

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *K.N. v. Saskatchewan Government Insurance,*
2008 SKAIA 023
Date: 20080414
File: 033 of 2007

BETWEEN

K.N., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Dan Coupal, for the Appellant
Chris Weitzel, for the Respondent

Before: **Barbara Tomkins, Chair**

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

Heard at Regina, Saskatchewan
April 1, 2008

DECISION

[1] The Appellant, K.N., was injured in a vehicle accident on November 28, 2005. He applied for and received benefits under Part VIII – the no-fault provisions – of *The Automobile Accident Insurance Act* (“the Act”).

[2] He initially reported and was treated for injuries to his jaw, neck, back, spine, shoulder, elbow and arm but, by February 2007 when the matters at issue in this appeal arose, most of his injuries had essentially been resolved. However, the injury to his left shoulder, involving his neck and arm, was not then resolved and remains unresolved at this time.

[3] On February 28, 2007, SGI provided a letter indicating that all benefits arising from the accident would be terminated effective that date. It was SGI’s view that the Appellant failed to follow and participate in a treatment program that had been recommended, contrary to section 183(e).¹ The Appellant believes he had a valid reason for his lack of compliance with the rehabilitation program and appealed SGI’s decision.

JURISDICTION

[4] In his opening statement, the Appellant, through his advocate, indicated his intention to appeal a number of decisions relating to his claim. In particular, for example, he indicated that he intended to appeal the termination of benefits and SGI’s earlier refusal to provide substitute worker benefits or family enterprise benefits.

[5] 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

¹SGI did not indicate in its decision letter or in the course of the hearing which specific subsection of section 183 it relied on as the basis for termination. In SGI’s second warning letter dated February 20, 2007, the entire section was quoted – although without reference or number – and subsection (e) was highlighted. I assume, therefore, that the termination was founded on section 183(e) of the *Act*.

(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.

[6] SGI's decision letter wherein it indicated that the Appellant was not entitled to either a family enterprise benefit or a substitute worker benefit is dated December 28, 2005. We are not aware of and understand that there was no appeal filed respecting that decision specifically and that the Appellant did not file any appeal at all until April 3, 2007. Even that application to appeal does not indicate disagreement with SGI's earlier decision or an intention to appeal it.

[7] Clearly, the Appellant did not appeal SGI's December 28, 2005 decision within 90 days as is required under section 191(1)(a) of the *Act*. Case law, such as the Court of Queen's Bench decision in *Mintzler v. SGI*² and this Commission's decision in *K.F. v. SGI*,³ establishes that the time frames set out in section 191 cannot be extended. Thus, SGI's letter of December 28, 2005 is not before me and neither, therefore, its decisions declining substitute worker benefits and family enterprise benefits.

[8] The Appellant's application to appeal SGI's February 28, 2007 decision terminating all benefits is dated April 3, 2007 and was received by the Commission on that date. Thus, it was filed within 90 days of the decision letter in accordance with section 191(1)(a) and is properly before me.

FACTS AND FINDINGS

[9] I will not detail the Appellant's injuries, diagnoses, treatment and recovery save as is relevant to the matters under appeal. Suffice to say, therefore, that the Appellant recovered in the care of his physician and a neurologist until October 18, 2006 when his (GP) practitioner recommended that he undergo a secondary assessment.

[10] The assessment was conducted on November 8, 2006 by a team comprised of a physiotherapist, chiropractor, physician and occupational therapist. The team concluded that he suffered a level II whiplash associated disorder that was resolving and a left brachial

² 2000 SKQB 104, 2001 SKCA 54 (CanLII)

³ 2004 SKAIA 06

plexus lesion. In consequence, he suffered pain and limitations in the use of his left shoulder and was unable to manage five of seven reported job demands. The team recommended:

- A secondary treatment program which he would attend three times weekly for six to eight weeks;
- A global conditioning program to help him lose weight and prepare him for his job demands;
- That the treatment centre verify his job demands;
- That he gradually return to full pre-injury job demands;
- That he gradually increase his activities at work and continue appropriate pacing and modification of technique; and
- That he gradually return to all homemaking and yard work, including vacuuming and washing floors but not including shoveling and raking.

[11] The Appellant commenced the secondary treatment and conditioning (exercise) programs on January 22⁴ and was projected to complete on March 16, 2007. An assessment conducted January 22 suggests that the care providers were not wholly optimistic; in the report they wrote that “The goal is to return to pre-injury level of function. The expected outcome is less than favourable due to the nature of the injury.”

[12] The Appellant began to miss his rehabilitation appointments shortly into the program. Absentee reporting forms show that he did not attend on February 1, 2 and 9th. Upon being notified of these absences, SGI sent the Appellant what it refers to as a warning letter. In the letter, dated February 13, 2007, SGI advised that it was aware of the absences and reminded the Appellant of his responsibility to “fully and actively participate in all of your medical and rehabilitation appointments.” It asked him to contact the centre and SGI if he was unable to attend an appointment due to emergency and to contact SGI if he was having difficulty attending “for any reason”.

[13] The Appellant nonetheless failed to attend on February 14 and 16, 2007. In a Progress Report on the latter date, the care providers express concern about the number of absences but did state that the Appellant’s attitude and effort were good when he did attend.

⁴ No evidence or explanation was provided as to whether the delay between the date of assessment and date of commencement of the program was unusual or, if so, the reason for that delay.

They reported that the expected outcome of treatment had changed since the initial report referred to in paragraph [11] above. In particular, they wrote that “There are two reasons to explain this. One is the poor attendance. The other is the nature of his injury.”

[14] On February 20, 2007, SGI sent a second warning letter. It advised the Appellant that SGI was aware that he had missed two further appointments after the first warning letter and warned him clearly of the consequences if he continued to miss appointments. In particular, it indicated that SGI could reduce, suspend or discontinue a person’s benefits in certain stated circumstances. These words were highlighted: “without valid reason refuses, does not follow or is not available for treatment recommended by a practitioner and the insurer”.⁵

[15] The Appellant’s Personal Injury Representative (PIR) had what appears to have been a lengthy telephone conversation with him on February 21, 2007. The Appellant confirmed receipt of both warning letters but said he had received them close together in time, apparently not a week apart as they had been sent. He said that he had thought that missed appointments could be “tacked on” at the end of the program and that he hadn’t realized that missing appointments caused him to be non-compliant.

[16] The PIR explained that this was not correct and, according to her notes, that “if he does not show up for treatments and he does not contact anyone to advise of this, then it is considered non-compliance, as he is just missing with no explanation.” She explained that the program was tailored for his recovery and that treatment had to be consistent and regular for best results.

[17] The Appellant agreed that this made sense but advised that as he was self-employed in construction, his work had been “off the charts” and that with two apprentice carpenters who required supervision and a labour shortage, he was unable to leave work and leave them unattended while he attended to treatment. He reiterated that given this situation and his belief that he could effectively move the treatments to the end of the program, he thought it would be all right to miss.

⁵ Although the numbers were not specified, the letter quoted section 183 of the Act and highlighted subsection (e) thereof.

[18] The PIR indicated she understood that it could be difficult to schedule treatment around work schedules and noted that the duration of his treatments had been reduced to three hours to make it more convenient for him to arrange to attend.

[19] The PIR repeated that “when someone does not attend treatment and does not call in to advise or provide notice, such as was the case with several of the notices I have received, this is considered non-compliance.”

[20] The Appellant finally protested that he had been without benefits for income replacement since the accident and was in serious financial straits, that he was trying to catch up to his debt and that, in effect, he thought this had to be a priority over treatment that he said his doctor and neurologist had said would not help the kind of injury he had. He said that they had said he should regain condition through work, given its physical nature, and that if he didn't get back to his pre-injury condition that way, he likely wasn't going to.

[21] The PIR asked him to provided medical reports to this effect from the GP and neurologist. She advised that she would allow two weeks for him to arrange appointments with the two physicians and maybe to see them; once he called to advise of the dates of the appointments, she would request reports from them. But she also said that until SGI received and considered such reports, the Appellant would be expected to attend the recommended treatment or risk the consequences.

[22] The Appellant contact the PIR on February 23, 2007 and advised that he had seen his GP the day previous and that the GP had said he would talk to the neurologist. The PIR said she would send requests for their medical opinions.

[23] He also advised that, due to the fact that he was working outside the city, he would not be able to attend treatment that day. When he said he had advised the treatment centre, the PIR asked whether they had considered it another missed appointment or if they had rescheduled it and were not considering it a missed session. The Appellant advised that they had rescheduled it.

[24] The centre nonetheless reported the missed appointment on February 23 as such and further missed appointments were reported on February 26 and 28. These brought the total missed appointments to eight of 17 that were scheduled to February 28, 2007.

[25] The Appellant called the PIR on February 28, 2007 and asked whether she had received a report yet from the GP. The PIR indicated that she had not but that she had learned of three missed appointments since their previous conversation. The Appellant protested that she had said he only had to attend until his doctor told him otherwise; the PIR said this was not correct and that she had specifically advised him to the contrary.

[26] She advised that he had received two warning letters, had a lengthy conversation and yet still did not attend. She said that in these circumstances, SGI “must end all funding of his benefits.” The Appellant reiterated his position that he had to work long days to keep up with job demands and that he wanted to simply extend the treatment to achieve the required attendance numbers. The PIR advised, as she had in the prior conversation, that the first was not an acceptable excuse for non-attendance and the second compromised his recovery. She repeated that SGI “has no recourse” and “must” discontinue his benefits.

[27] Accordingly, SGI send a decision letter dated February 28, 2007 and effective that date indicating that all benefits save those related to permanent impairment were terminated. It is this decision that the Appellant has appealed.

[28] The Appellant gave sworn evidence at the hearing, as did his mother and co-worker. The Appellant’s current PIR gave evidence on behalf of SGI. I will refer to their oral evidence as necessary in the discussion and analysis that follows.

ONUS OF PROOF

[29] For purposes of a decision to terminate benefits pursuant to section 183, SGI bears the onus to prove the circumstances that trigger its exercise of discretion to reduce, suspend or terminate a benefit. Upon proof of those circumstances, the onus to prove a valid excuse lies with the Appellant.

LAW AND ANALYSIS

A. Termination of Benefits

[30] SGI's decision to terminate the Appellant's benefits is stated in the decision letter to be based on three areas of non-compliance by the Appellant as follows:

- i) Failure to attend treatment as recommended and required pursuant to the secondary assessment;
- ii) Failure to perform a gradual return to full pre-injury job demands as recommended at the secondary assessment; and
- iii) Failure to gradually increase activities at work using appropriate pacing and modification techniques as recommended at the secondary assessment.

[31] Turning to (ii) and (iii) first, for reasons that follow, I find that SGI has not proven either.

[32] There is no evidence that a gradual return to full pre-injury job demands was developed, although the Appellant's current PIR testified that this would be expected from the treatment centre. I do note a former PIR's record of a conversation with the treatment centre on January 19, 2007. The care provider indicated that the secondary assessment had suggested obtaining a clearer picture of the Appellant's job demands. The PIR advised that since the Appellant was not entitled to IRB, SGI's interest lay only in his ability to manage activities of daily living in respect of which he was then receiving benefits. The implication of this, of course, is that SGI did not require and the centre need not undertake an assessment of the Appellant's job demands.

[33] Therefore, aside from the Appellant's advice to the secondary assessment team and some information in his oral evidence, I was provided no evidence about the Appellant's job demands, the manner in which resumption was recommended or anticipated, or the manner in which he resumed them.

[34] The Appellant's oral evidence was that he felt compelled to work irrespective of his injuries due to his financial situation. He said that he did what he could and called upon others such as his father to assist him with work he could not manage. Over time, he was physically able to manage more of his duties and found ways to differently manage some.

For example, he testified that he dragged drywall sheets that he would have carried prior to the accident. On many occasions, he admitted, his work caused him significant pain. He either worked through it or, if it was more severe, curtailed his work day.

[35] I cannot say that this does not constitute a self-managed gradual return to full pre-injury job demands or a self-managed gradual increase in work activities using appropriate pacing and modification techniques. Certainly, no evidence was provided that suggested his care providers thought his activities were inappropriate or contrary to the secondary recommendations.

[36] Therefore, breach of section 183 on the basis of non-compliance by reason of either (ii) or (iii) above is not proven and cannot stand.

[37] The more substantial allegation on which SGI significantly relied in that set out as (i) above. SGI submits that the Appellant missed almost half of his scheduled treatment appointments, being those scheduled for February 1, 2, 9, 14, 16, 23, 26 and 28, 2007. SGI says that he missed them without valid reason and that this constitutes non-compliance entitling it to terminate benefits under section 183. The Appellant admits that he did not attend the appointments. SGI has, therefore, proven that he was not available for treatment recommended by a practitioner and the insurer for purposes of the section.

[38] In response, the Appellant has put forward three circumstances that he believes constitute valid reason for his absences:

- i) He had not realized that failure to attend constituted non-compliance; he thought that the missed appointments could simply be added at the end of treatment until he had attended the required number.
- ii) He said his GP had advised him that the treatment was not providing him any benefit and he thought that given this, he could discontinue attendance; and
- iii) He said that since he had not been paid IRBs from the date of the accident and had fallen into serious financial compromise, his attendance at work was a necessary and a reasonable excuse to miss his treatment appointments.

[39] I accept the Appellant's evidence that he did not understand that failure to attend constituted non-compliance and that missed appointments could not simply be added at the end of his treatment. The PIR's notes indicate that he raised this belief with her in at least two conversations, being those on February 21 and 28, 2007.

[40] When the matter was raised on February 21, the PIR recorded in her notes that she advised the Appellant that his belief was not correct. The PIR who had that conversation did not testify but there is no suggestion in her notes that she did not accept that the Appellant actually believed this; she appears to have accepted his excuse as credible. I have no basis to think otherwise. I therefore conclude that the Appellant honestly did not understand, at least prior to February 21, that missing appointments constituted non-compliance. This is a valid excuse respecting his absences on February 1, 2, 9, 14 and 16.

[41] Turning to his absences on February 23, 26 and 28, I find the PIR's notes of her conversation with the Appellant on February 21 show that what she told him was unintentionally confusing. While she was firm in stating that missed appointments could not be "tacked on" at the end of treatment, she recorded that she twice advised the Appellant that if he missed an appointment and did not give notice that he would miss, *that* would be considered non-compliance. This could be taken to mean that the act of non-compliance lay in the failure to provide notice rather than in the missed appointment itself.

[42] It is significant to note that according to SGI's recounting of events in the decision letter and according to the Appellant's oral evidence, he did not give notice respecting any of his missed appointments prior to the referenced conversation, whereas he provided notice of all missed appointments after the conversation. He said he hadn't realized it was "a big deal" until the PIR cautioned him and after that he gave notice.

[43] This belief is corroborated in a sense by a conversation between the PIR and the Appellant on February 23, 2007. In that conversation, the Appellant advised that he had spoken to the centre and told them he would miss his appointment that day. The PIR recorded that she asked whether the centre had considered it a missed appointment or whether they had rescheduled it and *would not* consider it a missed appointment. This certainly suggests that when an insured gives notice that he will not attend an appointment,

it can be rescheduled and not counted as a missed appointment. This would appear to corroborate the view that the non-compliance lay in the failure to notify rather than necessarily in the missed appointment itself. It further suggests that missed appointments can simply be rescheduled, contrary to what the PIR had advised on the previous day.

[44] I am mindful of SGI's February 13 and February 20, 2007 warning letters which might have clarified the matter. However, I note that the letters both indicated that the Appellant should advise the PIR and the treatment centre if he was unable to attend due to an emergency and the appointment would be rescheduled.

[45] While the reference to an emergency is, I believe, intended to distinguish among reasons for missing, the term was not defined and might include absences that were necessary and unavoidable. Without so concluding, I accept that the Appellant thought his absences were both. I do not have to decide whether his absences were excusable on this basis but instead, note that the information in this warning letter further confirmed that in some circumstances appointments would be simply rescheduled while others would be considered non-compliance.

[46] For these reasons, I accept that the Appellant honestly believed that if he missed an appointment it could be rescheduled and that he did not understand that simple failure to attend might be considered non-compliance for purposes of section 183. He has provided a valid excuse for his non-compliance.

[47] Further in regard to appointments missed after February 21, 2007, I accept that the PIR advised the Appellant that he would be expected to continue to attend unless and until she had medical evidence confirming that the rehabilitation was not indicated in his case. However, she also advised the Appellant that if he let her know of the date of his appointments with his GP and the neurologist, she would obtain reports from them. He provided this information to her by phone on February 23 and the PIR again indicated that she would obtain reports from the physicians.

[48] The Appellant certainly understood this, as he called on February 28 to ask if she had received the reports. The PIR advised that she had not and instead, advised that benefits would be terminated.

[49] In fact, she had not requested the reports. Had the PIR called the GP on February 23, she might have received the information she (and the Appellant) required on that date. Had she sent a fax, she might have had it that day or the next. Or she might have waited much longer in either case. But I do not believe that, having said she would do it and not having done so, SGI can hold the Appellant to task for non-attendance after February 22 when his GP, he says, confirmed that the treatment was not likely to be helpful for him.

[50] This suggestion was not shocking to the PIR as the treatment centre had advised on a number of occasions, commencing at the Appellant's initial assessment, that it was not optimistic about the effectiveness of the treatment given the nature of his injury. After his poor attendance was a fact, the centre continued to indicate pessimism about his recovery for separate reasons – poor attendance and the nature of his injury. It was clear that there was concern that the rehabilitation might not be helpful and not just because he missed too many of his scheduled dates.

[51] In a conversation with the PIR on February 23, the treating physiotherapist indicated that she wasn't certain "what would be most appropriate". While she clearly indicated that the Appellant's poor attendance compromised any benefit he might get from the program due to poor attendance, it appears that the quoted words were said in respect of treatment itself. It is not clear, however, whether the physiotherapist said this in reference to the kind of treatment that should be offered or in reference to whether treatment should be offered at all.

[52] It seems to me that in circumstances such as these, where available information raised questions about the viability and effectiveness of the recommended treatment, it was especially incumbent on SGI to follow-up with the Appellant's care provider as the PIR twice said she would. The resolution of the issue was important.

[53] In the meantime, the Appellant had spoken with his physician and obtained, he says, the information he thought SGI sought. He understood that SGI would obtain the necessary reports. It was not unreasonable for the Appellant, who is evidently not sophisticated in his approach to and understanding of the administration of his insurance claim, to believe that reports had been obtained and that he had met the requirements intended by his PIR in their February 21 conversation.

[54] In light of my conclusions above, it is not necessary that I consider the Appellant's third alleged valid reason for non-compliance. Also in light of my conclusions above, SGI's decision letter of February 28, 2007 and the termination of benefits for the reasons given is set aside.

[55] Given this conclusion, I do not have to consider whether SGI exercised its discretion under section 183 reasonably. I do note, however, that the PIR indicated that SGI "had no recourse" but to terminate benefits and that in the circumstances, it "must" terminate benefits. This is simply not correct. SGI had discretion under section 183 to allow benefits to continue notwithstanding non-compliance or to reduce, suspend or terminate some or all of the benefits. It does not appear that SGI turned its mind to these alternatives. If not, it would be difficult to find that its exercise of discretion was reasonable.

B. Income Replacement Benefits While Attending Rehabilitation

[56] It was suggested that if I concluded the decision of February 28, 2007 terminating benefits was set aside, all benefits previously paid or declined would become available for my consideration. This is not correct. However, once that letter is set aside, issues that were pending immediately prior to its issue are effectively "revived".

[57] In this case, the Appellant might have been entitled to an income replacement benefit (IRB) in to reimburse his time away from work while attending treatment. He was advised of this in a telephone conversation on January 24, 2007, just days after his treatment program commenced. The PIR explained that SGI required information about the

Appellant's employment and income in order to determine his entitlement and the amount thereof. The Appellant did not provide this information at that time or after.

[58] The Appellant, through his agent, suggested that responsibility for this lay with SGI. He said the Appellant had started a new job, was not salaried and that he simply didn't understand what SGI needed. This may be so but the Appellant has responsibility to provide required information and it is not unreasonable that SGI requires it. While his circumstances may be unusual, they are probably not without precedent to SGI. If he did not understand what was required, it obviously fell to the Appellant to advise SGI of this and seek clarification. At minimum, he could have obtained and provided *some* information. If it was not sufficient, SGI would have obtained clarification or additional information or advised the Appellant what further was required. It is not enough to say, a year later, that he did not understand and that SGI ought to have done a better job explaining what it needed.

[59] That being said, the matter remains viable. If the Appellant provides information respecting his employment income during the time he was receiving his secondary treatment, SGI will calculate and pay any IRB to which he was entitled. I am confident that SGI will assist him in suggesting the kind of information that will be helpful for this purpose.

C. Income Replacement Benefits at 180 Days

[60] In the course of the hearing, questions arose as to whether the Appellant might have been eligible for IRB 180 days after his accident and whether, if so, the matter is within my jurisdiction in this appeal. The Appellant urged that it is, while SGI suggested that it is not.

[61] In this respect, SGI indicated that it had considered whether the Appellant was eligible and concluded that he was not. No decision letter was sent in this regard. SGI argued that there are a number of benefits that might be available to an insured but that few insured persons are eligible for all benefits. SGI says the legislation does not contemplate that a decision letter will be issued in every case when a claimant is not eligible for a benefit. I agree.

[62] However, there is a difference between a determination that an adult who has been continuously employed for years and who was not a student in recent memory is not entitled to a loss of studies benefit and a determination that a person who was not employed on the date of his accident is not entitled to an IRB at the expiration of 180 days. In the former case, a decision letter is probably not necessary but, at least in some cases, a letter will be necessary in the latter. I think one was required in this case.

[63] The Appellant was a young man who had been consistently employed for some years prior to his accident. For reasons that will be discussed below, he was not employed on the date of his accident and so was found not entitled to IRB at the outset of his claim. He was, however, and SGI agrees, entitled to IRB consideration at 180 days.

[64] The accident occurred on November 28, 2005 and 180 days expired on about May 27, 2006. With this in mind, the Appellant's PIR considered whether he was entitled to IRB in a note dated May 5, 2006. She wrote:

1) IRB issue

At the time of the accident, [Appellant] was a salaried employee with [employer]. He was laid off at the time of the accident due to lack of work. It was anticipated that he would be laid off until Feb/06. While being laid off, he was taking the opportunity to finish building his new home. EI denied coverage because he stated he was not available to search for work. No IRB was paid because of the layoff.

Before being called back from the layoff, [Appellant] quit [employment]. He was in the process of purchasing a siding business which would take place in Jan/06 (this was delayed until Mar/06). This self-employment was not secured at time of the accident and therefore no IRB was payable.

A decision letter was provided to him on December 28/05, outlining that he was not entitled to an IRB. He did not appeal.

Current medical information indicated [Appellant] is working and there are no medical reasons why he cannot work. Accordingly, a 180 day review would not be required.

[65] It is clear from the PIR's note that a number of considerations were involved in reaching her conclusion against an IRB and that various pieces of information were

considered. This is not a situation where a benefit is obviously not applicable but one that required the collection and assessment of information.

[66] Fairness and justice require that when a decision is made that affects a person, he or she should know that a decision is being made, be apprised of the information that is being considered in reaching that decision, have an opportunity to challenge that information and put his or her information forward for consideration. Finally, he or she is entitled to notice of the decision. This premise is reflected in the provisions of section 189 of the *Act* which require SGI to give every claimant a written decision respecting his or her entitlement, including reasons and notice of the right to appeal.

[67] The Appellant was afforded none of these in respect of SGI's decision that he was not entitled to IRB after 180 days. He could be afforded them only by means of a written decision pursuant to section 189. I find that SGI was required by the *Act* and the circumstances to provide a written decision regarding this benefit.

[68] The *Act* provides, in section 188, that decisions made and actions taken by SGI may be reviewed in accordance with the provisions of Division 11, wherein the Automobile Injury Appeal Commission is created as a forum of review. Thus, I have jurisdiction to order SGI to now provide a written decision regarding this matter and afford the Appellant the opportunity to appeal it or I may take jurisdiction now in respect of SGI's action in denying an IRB at 180 days post-accident.

[69] I am inclined to the latter. Ordering the provision of a decision letter now reflecting the 2006 decision would only further delay consideration of a matter that is now almost two years past. Documentary evidence relevant to the matter was provided by the parties, as was oral evidence; the matters in issue were canvassed in the course of the hearing.

[70] The Appellant told his PIR in his initial interview on December 6, 2005, that he held employment as a carpenter, repairer and drywaller with a residential construction business for about four years until November 15, 2005. In addition, he was building his own home through an attractive financial arrangement with his employer and a significant investment of "sweat equity". He said that the business was going to lay off some

employees during its slow period and, although he had seniority and would not be subject to layoff, he volunteered to be laid off so that he could finish building his home. He expected the home to be completed by the end of January 2007 and to be recalled to work in February. He said that he intended to return to his employer when the recall arose but admitted that he had received other offers of employment and he was considering purchasing a siding business that was available for sale.

[71] This information was confirmed in a conversation the PIR had with the Appellant's former employer on December 12, 2005. A representative of the employer – whom the Appellant's mother in her evidence said was the company's accountant/bookkeeper – advised that the Appellant had been laid off and that this is what his Record of Employment stated.⁶ While he did not know when he would be called back, he said the Appellant would be laid off while the work shortage existed and that the Appellant's suggestion of return in February 2006 sounded “about right”.

[72] The vehicle accident occurred on November 28, 2005, less than two weeks after the Appellant left his employment. His injuries were such that his physician indicated in a report dated December 8, 2005 that the Appellant should not participate in normal activities including work; he was uncertain of the duration of this restriction. In his January 3, 2006 report, the physician indicated that the duration of the restriction was in excess of 12 weeks.

[73] By February 3, 2006, the physician reported that the Appellant was working, though with pain and decreased strength in his left arm. The physician was awaiting testing but suspected a brachial plexus injury.

[74] By April 8, 2006 the physician reported that the Appellant was working but that there were medical reasons for him to refrain from doing so. Again, he estimated the time of restriction at more than 12 weeks. He noted that “Patient is in constant pain L shoulder radiated to L upper limb with [illegible] ulnar nerve distribution – [illegible] L cervical area”.

⁶ Despite repeated requests, the Appellant did not provide a copy of this document to SGI.

[75] Based on the evidence provided to me, this is the information that was available to the PIR at the time she made the initial determination that the Appellant would not be entitled to IRB at 180 days after his accident. I do not believe that it supports her conclusion.

[76] The PIR who made this decision and wrote the note quoted in paragraph [64] above was not called to testify and we therefore do not know for certain the basis for her conclusion that the Appellant was by then working and that there were no medical reasons why he could not work.

[77] As to whether the Appellant was working, there were medical reports, as noted, suggesting this. While this information was second-hand to the PIR and probably ought to have been confirmed with the Appellant, the evidence now available establishes that by May 2006, the Appellant had resumed working.

[78] As to whether there were “no medical reasons why he cannot work”, I cannot find a basis for this conclusion.

[79] The Appellant’s GP had, in a report dated April 8, 2004, indicated that he was working but not participating in activities of daily living. He further noted that there were medical reasons for the Appellant to refrain from normal activity, including work, for at least twelve weeks and that he was in constant pain. With this information and little more, it was unreasonable to conclude that there were “no medical reasons why he could not work”. Instead, one would be expected at minimum to inquire as to whether the Appellant was working against medical advice and whether and to what extent his capabilities were limited by his injuries.

[80] These questions were especially indicated in this case where, to SGI’s knowledge, the Appellant’s financial circumstances were very seriously affected by his loss of income and ineligibility for IRB after the accident. He may have felt then, as he certainly did later, that he had to work to stay financially viable.

[81] The matter of post-180 day IRB was considered again in early May 2007, possibly as a consequence of his pending appeal to this Commission. By this time, a third PIR had carriage of the file.

[82] He spoke first to the Appellant's former employer who advised that the Appellant had worked there for about four years but quit in November 2005. He said that the Appellant had been working for someone from Alberta and planned to buy his siding company but that the sale had not taken place. The Appellant then became a free-lancer. He had done occasional jobs for the former employer but had not been on the payroll since November 2005.

[83] The PIR then called the Appellant. The Appellant agreed that he had quit his former employment and confirmed that he had worked for a man who owned a siding business that the Appellant hoped to purchase. He said the hope was not realized due to the accident and his consequent inability to do the required work.

[84] The Appellant advised that he hadn't worked on his home for four or five months after the accident. Eventually his father quit his job to help the Appellant, and a friend was also helping him. He said that by about five months after the accident, he was doing everything that he had been doing prior to the accident. At the time of the conversation in May 2007, the Appellant said he was doing free lance work for other home builders and was also building more homes on his own to sell for profit.

[85] Based on this information, the PIR concluded that there was no IRB entitlement in May 2005 when 180 days had expired after the accident. In evidence before us, he said he noted the Appellant's information that by five months after the accident he was working and doing "everything" that he had been doing prior to it. He had no reason to doubt the Appellant's assertion in this regard. If the appellant was able to do all pre-injury job duties at five months post-accident, he would not be eligible for IRB at 180 days.

[86] It was apparent in the course of the Appellant's oral evidence that he is not as careful in expressing himself as we might like. While at one point he described the limitations he continues to manage at work to this day, he shortly after stated that he was

now doing everything that he had been doing prior to the accident. He didn't seem to recognize or be troubled by the apparent contradiction between these pieces of evidence.

[87] When questioned directly about the contradiction, the Appellant explained that he was, in effect, ensuring that everything that he had done before the accident got done afterward but he did not mean necessarily that he did it himself. Specifically, he said that after his father joined him, he essentially gave instructions while his father did the work. Especially after the friend helped, he was able to rely on them to do heavy work and he did what he could by then manage. He also worked through pain and sometimes had to curtail his working hours. In this manner, when taking on a job, he was able to get all of the work done and, in that sense, he was doing everything he had done before the accident.

[88] I believe this must be true. It is the only plausible explanation for the contradiction. Medical evidence confirms that the Appellant worked with apparently significant limitations and perhaps against medical advice in early April 2006. His GP's reports dated June 5 and August 5, 2006 – both after 180 days had passed – indicate that the Appellant continued to suffer constant pain radiated from left shoulder and down his arm and, quoting from the August 5 report, "Patient works with limitation because of limb injuries".

[89] It is my view, given the reports on file at May 2005 and afterward, that the Appellant was not, five months after his vehicle accident, able to do everything he had been doing prior to the accident. Unlike SGI, I cannot accept or rely on the Appellant's statement to that effect made in 2007 – two years after the event - without clarification of the apparently contradictory medical evidence. In particular, I note the secondary assessment report completed in November 2006 which showed the Appellant did not then meet five of seven self-reported job demands. Further, a gradual resumption of demands was recommended, again presuming they were not all then being performed. It is unlikely, if his condition did not meet job requirements in November, that it could have done so six months earlier in May.

[90] I am satisfied that the decision that the Appellant was not entitled to IRB at 180 days was flawed. The fact that a person is working at 180 days does not, in and of itself, dispose of the question; the circumstances of this case indicate clearly the reason this cannot

be so. While he was working at the time, he did so with restrictions and only with the assistance of others; he may have done so contrary to medical advice.

[91] I order SGI to determine the Appellant's entitlement to IRB at 180 days after his accident and to pay such sum as he was entitled to commencing at 181 days and continuing as long as he was entitled. This determination will be made on the basis of the conclusions above and will include a determination of the Appellant's income, actual capability to work and restrictions there from. From my review of the evidence, it appears that he was, at April 2006, no less limited than he was at the time of his secondary assessment in November 2006 and SGI will make its calculation based on those limitations, at minimum.

[92] For purposes of this calculation, if necessary, I am satisfied that the Appellant was, at the time of his accident, laid off from his prior employment and that he had would have been recalled and available in February or shortly thereafter unless, in the interim, he had accepted other employment. For reasons that are separately detailed below, I am satisfied that he did not quit his employment prior to the vehicle accident.

D. Employment Status

[93] In the course of the hearing, a great deal of attention was paid to the question of whether the Appellant was laid off from his job in November 2005 with intended recall, or whether he quit that employment.

[94] In my view, the Appellant was laid off from his employment, with intended recall when the "slow period" ended and that this was anticipated to be in about February 2006. In so concluding, I am aware that the Appellant had other irons in the fire and admitted that he would consider them and might not return to his employer when the layoff period ended. I think, however, that virtually anyone on layoff will consider his or her options during the period but the fact of being laid off is not changed unless and until he accepts an offer of other employment.

[95] I am also aware that the Appellant and his mother, who works for the same business, testified aggressively that he had quit his employment and was not laid off.

Indeed, the Appellant testified that the business did not routinely lay people off and had not laid anyone off in the four years he worked there.

[96] I do not accept their evidence. It was delivered repeatedly in such manner that I was left with the impression that both believed a finding that the Appellant quit his employment, rather than being laid off, was in his interest. Their evidence on this point was either rationalized after the fact or intentionally misleading. Either way, it was not convincing.

[97] The assertion that the Appellant quit his employment cannot be reconciled with the information that he provided to SGI on December 6, 2005, just over a week after the accident. The Appellant then advised in some detail that he had been laid off and expected to be called back in February 2006. He explained that he had volunteered for lay-off and that, given his seniority, it was unlikely he would have been laid off otherwise.

[98] This perspective was confirmed by the employer's accountant/bookkeeper in a conversation on December 12.

[99] In response to questions regarding these conversations, the Appellant stated that in his mind, a lay off is the employer's choice while quitting is the employee's choice. I tend to believe that this *is* his understanding. If so and because it was his choice to accept a lay-off, I can perhaps accept that in the Appellant's mind, he had quit his employment. However, in light of the information he provided in December 2005, I suspect this perspective evolved some time later.

[100] I have also noted SGI's conversation with the business owner on May 7, 2007 wherein the owner said that the Appellant had quit his employment in November 2005 and had not been on the payroll since then. I am not prepared to accept this statement as differentiating between lay off and quitting. A year and a half after the fact, the Appellant had by then certainly not returned to the employment and had no intentions of doing so. In that sense, he had by then quit his employment. The owner was not asked what the situation was in November 2005. Without that question specifically posed, I am not satisfied that we have his specific answer.

[101] I cannot conclude that the Appellant quit his employment as I cannot rationalize that finding with the information he and his employer provided shortly after the accident.

MISCELLANEOUS

[102] The Appellant claims that he suffered significant financial losses as a consequence of his vehicle accident and avoided bankruptcy only by hard work and the assistance of friends and family. He believes that there must have been or ought to have been benefits available that would have off-set the losses he suffered.

[103] In fact, there are not. Entitlement to income replacement benefits is premised on the idea that income a person lost as a result of injuries suffered in an accident will be replaced until he or she has recovered. In this case, unfortunately, the Appellant was not employed and earning income at the date of his accident.

[104] The Appellant's entitlement would have been significantly different if he had been laid off two weeks later or had his accident two weeks earlier. The Appellant suggested that this is unfair, especially for a claimant like him who has a demonstrated history of long-term employment and who was injured just weeks after leaving that employment.

[105] It may be unfair but it is more likely simply a consequence of unfortunate timing. I am not aware of any disability insurance plan that provides benefits to replace lost income for a person who was not earning an income at the time coverage commenced.

[106] In any event, SGI determined that the Appellant was not eligible for IRB in his circumstances and so advised in a letter dated December 28, 2005. The Appellant did not appeal that decision. The matter is therefore moot.

CONCLUSION

[107] In summary, SGI's decision letter dated February 28, 2007 is set aside, as, consequently, is the termination of the Appellant's benefits.

[108] SGI has conceded that the Appellant was entitled to IRB for the time that he was receiving rehabilitation and treatment. The Appellant may provide SGI with information

relevant to this determination and SGI will assist as reasonable in this regard. Upon receipt of necessary information, SGI will determine the amount of the entitlement, if any, and pay such sum. A decision letter meeting the requirements of section 191 will be provided in this regard.

[109] SGI's decision that the Appellant was not entitled to IRB at 181 days after his accident is set aside. SGI will determine the Appellant's entitlement to IRB at 180 days after his accident taking into consideration the findings of fact above and will pay such sum as he was entitled to commencing at 181 days and continuing until he was no longer entitled, if that point has yet been reached. SGI will pay interest on the amount of that entitlement at the rate set out in section 210 and applicable regulations. A decision letter meeting the requirements of section 191 will be provided in regard to the determination of eligibility and the amounts therefore payable. The Appellant will obtain and provide such information as SGI reasonably requires in order to make the necessary determination.

COSTS

[110] As he has been successful in his appeal, the Appellant shall have his reasonable costs reimbursed in accordance with section 193(11) of the *Act* and section 96 of the *Personal Injury Benefit Regulations*, subject to the legislated maximum.

[111] In addition, the Appellant will have his appeal fee refunded.

Dated at [Regina](#), Saskatchewan, on [April 14, 2008](#).

Barbara Tomkins, Chair