

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *H.V. v. Saskatchewan Government
Insurance, 2008 SKAIA 057*

Date: 20081223

File: 020 of 2008

BETWEEN

H.V., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
H.V., Appellant
Jane Watson, for the Respondent

Before: **Peter Bergbusch, Chair**
Jane Lancaster, Q.C., 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 Saskatoon, Saskatchewan
September 15, 2008

DECISION

INTRODUCTION

[1] The Appellant has appealed a decision of Saskatchewan Government Insurance (“SGI”) dated July 5, 2007, in accordance with subs. 191(1) of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (the “Act”). In that letter, SGI advised the Appellant that it was terminating all benefits payable to him under Part VIII of the *Act* on the basis that he had knowingly provided false invoices to the insurer. SGI advised that it had evidence to support the conclusion that the Appellant had provided false invoices for payments made to substitute workers.

[2] In his application to appeal SGI’s decision, the Appellant states:

I do not feel that SGI has the full story and they are not interested in hearing my side of things. I paid a person to do replacement work and that person is saying that he didn’t work part of the time he submitted to me for payment.

[3] This appeal raises the following issues:

1. Has SGI established that the Appellant knowingly provided false invoices?
2. If the Appellant did knowingly supply false invoices to SGI, was SGI’s decision to terminate all benefits reasonable?

SUMMARY OF FACTS

[4] The Appellant suffered injuries in two automobile accidents. The first occurred on December 24, 2004, when the car in which he was a front seat passenger struck a Clydesdale horse at highway speed. His body was twisted slightly to the left during the impact and he struck his head on the inside of the vehicle. He received treatment at a hospital emergency department the same day. The second accident took place on November 11, 2005, when the van the Appellant was driving struck the side of a car, then jumped over a meridian and hit a sign. The Appellant received treatment at hospital.

[5] Prior to the motor vehicle accident, the Appellant worked as the owner and operator of a fight club (the “Club”). The Appellant offered instruction in various combative arts, such as kick-boxing, ultimate fighting, and martial arts such as Muay Thai. He taught beginner and advanced classes at the Club. The Club was open from 12 p.m. to 10 p.m. on weekdays. In addition to his duties as an instructor and coach, the Appellant was also

responsible for the day-to-day operations and promotion of the Club. His duties included fighting in competitions, coaching and sparring with fighters, assessing students, promoting and refereeing or judging competitions, and providing security for events.

[6] Among other courses of treatment for injuries sustained in the first accident, the Appellant submitted to a secondary assessment on February 7 and 8, 2005. The assessment team concluded that, while the Appellant was not fully recovered from his injuries, he was by then able to fulfill many of the physical demands of his occupation. He could not, however, engage in some physical contact that was a part of his activities as a competition level fighter and as a trainer.

[7] Following this assessment, the Appellant participated in a secondary rehabilitation program and had started a return to work program by the time of his second motor vehicle accident. Subsequently, he continued rehabilitation four times a week. As of March 15 and 16, 2006, the Appellant was participating in a return to work program by resuming teaching beginner classes, although he was not teaching advanced classes.

[8] In its mid-conference report on December 21, 2006, the rehabilitation team noted that the Appellant had attended 21 out of 28 scheduled appointments, missing some days due to increased symptoms from teaching evening classes. While he continued to work evenings, he had not returned to his pre-accident level of functioning.

[9] The Appellant was discharged on or about March 1, 2007, from the rehabilitation program. The conclusion of the treatment team was that the Appellant was capable of performing physical work at the medium level for an 8-hour day, which did not meet the demands of his occupation. One of the recommendations upon discharge was that the Appellant “continue teaching the beginner class, continue with marketing and the advertising aspect of his business.”

[10] The Appellant elected to receive a benefit to hire replacement labour in lieu of an income replacement benefit. While an income replacement benefit is paid to reimburse an individual for his or her lost wages, an alternative is to pay someone else to do the work the injured person cannot. SGI then reimburses the insured for the wages of the substitute worker. The Appellant elected a substitute worker benefit, presumably because that would

better ensure that the Club could keep operating. He submitted accounts for E.M. and K.I., among others, for reimbursement.

[11] In about April 2007 the Appellant had a falling out with one of the instructors, E.M., who taught and trained at his Club. On April 4, 2007, E.M. gave a statement to SGI. E.M. stated that he had joined the Club in July 2003. He claimed that the Appellant asked him to teach all the classes at the Club, in exchange for occasional pay, free membership and free equipment. At first, the Appellant taught 80% of the classes and E.M. the rest, but eventually E.M. was teaching all of the classes. E.M. claimed that this was the arrangement before the Appellant's motor vehicle accident on December 24, 2004, and that nothing changed thereafter. He said that the arrangement was that, if he trained a fighter, the fighter would pay him \$20.00 and he would pay the Club \$5.00. Occasionally, he said, the Appellant would pay him a couple hundred dollars. E.M. stated that he had been shown the invoices submitted by the Appellant to SGI for replacement labour, but had not been paid as indicated on the invoices. E.M. stated that he had last taught a class at the Club on April 2, 2007.

[12] E.M. called SGI again after providing this statement to report on money that he believed the Appellant had earned from sponsoring two events in April 2007.

[13] A second individual, K.I., also contacted SGI about his work for the Appellant. He said that he had worked in the Club following the Appellant's accident, without pay. He alleged that the Appellant had promised to pay him for his instructing once his claim with SGI had been resolved, but that the Appellant later said that his claim had fallen through.

[14] SGI's personal injury representative advised K.I. that the Appellant had listed him as a substitute worker from January 3, 2005 to June 6, 2005. K.I. stated that that was incorrect as he had a two-year employment contract in another community from April 16, 2005 to April 16, 2007.

[15] On June 4, 2007, an SGI special investigator interviewed E.M., who advised that he had been employed by a Saskatoon business since January 2007 and had worked for the business on days when the Appellant's records indicated he was working at the Club. SGI obtained E.M.'s work records from the business. Comparing these work records to the record of hours worked by E.M. at the Club submitted by the Appellant to SGI for

reimbursement, the SGI special investigator concluded that some of the records submitted to SGI were false. He concluded that: “There are a total of eighty-five hours that can be shown as fraudulent billing.” The investigator also concluded that the Appellant’s submission for reimbursement of hours worked by K.I. after April 15, 2005 was fraudulent since he was then working in another community.

[16] As a result of these disclosures, SGI concluded that the Appellant had knowingly submitted false invoices for substitute labour, and sent him the decision letter dated June 5, 2007, terminating his benefits.

[17] Subsequently, K.I. was interviewed by SGI’s special investigator concerning his allegations about the Appellant. A transcript of this interview was filed with the Commission. Although the Commission is not bound by the strict rules of evidence, we see no reason to give any weight to this transcript: K.I. had not been affirmed to tell the truth when he was interviewed; the information in the statement was almost entirely led by the interviewer; he testified in person during the hearing before us; and the investigator did not testify about the circumstances surrounding the interview.

[18] On July 30, 2007, SGI sent the Appellant a further letter seeking repayment of \$2,070.00, which its investigation had determined was at minimum the amount the Appellant had been overpaid for “fraudulent replacement labour invoices”. SGI indicated that it determined that at least \$1,020.00 of the amounts set on invoices related to work done by E.M. between January 22 and April 12, 2007 was fraudulent, and at least \$1,050.00 of amounts claimed for work done by K.I. between April 15 and June 6, 2005 was fraudulent.

[19] In September 2007, E.M. made a complaint to the Labour Standards Branch of Saskatchewan Labour, alleging that the Appellant owed him unpaid wages for the months of November and December, 2006, and January through April, 2007. As a result of this complaint, a labour standards officer sent the Appellant a letter dated September 5, 2007 asking him to meet with her to discuss the claim of unpaid wages. Eventually, the Labour Standards Branch produced an “Inspection Summary,” indicating that E.M. was owed lump sum wages of \$10,374.20 for full-time work as a trainer/coach from November 1, 2006 to April 15, 2007, with work hours of 30 to 38 hours per week. However, after investigating

the allegations, the Labour Standards Branch closed its file without further action, although we heard no evidence regarding the reasons for this decision.

[20] Many of the documents and much of the testimony we heard in this case was not relevant to the issue we have to decide. For example, the Appellant filed hard copies of emails between K.I. and himself in which K.I. indicated his eventual goal to establish his own fight Club. The Appellant suggests that he had to kick K.I. out of the Club because K.I. was trying to recruit students to join his own, competing Club. We do not need to decide whether this was the case, nor do we find this dispute a reason in itself to disbelieve K.I.'s testimony.

[21] The parties were advised on January 31, 2008, that mediation had been concluded. The Appellant's Application Form to appeal SGI's decision was received by the Commission on March 25, 2008. The appeal was filed, therefore, within the 60-day limitation period prescribed by the *Act*: subs. 191(1)(b).

LAW AND ANALYSIS

[22] The Commission's jurisdiction to review a decision of SGI is set out in subs. 193(7) of the *Act*. The Commission may set aside, confirm or vary the insurer's decision. In addition, the Commission may make any decision that the insurer is authorized to make pursuant to Part VIII of the *Act*.

[23] The Saskatchewan Court of Appeal addressed the standard of review applicable to appeals to this Commission in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In that case, the Appellant had put SGI's findings of fact in issue and the Commission had held a hearing pursuant to subs. 193(6) of the *Act*. The Court of Appeal observed that more than one standard of review was indicated by the legislation:

[14] A reading of the relevant statutory provisions would indicate that there is more than one standard of review potentially applicable to a review of a decision of SGI. Here, we are concerned only with determining the appropriate standard of review on an appeal where the appellant places the facts in issue.

[24] In *Allary*, the Court of Appeal concluded that, where an appellant places SGI's findings of fact in issue, the standard of review of those findings is correctness:

[20] Where the facts are placed in issue, as they are here, the appeal commission has an obligation to receive and consider any new evidence submitted by the appellant

and, depending on the nature of the hearing which is conducted, to consider as well the evidence received by SGI in making the finding of fact or facts in dispute on the appeal. The appeal commission must determine whether the decision of SGI was erroneous having regard to all the evidence. The factual issue for determination within the case was whether there was a causal link between the benefits claimed and the injuries caused by the accident of September 8, 2001.

[21] Notwithstanding its comments on the appropriate standard of review, the Commission in fact applied the proper standard, i.e. correctness. It conducted a hearing, heard the evidence of the appellant and reviewed the record including certain documentary evidence concerning the issue of causation to determine whether or not there was a causal link between the transportation benefits and mental health benefits claimed and the injury.

[25] The Appellant submitted invoices to SGI for reimbursement of substitute workers he hired to perform the duties he fulfilled prior to the first accident. This benefit is found at section 116 of the *Act*:

116(1) Subject to the regulations, if an insured is self-employed at the date of an accident and is entitled to an income replacement benefit pursuant to section 113, 114, 122 or 123, the insured may elect to receive a benefit to hire a substitute worker.

[26] The specific provision of the *Act* upon which SGI relies to terminate the Appellant's benefits is as follows:

183 The insurer may refuse to pay a benefit to a beneficiary or may reduce the amount of a benefit or suspend or terminate the benefit if the beneficiary:

- (a) knowingly provides false or inaccurate information to the insurer;
- (b) refuses or neglects to produce information required by the insurer for the purposes of this Part or to provide an authorization reasonably required by the insurer to obtain the information;
- (c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;
- (d) without valid reason, neglects or refuses to undergo an examination by a practitioner, or interferes with an examination by a practitioner, requested or required by the insurer;
- (e) without valid reason, refuses, does not follow or is not available for treatment recommended by a practitioner and the insurer;
- (f) without valid reason, prevents or delays recovery by his or her activities;
- (g) without valid reason, does not follow or participate in a rehabilitation program; or
- (h) prevents or obstructs the insurer from exercising any of its rights of recovery or subrogation pursuant to this Part.

[27] In this case, the Appellant challenges SGI's findings that he knowingly provided false invoices to the insurer of payments he made for substitute workers. As we have heard testimony of numerous witnesses and considered documents placed in evidence by both parties, the standard of review of these findings is correctness.

[28] If we conclude that the Appellant did knowingly provide false or inaccurate information to SGI, we will then consider whether SGI's decision to terminate his benefits was reasonable in the circumstances. The choice of remedy under section 183 is discretionary: *O.A. v. Saskatchewan Government Insurance*, 2007 SKAIA 84 (CanLII). Pursuant to the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick* 2008 SCC 09 (CanLII), the standard of review applicable to SGI's choice of remedy under section 183 is reasonableness.

[29] Finally, when SGI has terminated a benefit pursuant to section 183 of the *Act*, the onus of proof is on SGI to establish on a balance of probabilities that it was justified in doing so: *Miller v. Saskatchewan Government Insurance*, 2001 SKQB 335 at paragraph 11; see also *Job v. Saskatchewan Government Insurance*, 2004 SKCA 164.

[30] We heard some argument and received a helpful written brief from counsel as to the degree of proof that must be provided in a case such as this. A line of cases and texts had suggested that the standard of proof might be modified in civil proceedings depending on the gravity of the conduct alleged. For example, some cases suggested a higher standard of proof in such cases.

[31] Coincidentally, the Supreme Court of Canada recently determined the matter in *F. H. v. McDougall* 2008 SCC 53 (CanLII) where the Court indicated at paragraph 40, that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities." The Court added that, in every case, "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." [*ibid.* at paragraph 45]

[32] This, therefore, will be our standard in this appeal.

Summary and Findings Regarding Testimony of Witnesses

[33] The Appellant called three witnesses, in addition to testifying on his own behalf. S.W. worked occasionally as a receptionist at the Club and at special fight events organized by the Appellant. When she worked at the Club, she would record her hours on a large calendar posted on the wall. She said that she was always paid in cash by the Appellant and he would cover employees' expenses, such as meals and their bar tab, when they worked at special events. She did not work at the Club when E.M. worked there in 2007, but she did

work with him at his other employer's business in 2007 and confirmed that the latter kept records of employee hours worked from time sheets submitted by employees.

[34] The Appellant also called T.R., who had been a member of the Club since 2001 and eventually became a coach at the Club. He also testified about a large wall calendar on which employees would record their hours worked at the Club. He confirmed that he had been paid for teaching classes, and had received \$140 to \$240 depending upon the size of the classes. Later, he testified that he worked from the winter of 2005 "almost" as a full-time employee, receiving pay at a rate of \$8.95 per hour. These two explanations of the way he was paid do not seem consistent, although it may be that he was paid differently at different times. He acknowledged that all payments he received were "under the table" and had not been declared for income tax purposes.

[35] K.L. also testified that he had worked for the Appellant at special events, assisting with setting up the fight arena, officiating, and packing up after the event. He had always been paid by the Appellant for these events. However, he had never worked at the Club.

[36] The Appellant testified that he began to pay for replacement work at the Club when he could not do the work anymore as a result of the motor vehicle accident. He testified that a calendar was posted on the wall at the Club for employees to record their hours. Every month he would record the shifts indicated by employees on the calendar and would pay them \$10 per hour for their recorded hours. He said he presumed they were honest and did not double-check their hours with them. He paid employees in cash by putting their pay in envelopes, which he would give to them if they were at the Club, or otherwise leave in a cashbox at the Club for them to take.

[37] He testified that he made up the invoices for SGI based upon the calendar. He said he paid the employees the amounts listed in the invoices, and then waited for reimbursement from SGI. He did not have a copy of the wall calendar to submit in evidence and could not explain what had become of it. He suggested that it was set aside after it was no longer useful and the cleaning staff threw the calendar out.

[38] Under cross-examination, he acknowledged that he had traveled with E.M. to a fight in Hull, Quebec, on March 28, 2007. He conceded that E.M. could not have worked on the Tuesday, Wednesday and Thursday of that week even though he claimed reimbursement

from SGI for 20 hours worked by E.M. on those days. He could not explain the discrepancy, but suggested that E.M. might have written on the calendar that he had worked those days and the Appellant did not put two and two together.

[39] The Appellant testified extensively about his dealings with K.I. and E.M., including disagreements he had had with them. For example, he testified that E.M. had gotten parking tickets while using the Appellant's van and had rung up substantial long distance charges on his cell phone. He also commented upon and submitted documents in support of his claim that K.I. had started up a competing gym and was trying to lure students away from the Club.

[40] K.I. testified for SGI. He became a member of the Club in the fall of 1999 and left the Club, he said, in April of 2005. After the Appellant's motor vehicle accident in December 2004, he taught some of the Appellant's classes in fighting techniques at the Club. He was supposed to keep track of his own hours by recording them on a calendar on a wall at the Club and expected to be paid for those hours. He said that he did not receive any payments from the Appellant for his hours worked, although the Appellant had promised to pay him once he received payment from SGI. What kept K.I. going, he said, was the Appellant's promise that K.I. would receive accreditation as a martial arts instructor as a result of his hours of instruction at the Club. He said that the only money he ever received from the Appellant was \$100 that he borrowed. During the hours that he was working at the Club, K.I. considered himself to be in charge of the facility and shared teaching duties with another Club member, E.M.

[41] While he was working at the Club, K.I. was also taking courses in addictions counselling at the Saskatchewan Indian Institute of Technologies. He did not believe that he had worked afternoon hours at the Club, as indicated on one of the invoices submitted by the Appellant to SGI, because he had a full course load and was attending classes from 9 a.m. to 4 p.m. every weekday.

[42] K.I. indicated that the last date he worked for the Appellant was April 16, 2005. He is quite sure of the date because on that day he had been elected a Band Councillor. This was a full-time, two-year position and he began employment within one or two days of the election. While employed as such, he also completed his practicum as an addictions

counsellor. He continued to have some dealings with the Appellant, such as looking at facilities in another community where they could open a second gym, but he denied that he continued to work at the Club following his election.

[43] The Appellant confronted K.I. during cross-examination with the suggestion that he had had a dream of opening his own fight club and, in fact, had opened a club but under his 17 year-old brother's name. Whether or not this was true, and why K.I. would have opened up the club under someone else's name if that was the case, it did not demonstrate that K.I. has any particular animosity toward the Appellant or that K.I. was not credible. In general, we found K.I. to be a truthful witness.

[44] The Appellant also submitted in evidence an email sent to him by K.I. on May 28, 2005. K.I. stated that he "came by today and I heard that the guys got paid." He continued:

I dont believe that the guys are not being paid right. If you look at the hours that are put into it and the work that is done. It does not look cool from what I see.

I know that every one has their part to play in the fight Club. But I know that everyone has bills to pay. rent and food. But its only fair that people get paid for the effort and time that is put in. I realize that there are times where there you are generous and cover expenses and so on.. Month to month is where people need the cash, more than just trips and so on,

I have no problems with my deal, and now that I have money it doesnt really matter because soon I will be well off. ... [Errors in original]

[45] K.I. ended the email, "Your Team, your friend your employee". While K.I.'s message does not completely make sense to us, the fact that he concluded it by referring to himself as the Appellant's employee is not inconsistent with his testimony. K.I. agreed that he continued to work for the Appellant after April 16, 2005 on a sporadic basis; he simply denied that he continued to work full-time at the Club. In addition, his comment that he "**came by today** and ... heard that the guys got paid" [emphasis added] corroborates that he was not present at the Club full-time in May 2005.

[46] SGI also called E.M. to testify. He became a member of the Club in July 2003 and was employed by the Club from late 2004 to April 2007. At first, he received a free membership in exchange for work, but later, perhaps in 2005, he began receiving pay – about \$100 to \$150 per week – in exchange for work. He said that he was not paid at a specified hourly rate. He received his pay in an envelope. Regardless of how many hours he had worked, the amount left for him was always the same. Primarily he worked during

evenings and on the weekend. His duties included opening up the gym, getting classes started, cleaning up after classes, and working the front desk. According to him, he taught every single class.

[47] He testified that the Appellant was not around the gym when he was there. He said that he was the person who made the Club successful. He outlined the times and types of classes that he taught. He provided his version of a disagreement with the Appellant regarding the use of the Appellant's van and his cell phone. He described his eventual falling out with the Appellant, which culminated in a trip they took together to Hull, Quebec for a fight event. He acknowledged that, in 2007 while he was employed by the Club, he was trying to open a competing gym.

[48] One of SGI's specific allegations concerns over billing by the Appellant for hours worked by E.M. as a substitute worker. He explained that he worked at the other business for 4 to 5 months, during the same period that he worked at the Club. He recorded his hours worked at the other business by filling in timesheets. On weekdays, he worked from 8:30 am to 5 pm, and then hurried over to the Club by about 5:15 pm. He expressly denied that he worked afternoon shifts at the Club during the period that he was working at the other business. However, under cross-examination he said that he worked at least the number of hours listed on the Appellant's invoices to SGI, just not at the specific times and on the specific days listed on the invoices.

[49] He said that he found out about the invoices the Appellant was sending to SGI to claim reimbursement for substitute labour when SGI's special investigator showed them to him. He said that, when he found out about the money he was supposed to be receiving, he became enraged. As a result, he made a complaint to the Labour Standards Branch for unpaid wages.

[50] E.M. was keen to emphasize his importance and to denigrate the Appellant. Because of his unconcealed disdain for the Appellant and his self-regard, we found it difficult to accept much of his testimony at face value. Indeed, he made a claim through Labour Standards for the very hours he told SGI's investigator he did not work and for which he told us he did work and was paid, albeit perhaps in a lesser amount than he thought proper. This demonstrates a lack of veracity which seriously impugns his credibility before us.

Did the Appellant provide false or inaccurate information to SGI?

[51] We note first that the purpose for SGI providing to the Appellant a substitute worker benefit was to enable him to hire someone to replace the work that he had performed for his business prior to the first motor vehicle accident. As the owner/operator of the Club, as a trainer of beginner and advanced martial arts students, as an occasional fight promoter and fighter, the Appellant was not able to continue to perform all of these roles following his first accident. However, by the time that he was attending tertiary treatment at Fit for Active Living, he was fulfilling some of these duties. According to various reports of rehabilitation agencies, the Appellant was teaching beginner classes in the evening, and attending rehabilitation during the day. In fact, one of the reasons given for his spotty attendance during the early part of his rehabilitation was that he had increased symptoms from teaching evening classes.

[52] SGI had copies of these reports. It also received from the Appellant weekly invoices, from the week of January 3, 2005, to April 30, 2007. Each invoice identified the employees who had provided replacement labour to the Club during that week, and claimed, in total, 64 hours of replacement labour. The hours claimed for each employee were not overlapping; in other words, an invoice would show that one employee worked, for example, from 5 pm to 10 pm Monday to Wednesday, while another worked those hours on Thursday and Friday. The sum of all hours claimed on each invoice was equal to the number of hours that the Appellant said the Club was open every week. This is surprising, since the records show that the Appellant was performing many (but not all) of his pre-accident occupational duties at least during the period that he was attending rehabilitation.

[53] As the substitute worker benefit was being provided to him in order to reimburse him for the cost of hiring someone to perform the duties that he could not fulfill himself, it is difficult to understand why he would have been entitled to claim the cost of one employee for every hour that the Club was open. However, this is not a matter on which this appeal turns.

[54] SGI's decision to terminate benefits resulted from its determination that the Appellant had submitted invoices showing that E.M. and K.I. had worked certain hours at the Club that, SGI concluded, they had not.

[55] It is evident that the Appellant submitted false or inaccurate invoices to SGI of hours worked by employees of the Club as replacement labour. SGI has provided to the Commission a summary table showing the hours worked by E.M. at the other business which overlap hours submitted to SGI by the Appellant in his invoices.

[56] The Appellant does not dispute that his invoices to SGI overstate the hours worked by K.I. and E.M. In fact, he claims that he learned that the Club had not been open during all of the hours he listed on invoices to SGI only after the departures of K.I. and E.M.

Did the Appellant know that the information provided to SGI was false or inaccurate?

[57] SGI argues that the Appellant knew that he was providing false or inaccurate information to SGI. As examples, Ms. Watson points to the following:

1. The hours claimed for E.M. on invoices to SGI, when E.M. was away in Hull, Quebec, at a tournament with the Appellant;
2. E.M.'s testimony that he did not record his work hours on the wall calendar, contrary to the Appellant's position;
3. The fact that E.M. was working at the other business at times claimed by the Appellant for reimbursement from SGI;
4. The hours claimed for K.I. after he had taken up employment as a Councillor.

[58] SGI also argued that the Commission should draw an adverse inference from the Appellant's failure to produce a copy of the wall calendar or to produce any payroll records to corroborate his version of events.

[59] While the Appellant does not dispute that some of the invoices he submitted to SGI were false or inaccurate, he vehemently denies that he knew that they were incorrect. Instead, he says that he relied upon the hours recorded by K.I. and E.M. on the wall calendar at the gym. He says that they were in charge of the Club at that time and he trusted them to record their hours honestly. If these amounts were incorrect, he says, he has also been deceived. He also asserts that he paid K.I. and E.M. for every hour that he claimed on his invoices.

[60] The Appellant summarized his position in a letter filed with the Commission dated March 27, 2008:

... At the time of the injury I was a Competitor and a Chief Instructor of the Club but because of accident related injured [sic] I was to attend rehabilitation during the day and SGI said they would cover replacement help for someone to teach my classes while in physiotherapy. My job wasn't a job that just anyone could do and I didn't have anyone qualified enough to take over the Club but had no alternative to pick a couple students that were there the longest. Because I wasn't there, they told me what days and hours each of them worked and I would submit the hours and pay them. ...

[61] The Appellant described problems that he had with K.I. and then E.M., the two students hired to provide replacement labour, which led him to revoke their Club memberships. He explained that he had paid E.M. for all hours that he claimed to have worked and later discovered that he had not worked some of those hours. The Appellant attacked the consistency of E.M.'s complaints:

... Prior to kicking him out of the Club, I submitted and paid him for all hours that he said he worked. I asked a couple more students if they would be interested in teaching. While training the new instructors what to teach I found out from students that a lot of the time that [E.M.] said he was at the Club he actually had it closed. Soon after he went to SGI and said that hours I submitted he never worked the hours. He was expecting that he would get paid again from SGI since [K.I.] nor him had the money to open up their Club.

When [E.M.] found out he wasn't getting the money from SGI he went to the Labour Board and told them that he did work the hours but never got paid. He is telling SGI that he never worked the hours. Which is it?? [Emphasis in original]

[62] The Appellant speculates that E.M. hoped to receive payment again from SGI for hours that he said he had not worked. This allegation does not make sense. However, the Appellant is correct that the information E.M. provided to SGI is inconsistent with the claim for unpaid wages he submitted to the Labour Standards Branch.

[63] The Appellant explained further the discrepancy between the hours actually worked by E.M. and K.I. and the amounts he claimed for reimbursement in a letter dated July 8, 2008:

... Since the accident, Dec 24, 04 I went to physio for a long time and had no choice but to put my business in the hands of other people. I was going to physio full time and dealing with physical and mental problems from the accident and I presumed that my business was in good hands. While in physio [E.M.] and [K.I.] told me hours that they supposedly worked and I paid them for those hours. I didn't know they weren't there half the time until I was done physio and started spending more time at the Club and then students told me it was closed lots.

[64] We do not accept that the Appellant only learned that the Club had not been open during all of the hours listed on the invoices to SGI after the departures of K.I. and E.M. Even during physiotherapy the Appellant was spending evenings teaching some classes at

the Club. In addition, K.I. left the Club approximately two years before E.M.. It is simply not believable that the Appellant did not know when the Club was open and did not hear a single complaint until both K.I. and E.M. had left.

[65] We have reached the conclusion that the Appellant did knowingly provide false and inaccurate information to SGI and specifically:

- He invoiced SGI for replacement labour for E.M. during the time E.M. and the Appellant were at a tournament in Hull, Quebec;
- He invoiced for replacement labour for E.M. during times that E.M. was in fact working at the other business.
- He invoiced for replacement labour for K.I. during hours that K.I. was in fact working as a Councillor; and
- He intentionally drafted the invoices to show 64 hours per week worked by different persons at different hours, irrespective of the actual hours that each of the individuals worked.

[66] To conclude otherwise, we would have to accept the Appellant's explanation that E.M. recorded on the wall calendar, falsely, that he worked at the Club on the days in March 2007 that he was attending a fight competition with the Appellant in Hull, Quebec. We would also have to accept that the Appellant was so oblivious to what was happening that he inadvertently included these hours in his invoice to SGI.

[67] While we accept that the Appellant was suffering from depression and substance abuse at times during his rehabilitation, he was actively participating in rehabilitation during some of the period that he prepared false invoices. If he had been so unaware of events because of these problems, we would have expected this to have been addressed in one of the reports.

[68] In addition, the Appellant did not strike us as unintelligent. We have determined that the Appellant knew that E.M. did not work at the Club during several days the week of March 28, 2007, but took a chance that SGI would not discover this.

[69] We also reject the Appellant's explanation that he was so oblivious to the day-to-day operations of the Club that he simply accepted as fact the hours recorded by K.I. and E.M., and submitted them to SGI. In fact, a review of all of the invoices provided to SGI shows that the Appellant submitted a claim for reimbursement of every hour that the Club was, or

could have been, open and showed no overlap among the hours worked by the replacement workers. We believe that this was calculated and intentional.

[70] The Appellant says that he only discovered after the fact that E.M. and K.I. had not been opening the Club during certain hours of the day. However, according to the rehabilitation reports, the Appellant was teaching beginner classes in the evening at the Club at some of these times and was also taking care of the daily operations of the Club. He must have been in regular contact with Club members and students. Under the circumstances, it is inconceivable that the Appellant was unaware of the actual hours of operation of the Club. In our view, the Appellant must have known, and did know, that K.I. was not working every day in the Club after April 16, 2005. The Appellant also knew that E.M. was not working at the Club before 5 p.m. on days that he worked for the other business.

[71] To be clear, we have not determined exactly which hours E.M. or K.I. worked for the Appellant, and we doubt it would be possible to reconstruct this information accurately. Indeed, E.M. testified that he did work the number of hours invoiced – or perhaps more – but not on the days or at the times that the Appellant submitted. We are satisfied, however, that certain of the hours billed in regard to both E.M. and K.I. were not worked by them at all. Clearly and for a number of reasons, the invoices were not accurate and the Appellant knew this.

Was it reasonable for SGI to terminate the Appellant's entitlement to "any and all further benefits under Part VIII" of the Act?

[72] As discussed above, SGI has a discretion under Section 183 of the *Act* in determining the consequences flowing from a breach of the provision. It is useful to reproduce the section again:

183 The insurer may refuse to pay a benefit to a beneficiary or may reduce the amount of a benefit or suspend or terminate the benefit if the beneficiary:

- (a) knowingly provides false or inaccurate information to the insurer;
- (b) refuses or neglects to produce information required by the insurer for the purposes of this Part or to provide an authorization reasonably required by the insurer to obtain the information;
- (c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;
- (d) without valid reason, neglects or refuses to undergo an examination by a practitioner, or interferes with an examination by a practitioner, requested or required by the insurer;

- (e) without valid reason, refuses, does not follow or is not available for treatment recommended by a practitioner and the insurer;
- (f) without valid reason, prevents or delays recovery by his or her activities;
- (g) without valid reason, does not follow or participate in a rehabilitation program; or
- (h) prevents or obstructs the insurer from exercising any of its rights of recovery or subrogation pursuant to this Part.

[73] From the documents in evidence, it is clear that SGI considered no option other than termination of all benefits in this case. The day after SGI's special investigator interviewed E.M. and provided a brief summary of his interview to an SGI personal injury representative and the Manager of Saskatoon Injury Claims, SGI sent the decision letter in dispute to the Appellant. Further, SGI did not terminate the benefit in issue – the substitute worker benefit – but instead terminated all benefits available under Part VIII of the *Act*.

[74] Unlike provisions in other insurance legislation, such as section 191 of *The Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, wilfully making a false claim under the *Act* does not result in automatic forfeiture of all benefits. Section 183 of the *Act* clearly indicates that SGI has an array of possible consequences that it may consider when faced with a violation of Subsection 183(a).

[75] There is a rational connection between the wrongdoing that occurred here and the termination of all income replacement benefits under Division 4 of Part VIII of the *Act*. We uphold SGI's decision to that extent. However, we are not satisfied that the termination of all Part VIII benefits was reasonable in this case, especially in view of the fact that SGI does not appear to have considered other options and provided cogent reasons for its decision to sever the Appellant's entitlement entirely. Further, it does not appear that SGI considered whether to terminate all benefits, some benefits or only the income replacement benefit. There was a failure to exercise discretion.

[76] Accordingly, to the extent that the decision letter purports to terminate all Part VIII benefits other than income replacement benefits, the decision is set aside.

CONCLUSION

[77] For the foregoing reasons, SGI's decision to terminate the Appellant's income replacement benefit under Division 4 of Part VIII of the *Act* is upheld. The Appellant's

entitlement to all other benefits under Part VIII of the *Act* is restored. In the circumstances of this case, we are not prepared to award any costs to the Appellant.

Dated at Regina, Saskatchewan, on December 23, 2008.

Peter Bergbusch, Chair

Jane Lancaster, Q.C., Commission Member

Barbara Tomkins, Commission Member