

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *L.N. v. Saskatchewan Government Insurance,*
2008 SKAIA 034

Date: 20070618

File: 077 of 2006

BETWEEN

L.N., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
L.N., Appellant
Dale Brown, for the Respondent

***Before:* Jane Lancaster, Q.C., 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 Saskatoon, Saskatchewan
June 5, 2008

DECISION

- [1] The Appellant appeals a decision of Saskatchewan Government Insurance (SGI) dated April 12, 2006 determining her into employment as a Receptionist.

PRELIMINARY ISSUES:

- [2] The Appellant advised the Automobile Injury Appeal Commission (AIAC) that she did not intend to attend the hearing which had been scheduled for June 5, 2008 in Saskatoon, Saskatchewan.

- [3] The Appellant was advised of the provisions of s97(1) of the *Personal Injury Benefits Regulations* pursuant to the *Automobile Accident Insurance Act c. A-35* which state as follows:

S97(1) If written notice of the time, date and place of the hearing has been given to the claimant and the claimant fails to attend the hearing, the appeal committee may:
(a)hear and decide the appeal in the absence of the claimant;
(b)dismiss the appeal without conducting the hearing; or
(c)grant an adjournment and assign a new time, date and place for the hearing.

- [4] Administrative staff of the AIAC confirmed at the hearing that the Appellant had received notification on March 24, 2008 of the date, time and place of the hearing and also confirmed that this information was also provided during conversations between the administrative staff and the Appellant which took place as late as June 4, 2008.

- [5] Counsel for SGI advised that they were not taking a position on this issue and would not be opposed to an adjournment if it were felt that this would assist the Appellant in attending the appeal.

- [6] The Appellant was aware of the date, time and place of the hearing and was aware of the possible consequences of the decision not to attend; SGI had made arrangements for four witnesses to appear in person and by telephone on this date to testify in this appeal.

[7] This is not a situation whereby the Appellant has lost contact with the AIAC; the Appellant is not requesting an adjournment but has indicated that she would prefer that a decision was made.

[8] In light of this, the appeal will proceed in the absence of the Appellant.

JURISDICTION:

[9] The AIAC derives its jurisdiction from section 191(1) of the *Automobile Accident Insurance Act c. A-35*, as amended in 2002, 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 with the later of:
(a) 90 days after the date of the 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) that the mediation is completed.

[10] The Appellant's claim is administered pursuant to the *Automobile Accident Insurance Act* as it stood at the time of her accident. (Old Act). However, when the Act was amended in 2002, the 2002 *Automobile Accident Insurance Act* (new Act) addressed the issue of appeals under the old Act. In section 218.1 of the new Act, the appeal provisions of the new Act govern appeals originating from accidents that occurred under the old Act.

[11] The Appellant faxed her appeal to the AIAC on July 10, 2006.

[12] As a written appeal (the faxed copy) was received within the 90 days of the April 12, 2006 decision letter, the Commission has jurisdiction on this appeal.

ISSUE:

[13] Has SGI proven on a balance of probabilities that the Appellant has the capacity to perform the occupation of receptionist as determined by the insurer?

Determination of Employment:

Relevant Statutory Sections:

s132

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

S134

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

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved pursuant to this Part;
- (c) whether the employment is available in the region of Saskatchewan in which the victim resides;
- (d) the employment that the victim is able to hold:
 - (i) on a regular and full time basis; or
 - (ii) if it would not be possible for the victim to hold employment on a regular and full-time basis, on a part-time basis;
- (e) any other prescribed factors.

[14] 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.

[15] 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 most disability plans. The idea is one akin to the legal obligation of mitigating one's losses.

[16] In SGI's case, however, the matter of determined employment does not arise due to the legal concept of mitigation but by virtue of the quoted sections of the *Act*.

[17] However, the Act requires SGI to consider whether there is any particular employment in the region of the province where the individual resides which he or she can perform. A job is considered available within the statutory scheme above if it exists within 100 kilometres of the Appellant's residence. It does not mean there is a job opportunity or offer of employment.

[18] The Act does not require that SGI actually find a job for the individual who is determined into employment, nor does it provide that the income replacement benefit will continue until the individual actually obtains employment.

FACTS AND FINDINGS

[19] When the Appellant's accident occurred, she was classified as a full time worker as per the definition set out in s.14 of the *Personal Injury Benefits Regulations* (the *regulations*) and income replacement was paid pursuant to the *Act* and *Regulations*.

[20] When it became evident that the Appellant would not be able to return full time to her former occupation as a hairdresser, but could only work at this occupation approximately 50% of the time, SGI "determined" her into the employment of file clerk on October 29, 2001.

[21] The Appellant appealed SGI's decision and in a decision of the AIAC dated February 20, 2004 (*L.N. v SGI*, 2004 SKAIA 004) overturned SGI's decision on determination primarily on the basis that SGI had not properly considered the physical limitations of the Appellant pursuant to s134(a) of the *Act*.

[22] As a result, the Appellant was entitled and received her income replacement benefits as before the "determination process."

[23] In October 2004, SGI hired a vocational consultant to assess the Appellant's transferable skills. The vocational consultant testified at the hearing and provided his credentials to provide this service indicating that he worked with individuals primarily to return them to work, either their previous or other employment after illness or accident.

[24] As part of this process, he testified that he engaged in a computer based program with the Appellant designed to identify the interests, aptitudes and skills as well as identifying those skills which the Appellant brought from her previous employment record, other activities and education.

[25] He advised that in working with the Appellant it was clear that she had a number of transferable skills, in addition to the aptitude and intelligence for a number of occupations. He testified that he had met with the Appellant but had no knowledge of her medical condition or physical limitations. As a result, he required additional information of the Appellant's functional ability before he would be able to decide conclusively suitable employment options for the Appellant that would take into consideration her education, transferable skills, training, and aptitude.

[26] In looking at suitable employment options, the vocational consultant referred to the National Occupation Classification (NOC) a publication by the Federal government which provides a standardized identification of every job and is a widely used tool to identify jobs as well as setting out strength levels, body positions, and general duties, education requirements, etc.

[27] The vocational consultant provided 3 possible NOC classifications to SGI as possible matches for the Appellant based on those transferable skills. These were receptionist, dispatcher, and office clerk.

[28] In addition to providing the Transferable Skills report, the vocational consultant also prepared a Labour Market Survey dated April 26, 2005, in which he checked the availability of employment opportunities in the 3 possible employment matches. In addition, this survey also confirmed the Appellant possessed the necessary qualifications and/or requirements to be considered for all three of the suggested occupations.

[29] During his testimony, the vocational consultant testified that, in his opinion, the Appellant had the necessary qualifications and skills for each of these occupations and he had found a number of employment opportunities in her community for each of the

categories. He testified that in his view she had the requisite education, training and work experience to perform these jobs.

[30] In order to confirm that the NOC classifications as set out accurately reflected the real job situation of a receptionist in the area where the Appellant resided, SGI hired an occupational therapist, Colleen Hancharuk, to do a Worksite Assessment Report. Ms. Hancharuk was employed by Innovative Rehabilitation Consultants and testified that doing worksite and ergonomic assessments were part of her training in assisting people who were injured or ill to look at appropriate options for return to work.

[31] Ms. Hancharuk testified at the hearing she had not met the Appellant but had been hired by SGI to perform a worksite assessment at three specific employment places in each of the categories of receptionist, dispatcher and office clerk. She had as a reference the Transferable Skills report prepared by the vocational consultant.

[32] As she had no prior knowledge of this Appellant's physical limitations, her report was to be an objective report of the actual physical demands of the workplace as well as other requirements such as job training, education.

[33] Counsel for SGI had Ms. Hancharuk focus primarily on the job of receptionist NOC #1414 as this was the employment specifically set out in the April 12, 2006 decision letter.

[34] Ms. Hancharuk testified that she went to the employment site and observed and spoke to both the receptionist and her supervisor. She had the receptionist go through all the steps required during the day, for how long and at what intensity. She emphasized during her testimony that she did not just question the employees but made observations, took measurements and especially observed movement and physical positioning required in the job.

[35] In her view, although the job was primarily sedentary, there was ample opportunity to change position in contrast to a job such as on a production line, where an employee would be involved in static sitting with only breaks for coffee or lunch.

[36] In her view, jobs that allow flexibility to get up, change positions, to move, are viewed from an occupational therapist perspective as positive. She provided a report to SGI indicating the ergonomic requirement of the job as well as the frequency and strength requirement of this occupation. In her opinion as an occupational therapist, she indicated that the position of receptionist would be at a light level in terms of physical tasks.

[37] Counsel for SGI also called an occupational therapist, Sandeep Sharma, who performed a Residual Capacity Evaluation at Kinetik Rehab in Saskatoon on January 11 and 12, 2005. The evaluation team was comprised of an occupational therapist, psychologist and medical doctor. At the conclusion of the assessment, the team provided the opinion that the Appellant was capable of returning to work at a light level for 8 hours per day.

[38] In addition, Mr. Sharma performed a Functional Capacity Evaluation (FCE) on the Appellant on January 12, 2005 using a protocol named Physical Work Performance Evaluation. This protocol, according to Mr. Sharma, who testified that he had been trained in the use of this protocol, is widely used by occupational therapists to objectively measure the biometrics of a person. This provides information whereby the functional capacity of a person can be measured and evaluated. An important measure in this protocol is the endurance of the person during the testing. This is done by measuring change in performance and heart rate and extrapolating the 3 hour 30 minute testing to determine the functional capacity a claimant retains over an 8 hour/5 day work week.

[39] Mr. Sharma testified that the FCE is a useful tool but it is not meant to guarantee that a person can do a specific job. It is of assistance in predicting whether or not it is worthwhile to consider certain occupations by reviewing if the FCE meets the job requirements of the occupation.

[40] Mr. Sharma testified that this biomechanical assessment protocol is widely used by the Kinetik Rehabilitation Centre as a reliable assessment tool. He filed a research document, Reliability and Validity of a Newly Developed Test of Physical Work Performance, Lechner DE et al Journal of Occupational Medicine, September 1994, Volume 36, No. 9; pages 997-1004) which showed independent studies of this protocol as being a reliable and valid indicator of physical work abilities especially when used for making

decisions regarding return to work after injury, pre-employment placement and vocational exploration.

[41] This research document was reproduced and included in the Appeal Book which both parties as well as the Commission had received prior to the hearing.

[42] As a result of this evaluation, Mr. Sharma testified that in his opinion the Appellant would likely meet the physical demands of all the alternative occupations of dispatcher, clerk or receptionist. Mr. Sharma advised that in his view, as it had been almost a year since the RCE when he made his report to SGI about the specific occupations, it would be warranted to redo the functional capacity evaluation to see if there had been any changes in the Appellant's medical condition.

[43] Counsel for SGI asked him to comment on the concerns raised in the Appellant's appeal that if she worked for 8 hours per day, she would not be able to perform household and other activities. He testified that in his view, the reason why the Appellant was able to cope with working approximately half time and then was able to perform her living activities was that she was in an occupation which was beyond her capabilities to work full time. Her occupation as a hairdresser put significant stresses on her by requiring her to work standing for extended periods of time and also to work with her arms extended and arms raised.

[44] In his view, if she was working at a job which allowed a more sedentary posture, she would not be experiencing the physical body positions which have been problematic for her. Therefore, he testified, by working at a job that was within her physical abilities she would be able to work full time and still perform her activities of daily living.

[45] Occupational Therapist, Meghan Regehr, also testified. She also works for Kinetik Rehabilitation. She testified that she was trained to assess the functional abilities of persons using the same protocol as Mr. Sharma. She used the same standardized testing on the Appellant on January 19, 2006 and testified that in her opinion, the Appellant's functional capacity had improved since the last FCE and now met the level of medium level of work for an 8 hour day.

[46] In particular, she looked at the physical job descriptions and worksite analysis prepared by occupational therapist, Ms. Handarchuk, and provided her opinion that the Appellant could, with minor adaptations perform all three of the jobs assessed, including the determined employment of receptionist.

[47] Ms. Regehr gave an example of the minor adaptation she had considered. The receptionist job required that the receptionist carry a box of photocopier paper which weighed 20 kilograms. This was above the weight that the Appellant would be able to safely carry. However, the box of photocopier paper could be opened and individual 2 kilogram packages of paper could be carried without difficulty by the Appellant and was within her physical capacity for lifting and carrying.

[48] Ms. Regehr testified that in her opinion the Appellant would be able to work as a receptionist for an 8 hour day/5days per week if she made those minor adaptations. In addition when asked by counsel for SGI to comment on the concern expressed by the Appellant that she could not work full time and also do activities for daily living, she stated that it was her clinical opinion that if a person has been assessed capable of working at a medium level, and was working at less than that (light/sedentary), there should be no issues in also doing activities for daily living.

ANALYSIS:

[49] SGI's position is that it is entitled to rely on the opinions of the occupational therapists and the vocational consultant that the Appellant can do the job as receptionist.

[50] SGI relies on the case of *Gerald Job v. Saskatchewan Government Insurance* 2002 SKQB 479; 2004 SKCA 164, wherein the Court of Appeal confirmed that SGI is entitled to accept and rely on the reports of experts in the determination process.

[51] SGI argues that they have proven on a balance of probabilities that the Appellant has the physical capacities to do the job on a full time basis pursuant to s.131(d) of the Act. In addition, SGI argues that reports of the vocational consultant show that the Appellant has

met the other factors set out in s134(a) and (b) such as education, availability of employment and skills to the determined employment.

[52] In her appeal document, the Appellant states that she does not feel that she is capable of the determined occupation as a receptionist for 8 hours per day. She states that the physical abilities of working 8 hours a day along with household responsibilities would be detrimental to my over all well being. Furthermore, she states, her limiting factors have never been matched against the real job under s134 of the Act

[53] The Appellant is currently working in a job which is beyond her physical capabilities such that she can only tolerate working approximately 50% of the time. This is mainly due to the requirement to stand the majority of the working time as well as holding her arms in a position which aggravates her neck and back condition.

[54] It is clear that the Appellant would like to maintain this employment and continue to have SGI “top up” her salary to a full time equivalent. In addition, she has expressed concerns about how working full time may have an impact on her household abilities.

[55] The vocational consultant testified that the Appellant had indicated to him that she intended to work part time in her present occupation as a hairdresser and had no plans of changing vocations and therefore, his services to provide further vocational assistance were not required by her.

[56] SGI takes the position that if the Appellant has the capacity to work full time, then the legislation requires that they proceed with a determined employment and then “top up” any salary deficiency that may occur.

[57] The legislation does not require that the Appellant in fact obtain employment in the determined category, but only whether on a balance of probabilities, the Appellant has the physical capacity to perform the determined employment.

[58] I am satisfied on a balance of probabilities that SGI has met the legislative requirements pursuant to s132 and s134 of the Act.

[59] With regard to whether or not the Appellant would have the ability to perform her household duties if she were to work full time in her determined occupation as a receptionist. I accept the evidence of the occupational therapists, Mr. Sharma and Ms. Regehr, that if she were to be employed at a job which meets or is less than her functional abilities, such as the receptionist job, she would be capable of performing these tasks as she does when she is employed in a job half time which does not meet her functional capabilities.

[60] Counsel for SGI also referred me to a recent decision of this Commission, *C.A. v. SGI*, 2008 AIAC 019 which stated that the legislation dealing with determined employment does not require that SGI consider whether the Appellant can work and keep up with her homemaking duties. As I have accepted that the Appellant would be capable of performing her homemaking duties by working at a job which meets her functional capabilities, I am not relying on the *C.A.* case for my decision.

CONCLUSION:

[61] SGI's decision of April 12, 2006 is upheld and the appeal is dismissed. There is no order as to costs.

Dated at Saskatoon, Saskatchewan, on June 18, 2008.

Jane Lancaster, Q.C., Chair