KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 63**

Date: **2025 05 14**
File No.: QBG-SA-00498-2020
Judicial Centre: Saskatoon

BETWEEN:

NATHAN WUTTUNEE

PLAINTIFF

- and -

SASKATCHEWAN GOVERNMENT INSURANCE

DEFENDANT

Counsel:

Henry Oltman	for the plaintiff
Dean C. Stanley	for the defendant

JUDGMENT
May 14, 2025

MORRALL J.

Introduction

[1] On June 18, 2005, Nathan Wuttunee was a pedestrian when he was involved in a motor vehicle accident where a collision with a motor vehicle knocked him unconscious [Accident]. The Accident was not his fault. He suffered many injuries of varying degrees of severity. Before the Accident, Mr. Wuttunee had a sporadic history of employment, including employment as a cook at Smitty's in North Battleford. However, he was not working on the date of the Accident. After the Accident, Mr. Wuttunee had a sporadic history of employment, including work as a

construction labourer. In the years following the Accident, Mr. Wuttunee also suffered some complications as a result of the injuries from the Accident. He is currently not employed.

[2] Saskatchewan Government Insurance [SGI], as the institution responsible for the administration of benefits to claimants as a result of automobile accidents, has provided Mr. Wuttunee with a number of decision letters which outline their position regarding income replacement benefits payable under *The Automobile Accident Insurance Act*, RSS 1978, c A-35 [*AAIA*]. They have paid Mr. Wuttunee some income replacement benefits for some periods since the Accident but have denied those same benefits for other time periods and on an ongoing basis.

[3] Mr. Wuttunee has issued two claims appealing some of these determinations by SGI which have been consolidated into this one action. The disputes in question centre over whether SGI should pay Mr. Wuttunee any income replacement benefits under the *AAIA* over and above what they have already paid him.

[4] SGI did not provide Mr. Wuttunee with any income replacement benefits right after the Accident as they assert that Mr. Wuttunee was not employed at the time of the Accident and did not display any intention of obtaining any employment at that time. However, during February 2008 when SGI had confirmation he was employed as a construction labourer and could not work due to surgery that resulted from injuries sustained in the Accident, they started providing Mr. Wuttunee with income replacement benefits as of February 13, 2008. These benefits lasted until May 11, 2011, when they were terminated because SGI determined he was capable of working again.

[5] As a result of multiple hospital attendances due to seizures that SGI determined were related to the injuries suffered during the Accident, SGI also provided income replacement benefits from August 7, 2014 to May 31, 2017. After that time, SGI determined he was again employable and ceased to provide him any further income

replacement benefits.

[6] Mr. Wuttunee disputes the findings by SGI denying him income replacement benefits. He argues that given his history of employment prior to the Accident, he would have been working, albeit sporadically, after the Accident had it not occurred. Therefore, he was entitled to benefits during those periods.

[7] Further, as a result of the complications from the injuries he sustained in the Accident, including the seizures and knee issues which have ended his ability to perform physically demanding tasks, he argues there are no available options for employment for him going forward. He says he has tried working but is not able to sustainably perform any of the necessary tasks required for any job within his capacity. Therefore, he should be entitled to income replacement benefits during all periods since the Accident.

Issues

[8] Having regard to the multiple periods where Mr. Wuttunee's employability and the extent of his injuries are disputed in this consolidated action, I will outline the issues in chronological order as they pertain to the various times when SGI declined to pay Mr. Wuttunee any income replacement benefits. I would frame the issues as follows:

1) Is the determination of these appeals of several decision letters rendered by SGI appropriate for summary judgment?

2) Is the evidence of the proposed experts admissible in these proceedings?

3) Did SGI correctly determine that Mr. Wuttunee was not entitled to income replacement benefits for the first 180 days after the Accident

under the *AAIA* according to their decision letter of May 3, 2022?

4) Did SGI correctly determine that Mr. Wuttunee was not entitled to income replacement benefits under the *AAIA* during the period between December 8, 2005 and February 13, 2008, according to their decision letter of May 4, 2022?

5) Did SGI correctly determine that Mr. Wuttunee was not entitled to income replacement benefits under the *AAIA* during the period between May 11, 2011 and August 7, 2014?

6) Even if SGI incorrectly determined that Mr. Wuttunee was not entitled to income replacement benefits under the *AAIA* during the period between May 11, 2011 and August 7, 2014, does Mr. Wuttunee's failure to appeal or mediate SGI's decision letter of May 10, 2010 prevent his claim from succeeding for this period?

7) Did SGI correctly determine that Mr. Wuttunee was not entitled to income replacement benefits under the *AAIA* during the period between August 7, 2014 and February 4, 2015?

8) Did SGI correctly determine that Mr. Wuttunee was not entitled to income replacement benefits under the *AAIA* from May 31, 2017 until present?

9) What is the appropriate quantum of costs?

Preliminary Matter

[9] Prior to the summary judgment hearing on February 5, 2025 SGI had brought an application filed December 20, 2024, seeking an order pursuant to Rule 7-5(3) of *The King's Bench Rules* directing that oral evidence be presented by

Michelle Parker of the Saskatchewan Health Authority as she would not provide an affidavit in response to the summary judgment application. Part of the evidence indicated that they had first requested that she sign an affidavit that they had pre-drafted for her on September 25, 2024. On October 9, 2024 they received a response indicating that Ms. Parker would only present herself pursuant to a subpoena. SGI had previously entered into a consent order filed on March 15, 2024 agreeing that all affidavits in this matter be filed no less than 120 days before the hearing date.

[10] In a fiat dated January 23, 2025 another judge of this court dismissed the application partly because they felt that entertaining the motion would be "stepping into the shoes" of the hearing judge. I did not receive any formal application prior to the hearing date of February 5, 2025.

[11] In SGI's brief of law filed on January 23, 2025 for the summary judgment hearing, they indicated that their position was "that should the records discussed above, and found … [in] Dr. Alport Affidavit, raise additional questions that a reasonable approach would be to have Ms. Parker provide oral testimony, unless the Court concludes that the Plaintiff's summary judgment application fails even without Ms. Parker's testimony."

[12] At the hearing, I informed SGI that the approach identified in their brief of law is procedurally unfair and contrary to the summary judgment "best foot forward" principle as Mr. Wuttunee would be unable to properly respond to any additional evidence that Ms. Parker may provide. Litigants do not get to have backup plans embedded in hearings that inure to their benefit to extend proceedings should one of their arguments fail to convince a court during the decision-writing process.

[13] Despite that, at the outset of the hearing, I provided SGI with an opportunity to renew their request for such an order, although I noted that Mr. Wuttunee would no doubt oppose the application and, if an adjournment and order was granted,

seek significant costs thrown away.

[14] At the end of the day, counsel for SGI indicated that they had conclusively determined that they would no longer be entertaining any application for Ms. Parker to provide oral and/or expert testimony.

Analysis

Summary Judgment

[15] In the decision of *Metanczuk v Watson*, 2023 SKKB 208 at paras 98 to 102 [*Metanczuk*], I reviewed some of the established case law outlining the legal requirements necessary to determine when it is appropriate to grant summary judgment. In *Metanczuk*, despite the various experts and multitude of conflicting evidence involving complex factual matters, I had found that the Court was able to make a fair and just determination on all the issues put forward by the parties.

[16] The case at bar has some similar aspects to *Metanczuk*, as I would be tasked with determining conflicting opinion evidence using the summary judgment procedure by agreement of the parties. However, the legal issues and factual scenario in this case are less complex and involve a considerably smaller volume of materials and less conflicting evidence than *Metanczuk*.

[17] The dispute in the case at bar involves issues relating to the Accident's impact on Mr. Wuttunee's ability to work and whether SGI is required to pay Mr. Wuttunee income replacement benefits for the times they deny he was entitled to those benefits.

[18] I note that in my review of the material, the affidavit evidence provided included extensive written reports prepared by the various doctors who are proposed to be experts, along with the reports made by the different medical practitioners who

treated Mr. Wuttunee. In addition, each proposed expert provided affidavit material; all but one expert (Mr. Kooey) was cross-examined by the opposite party, and a transcript of that examination was prepared. I would also be required to assess the credibility and reliability of Mr. Wuttunee's evidence in relation to the medical evidence. With respect to the medical evidence, the assessment does not involve credibility findings as my determination requires me to assess the reliability of each professional's evidence and what weight I may assign it having regard to the other medical records and reports I have before me.

[19] In the end result, I do not find that further *viva voce* testimony would add anything essential to the inquiry the Court must conduct except create additional expense and delay. Further examination and cross-examination would be duplicitous. In these circumstances, I would gain nothing by personally observing the demeanour of any witness. The primary dispute between the parties involves assessing the weight I should assign to any witness's testimony due to their stated qualifications and experience rather than determining whether or not to believe or disbelieve any witness.

[20] In the context of the focused issue the Court must determine, I find that the parties have put their "best foot forward". Given that the appeal is to be conducted in the same way as actions commenced by statement of claims pursuant to s. 192 of the *AAIA*, there are no additional procedural or evidentiary hurdles that the Court must grapple with over and above the standard litigation issues (see *Saskatchewan Government Insurance v Schira*, 2020 SKCA 88 at para 51, [2020] 11 WWR 204.

[21] Therefore, I find that I have enough evidentiary material to weigh all the evidence, evaluate the credibility of all the witnesses, make appropriate reasonable inferences, and resolve the conflicting opinions in this summary judgment matter fairly and justly. Given that SGI and Mr. Wuttunee both agreed to this summary judgment procedure, no one party in this proceeding bears any additional onus as a result of using

the summary judgment procedure.

Expert Witnesses

[22] In *Metanczuk* at paras 115 to 117, I review the legal requirements for the Court to receive expert opinion evidence. Both parties have filed statements of expertise regarding the qualifications of each expert witness that is proposed to be tendered by both parties. There is no dispute between the parties that each individual so tendered may be qualified as an expert and give opinion evidence in their proposed field of expertise. However, I will review their qualifications and make a final determination in the matter according to the law outlined above.

[23] SGI tendered three individuals.

[24] Firstly, SGI tenders Mr. Corey Kooey to offer opinion evidence as an occupational therapist, and more specifically as to Mr. Wuttunee's recovery from injuries experienced on June 18, 2005 and how Mr. Wuttunee's recovery translates into his ability to complete his activities of daily living.

[25] Secondly, SGI tenders Dr. John Alport to offer opinion evidence as a medical doctor or physician, and more specifically, as to Mr. Wuttunee's clinical diagnoses, the causes of his diagnoses, and the timeline of his recovery from his injuries, arising from the Accident.

[26] Thirdly, SGI tenders Dr. Terry Levitt to offer opinion evidence as a registered psychologist, and more specifically, the diagnoses, the causes of the diagnoses, and the timeline of recovery from psychological injuries Mr. Wuttunee experienced on or about June 18, 2005.

[27] Mr. Wuttunee tenders Dr. Waill Khalil to offer opinion evidence as a physiatrist in the area of physical rehabilitative medicine and diagnosis of chronic pain

conditions and the associated limitations.

[28] After reviewing each proposed expert's qualifications and report, I find they are qualified in their field of proposed expertise and can provide relevant and necessary testimony to the Court regarding the causation of the injuries in relation to the Accident. The potential helpfulness of the evidence is not outweighed by any of the dangers associated with the use of expert evidence. I will not comment on the quality, utility or weight of the evidence provided as I find that it is more appropriately addressed in the context of my examination of the whole of the evidence provided in this summary judgment hearing.

Income Benefits 180 days Post-Accident

[29] There is no dispute between the parties that Mr. Wuttunee suffered significant injuries as a result of the Accident.

[30] The medical records indicate that, after being hit by a motor vehicle in Saskatoon on June 18, 2005, he was found unconscious and taken by ambulance to the Royal University Hospital [RUH]. On arrival, he had a Glasgow Coma Scale of 3-4 out of 15 and was intubated and admitted to the Intensive Care Unit [ICU]. Initial injuries included a deep laceration above his left eye, a left frontal scalp laceration, a fracture in his C7 cervical spine, a deep left dorsal wrist laceration and other multiple abrasions. He had left shoulder bruising and swelling which was diagnosed as acromioclavicular joint separation and his shoulder was placed in a sling. His right upper arm and right knee appeared slightly disfigured, and he complained of right knee pain and not fully aware of his surroundings at times.

[31] With respect to his brain activity, the hospital records note that by June 22, 2005, he was still disoriented and thinking he was at home. On June 23, 2005 hospital staff administered a Galveston Orientation and Amnesia Test [GOAT] and

Mr. Wuttunee scored a 28 out of 100, which was indicative of significant impairment and post-traumatic amnesia. By June 27, 2005, he scored a 95 out of 100 on his GOAT test, which indicated that he no longer had post-traumatic amnesia and demonstrated significant improvement.

[32] He was discharged from the hospital on June 27, 2005, with the records noting that he was "improved but still inappropriate. Plan discharge home today with family" and that there was no significant head injury. He was advised to wear his Philadelphia cervical collar for six weeks. He began physiotherapy treatments on July 21, 2005 and continued to experience bilateral knee pain which was more severe on the right side. He was not otherwise assessed until December 7, 2005.

[33] With respect to evidence of employment at the time of the Accident, it is not in dispute that Mr. Wuttunee did not hold any employment on the date of the Accident. Further, it is also not in dispute that he did not fill in any employment information in his initial claim for benefits from SGI shortly after the Accident.

[34] However, in his affidavit sworn January 5, 2024, Mr. Wuttunee swears that he was "consistently employed before the accident" and "working as a cook at Smitty's restaurant at the Tropical Inn in North Battleford, up to one week before the accident". He states that "if it was not for the accident, I would have been working…likely…as a cook at Smitty's". During cross-examination, he implied that he was not working at the time of the accident due to a dispute about payment and said that "I came and went as I pleased" and "I was going to go back when I was done arguing with them and they paid me what they owed me…". He did admit that he did not provide any documents to SGI about job applications he may have made but said he "was not aware he had to provide everything to SGI".

[35] Part of the evidence provided by Mr. Wuttunee includes T4 slips which showed income of $482.31 in 2003, $7,249.00 in 2004 and a total of $3,224.00 in 2005

with $1,850.00 of that amount in 2005 coming from Smitty's.

[36] With respect to the time period 180 days after the Accident, in their decision letter to Mr. Wuttunee dated May 3, 2022, SGI indicated that at the time of the Accident, he "did not hold employment and [he] did not provide any documentation to support that [he] would have held employment in the first 180 days" and therefore, pursuant to s. 113(2) of the *AAIA*, he does not "meet the criteria to qualify for an income benefit in the first 180 days."

[37] Mr. Wuttunee disputes SGI's decision in this regard and notes that he suffered serious injuries and was unable to work after he was discharged from the hospital. He argues that SGI failed to properly investigate his entitlement to income replacement benefits. While he was not working on the day of the Accident, a review of the evidence would demonstrate that Mr. Wuttunee was employed and had been employed around the time of the Accident, but SGI failed in their duty to acknowledge the information given to them.

[38] SGI takes the position that a full review of Mr. Wuttunee's employment history proves that he would not have held employment in the 180 days following the Accident. They noted that he did not fill in anything with respect to employment in his initial claim for benefits to SGI, did not subsequently provide any material regarding potential interviews, applications for jobs or any other specific evidence that would show some intention to work at any time after the Accident.

[39] From my review of the arguments, during this period of time, SGI is not contesting the fact that, if Mr. Wuttunee was able to properly demonstrate employability according to the test, he would be entitled to benefits given the severity of his injuries.

[40] Therefore, I must review the appropriate legislative provisions and the

legal authority guiding those provisions. As the dispute centres over whether Mr. Wuttunee is entitled to income replacement benefits, I begin by considering s. 113 of the *AAIA* and s. 14 of *The Personal Injury Benefits Regulations*, RRS c A-35 Reg 3 [*PIBR*].

[41] Section 113(2) of the *AAIA* states as follows:

> **113**(2) An insured is entitled to an income replacement benefit if, as a result of an accident, the insured:
>
> (a) is unable to continue an employment held by the insured at the date of the accident;
>
> (b) is unable to hold an employment the insured would have held in the first 180-day period following the accident if the accident had not occurred; or
>
> (c) is deprived of benefits pursuant to the Employment Insurance Act (Canada) or any other prescribed benefits to which he or she was entitled at the date of the accident.

[42] Given that Mr. Wuttunee did not hold any employment at the time of the Accident, s. 113(2)(b) is applicable and reference must be made to the definition of "hold an employment". Section 14 of the *PIBR* states as follows:

> **Meaning of unable to hold employment**
> **14** For the purposes of the Act, an insured is unable to hold employment if a bodily injury that was caused by the accident renders the insured entirely or substantially unable to perform the essential duties of the employment that the insured:
>
> (a) performed at the date of the accident; or
>
> (b) would have performed but for the accident.

[43] As part of his argument in relation to the measure of assistance that SGI was required to provide him in relation to outlining his employment history, Mr. Wuttunee relies on s. 171 of the *AAIA*.

[44] Section 171 of the *AAIA* states as follows:

> **Insurer to advise and assist claimants**
> **171** The insurer shall advise and assist every claimant and shall endeavour to ensure that every claimant is informed of and receives the benefits to which the claimant is entitled.

[45] I will determine who initially bears the onus of proof in situations where SGI has determined that no income replacement benefits should be provided to an insured in the period immediately following an accident. However, as noted in *Cop v Saskatchewan Government Insurance*, 2019 SKCA 75, [2020] 2 WWR 396 [*Cop*], a finding of which party bears the onus is seldom determinative in civil proceedings. The Court in *Cop* explains at para. 53 that "In civil proceedings, if there is evidence that allows the trier of fact to reach a determination, the burden does not come into play at all." The Court then approved of the following statement: "But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter."

[46] In the circumstances of the issue above involving proving initial entitlement to benefits when SGI has denied Mr. Wuttunee's income replacement benefits, the law is clear that Mr. Wuttunee bears the initial burden of proof. As stated in *Cass v Saskatchewan Government Insurance* 2021 SKCA 130, 83 MVR (7th) 202 [*Cass*]:

> [45] *Ballantyne* [2015 SKCA 38, 457 Sask R 254] is frequently cited as authority for the proposition that the onus of establishing entitlement to Part VIII benefits is, in first instance, borne by a claimant in that they "must establish he or she meets the pre-conditions necessary for entitlement to any benefit they claim" (at para 15). However, once entitlement to a benefit is made out, and payments have begun, where SGI seeks to terminate those benefits, it "has the onus to prove on a balance of probability that the benefits are not payable under the *Act*" (*Job v Saskatchewan Government Insurance*, 2004 SKCA

> 164 at para 11, 257 Sask R 85 [*Job*]) or that the insured "was no longer entitled to receive them" (*Lukian v Saskatchewan Government Insurance*, 2015 SKCA 147 at para 22, 472 Sask R 171 [*Lukian*]). …

[47] In interpreting s. 113(2)(b), the decision of *Fraser v Saskatchewan Government Insurance*, 2013 SKCA 109 at para 13 [*Fraser*], notes that the income replacement benefits contemplated "are available in relation to any employment that the insured would have held during the 180 days following the accident." Therefore, if Mr. Wuttunee can demonstrate that he would have worked at any point between June 18, 2005 and December 15, 2005, he is entitled to income replacement benefits.

[48] At para. 20, the Court in *Fraser* provides a bottom-line summation of the requirement of proof of employment that Mr. Wuttunee must establish on a balance of probabilities as follows:

> [20] We agree with Mr. Fraser that the Commission erred in taking this approach. In our respectful view, s. 113(2)(b) means exactly what it says. An insured need not have been employed or have had a valid employment contract in hand at the time of his or her accident in order to collect benefits. Rather, an insured must establish only that he or she "would have held" employment during the 180-day period following the accident.

[49] While recognizing at para. 23 of *Fraser* that "Each claim for income replacement benefits will obviously turn on its own facts and on how those facts speak to the commitment or motivation of the insured on the one hand and the employment opportunities of the insured on the other", the Court outlined at para. 25 a non-exhaustive list of factors to determine whether an insured would have been employed but for the accident:

> [25] … These factors might include whether a formal offer of employment had been made, whether the offer was credible, how strongly the insured would have been inclined to act on the

> offer and so forth. Other considerations including whether someone else was hired in the wake of the insured's injury may serve to inform the bottom-line question of whether the insured would have been employed. …

[50] Although Mr. Wuttunee argues that SGI breached s. 171 of the *AAIA* by failing to properly investigate his claim, I find that this does not assist me in making any determination for or against Mr. Wuttunee under s. 113(2)(b). The Court in *Harsch v Saskatchewan Government Insurance*, 2021 SKCA 159, [2022] 2 WWR 675, approved of the following description of an insurer's duty of good faith:

> [22] In *Fidler v Sun Life Insurance Company of Canada*, 2006 SCC 30 at para 63, [2006] 2 SCR 3 [*Fidler*], the Supreme Court of Canada adopted the description of an insurer's duty of good faith set forth in *702535 Ontario Inc. v Lloyd's London, Non-Marine Underwriters* (2000), 184 DLR (4th) 687 (Ont CA) at para 29 [*Lloyd's of London*], where O'Connor J.A. wrote:
>
> > [29] The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[51] In these circumstances, I do not find that SGI did anything wrong by not investigating Mr. Wuttunee's employment claim at this initial stage. Much like police officers providing impaired suspects their rights under the *Canadian Charter of Rights*

and Freedoms, adjusters are not babysitters or mind readers. While Mr. Wuttunee alleges that the adjuster "shunned me out", it is for Mr. Wuttunee to make some sort of credible claim of employment rather than for the adjuster to ferret it out based on passing remarks. Had there been some obvious information provided about employment, I would agree that an adjuster, in the spirit of a "benefit-conferring" legislative scheme, would have an obligation not to obfuscate any such material and to assist such a claimant in obtaining his entitlements. However, when an individual leaves the employment part of his claim blank as Mr. Wuttunee did in the case at bar, it is Mr. Wuttunee who has an obligation to make a concerted effort to amend that lack of detail or inquire and seek advice.

[52] Having reviewed the evidence of Mr. Wuttunee and the cross-examination of Leanne Franklin and documentation provided, including the evidence of the injury notes for this time period, I do not find any demonstratable evidence of a nature that SGI should have followed up with further inquiries.

[53] That said, I do not find that there was anything intentional or nefarious about Mr. Wuttunee's lack of disclosure of information to SGI at that point. Given his lack of education and familiarity with the process, along with his lack of knowledge of the requirements of s. 113, it is unsurprising that Mr. Wuttunee provided no information to SGI at the time of the claim or thereafter which may have engaged SGI in a re-evaluation of the income replacement benefits in his claim. The claims process is byzantine and bureaucratic. The detail required in the process is part of the reason why many people engage the services of a lawyer to pursue these claims.

[54] In the end result, I do not find that an inference can be drawn for Mr. Wuttunee or against SGI in these circumstances due to both parties' approach to the claims process.

[55] I will now assess the weight of the evidence to determine if Mr. Wuttunee

has established on a balance of probabilities that he would have held employment during the 180-day period following the Accident.

[56] It is clear that Mr. Wuttunee does not have any documentary evidence establishing a credible formal offer of employment. He does not have any copies of resumes that would prove that he applied for a new job, nor did he have any specific documentary evidence of any particular employment he was pursuing. He had no formal and credible offers of employment. There was no documentary evidence that he was going to act on any offer.

[57] However, I must realistically consider Mr. Wuttunee's personal circumstances in determining what evidence should or should not exist with respect to future employment. Given his particular socio-economic circumstances and the recency of the end of his employment at Smitty's, I find this lack of formal evidence is not unusual. Mr. Wuttunee has never had steady long-term employment. He does not have more than a grade 8 education which limits his opportunities for employment and his capacity to exercise more formal means of considering and accepting employment. I find that the Court should not expect Mr. Wuttunee to have pursued employment opportunities in the manner of someone with a post-secondary education and the skills and abilities that would come with such experience. From my review, Mr. Wuttunee's testimony regarding how he approached his employment situation was in a manner commensurate with his circumstances.

[58] Considering Mr. Wuttunee's personal circumstances, I will not attempt to assess his employability on an unbalanced scale using factors that do not apply to his life experience.

[59] However, this does not relieve Mr. Wuttunee of the burden of providing sufficient evidence of employability. I do not disagree with SGI that his vague musings about employment in his affidavit and cross-examination are not strong evidence of

intention or corroboration of employability. It is easy to say things but much more difficult to make sustained and concrete efforts toward a goal.

[60] In these circumstances, it is important to keep in mind that I must consider whether Mr. Wuttunee would have been employed in the six months following the Accident had there been no Accident. In this regard, the best predictor of future behaviour is past behaviour. The most effective way to determine employability based on the evidence available to me is to examine Mr. Wuttunee's T4 slips which provide clear independent evidence of what he did in the past. In this regard, according to the T4 slips, Mr. Wuttunee had modest employment during the preceding six months in 2005 and the preceding 12 months in 2004. There is no evidence of any change of Mr. Wuttunee's working conditions or life events which would have rendered the first half of 2005 any different from the last half of 2005 or any period in 2004. While the work Mr. Wuttunee had was not steady, it is generally constant. Although there is no evidence establishing the wages, hours or time frames of employment, jobs of the sort that Mr. Wuttunee is qualified for do not necessarily have such established documented parameters. The minutiae of the terms of the employment contract are less important than the availability of the employment in the first place.

[61] Although Mr. Wuttunee was on a break due to some sort of wage dispute, the T4 slips overall tell the story of someone who is generally employed. It is also telling to look at Mr. Wuttunee's employment history from 2006 and 2007, post-Accident. In 2006, Mr. Wuttunee's T4 slips reveal that he worked for four different employers and made an income of $2,142.58. In 2007, Mr. Wuttunee's T4 slips reveal he worked for 10 different employers and made an income of $11,993.83. I find that this establishes good evidence of someone who would have held employment but for the Accident. The variety of Mr. Wuttunee's jobs illustrates the unsuitability of the Court relying on specific letters of intention or other records to establish proof in his particular circumstances. Clearly, Mr. Wuttunee is an individual who looks for whatever work he

can get and is not too picky given his limited educational credentials. Given the limited and temporary nature of some of the jobs, it is clear that this employment does not exist in the realm of formal offers or bargaining about benefits.

[62] I also consider the fact that Mr. Wuttunee did return to work to Smitty's in 2006, which also demonstrates that avenue of employment was not closed off and an indication that corroborates his stated intention to return to work in that capacity.

[63] Therefore, for all the above reasons, I find that he would have shown and did show the same perseverance in looking and finding work in the 180 days following the Accident had the Accident not occurred as he did in maintaining employment in 2004, 2005, 2006 and 2007.

[64] Mr. Wuttunee has met his onus of demonstrating that he would have held employment according to s. 113(2)(b) of the *AAIA* and s. 14 of the *PIBR* in the 180 days following the Accident. He is entitled to income replacement benefits during this period of time.

Income Benefits between December 17, 2005 and February 13, 2008

[65] In SGI's decision letter of May 4, 2022 they state that, pursuant to s. 131(1)(c) of the *AAIA*, Mr. Wuttunee was "capable of performing [his] daily activities as outlined in the physiotherapy assessment report from STAR Rehab dated Dec 8, 2005" and found that he did not meet the criteria to qualify for an income benefit. This decision was predicated on SGI's assertion that, at the time of the collision, he was not employed and "did not show any plans to find employment".

[66] Although SGI's argument in relation to Mr. Wuttunee's circumstances for this period of time assumed that Mr. Wuttunee would not have held employment, I found this conclusion erroneous. Given my findings, s. 113(4) of the *AAIA* would apply as it states as follows:

> **113**(4) On and after the 181st day after the accident, an insured is entitled to an income replacement benefit if the insured is unable to hold employment the insured held or would have held but for the accident.

[67] The subsections of s. 131 of the *AAIA* outline the terms upon which SGI may terminate benefits. They state as follows:

> **Termination of benefits**
> **131**(1) Notwithstanding any other provision of this Part, an insured ceases to be entitled to a benefit pursuant to this Division when any of the following occurs:
>
> (a) the insured is able to hold the last employment that the insured held before receiving a benefit;
>
> (b) in the case of an insured who was not employed at the date of the accident but who had displayed an intention of obtaining employment at the date of the accident, the insured is able to hold the employment the insured could have held at the date of the accident;
>
> (c) in the case of an insured who was not employed at the date of the accident and had not displayed any intention of obtaining employment at the date of the accident, the insured has substantially returned to the activities of daily living;
>
> (d) the insured is able to hold an employment determined for the insured pursuant to subsection 119(4);
>
> (e) the insured holds an employment from which the yearly employment income is equal to or greater than the yearly employment income on which the benefit is calculated;
>
> (f) subject to section 127, the insured is 65 years of age or older;
>
> (g) the insured does not make the insured available for employment;
>
> (h) the insured is able to hold an employment the insured held or would have held at the date of the accident but

> declines a bona fide offer of employment that, in the opinion of the insurer, the insured is capable of holding;
>
> (i) the insured dies.

[68] Given that I have found that Mr. Wuttunee had displayed an intention of obtaining employment at the date of the Accident, s. 131(1)(c) does not apply and s. 113(2)(b) would continue to apply as a result of s. 113(4). In the circumstances of the case at bar, income replacement benefits would cease only if Mr. Wuttunee fell within the ambit of s. 131(1)(b) so that he was able to hold the last employment he held before his benefits commenced. This means, broadly speaking, that if there was evidence that he was able to return to work at Smitty's or some equivalent employment, his income replacement benefits would cease.

[69] In terms of onus with respect to these circumstances where SGI has always denied that Mr. Wuttunee is entitled to benefits for this period of time and has not changed their position in that regard, it could be argued that I follow the *Cass* decision in some respects and find that Mr. Wuttunee bears the onus of proving that he was not able to hold the last employment before he began "receiving" his income replacement benefits. However, the complicating factor is that I have found that SGI was incorrect in their assessment under s. 113(2)(b) so that Mr. Wuttunee should have been receiving benefits. While I acknowledge that the "receipt" of such benefits is notional and that SGI never started paying out any benefits as the decision in *Cass* appears to require, given the language used in s. 131(1)(a) of the *AAIA* and the context as it pertains to removing a benefit to which an insured was previously entitled, I find that the onus must be on SGI to justify the removal of benefits.

[70] I find that in terms of determining onus, it is of primary importance to determine whether SGI removed a benefit to which an insured was entitled and it is not relevant whether they had paid out the benefit initially. There could be a number of technical reasons why SGI does not pay someone a benefit that could include having

the wrong postal code or other mundane reasons unrelated to the essential requirements of the legislation. It does not make sense or appear equitable to put the burden on the party actually physically receiving a benefit or who should be receiving a benefit in these circumstances to justify why they should continue to receive a benefit to which they were previously entitled but for the error of SGI.

[71] Having determined onus but before I begin assessing the evidence required under s. 14 of the *PIBR*, I take into account that, as stated in *Cass* at para 92, "the two concepts – residual pain and the inability to function in one's job – are two different matters that 'should not be conflated for purposes of s. 14 of the *Regulations*'". As stated in *Van de Sype v Saskatchewan Government Insurance*, 2020 SKCA 18 at para 103 [*Van de Sype*]:

> [103] Mr. Van de Sype also argues that the conclusion he is able to perform his job duties must be wrong, citing the medical evidence that he was still experiencing pain and could only work with pain in some cases. While it is true that he still had some residual pain and, leaving aside the issue of whether that pain was related or extraneous to the accident, the presence of pain and the inability to function in one's job duties should not be conflated for the purposes of s. 14 of the *Regulations* [*Personal Injury Benefits Regulations,* RRS c A-35 Reg 3]. The *Act* [*The Automobile Accident Insurance Act,* RSS 1978, c A-35] and s. 14 of the *Regulations* provide that IRB is payable if a person is entirely or substantially unable to perform the essential duties of the employment he or she held prior to the accident. They do not say that IRB is payable as long as the person continues to have pain from the accident. That said, there may be cases where the pain is so severe or unmanageable as to render the person unable to perform those essential duties.

[72] Put another way, to apply the specific circumstances to the case at bar, the question I must answer is whether SGI has proven that Mr. Wuttunee is able to perform the duties of a cook at Smitty's at any point during this time period. He may suffer pain as part of performing his duties as a cook at Smitty's but only should the pain in doing so be "severe or unmanageable", then SGI will be responsible for

providing Mr. Wuttunee with income replacement benefits.

[73] Unfortunately, there is little evidence with respect to Mr. Wuttunee's capacity to work during this period of time.

[74] In reviewing the available evidence, I find that Mr. Wuttunee does not provide any additional evidence over and above the reports with respect to his visits to the physiotherapists or other medical practitioners at that time. In his affidavit, he did not speak to his abilities to function as a cook or the difficulties he had in maintaining these jobs due to pain relating specifically to this time period.

[75] In examining his T4 slips for 2006, I note that he did work for Smitty's but only earned $563. This evidence would accord with someone who was trying to work but was not capable of continuing to do so due to pain. This evidence also equally accords with someone who did not work long due to unrelated personal disputes with an employer or being laid off due to lack of work. No reason was provided by Mr. Wuttunee nor did SGI investigate Mr. Wuttunee's employability.

[76] Further, in examining his 2007 T4 slips, these slips indicate some limited restaurant work but fairly substantial industrial work. It is a matter of common sense that industrial work would be as tasking or more, from a physical and mental standpoint, as working as a cook at Smitty's or anywhere else.

[77] In examining the medical evidence, I note there are no specific opinions regarding employability from any doctor or occupational therapist for this period of time. This is likely as a result of SGI's erroneous focus on whether Mr. Wuttunee had "substantially returned to the activities of daily living" rather than assessing whether Mr. Wuttunee could hold his previously-held employment. While SGI's position was understandable, I must place more emphasis on a review of the existing factual circumstances given the evidence in existence. However, I acknowledge that I should

not strain inferences in order to come to a determination if sufficient evidence does not exist.

[78] In the Star Rehab initial assessment report of December 8, 2005 they note under the heading of functional abilities, “Mr. Wuttunee reports that he is currently unemployed. He reports that he has no difficulties with his activities of daily living.” They noted his chief complaints to be related to the “Burning pain along the left side of the neck”, “pain and weakness in the left shoulder”, “constant pain in his right knee”, among other complaints. They posit that “it is likely that Mr. Wuttunee will have residual reports of pain; however should do well in maximizing his strength and function”.

[79] In the Star Rehab progress report of January 31, 2006 they note under the heading Functional Assessment that “Mr. Wuttunee demonstrated the ability to lift from the floor to the waist of 120 pounds occasionally, from the waist to the shoulder of 50 pounds occasionally, bilateral carrying of 90 pounds occasionally, and pushing and pulling of 240 pounds occasionally”. In the Star Rehab discharge report of February 28, 2006 they report that Mr. Wuttunee “tends to have numerous complaints with regards to reported pain and reported impaired function in activities of daily living; however, this changes frequently from appointment to appointment. He appears quite motivated and compliant with his gym program and home exercise regime”.

[80] In a letter by Dr. Taillon dated February 1, 2007, Dr. Taillon states that Mr. Wuttunee’s “main complaint is his right knee giving way and shifting” and “he has to stop basketball, break dancing and boxing”. In a letter dated July 12, 2007, Dr. Taillon reports Mr. Wuttunee had a complete PCL tear in his left knee with injuries to his right knee as well. There is also a notation that Mr. Wuttunee was “recently laid off work”.

[81] In the primary physiotherapy Intake/Assessment report of August 2, 2007

they assess Mr. Wuttunee's current work capability as "Work full duties" with the only restrictions noted being "pivoting".

[82] Given the various reports and after analyzing the available evidence for this time period, I do not find that Mr. Wuttunee is deliberately choosing not to work or limiting his employment opportunities to extract some benefit from SGI. He had never received any income benefits so was not aware he was entitled to any such consideration. He had no reason to malinger and every reason to attempt to earn extra money. The reports, although noting that he was not always consistent in his reporting, describe him as "compliant" and "motivated".

[83] I must balance this against the evidence that shows that he had pain but ability to move, carry and push heavy objects which align with a capacity to be employed as outlined in *Van de Sype*. I also note the references to him playing various sports and break dancing, which would suggest an ability to perform many of the duties of a cook as of a certain period of time.

[84] In analyzing the evidence, I do not find Dr. Khalil's report and opinion evidence of any assistance for this time period. While Dr. Khalil considered many reports for this time frame, they did not provide any focused credible assistance relating to Mr. Wuttunee's condition during this period of time in Mr. Wuttunee's life. While he had indicated that in his opinion that Mr. Wuttunee's ability to seek employment was "compromised", this evidence did not relate to past periods of time after the Accident with any specificity or provide any reasoned discussion regarding what employment may be an issue.

[85] This is important as clearly Mr. Wuttunee was able to obtain employment at various times since the Accident as evidenced by the T4 slips. Therefore, not addressing that conflict lessens the amount of weight I can accord to his conclusions. The blanket statement made by Dr. Khalil is unhelpful, especially given the

unaddressed contrary findings made in other reports. Given that Mr. Wuttunee saw Dr. Khalil only once on August 8, 2022, I rely on opinions and evidence other than Dr. Khalil in making my determination for this time period.

[86] As with my analysis of Mr. Wuttunee's employability in the first 180 days post-Accident, I find that resorting to the T4 slips to be again the most telling and accurate indication of whether Mr. Wuttunee was substantially unable to return to work. He did not work that much in 2006 compared to other years. However, in 2007 he worked more than he ever had in the years for which the Court has evidence of his T4 slips. Given that I find Mr. Wuttunee had a desire to work and did not have the ability to do so as he had in very recent past years, I find that in the 2006 year from January to December that he was substantially unable to return to the type of work he had held before the Accident. Although there is evidence that he attempted some limited employment, I find that the totality of evidence shows that he was substantially unable to work in those years. I find that his lack of employment positively demonstrates his incapacity to be able to return to his former employment as he was not able to hold any employment for a lengthy period of time, judging from the minimum wage characteristics of his type of employment in relation to the total amount of money earned. This finding is partly predicated on the evidence demonstrating a positive indication that Mr. Wuttunee was motivated in his rehabilitation program. This shows, in combination with the other evidence, he was trying to work but the pain in doing so was too severe or made continuing such employment unmanageable.

[87] However, in the 2007 and 2008 years, starting on January 1, 2007, I find that SGI has led enough evidence to demonstrate that Mr. Wuttunee was able to perform his duties as a cook. Again, the T4 slips demonstrate significant levels of employment by Mr. Wuttunee in a number of different jobs, some of which may be regarded as more taxing than that of a cook. It is also of significance that his income after the Accident was higher this year than any of the years before the Accident. I realize that the evidence

of what the specific requirements were of these various places of employment was not provided, but as a matter of common sense I can infer that he was able to perform physically demanding tasks. My conclusion is also as a result of the sports that Mr. Wuttunee was engaged in as of at least February 1, 2007.

[88] I realize that the cutoff between the 2006 and 2007 year is somewhat arbitrary, but it appears to be equitable and justifiable as a result of the difference in the income of employment between the years and the lack of information provided or requested by the parties on this issue. I would also suspect that, due to the passage of time, there would not be any records available for many of the instances of short-term employment and recollections from individuals involved would be non-existent 18 years later. Even had I *viva voce* evidence, there would no improvement in the quality of evidence before me.

[89] While I note that Mr. Wuttunee suffered a seizure on November 11, 2007 for which he was hospitalized, there is no evidence that this contributed to any unemployability up to the date when SGI provided income replacement benefits on February 13, 2008.

[90] Therefore, I find that Mr. Wuttunee is entitled to income replacement benefits from December 16, 2005 to December 31, 2006.

[91] However, I find that SGI has met the criteria in s. 131(1)(a) to deny Mr. Wuttunee benefits from January 1, 2007 to February 13, 2008.

Income Benefits from May 11, 2011 to August 7, 2014

[92] In determining the issue of whether SGI was correct in terminating Mr. Wuttunee's income replacement benefits for this period and beyond, the Court must review the evidence and progress reports from February 13, 2008 onwards to properly contextualize the reports that led SGI to terminate benefits and make their

subsequent decisions.

[93] At the time, Mr. Wuttunee's employment at G.L. Builders was as a "construction labourer". In the physical job analysis sheet prepared by Mr. Wuttunee's supervisor, Boyd Federink, he noted Mr. Wuttunee's duties as "Cleaning, hauling garbage, demolition, use shovel, broom". He noted Mr. Wuttunee would be required to lift a wheelbarrow to move construction material, including wood, brick and drywall as well as carry it to various locations zero to 30 times a day for anywhere between 30 to 60 seconds. He stated that Mr. Wuttunee would be required to walk on concrete covered in tile and carpet and climb a ladder from 2 to 5 feet zero to 20 times a day. In relation to kneeling, crouching, crawling and walking, he noted that Mr. Wuttunee would be doing this by picking up construction materials 20-50 times on and off all day. With respect to reaching overhead, he indicated that Mr. Wuttunee would be doing this everyday between zero to 20 times.

[94] On February 13, 2008, SGI provided a letter to Mr. Wuttunee wherein they indicated that they would provide him with income replacement benefits from that date forward as a result of his employer's verification of earnings and a report regarding his recent knee surgery. They indicated that they calculated his benefit on the basis "of the income [he] would have earned in the first 180 days following the relapse due to surgery of February 5, 2008 …". The evidence showed that SGI paid him benefits in relation to his employment as a "construction labourer".

[95] In the Occupational Therapist Home Assessment Report of February 19, 2008, as part of Mr. Kooey's report, they note that Mr. Wuttunee was told not to work upon discharge from surgery for his right knee. They also report that Mr. Wuttunee had noted that he had eight jobs all involving manual labor or kitchen jobs since the Accident but that he had to quit or was dismissed "due to his inability to fulfill the physical demands of the position".

[96] The therapist noted that it was anticipated that Mr. Wuttunee would be "unable to complete any manual labor or kitchen positions due to the anticipated surgeries required" and that a "vocational consultant" may be an asset.

[97] Mr. Wuttunee had arthroscopy surgery to his right knee on February 5, 2008, surgery to repair the MCL in the right knee on May 21, 2008, surgery to repair the left PCL in the knee on February 11, 2009, and open reduction and internal fixation (ORIF) to the left patella on April 2, 2009.

[98] In terms of Mr. Wuttunee's neurological issues, in Dr. Levitt's report of July 11, 2008, he noted that Mr. Wuttunee was "over three years post a moderately severe traumatic brain injury" and that there was a connection between his brain injury and the seizures that occurred thereafter. However, he indicates that "The collective information suggests a good neuropsychological and neurobehavioral recovery from this incident." He concludes that, "From a neuropsychological standpoint, there is no basis to conclude that Mr. Wuttunee is not capable of resuming his pre-injury involvements."

[99] In cross-examination, Dr. Levitt agreed that he did not consider Mr. Wuttunee's physical injuries and their impact on his functionality in his assessment. He also agreed that he has not had any further assessments with Mr. Wuttunee since the report so that Mr. Wuttunee's neuropsychological profile may have changed although any cognitive decline would not be expected without the occurrence of another event. He also agreed that uncontrolled seizures would be an impediment to working at a pre-injury level.

[100] A FIT Progress report dated March 15, 2010 had noted that Mr. Wuttunee would be at his maximum rehabilitation potential at discharge and notes that they do not expect him to be pain or symptom-free at discharge and that he will need to focus on "his abilities, both physical and cognitive rather than disability."

[101] The FIT for Active Living Discharge report of April 15, 2010 indicated that their assessment was that Mr. Wuttunee was capable of performing physical work at the medium level for an 8-hour day. They stated that "The client was limited primarily by left knee symptoms" and noted specifically that "Mr. Wuttunee may experience difficulties with heavy overhead work due to the lack of stability of the left acromioclavicular joint and may experience difficulties with heavy loading in a fully flexed position, i.e. lifting from a squat position."

[102] In terms of Mr. Wuttunee's functional ability, they note that he would only be able to crawl, climb a ladder and kneel a maximum of 33 percent of a workday. They find that he could stand, sit, climb stairs, squat repeatedly and move in some positions a maximum of 66 percent of a weekday. There were no issues with his grip, balance and repetitive trunk rotation. Whether or not this would allow him to work as a cook is not defined in this report. However, in a Fit Tertiary Assessment Report dated May 24, 2018, with broadly similar scores regarding his functional testing, they found that Mr. Wuttunee "would be capable of working as a cook." Dr. Alport's opinion from his report of July 15, 2024 concurs with this statement as he states that "there seems to be no reason he could not work as a cook or a similar sedentary job." He maintained this conclusion during cross-examination.

[103] On May 11, 2010 SGI sent a decision letter to Mr. Wuttunee indicating that they believe he "has completed rehabilitation to the point that [he] is substantially able to perform job demands of an 8 hour day at a medium level" as a result of their review of the FIT for Active Living Report dated April 15, 2010. Pursuant to s. 132(1) of the *AAIA*, they determined he is entitled to a one-year grace period so that his income replacement benefits will not terminate until May 11, 2011.

[104] This May 11, 2010 decision letter from SGI was not appealed.

[105] In the progress report by the vocational rehabilitation consultant attached

to Mr. Kooey's report of February 1, 2011, they indicate that Mr. Wuttunee was not working towards becoming a chef as he believed that people with epilepsy should not work in kitchens as it was unsafe, and he might explore some schooling options. They also noted that he was not looking for employment until the summer months, "as he did not like the cold weather and felt his knee symptoms increased due to the cold weather."

[106] Dr. Alport notes in his report of December 16, 2019 that Mr. Wuttunee would have been unable to work in a sedentary position for six months while recovering from each one of his knee operations. He further stated that, "Given the severity of both knee injuries, I have concluded that the motor vehicle collision effectively ended this claimant's ability to perform physically demanding tasks. His left shoulder injury has resulted in a permanent restriction of avoiding heavy lifting, especially overhead lifting with the left arm." He indicated that "there is no question" that Mr. Wuttunee is incapable of working in a heavy industrial setting but a sedentary job "should be possible".

[107] In terms of analyzing Dr. Khalil's report, I find myself unable to give his conclusions much weight as it relates to employability for this time period as well. Not only does Dr. Khalil have little training in occupational therapy, but he did not complete any functional testing of Mr. Wuttunee on the occasion he saw him on August 8, 2022. While he finds that Mr. Wuttunee's ability to obtain employment is compromised, for the reasons outlined in my prior analysis of Dr. Khalil's opinion for the preceding time period, I am unable to give any weight to his opinion for this time period as well.

[108] I take into account that same lack of experience in Dr. Alport's testimony with respect to his opinion that he could work as a cook. However, Dr. Alport's opinions relate to specific documentation and address the conflict with Dr. Khalil's report, so I put some more weight on his opinion with respect to employability.

[109] In terms of the evidence provided by the T4 slips, I note that

Mr. Wuttunee found employment at three entities and earned a total of $5,917.11 in 2011. In 2012, he earned $330 from Smitty's and nothing else. In 2013 he earned $1,728.98 from the Western Development Museum and nothing else.

[110] In terms of onus at this stage of the proceedings, I find that SGI bears the onus. As noted in *Cass* at para 45, given that SGI is applying to terminate benefits it has paid out, they have the onus to prove that Mr. Wuttunee is no longer entitled to receive benefits. Unlike *Cass*, the case at bar does not involve a circumstance where Mr. Wuttunee is appealing a decision by SGI not to reinstate a benefit, he is appealing their decision to terminate a benefit they initially provided to him.

[111] In their letter of February 13, 2008, SGI characterized Mr. Wuttunee's circumstances as a "relapse". I do not find any error with this conclusion. Given the interpretation of the *AAIA* by the Saskatchewan Court of Appeal in *Murphy v Saskatchewan Government Insurance*, 2008 SKCA 57 at paras 28 and 29, 310 Sask R 149, the subsequent benefits must be treated as if they were the result of a new accident. Therefore, s. 140 of the *AAIA* would apply to the benefits subsequent to February 13, 2008, as this relapse would have occurred within two years of December 31, 2006, which is the date I found Mr. Wuttunee's benefits terminated pursuant to s. 131(1)(a).

[112] Section 140 of the *AAIA* states as follows:

> **Relapse within two years**
> **140**(1) This section applies if an insured suffers a relapse of a bodily injury within two years after the later of:
>
> (a) the end of the last period for which the insured received a benefit pursuant to this Division, other than a benefit pursuant to section 126 or 135; and
>
> (b) the date of the accident, if the insured was not entitled to a benefit pursuant to this Division before the relapse.

> (2) An insured who is unable to hold an employment held by the insured at the date of the relapse is entitled to a benefit pursuant to this Division.
>
> (3) The insured is entitled to a benefit pursuant to subsection (2) from the date of the relapse.
>
> (4) The insurer shall calculate the benefit pursuant to subsection (2) on the basis of the greater of:
>
> > (a) the yearly employment income used by the insurer immediately before the end of the period mentioned in clause (1)(a); and
> >
> > (b) the yearly employment income of the insured at the date of the relapse.
>
> (5) Notwithstanding subsection (4), if an insured suffers a relapse on or after the 180th day following the accident and before the relapse had not been receiving an income replacement benefit pursuant to subsection 113(4), (5), (6), (7) or (8), the insured is entitled to the greater of:
>
> > (a) an income replacement benefit calculated on the basis of the yearly employment income of the insured at the date of the relapse; and
> >
> > (b) an income replacement benefit calculated in the manner set out in:
> >
> > > (i) subsection 113(5); or
> > >
> > > (ii) if the insured held a seasonal employment, subsection 113(6) or (7) as the circumstances require.
>
> (6) If an insured receives an income replacement benefit at the date of relapse pursuant to clause (5)(a), the insurer shall adjust the insured's income pursuant to subsection 113(4) on the 180th day after the date of relapse.

[113] Given s. 140(2) of the *AAIA*, Mr. Wuttunee is entitled to a benefit based on the employment he held as a labourer doing heavy industrial work as noted in the job description information given to SGI. This was his employment on "the date of the relapse" as determined by SGI. While the parties focused most, if not all, of their

attention on whether Mr. Wuttunee could return to his employment as a cook, I find that these arguments are misplaced. Given that Mr. Wuttunee's relapse is treated as a separate accident, the employment capacity that the parties must consider is Mr. Wuttunee's employment on the date of the relapse, not the date of the original Accident. Therefore, should SGI wish to terminate benefits pursuant to s. 131(1)(a), there would need to be evidence of his ability to return to the construction labourer position he held at the date of the "relapse".

[114] From my review of the evidence that I accept, I find that there is a very clear indication that Mr. Wuttunee is unable to return to his employment as a construction labourer given the demands of such employment that include lifting things overhead and a high level of physical involvement. The report from SGI's expert, Dr. Alport, from December 2019, states that Mr. Wuttunee cannot work in a heavy industrial setting after the surgeries. I agree. My review of the FIT discharge report of April 15, 2010 confirms these limitations of Mr. Wuttunee's abilities. This also is corroborated to some extent by the evidence of income listed in the T4 slips. While there is no evidence of Mr. Wuttunee's subsequent job duties, his limited employment corroborates the prior statement attributed to Mr. Wuttunee that he is dismissed from or quits jobs as a result of an inability to fulfill the job requirements due to his injuries.

[115] However, despite this finding, SGI submits that I am unable to change the finding in SGI's decision letter of May 11, 2010 that terminated Mr. Wuttunee's benefits as he was able to return to his employment. SGI asserts this is because the findings in the letter were never appealed or mediated and SGI never otherwise agreed to review those terminated benefits. They argue that SGI would be ambushed should the Court consider reviewing these findings as there was no material in the pleadings filed by Mr. Wuttunee that suggested this May 11, 2010 decision letter was in issue.

[116] Mr. Wuttunee agrees that they never appealed the May 11, 2010 decision

letter and states that he is not asking for a reassessment of that letter. He argues that his pleadings were clear in delineating that they were asking that the Court review SGI's determinations regarding benefits during the time period between May 10, 2010 and August 7, 2014 so that SGI could not be ambushed by their submissions. They assert that they are impugning the findings in SGI's decision letter of August 25, 2020 that Mr. Wuttunee was able to work during the period between May 10, 2011 and August 7, 2014, which necessarily leads to a finding that Mr. Wuttunee is entitled to benefits for that period of time.

[117] As a starting point in this review, I will outline some aspects of the decision letter of August 25, 2020 that are pertinent to this discussion. I have already reviewed the May 10, 2010 decision letter.

[118] The August 25, 2020 letter found that Mr. Wuttunee suffered "a relapse" of his seizures effective August 7, 2014, and that he was "consistently seizure-free" effective May 31, 2017. It noted that he was unemployed at the date of relapse, and he had "not provided any information regarding probable or promised employment prior to the relapse date …". As a result of that lack of information, they considered him "seasonally unemployed" in the first 180 days after the seizure so that he is not eligible for benefits in that time period. SGI then outlines the benefits they are providing Mr. Wuttunee between February 4, 2015 (180 days after August 7, 2014) and May 31, 2017.

[119] To properly determine this matter, I must review the applicable limitation periods and assess the breadth of the decision letters proffered by SGI.

[120] The applicable sections that outline the limitation periods in the *AAIA* are as follows:

> **Insurer's decisions final**
> **188** Notwithstanding any other Act or law, any decision made or action taken by the insurer pursuant to this Part is final and

conclusive and may be reviewed only in accordance with this Division.

…

Mediation
190(1) If a claimant wishes to mediate the claimant's claim for benefits, the claimant shall provide the insurer with a written notice requesting mediation.

(2) A claimant shall:

(a) provide the written notice mentioned in subsection (1) to the insurer within 90 days after the date the claimant received the insurer's written decision pursuant to section 189;

(b) set out in the written notice the matters that the claimant wishes to mediate; and

(c) pay any prescribed fee.

…

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

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

(b) if a claimant has requested mediation pursuant to section 190, 90 days after the date of the mediator's written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[121] The decision of *Silzer v Saskatchewan Government Insurance*, 2021 SKCA 59 at para 108, reiterates the plain language of the *AAIA* regarding the imposed deadlines. In addition, the decision of *Holt v Saskatchewan Government Insurance*, 2018 SKCA 7, 75 CCLI (5th) 175 [*Holt*], emphasizes that the Court is not to twist the language of the statute in order to correct some perceived unfairness, despite being benefit-conferring legislation. As stated in para. 82:

> [82] The bottom-line point to be made is simply this. The no-fault insurance scheme set out in the *Act* [*The Automobile Accident Insurance Act*, RSS 1978, c A-35] is a creature of legislation. It contains defined principles and methodologies. While application of some of the statutory provisions may be perceived as subjectively unfair on a case-by-case basis, there is no statutory authority authorizing the respondent, or for that matter this Court, to relieve against, or ameliorate, perceived unfairness where the legislation is constitutionally sound and has otherwise been properly applied. Nor is there any principle of law that authorizes judicial intervention in the proper application of a legislative scheme, absent clear legislative authority to do so.

[122] The evidence is clear and accepted by Mr. Wuttunee that he neither appealed nor requested mediation regarding the decision in the May 10, 2010 decision letter. Therefore, it is clear that the determinations made by SGI in the May 10, 2010 decision letter cannot be revisited. However, I must now review the August 25, 2020 decision letter which was properly appealed and determine the breadth of review that is possible as a result of the findings made by SGI in that letter.

[123] In reviewing the breadth of the August 25, 2020 decision letter, the first issue to tackle relates to whether there was any "ambush" upon SGI by Mr. Wuttunee in springing this issue upon them without warning so as to be procedurally unfair. I begin by examining the pleadings.

[124] Before the parties agreed to consolidate the actions, Mr. Wuttunee had issued two statements of claims against SGI.

[125] In QBG-SA-00498-2020, Mr. Wuttunee issued an amended claim on December 11, 2020 that impugned the findings in the August 25, 2020 decision letter, as he asserted that he was not employable prior to March 8, 2015 and he had displayed an intention to obtain employment at the date of the Accident. In paragraph 9, the claim states that, "The period between the initial termination of May 11, 2010 and March 8, 2015 is the subject period of time relevant to this Appeal." Near the end of the claim,

Mr. Wuttunee requests, “A declaration that the administrative tribunal’s decision determining a relapse date of March 8, 2015 is set aside and a declaration that he was not employable as a result of the accident prior thereto;”.

[126] In QBG-SA-00619-2022, issued on June 27, 2022, he asserted in paragraph 21 that he was appealing the provision of benefits for “the periods of June 18, 2005 up to February 5, 2008 and from May 31, 2017 to present.” He also indicated in paragraph 14 that there was already “an existing action” between the parties “in which Income Replacement Benefits were denied during the period of May 11, 2011 to August 7, 2014.”

[127] In SGI’s statement of defence on QBG-SA-00498-2020, they assert that they correctly or reasonably determined that Mr. Wuttunee relapsed and that his benefits should begin from the date of relapse on the basis that the relapse was a second accident. They do not assert any limitation defence under s. 188, s. 190 and s. 191 of the *AAIA* or indicate that there was an issue or dispute regarding Mr. Wuttunee’s framing of his claim for benefits regarding the time period between May 10, 2011 and March 8, 2015.

[128] From a review of these pleadings, it is plain and obvious that Mr. Wuttunee wanted to use the determinations made in the August 25, 2020 decision letter to revisit the denial of benefits for the period between May 10, 2011 to August 7, 2014. This is clearly stated in both statements of claim. Arguments to the same effect were made in his brief of law. Although SGI noted that their decision letter of May 10, 2010 had not been appealed in their brief of law, it was not until the Court raised the issue after argument that SGI’s position crystallized regarding the limitation period affecting any revisiting of the assessment of the period between May 10, 2011 to August 7, 2014.

[129] I find there was no ambush by Mr. Wuttunee. However, the question

remains whether Mr. Wuttunee can rely on the determinations in the August 25, 2020 decision letter to reassess the impugned period.

[130] Before undertaking my review, I note that it is not strictly necessary for SGI to plead and rely on the limitation periods under the *AAIA* in their statement of defence in order to receive their benefit at a trial or hearing. The decision of *Fritz v Knorr*, [1993] 7 WWR 303 (WL) (Sask QB) at para 28, stands for the proposition that, where the plaintiff is not prejudiced and despite limitation periods being generally construed as procedural in nature, a defendant is entitled to raise statutory limitation period defences despite not having pled such defences "subject to being responsible for costs incurred by the plaintiff by virtue of such defence having been raised at a late date." As an alternative, the Court found that if it was in error in so doing, they would grant leave to the defendant to file a statement of defence asserting this defence.

[131] From my review of the pleadings, I find that there would be no prejudice to Mr. Wuttunee in allowing SGI to assert this limitation period regarding the findings of the May 10, 2010 decision letter as Mr. Wuttunee already agrees that those findings cannot be reassessed and simply asserts he is impugning the August 25, 2020 decision letter.

[132] I must now review the breadth of the August 25, 2020 decision letter to determine whether revisiting the determinations therein would allow a review of SGI's denial of benefits to Mr. Wuttunee between May 10, 2011 and August 7, 2014.

[133] In order to assess the breadth of the August 25, 2020 letter, I must review the determinations made by SGI in their May 11, 2010 decision letter. From my review, the May 10, 2010 decision letter clearly finds that Mr. Wuttunee is "substantially able to perform job demands of an 8 hour day at a medium level" and thereafter terminates his income benefits effective May 11, 2011 owing to the one year grace period contained in s. 132(1) of the *AAIA*. Given my findings that SGI should have assessed

Mr. Wuttunee's ability to return to work as a construction labourer rather than as a cook, SGI's determinations in their May 10, 2010 decision letter are in error. However, as I have found above, Mr. Wuttunee has no recourse to challenge these findings given he never appealed or mediated the decision letter.

[134] As stated above, the August 25, 2020 decision letter finds that Mr. Wuttunee suffered a relapse for a certain period of time and provides him benefits for that period. It also found him unemployed on the date the relapse commenced so considered him seasonally unemployed for the first 180 days after he suffered his relapse so that his benefits would not start until the expiry of that period of time.

[135] Mr. Wuttunee has creatively sought to expand the breadth of SGI's decision in his claim by alleging that by appealing SGI's decision of August 25, 2020 to find Mr. Wuttunee employable and not having displayed any intention to obtain employment at the date of the relapse, they may revisit the entire period of time prior to this decision up to May 10, 2011, where SGI had denied benefits based on Mr. Wuttunee's employability.

[136] While clever, I find that Mr. Wuttunee cannot avoid the limitation period that prohibits reconsideration of the May 10, 2010 letter in such a fashion.

[137] From my review, the August 25, 2020 decision letter only deals with the period of time when Mr. Wuttunee was affected by seizures. While the August 25, 2020 letter states he is unemployed, it is in the context of assessing Mr. Wuttunee's benefits with respect to his relapse for his seizures, not as part of a wholesale review of their prior May 10, 2010 decision regarding benefit entitlement. There is no reference to any prior determinations in the August 25, 2020 letter. While this letter may inferentially rely upon building blocks provided in other decision letters, this does not provide an opportunity for counsel to manufacture a nexus that impugns those prior decisions. If this was so, the limitation periods provided in the legislation would have no meaning.

Using the guidance of the court in *Holt*, there is no way to expand the scope of the August 25, 2020 decision letter so as to revisit a deficiency in a prior decision letter despite any appearance of "unfairness".

[138] Therefore, SGI's determination to deny benefits to Mr. Wuttunee during the period between May 10, 2011 and August 7, 2014 must stand. However, this does not make their determination to do so correct or worthy of reliance as I continue my assessment for the various time periods.

Income Benefits Between August 7, 2014 and February 4, 2015

[139] As alluded to in my examination of the August 25, 2020 decision letter, while SGI provided benefits to Mr. Wuttunee from February 4, 2015 to May 31, 2017 they did not provide him benefits between August 7, 2014 and February 4, 2015, as they found that, despite suffering a "relapse", he was unemployed and no information was provided to them regarding promised or probable employment. Therefore, they considered him "seasonally unemployed".

[140] However, given my determination that Mr. Wuttunee was unable to return to his previous employment as a construction labourer and SGI has never determined a suitable employment for Mr. Wuttunee pursuant to s. 132 and s. 134 of the *AAIA*, I find that Mr. Wuttunee could not have "relapsed" as he was still "unable to hold an employment" under s. 140 of the *AAIA*, as I have previously determined in paragraph 114. As a result, there is no basis to find that he was seasonally unemployed or to deny him benefits.

[141] Therefore, I find that Mr. Wuttunee is entitled to income replacement benefits for the period between August 7, 2014 and February 4, 2015.

Income Benefits Between May 31, 2017 and Present

[142] Again, for the reasons given above in relation to the failure of SGI to

determine a suitable employment for Mr. Wuttunee and Mr. Wuttunee's inability to return to work as a construction labourer, which is not disputed by SGI's own expert, I find that Mr. Wuttunee continues to be unable to hold an employment for this period.

[143] Given those findings which are medically substantiated by SGI's expert, I find that Mr. Wuttunee is entitled to income benefits for the period from May 31, 2017 to the present.

Costs

[144] While Mr. Wuttunee has not been completely successful in this matter, his degree of success is significantly larger than that of SGI. I also note the issue of costs that I identified as a result of SGI not pleading the sections of the *AAIA* with respect to limitation periods. However, given that Mr. Wuttunee did not contest the fact that there was no appeal from the May 10, 2010 decision letter, it was likely not strictly necessary that SGI plead reliance on those sections.

[145] Therefore, on balance, I award costs to Mr. Wuttunee in column 2.

_____J.
J.P. MORRALL