper back pain, as well as soreness in his right shoulder area. He was diagnosed with Whiplash Associated Disorder II and Low Back Pain II, as well as cervicogenic headaches. After significant treatment, it was learned that he had vertebral injuries in his neck and back that could not be treated and would not be receptive to surgical intervention.

[7] Therefore, after extensive medical care and rehabilitation, the Appellant had reached the point where his condition was not expected to improve and he suffered some disability that was considered permanent.

[8] A Functional Capacity Evaluation was completed at the Wascana Rehabilitation Centre ("Wascana") on October 12 and 13, 1999. The Appellant was described as having demonstrated high abilities as follows:

- Weighted activities – floor to waist, horizontal lifting, bilateral carry and left handed carry.
- Trunk flexion in sitting and standing.
- Unweighted rotation in standing.
- Squatting, sitting and standing tolerance.

[9] Wascana also listed the Appellant's physical restrictions as follows:

[The Appellant's] physical restriction in heavy lifting, carrying, positional activities and overhead endurance are consistent with physical findings. A job demand that is crucial to his ability to function, is the ability to withstand jarring and vibration during seasonal planting. [The Appellant] is not able to tolerate this for longer than 1-2 hours and, therefore, will not be able to farm for the seasonal 10 – 16 hour days.

[10] Prior to the accident, the Appellant had been farming for about 13 years. His was a [farmer] and also did bobcat work for himself and others on a contract basis. In addition to

farming, the Appellant had supplemented his income by working as a welder, millwright, mechanic, heavy equipment operator and service worker in [Alberta].

[11] It is common ground that the Appellant, because of the permanent disabilities from his accident, is not able to resume his work either as a farmer or bobcat operator, which were his primary employments.

[12] In the course of his recovery and after accepting that he would not return to his work of farming, the Appellant diversified his farm by changing crops and reducing the number of cultivated acres, reducing or eliminating livestock and taking up bee-keeping.

[13] SGI engaged NRCS Inc., a disability management consulting company, to conduct a transferable skills analysis for the Appellant. The analysis would consider the Appellant's interests, education, experience and his physical capabilities and restrictions. Based on these, NRCS would suggest employments that the Appellant could undertake, given his limitations.

[14] NRCS found a significant number of occupations that might be suited for the Appellant. Once a labour market survey was conducted to determine whether employment in the identified occupations was available for the Appellant, a number of the originally identified occupations were eliminated. In its report dated October 10, 2001, NRCS suggested twenty-five occupations as suitable.

[15] A further Functional Capacity Evaluation was conducted by Wascana on May 13 and 14, 2002 to learn whether the Appellant was still able to function at the level he had during the FCE conducted in 1999. This showed improved abilities in certain areas such as overhead work, crawling and ladder climbing.

[16] Due to these improvements, SGI sought NRCS's further opinion regarding suitable occupations for the Appellant and specifically whether there might be additional suitable employments in light of the Appellant's increased capabilities. In February 2003, NRCS identified six occupations that it considered potentially suitable for the Appellant.

[17] However, by the time NRCS provided this report, almost a year had passed since the Appellant's most recent Residual Capacity Evaluation (RCE) had been completed. SGI asked that he attend for an updated RCE and he did so in May 2004 at Kinetik at Saskatoon City Hospital. The RCE report and Physical Work Performance Evaluation report both concluded that the Appellant was able to manage the farm work as modified after the accident and his work as an apiarist, provided he accommodated his intolerance for jarring movements. He was considered capable of a medium level of work for an eight hour workday.

[18] Another Transferable Skills Analysis and Labour Market Survey was conducted and a report provided dated July 4, 2005. After reviewing prior reports, Innovative Rehabilitation Consultants (IRC) considered alternative occupations that had been suggested in prior reports and eliminated all but four. The four occupations considered suitable for the Appellant, given his place of residence and physical limitations, were:

- Farmers and Farm Managers;
- Technical Sales Specialists – Wholesale Trade;
- Agricultural Representative, Consultants and Specialists; and
- Corporate Security Officers.

[19] By letter dated March 8, 2006, SGI advised the Appellant that it had determined him into employment as an Agriculture Representative/Consultant whose main duties included the provision of assistance and advice to farmers on all aspects of farm management, cultivation, fertilization, soil erosion, composition, disease prevention, nutrition, crop rotation and marketing.

[20] The Appellant did not think that he was qualified for work in the determined occupation and appealed SGI's decision.

[21] SGI requested and IRC provided an updated Labour Market Survey Report dated June 16, 2006. Upon SGI's request, IRC had obtained current labour market information for employment falling within the category of Agricultural Representatives, Consultants and Specialists. IRC was able to locate one employer in the Appellant's area of residence who

hired positions that would be considered within the stated category – Farm Business Consultants.

[22] In June 2006, a consultant at IRC spoke to Mr. Scott Yurie who is the Operations Manager for Farm Business Consultants (FBC) and who hires its Member Service Representatives for the southern part of the province. The duties of the job are to pre-arrange meetings with individuals at their homes or businesses and gather tax and other financial data. They would enter that data into a laptop computer that is provided by the employer.

[23] Mr. Yurie is reported to have stated that those in the Member Services Representative position act as information gatherers and that the job is an entry level position. There are no educational requirements for the position, though farm experience would be an asset. Basic computer skills are an asset but not essential. The employer seeks a person who has good communication and problem-solving skills, who can be a team player and who is motivated to provide good customer service. Prospective candidates are hired in November and first participate in two tests to determine their aptitude to successfully perform the work.

[24] Successful candidates work seasonally on a five-month contract from December until April. Usually, within one to one and a half years, a seasonal employee will become full-time. When asked if he was seeking a full-time person in the [area], Mr. Yurie answered that he was “always looking for good people”. He invited the Appellant and any other interested persons to apply for the seasonal positions as soon as possible.

[25] For reasons that were not provided in the course of this hearing, SGI, by letter dated October 10, 2006, advised the Appellant that it agreed the choice of Agricultural Representative/Consultant was not appropriate and that it would resume its search for a suitable employment for the Appellant. It appears this may be because the National Occupational Classification Guide (NOC) specified that a person in this category required post-secondary education in Agriculture or a related science as a pre-requisite to employment.

[26] SGI asked IRC to reconsider the matter. By letter dated July 12, 2007, IRC advised SGI that the NOC referenced was very broad and not all employments within the category would require the stated level of education. IRC advised that it was satisfied that the specific job – Member Services Representative for FBC – was an employment that fit within the Agricultural Representative/Consultant designation in the Code. In effect, IRC said that the specific jobs and job demands disclosed in the course of a Labour Market Survey took precedence over the specifications in the NOC.

[27] Notwithstanding this reassurance, SGI provided a further letter dated August 8, 2007. In this letter, SGI advised that it remained satisfied that the position of Member Service Representative was an appropriate fit for the Appellant but that it should have been put forward as under “Data Entry Clerks” rather than “Agricultural Representatives, Consultants and Specialists”.

[28] A decision letter dated August 17, 2007 confirmed that the Appellant had been determined into employment as a Member Service Representative under the NOC heading of Data Entry Clerk.

[29] The Appellant was of the view that he had no work experience or training appropriate for the determined employment. He also was not satisfied that such work was available in the area of his residence. He appealed SGI’s determination.

#### Oral Evidence

[30] The Appellant testified. He said that prior to the accident, he was a farmer who also did corral cleaning and bobcat work. As he has not been able to continue farming in the way he did before the accident, he has gradually changed crops to those that require less field work, reduced the number of acres he farms, given up his horses and most of his cattle and discontinued the corral cleaning and bobcat work. Instead, he has taken up bee-keeping and gradually increased the number of hives. This work, he said, requires little machine work and, although it involves elements of physical work, it is physical work that he can manage. It appears that the Appellant enjoys his work as an apiarist.

[31] He said that since the accident he has done bits of mechanical work around the farm. He works for a brief time and then rests because his ability to do the work is limited by the limited range of motion in his neck and debilitating headaches. He said tools and wrenches cause problems with his right arm which goes numb from time to time due to the herniation at T3-4 on his thoracic spine.

[32] He is able to drive but must stop, get out of the vehicle and move around at frequent intervals. For instance, he said on the drive from [town] to Regina for the hearing, he stopped twice to stretch and walk around his vehicle.

[33] The Appellant said he completed grade 11 and started, but did not complete, grade 12. He did not take typing in school and has not taken any computer training. He said he bought a computer in January 2007. He has taught himself a bit about searching the internet and can send and receive e-mail. He is not able, though, to attach and send a document.

[34] Russell Warner, a rehabilitation consultant for IRC, testified. He described his February 12, 2004 meeting with the Appellant and the nature and purposes of vocational testing that he did. He said he used this information to assist him in finding a suitable alternative employment for the Appellant.

[35] He admitted that he had not been provided a job description or pay scale for the Representative's position. However, he said that he thought the position of Member Services Representative was suited to the Appellant especially as it would allow him to meet with farmers to discuss farm matters in a geographical area he knew well. He admitted that he was not aware of the proportion of work that was farm-related or the amount that involved data entry.

[36] Mr. Warner had observed the Appellant's computer skills when he completed a form by clicking on areas of interest. He said it took the Appellant one-half hour to complete 28 clusters. In an aptitude portion of the form, the Appellant took one hour to complete five or six parts. He thought this indicated that the Appellant had the skills necessary to the determined position. On the other hand, Mr. Warner said that the answers on these tests

were secured by clicking the mouse; there was no occasion where the Appellant was required to type an answer.

[37] Mr. Warner did test the Appellant in an area he referred to as “Clerical Perception” that was intended to determine his visual speed and accuracy. He found that the Appellant performed in the bottom third. However, the Appellant mentioned that his glasses were his “old” prescription and that he was waiting for new ones. Mr. Warner suggested that this might have affected his performance.

[38] In regard to the determined position, he had not seen the program that the Member Service Representative would complete and did not know how complex it was. He didn’t know if the Representative would type words or click selections but had been told that even a person with no computer skills could learn to operate the program within two weeks. Indeed, when it was suggested that the Appellant was a two-finger typist who had a loss of feeling in one hand, Mr. Warner said he could then enter the data with one finger, though this might affect his productivity.

[39] Mr. Warner said he understood the incumbent could work from his home where he would make contacts, book appointments and arrange meetings. He was not aware whether the person would be provided a cold call list, would contact existing clients or both. He did know that the position was paid as piecework but he did not know whether the Representative was paid per client, per completed form or by a percentage of the company’s bill to the client. He did believe that speed, accuracy and quantity would be components in success at the position. If a person was slow at data entry, he would complete less work and earn less income. In addition, he thought the permanent positions would be offered to those who were most successful in their seasonal work.

[40] He observed the Appellant to sit for four-and-a-half hours during their interview and didn’t observe him to be having any difficulty. In any event, he said, the Appellant could stand during interviews.

[41] Joan Yawney, the Appellant’s original Personal Injury Representative at SGI, also testified. She said that she had not previously seen an insured determined into seasonal

employment but thought it was a good fit for the Appellant because the work in the determined position would occur during the least busy time in bee-keeping and the Appellant could therefore manage both jobs.

[42] In regard to the determined job, Ms. Yawney said she didn't know whether the company paid expenses relating to travel, computer and licences, if any. She said these had not been considered or factored into SGI's calculations and didn't know if the Appellant would actually net any income in the determined employment.

[43] Ms. Yawney said she wasn't aware of the nature of the data that would be entered in the determined position but thought it was numbers and dollar figures only. She stated that typing is not the same as keyboarding and that accuracy is important but speed is not.

#### **ONUS AND STANDARD OF PROOF**

[44] In *Collis v. Saskatchewan Government Insurance*<sup>1</sup>, the Saskatchewan Court of Queen's Bench considered the question of who held the onus of proof in appeals under the no-fault provisions of the *Act*. Justice Wimmer stated<sup>2</sup>:

Cases dealing with disability insurance contracts hold that the insured has the onus of establishing that he or she is disabled within the meaning of the policy and, having done so, the onus shifts to the insurer to prove that benefits are not, or are no longer, payable. Also, the fact that the insurer at one time accepted the claim may weigh the balance in favour of the insured.

[45] This view of onus was quoted and adopted by Justice Matheson in *Job v. Saskatchewan Government Insurance*<sup>3</sup>. The decision was appealed to the Court of Appeal and the matter of onus of proof was among the issues appealed. In that regard, Justice Vancise said<sup>4</sup>:

We are all of the opinion that Mr. Justice Matheson did not err in determining and applying the onus of proof. He found that when an insurer alleges that benefits are no longer payable it has the onus to prove on the balance of probability that the benefits are not payable under the *Act*. While he might have been a little more precise in his choice of language it is clear that he did not reverse the onus. He

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<sup>1</sup> 1998 CanLII 13463, 165 Sask. R. 108

<sup>2</sup> paragraph [5]

<sup>3</sup> 2002 SKQB 479 (CanLII)

<sup>4</sup> 2004 SKCA 164 (CanLII)

referred to *Collis v. Saskatchewan Government Insurance*, which clearly finds that the onus shifts to the insurer to prove that benefits are not or are no longer payable.

In this case, SGI has been paying [the Appellant] income replacement benefits (IRB) for various periods since the accident occurred. At minimum, a decision to determine him into employment constitutes a reduction of those IRB.

[46] As such, in accordance with both *Collis* and *Job*, the Appellant has met the burden to prove that he was disabled in the vehicle accident and the onus is then shifted to SGI to prove, on a balance of probabilities, that further or reduced benefits for income replacement are not payable by reason of determined employment.

[47] Income Replacement Benefits are benefits to which a claimant is entitled, provided he or she meets statutory criteria. That being the case and in accordance with the Court of Appeal's decision in *Allary v. Saskatchewan Government Insurance*<sup>5</sup>, our standard of review is correctness.

## LAW AND ANALYSIS

### Legislative Background

[48] SGI determined employment for the Appellant pursuant to sections 132 and 134 of the *Act* as it was in 1997 at the time of the Appellant's vehicle accident.<sup>6</sup> The relevant portions of these sections read:

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 [.]

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;

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<sup>5</sup> 2006 SKAIA 89 (CanLII)

<sup>6</sup> Amendments to the legislation took effect on August 1, 2002 and created, in effect, two acts – the old Act and the new Act. The Appellant's accident occurred in 1997 and is therefore administered under the old Act.

(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 of the victim to hold employment on a regular and full-time basis, on a part-time basis;

(e) any other prescribed factors.

[49] The scheme of these sections is fairly simple. If a person who is injured in a vehicle accident is unable, by reason of the injuries, to return to his or her pre-injury employment two years after the accident, SGI will consider what the person is then able to do and determine whether there is other employment that the person could undertake. This consideration will take into account, of course, any restrictions, limitation or disability that the person suffers and his or her education, training, work experience and intellectual abilities. SGI then determines, to use the terms of the legislation, a new employment for the injured person.

[50] This is not unusual in insurance contracts dealing with personal injury and consequent disability. Similar provisions are found, for example, in our workers' compensation legislation and in most disability plans. The idea is one akin to the legal obligation of mitigating one's losses.

[51] Consider this example: A mail carrier suffers a severe injury to his leg in a vehicle accident. Despite the best of care and the best possible outcome, he is unable to walk long distances and requires a cane or crutches even to walk short distances. No further improvement is anticipated and the restrictions are permanent.

[52] Our hypothetical person would receive income replacement benefits (IRB) throughout the course of and after treatment and rehabilitation. But after two years, SGI will say to him or her, "We know and agree that you cannot do the work of a mail carrier now and you won't be able to do that work again. We have replaced your lost income until now and will continue to do so. However, you are able to work, just not at your pre-injury employment. We think that it is not fair that you should never work again and receive IRB indefinitely. Instead, we think you have some obligation to minimize your loss of income

and you can do that if you take up another kind of work. If the work you can do does not pay as well as your job as a mail carrier, we'll pay you the difference.”

[53] In SGI's case, however, the matter of determined employment doesn't arise due to the legal concept of mitigation, but by virtue of the quoted sections of the Act.

#### The Determined Employment

[54] In the Appellant's case, it is not disputed that the injuries he suffered in the accident had permanent consequences and that he cannot resume his pre-injury employment as a farmer because that work requires physical exertion and movement that is now beyond his capabilities. It is also not disputed that the Appellant is capable of working eight hours per day at medium work.

[55] The difference of opinion in this case is as to the specific employment that SGI has determined for the Appellant. The main issue in this appeal, therefore, is whether the Appellant, given his education, training, work experience and physical and intellectual abilities, is qualified for the determined employment.

[56] We do not know whether a written job description exists for the determined employment but certainly none was provided to us. Instead, for information regarding the qualifications for and duties of the position, we must rely on information provided by IRC in its record of its conversation with Mr. Yurie and especially Mr. Warner's testimony before us.

[57] We have struggled with the lack of information available regarding the determined position. None of the documentary or oral evidence has clarified any of the following matters which we believe are relevant to our decision:

- What is the nature of the work? Does it primarily involve keyboarding or does it mainly involve conversation and consultation with farmers? If a combination of the two, what are the proportions?
- How much travel is necessarily required and how much is optimal to achieve reasonable remuneration?

- How is the remuneration calculated? Is it based on the number of clients contacted or consulted, the number of forms completed, the value of the services provided by FBC or some other measure?
- Are some or all of the related expenses the responsibility of the Member Services Representative or are some or all reimbursed by FBC?

[58] While some of these are not directly relevant to our considerations in that the designated yearly earnings from the position are not for our consideration, the answers to these questions are nonetheless relevant to our determination whether the determined employment is available to the Appellant. If, for example, we were to conclude that the Appellant is able to do the determined employment *per se* but could only manage two or three visits per month, we would be forced to conclude that he is not able to undertake the determined employment in a meaningful sense. There must be an air of reality to the determination and to our decision; a technical ability to do the work on a file-by-file basis but not on an on-going and reasonably remunerative basis cannot support a finding in SGI's favour.

[59] However, we are able to resolve this matter without reference to the questions posed above. There is undisputed evidence that:

- The Appellant has basic, self-taught computer skills. He scored in the lower third in clerical aptitude for accuracy and speed. While it may be that this score was affected by his need for an increased prescription in his glasses, we have no evidence of the impact the improved glasses would have on his score.
- The Appellant is unable to sit for extended periods and especially to drive for extended time on bumpy roads.
- Whatever the manner of calculating the remuneration for the determined employment, it will necessarily be higher in proportion to the number of visits or programs that are completed.

[60] The difficulty lies in the fact that none of the witnesses provided more than a passing familiarity with the work required in the determined employment. There is clear evidence that it involves contacting and meeting with farmers, entering tax-related information into a computer according to a pre-set program and that it is paid on a piecework basis. Beyond that, none of the documentary evidence and none of the witnesses who gave oral evidence

were certain or confident in their answers. In fact, the oral evidence is contradictory among witnesses on some of these matters.

[61] We do not accept Ms. Yawney's evidence relating to the determined employment. She was not involved in the exploration for appropriate employment and had no reason to acquaint herself with the details thereof. It was not her role; indeed, SGI hired IRS for this very purpose.

[62] While Mr. Warner was able to provide some details regarding the employment, we are not confident accepting his evidence in its entirety. His evidence, based on conversations with the Manager at FBC, involved speculation and inferences that were not obviously available from the information provided. It was apparent that he was more anxious in defending his determination and perhaps remaining in the good graces of SGI than in providing careful and accurate evidence.

[63] We are not satisfied that the Appellant is able to physically do the determined work. In a piecework position, remuneration is dependent on quantity over quality. We are satisfied that keyboarding skills are likely the most significant requirement for the work and that the Appellant is a two-finger typist with minimal self-taught computer skills. Even with the two week's training offered, he is unlikely to acquire skills that are adequate to enable him to manage the work at a significant level. His capability is further compromised by the fact that he suffers at least occasional numbness in his right arm and that he cannot sit for extended periods.

[64] While Mr. Warner testified that the Appellant could stand during the interviews, we do not know the basis for this conclusion. It may be that he is correct but it also may be that information is entered in the computer as it is provided, rather than at the end of an oral interview. If so, the Appellant would not be able to stand for either significant periods or at significant intervals without compromising his ability to do the work.

[65] We accept that the Appellant is unable to sit for extended periods in a vehicle traveling on uneven roads. One must assume that travel to his farm clients would involve typical Saskatchewan gravel roads which generally do not offer a smooth ride. Thus, he

would be required to leave his vehicle to stretch at frequent intervals, thereby further reducing his ability to manage the work in a meaningful way.

[66] We do not know the number of clients that those currently in the Member Services Representative seasonal positions usually see or are expected to see during the active time but believe that number would define “doing the Member Services Representative’s work”. We cannot comment whether the Appellant could manage a reasonable approximation of those numbers and failing proof that he could, we must conclude that SGI has not proven that he could do the determined employment.

[67] For all of these reasons, SGI has not proven that the Appellant, given his limitations, is physically able to do the determined employment. Further, SGI has not proven that the Appellant is qualified to do the determined employment.

#### Seasonal Nature of the Determined Employment

[68] The question arose during the hearing whether it is appropriate for SGI to determine an insured into seasonal work in cases where the person has been found able to manage full-time work, as has the Appellant. Given our conclusion above, it is not necessary that we reach conclusions on this matter.

[69] Had we been required to, we would have concluded that a determination into seasonal work does not comply with the requirements of section 134(d) which requires SGI to consider as a factor in its determination:

(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 of the victim to hold employment on a regular and full-time basis, on a part-time basis[.]

[70] A plain reading of this provision leads to the conclusion that SGI is to consider employment that the victim is able to hold on a regular and full-time basis unless it would not be possible for the victim to work on a regular and full-time basis. The Appellant has repeatedly been found to be capable of full-time work of a medium nature. Given this, the section directs SGI to consider employment that is on a regular and full-time basis.

[71] It was suggested that since the determined employment in this case is in fact regular and full-time employment on a seasonal basis, it falls within the section. We do not agree. We believe the word “regular” is intended to have meaning and purpose in the section.

[72] We can obtain guidance as to its meaning by reference to section 14 of the regulations. This section is intended for a purpose unrelated to our deliberations. However, it uses the term “regular employment” in the following context:

**14** A person holds regular employment on a full-time basis where the person:

(a) is employed at one employment for not less than 28 hours, not including overtime hours, in each week of the year preceding the date of the accident; or

(b) is employed at one employment:

(i) for not less than 28 hours per week, not including overtime hours; and

(ii) for a total of not less than two years, for successive or intermittent periods of not less than 32 weeks and with intervals of not more than 16 weeks between those periods.

[73] While the provision does not specifically so state, it appears clear to us that the provisions regarding hours of work are intended to indicate what will be considered full-time for purposes of the relevant sections of the Act. We believe that the provisions regarding time frames indicate what will be considered regular for purposes of the relevant sections of the Act.

[74] Thus, section 14 of the regulations suggests that full-time work will be work that is available a minimum of 28 hours per week and that it will be considered regular if available every week of the year or, over a period of at least two years, for periods of at least 32 weeks with intervals not greater than 16 weeks.

[75] We have not been provided information about the number of hours that the Appellant would be expected or required to work in the determined position. While SGI has argued that it is full-time employment, it provided no evidence of the weekly hours anticipated.

[76] Further, the employment determined for the Appellant is not available for 32 successive weeks but instead, for a maximum of about 20 weeks from December until April.

The interval following the “season” is longer than the period of employment at about 32 weeks.

[77] Thus, had the Appellant held employment as a Member Services Representative for FBC prior to his accident, it would not have been considered regular and full-time work by SGI for purposes of calculating his benefits. That being so, it is unreasonable and impossible to suggest that it would constitute regular and full-time work for purposes of a determination pursuant to sections 132 and 134.

[78] We are satisfied that the determined employment has not been shown to be full-time. It has been shown that it is not regular. In this case, therefore, the seasonal employment selected does not meet the criteria of section 134(d)(i).

[79] We are reassured in this conclusion by the fact that if SGI’s interpretation is correct, it could determine a person into a job, for example, for two weeks during the pre-holiday retail rush. This is inconsistent with the purpose of the section, as is a determination into seasonal employment for a person who is capable of year-round employment.

[80] SGI’s determination of the Appellant into seasonal employment is, in effect, an admission that there is no regular, full-time work within his skills, training and capabilities available to him. At least, none has been identified and offered.

#### Is the Determined Employment Available?

[81] The Appellant has suggested that the determined employment was not available to him, even were he able and qualified to take on the work. SGI has argued that it is.

[82] Given our conclusion above, it is not necessary that we reach conclusions on this issue.

#### Nature of Determined Employment

[83] In the course of argument, the commission asked counsel to consider a line of cases that dealt with the nature of appropriate determined employment, at least with regard to

private disability insurance contracts. In *Bacon v. Saskatchewan*<sup>7</sup> the court, in consideration of a number of cases, set out a list of thirteen principles that it said were applicable in disability insurance cases. These principles were accepted and followed in subsequent cases.<sup>8</sup> We queried whether these principles were applicable in cases that arose under Part VIII of the Act.

[84] Given our conclusions above, it is unnecessary that we consider this issue. We nonetheless appreciate the work done by counsel and SGI's submission on the matter.

### CONCLUSION

[85] SGI's decision letter of August 17, 2007 is set aside and the Appellant will be entitled to on-going benefits for IRB from and after that date. His entitlement shall continue unless and until an employment is properly determined for him or unless IRB are otherwise reduced or terminated within the provisions of the Act.

[86] As he has been successful in his appeal, the Appellant shall have his costs and expenses, including legal fees, reimbursed to a maximum of \$2500 as is set out in the Act and regulations. He shall also have his appeal fee refunded.

**Dated** at Regina, Saskatchewan, on January 30, 2008.

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Joy Dobko, Chair

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Beverly Cleveland, Commission Member

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Barbara Tomkins, Commission Member

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<sup>7</sup> [1990] S.J. No. 632, 48 C.C.L.I. 166, 88 Sask. R. 182 (Sask. Q.B.)

<sup>8</sup> For example, *Hagen v. Co-operators Life Insurance Co.*, [1997] TWL QB97014; *Hill v. Saskatchewan Health Care Association*, [1996] TWL QB96165; *Parker V. Saskatchewan Association of Health Organizations*, 1999 SKQB 222 (CanLII). In addition, the Saskatchewan Court of Appeal, without reference to *Bacon*, spoke to the question of what is "suitable alternative employment" in *Hood v. Metropolitan Life Insurance Co.*, [1993] TWL CA93075.