

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *N.Y. v. Saskatchewan Government Insurance*,
2008 SKAIA 042
Date: 20080828
File: 098 of 2007

BETWEEN

N.Y., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Ian Tulloch, for the Appellant
Elizabeth Flynn, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Conrad Hnatiuk, 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.**

Heard at Regina, Saskatchewan
August 7, 2008

DECISION

[1] The Appellant was injured in a vehicle accident on May 17, 2001. She 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] The Appellant suffered a significant injury to her left knee and lower leg that will never be fully recovered. Her ability to engage in certain activities is limited and restricted as a result and she is unable to resume her active participation in the family’s grain and cattle farm operation.

[3] Because she was not able to manage her pre-injury employment on the farm, she received Income Replacement Benefits (IRB) throughout her recovery and on-going. However, by letter dated June 13, 2007, SGI advised that it had determined that she could undertake the work of an Accounting Clerk and provided a decision to this effect. As a consequence of that decision, the Appellant’s benefits for income replacement would, on June 13, 2008, be reduced by the amount of an Accounting Clerk’s wages.

[4] The Appellant disputed SGI’s determination. She says that she does not have the skills and abilities necessary to meet the qualifications of an Accounting Clerk’s position and that, in any event, employment in the determined occupation is not available within a reasonable distance from her home. She appealed to the Automobile Injury Appeal Commission on that basis.

FACTS AND FINDINGS

[5] On May 17, 2001, the Appellant was crushed between a truck and a combine on the family farm. Her left lower leg was broken and the knee was essentially crushed. She has had a number of surgeries on the injured leg and received extensive therapy. Nonetheless, she continues to suffer significant disability in the affected leg and there is no indication that substantial improvement can be anticipated.

[6] As a result, the Appellant has lost mobility, strength and function in her leg and is limited in her ability to lift and carry heavy items or to carry any items for extended periods. Her tolerance for standing, walking and climbing stairs is compromised, as is her balance.

The parties are agreed that, as a result of these restrictions, the Appellant is no longer able to do most of the work she did on the farm prior to her accident.

[7] SGI engaged Innovative Rehabilitation Consultants (“IRC”), a disability management consulting company, to conduct an occupational alternatives analysis for the Appellant. As part of this analysis, Russ Warner, a Rehabilitation Consultant for IRC, met with the Appellant, administered certain vocational tests and received a copy of her résumé. Using this information and considering the National Occupational Classifications (NOC) published by Human Resources Development Canada, Mr. Warner identified occupations that he thought suited and appropriate to the Appellant’s interests, education, experience and physical capabilities and restrictions.

[8] The Appellant had been an elementary school teacher for many years until 1997. After that, she continued to teach as a substitute when needed, one to four days per month. Given this and the results of tests that were administered, Mr. Warner identified three potential occupations for the Appellant. Of these, he concluded that work as an elementary school teacher was the best match. However, those responsible for assessing her physical capabilities concluded that the employment was not suitable for her.

[9] IRC considered the matter further. By this time the file had been transferred to Jennifer Skazyk, a Vocational consultant at IRC. In a report dated March 19, 2007, she concluded that the Appellant’s interests, education, experience and physical capabilities and restrictions indicated she might be well-suited to the work in the category of “Accounting and Related Clerks”.

[10] As part of her analysis, Ms Skazyk then investigated whether such a position existed in the Appellant’s area of residence. She contacted an accounting firm in a town about 74 kilometres from the Appellant’s home and was advised that the firm had positions that met the definition of “Accounting Clerk” that ICS had identified. Dana Bymoen advised that the duties of the position included monthly book-keeping, payroll duties, preparation of personal tax returns and preparation of farm income program applications.

[11] Ms Bymoen advised that qualifications included either a farming background and experience with book-keeping or a one-year Accounting Technician course at SIAST. In addition, candidates would require, according to Ms Skazyk's report, "excellent interpersonal, communication and computer skills".

[12] Other skills and knowledge that were considered assets but which were not required included knowledge of accounting, payroll, record-keeping and farm program applications, as well as experience with certain specific software programs.

[13] This employer, Ms Bymoen said, would provide on-the-job training.

[14] With this information and Mr. Warner's earlier report of the Appellant's experience and abilities, Ms Skazyk concluded that the position was a match for the Appellant. She wrote:

[The Appellant] has had experience performing bookkeeping duties for her family's farm operation. She has computer skills and knows how to operate office equipment. This job is sedentary in nature and would not require any lifting, prolonged standing/walking, or low-level work. This occupation matches [the Appellant's] level of education, transferable skills, aptitudes, and physical abilities according to the NOC and according to information from an employer.

[15] Nicole Gallais, a physical therapist at the Functional Rehabilitation Program at Wascana Rehabilitation Centre considered the recommended employment against the Appellant's physical restrictions as a result of her accident and concluded that the identified employment would be suitable on that basis.

[16] Given these opinions, SGI sent its June 13, 2007 letter to the Appellant advising her that she had been determined into employment as "Accounting Clerk and Related Clerks". It is this decision that the Appellant appealed.

[17] After the appeal was filed and presumably consequent on it, SGI asked IRC to review the recommended employment against required computer skills. In a letter drafted October 31, 2007, Mr. Warner wrote:

After my initial meeting with [the Appellant] on December 22, 2005 the client provided me with a copy of her resume (see attached). In terms of skills related

specifically to computer proficiency, [the Appellant] identified under “Professional Development” she had been a Secretary for the Gull Lake Local Teacher’s Association from 1991 to 1995. Although I do not know how much computer work was required to perform this job I assume [the Appellant] would have used a computer to perform typing and data entry on a fairly consistent basis. [The Appellant] also identified under “Technical Skills” she had acquired typing, computer, CD Rom and Internet experience. It is also important to note that [the Appellant] participated in vocational testing that day and utilized a computer for approximately three hours in order to identify answers to specific questions.

[18] He then made reference to an earlier report in which the writer had stated that the Appellant “is responsible for all of the bookkeeping. She estimated it would involve at least two days per month over the winter months.”

[19] On this basis, Mr. Warner confirmed his opinion that the Appellant was physically able to do the work of an accounting clerk and that she had the skills necessary for the work.

[20] SGI sent a fax on January 29, 2008 confirming an earlier instruction to Mr. Warner. Among other things, SGI asked him to contact the Appellant to obtain information about her computer skills and her duties at the Gull Lake School Division¹ and to re-contact the identified employer to clarify the computer skills that were necessary for the designated job.

[21] Mr. Warner did so and provided further information in a letter dated February 8, 2008. He stated that he spoke to Ms Bymoer at the accounting firm again. He said he confirmed that, in lieu of the otherwise required one-year course, the firm would consider a person with a farming background and book-keeping experience and would provide on-the-job training.

[22] He said he had spoken to the Appellant and she had advised that she performed all book-keeping duties for the farm manually, starting after the vehicle accident in 2001.² She said she didn’t have any formal training or education relevant to the position and her computer skills were basic. He provided examples of her computer use – using Word

¹ This was an error. In fact, the Appellant’s résumé showed she had been secretary for the Gull Lake Local Teachers’ Association, not the school division.

² In her evidence, the Appellant said that she had done the books for the farm for about 35 years. This is also reported in other filed reports. We do not believe it is necessary to resolve the discrepancy for purposes of our decision but if it was, we would conclude that she did the farm books for some years before the vehicle accident and continued doing them after.

Perfect to prepare tests, browsing the internet and sending e-mail. She advised that she did not use a computer in her work with the Gull Lake Local Teachers' Association but instead took written notes at meetings. Mr. Warner told her that based on what she had written on her résumé, he had concluded she had "very good" computer and accounting skills because she had identified typing, computer, accounting, CD Rom and internet skills under the heading "Technical Skills" on her résumé. He says she admitted that she might have exaggerated her proficiency in these matters on her résumé.

[23] Based on his conversation with the Appellant and with Ms Bymoen, Mr. Warner concluded that the determined occupation was suited to the Appellant's knowledge, skills, education, experience and limitations.

[24] Given Mr. Warner's opinion, SGI maintained its position set out in the June 13, 2007 decision letter.

[25] The chronology of facts set out above was supplemented by oral evidence from the Appellant and from Mr. Warner. The Appellant said that the résumé she gave Mr. Warner was prepared in 1996. She said the résumé was intended to show she had "some" skills in the areas of typing, computer, internet and book-keeping but she did not intend the résumé to suggest she was proficient in these areas. She did admit that there was an element of exaggeration in the résumé in this respect.

[26] She said that Ms Skazyk never communicated with her and that Mr. Warner did not communicate with her after their interview until after SGI had sent their determination decision. She said that Mr. Warner did not ask her generally about the extent of her expertise in these areas or ask about her familiarity with specific software programs, but she thought from their conversation generally he would have known that she had limited computer skills.

[27] As to book-keeping, she said that she had said something to the effect that she did the "accounting" for the farm in a conversation with Mr. Warner after she had received the determination decision. She said that a few days later, she became concerned that this may

have given a wrong impression and called him to explain. He was not in and she left a message that she thought clarified the matter.

[28] In fact, the Appellant said, she has very basic self-taught computer skills. She has never worked in an office or used a computer for work purposes, other than to occasionally prepare a test for students. Otherwise, she uses it for personal purposes such as to create a black-and-white “poster” without graphics for community events, to send or receive an e-mail and browse news on the internet. She says she does not do banking or pay bills on-line and has never made an internet purchase.

[29] As to book-keeping, she said that she had kept the books for the farm for 35 years. Her role in this respect consists of recording information from receipts and cheques into a ledger that the family’s accountants provided. This recording is done by hand. The Appellant also calculates and pays wages owing to the hired help; while she calculates deductions such as those for Employment Insurance and CPP, she does not make the necessary submissions to the federal government. At intervals, the records she keeps are provided to the accountants. The Appellant does not and has never prepared either the farm or family’s personal tax returns. Her work with the farm books requires about two days per month.

[30] While we think that the Appellant may have minimized the extent of her computer proficiency, we are fully satisfied to accept her evidence that her computer skills are basic only.

[31] Mr. Warner testified that he met the Appellant in December 2005. During a three-and-a-half to four hour visit, he administered aptitude and related testing. This was done on a laptop computer that Mr. Warner provided.

[32] Mr. Warner said that after their meeting, he used the information he had gathered to draw his conclusions. He said the Appellant completed the tests on the computer without difficulty. He said during their conversations she did not volunteer to him that her computer skills were limited and, given the words on the résumé and his observations of her

completing the tests on the laptop, he assumed her computer skills were greater than she now suggests they are. He assumed they were what he described as “good”.

[33] Similarly, he said he assumed that she had accounting knowledge and experience due to her keeping the farm books over what he thought had been the previous four years. Indeed, in his Occupational Alternatives Report he stated that the Appellant had “extensive experience and knowledge of book-keeping for the farming industry”.

[34] Given the information he had obtained and the inferences and assumptions he thought reasonable to draw from it, he was of the view that the Appellant was well suited to the Accounting Clerk position that had been identified.

[35] Even after learning that the Appellant did not have either the computer skills or accounting experience he had thought, Mr. Warner maintained that the position was suited to the Appellant; he maintained this position to the date of hearing.

[36] He said that the Appellant has a farming background, has done the farm books and is bright. The identified employer offered on-the-job training and Mr. Warner said he understood that the employer would consider the Appellant for the position. He thought, given her farming experience, the employer would be satisfied with basic computer skills.

[37] We were not impressed by Mr. Warner’s evidence. He reviewed a report prepared by his co-worker, testing results from the Appellant and a résumé she provided and from these, drew inferences and made assumptions. In some cases, the inferences and assumptions were not reasonable and in many cases, alternative inferences and assumptions were also available. He had the ability to obtain factual information and work from that, yet he proceeded on the basis of assumptions.

[38] SGI, it seems, also identified this problem when it requested Mr. Warner to clarify the Appellant’s computer skills and proficiency. In his response, he stated the bases for his assumptions – that she had shown typing, computer, CD Rom and internet experience under the heading “Technical Skills” on her résumé, that she had used the computer for three hours of vocational testing and that he assumed she would have “used a computer to

perform typing and data entry on a fairly consistent basis” in her role as secretary for the Gull Lake Local Teachers’ Association. He further noted that she was responsible for all of the book-keeping for the farm, involving at least two days per month over the winter months.

[39] SGI was not satisfied with this and specifically asked Mr. Warner to speak to the potential employer and the Appellant to learn about the computer skills required for the position and those possessed by the Appellant. It is certainly possible that SGI was asking that he obtain factual information rather than speculate from information that was at best ambiguous.

[40] Mr. Warner placed responsibility for any inaccuracies on the Appellant’s shoulders. He said that she did not volunteer the information that her computer skills were minimal only or that her work with the farm books was not as extensive as some might speculate. However, we do not believe that one can put this responsibility on the Appellant without putting some on Mr. Warner. She may not have indicated that her skills were minimal or basic but neither did she suggest they were “good” or “very good” as Mr. Warner appears to have variously concluded.

[41] It was Mr. Warner’s task to determine what the Appellant’s skills, experience, training and knowledge were; if this information was not provided or was not provided in sufficient detail for him to reach reasoned conclusions, it was his obligation to obtain that information. It was not appropriate to speculate, for example, as to her likely duties as secretary to the Gull Lake Local Teachers’ Association or as to the degree of her expertise in any other matters, especially those that were critical to the question of her qualifications for the determined employment.

[42] Given these shortcomings, we do not have confidence in and do not accept Mr. Warner’s opinions.

LAW AND ANALYSIS

[43] SGI determined employment for the Appellant pursuant to sections 132 and 134 of the *Act* as it was at the time of the Appellant's vehicle accident.³ 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;
- (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.

[44] We are satisfied that the Appellant is not qualified for the position with the identified employer. There are a number of reasons for this conclusion but we will discuss only the most important of them.

[45] First, the position requires a farm background and book-keeping experience or a one-year Accounting Technician course. The Appellant certainly has an extensive farming background but her work on the farm books was limited to hand-entry of receipts and cheques in a ledger provided by the family's accountant. She did not prepare the farm and family tax returns, make submissions to the federal government or prepare applications for farm programs. While what she did is certainly part of book-keeping, it is not the totality of

³Amendments 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 2001 and is therefore administered under the old Act.

book-keeping for purposes of job qualification; it cannot be reasonably viewed as equivalent to a one-year course. Or, at minimum, SGI has not shown it to be either.

[46] Indeed, Mr. Warner may have admitted that her actual book-keeping experience was not adequate to lead the employer to waive the requirement for the one-year course. At least, he admitted that he did not know what level of book-keeping experience she had and therefore couldn't say if it was sufficient to lead the employer to waive the training.

[47] We are satisfied that the Appellant has only very basic computer skills. The job requirements, as related to Ms Skazyk, included "excellent" computer skills. Nothing in her résumé or in any information before us, including Mr. Warner's oral evidence, suggests that her computer skills are excellent or even more than basic. The Appellant therefore does not meet this qualification.

[48] Finally, the Appellant has filed a letter from Roland Monette, the named accountant of the identified accounting firm. In his letter, Mr. Monette states that he had reviewed the Appellant's résumé and did not feel that she would have the qualifications or computer skills necessary for an accounting technician position.

[49] SGI has argued that this letter is based solely on information provided to Mr. Monette by the Appellant and that neither SGI nor the Commission knows what information that was. Of course, SGI is correct about this. However, Mr. Monette's opinion is consistent with evidence before us of the job requirements provided by Ms Bymoen to Ms Skazyk and with evidence as to the Appellant's actual qualifications. Given that, we have no basis or reason to reject Mr. Monette's letter. And if the employer himself reasonably says that the Appellant is not qualified for the position, this fact in itself is evidence that she is not qualified. SGI has not refuted that evidence.

[50] We might note SGI's submission, through Mr. Warner, that since the employer was willing to offer on-the-job training, we might overlook the lack of qualifications. In light of our conclusions above, it is not necessary that we decide this issue. However, we are inclined to the view that the test for purposes of sections 132 and 134 is not whether an

employer might give the Appellant the position despite her lack of qualifications but whether she is actually qualified for the position.

[51] For all of these reasons, we are satisfied that the Appellant is not qualified for the position designated.

OTHER MATTERS

[52] In argument, SGI suggested that the Appellant had misrepresented her skills to Mr. Warner, that SGI was entitled to rely on the information she provided and that the Appellant should bear the consequences of the misrepresentation. We are not certain that is or should be the logical consequence in a case where qualifications are misrepresented but it is not necessary that we resolve that matter because we are satisfied that the Appellant did not misrepresent her qualifications. Her résumé did not state the level of her computer, accounting or book-keeping skills; it only stated that she had some. She did.

[53] It is not uncommon for a résumé to show bare skills; usually the depth of those skills is fleshed out in the course of an interview and selection process when the person is being considered for a position. In this case, however, the résumé was not provided in the course of a hiring process. Neither was it prepared for purposes of a determination under the Act and it was, in fact, nine years out of date. Mr. Warner knew this.

[54] While Mr. Warner speculated that the skills were greater than they were in fact, the Appellant speculated that the conversations she had with Mr. Warner clarified that the skills were only basic. While both engaged in speculation, neither engaged in misrepresentation.

[55] The Appellant submitted that the position identified was not reasonably available in the region of her residence as set out in section 134(c). That section reads as follows:

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

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

[56] The Appellant said that, while available only 74 kilometres from her home, the cost of transportation exceeded the net wages for the position and it was not reasonable to expect her to work for little or no income and face a significant reduction in her IRB as a result. In response, SGI noted that the section speaks of an employment within the region of her residence and says that their policy of considering only employments within 100 kilometres of the residence is probably a more generous interpretation than the words of the Act might yield.

[57] We do not have to resolve this matter in this decision but can say that there is a valid question whether the use of 100 kilometres is somehow related to section 51(1) of the regulations dealing with expenses for medical treatment obtained more than 100 kilometres from one's residence and, if so, whether the relationship justifies the policy for purposes of section 134(c) of the Act. Irrespective of that consideration, there is also a valid question whether the "100 kilometre policy" is reasonable and in keeping with the legislated purposes of the Act and regulations.

[58] This is an interesting argument and one that we do not believe has previously been placed before the Commission. However, in light of our conclusions above, it is not necessary that we consider it.

CONCLUSION

[59] SGI's letter of June 13, 2007 determining the Appellant as an "Accounting or Related Clerk" is set aside and the Appellant will be entitled to on-going benefits for IRB from and after that date. Her entitlement shall continue unless and until employment is properly determined for her or unless IRB are otherwise reduced or terminated within the provisions of the Act.

COSTS

[60] As she has been successful in her appeal, the Appellant is entitled to any pre-judgment interest on any benefits owing and is also entitled to a refund of her appeal fee and

reasonable costs in accordance with sections 193(11) and (12) of the *Act*, subject to the cap of \$2,500 set out in s. 96 of *The Personal Injury Benefit Regulations*.

Dated at Regina, Saskatchewan, on August 28, 2008.

Ann Phillips, Q.C., Chair

Conrad Hnatiuk, Commission Member

Barbara Tomkins, Commission Member