

**Automobile Injury Appeal Commission**

**Province of Saskatchewan**

**Citation:** *T.V. v. Saskatchewan Government Insurance,*  
2004 SKAIA 054

**Date:** 20041109

**File:** 034 of 2003

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**BETWEEN**

**T.V., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**

**T.V., for the Applicant**

**Lynn Henderson, for the Respondent**

***Before:*** **Beverly Cleveland, Chair**

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

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Heard at Prince Albert, Saskatchewan  
October 2, 2003

## DECISION

[1] The Appellant, T.V., appeals a decision of Saskatchewan Government Insurance (SGI) dated February 19, 2003 denying him further permanent impairment and benefits for injuries he sustained in a motorcycle accident on June 29, 1998.

### FACTS

[2] On June 29, 1998, the Appellant was injured when the motorcycle he was riding was hit from behind. He sustained a fractured clavicle (collar bone), four fractured ribs and chip avulsion fractures to the dorsal carpus of his right wrist. He was hospitalized in [Alberta] for about one week.

[3] The Appellant was [in his late forties] at the date of the accident. In 1990 he retired from the [employer one] and worked as an electronics technician in [BC] following his retirement. In 1995 the Appellant bought a farm near [location]. In 1996 he purchased a herd of [animal] and moved with his family to Saskatchewan where he has lived and worked ever since. The Appellant also worked part-time off the farm as a refrigeration technician for [employer two], [town], SK until his accident in 1998. The Appellant is married with two children, a son and daughter, who are now [teenagers].

[4] As a result of his injuries, the Appellant underwent a secondary assessment in Prince Albert and subsequent secondary treatment for one month in August 1999. On September 22, 1999, Pat Irwin, physiotherapist, reported to Petra Petrisor, personal injury representative for SGI:

“Further to our conversation regarding [the Appellant] and the limitations to his right arm/hand. Until [the Appellant’s] condition resolves he will not be able to do a substantial amount of work.

Routine farm duties that can be done without limited use of the right hand are being done, done slowly or are done mainly with the left hand. Any duties involving mechanical repair, harvest of hay, swathing, fencing all require the assistance of family and friends as [the Appellant] is unable to do prolonged use activities with the hand/arm without extensive pain and swelling (although he continues to try).

Swelling continues and resulting pain virtually (sic) make the hand/forearm unusable after a few minutes of continual work.

We continue to wait for an appointment with Dr. Kowbel, a pain specialist here in Prince Albert. If SGI could speed this process up it would be appreciated. It is hoped that he can offer a renewed hope for resolution of this problem. Why the body reacts this way to a seemingly minor injury is unknown and frustrating for all concerned.

The Occupational Therapist had ordered an anti-vibration glove and ergo-hammer for [the Appellant]. He states that the hammer doesn't work well and the glove is more of a hinderance. It's "like having a big sponge in the palm of your hand", and it is giving him diminished grip and sensation during activities.

In my professional opinion, unless this problem in the wrist/forearm resolves, [the Appellant] will never be able to return to his heating/refrigeration work, and farming will be a very expensive occupation with hiring people or equipment to do necessary work for him. I ask that you reconsider his file and the termination of benefits, this will be a long term file if no resolution occurs of the symptoms."

[5] The Appellant underwent an upper extremity assessment at Kinetik on January 5, 2000. Physical assessment showed swelling in the right distal forearm, reduced active range of motion in the right wrist, diminished light touch throughout the right hand and edema that got worse with activity. Sharon Kingston, occupational therapist, recommended the Appellant undergo a gradual (12 week) rehabilitation program on his right upper extremity, starting at a very light level and progressing slowly. She also recommended he limit his physical labour on the farm to prevent re-injury or inflammation during his rehabilitation.

[6] An adjuster injury note confirmed the rehabilitation recommendations and particularly noted "He has flare-ups because he overdoes it....Testing also showed that he has diminished touch sensation in his hand."

[7] On March 9, 2000, Dr. Clapson, surgeon (specialist in plastic and reconstructive surgery, hand and microsurgery), wrote to Ms. Petrisor:

"...I reviewed [the Appellant] recently. His main complaints continue to be of pain in the upper extremity. I was speaking with his hand therapist and it sounds like this is an intermittent program where he is being reviewed every two weeks.

"I think [the Appellant] has a chronic problem in his upper extremity and I wonder if he is not continually overusing it in his job on the farm. I just received his work site assessment recently and I believe that there is some problem between the ability of [the Appellant] to complete his farm work and the farm work that is available for him to do.

“From a medical point of view, [the Appellant] has a few tender spots in his arms which would benefit from intermittent (cortisone) injection which would make him more comfortable.”

[8] Dr. Clapson referred the Appellant for a nerve conduction study in April 2000. He wrote to the Appellant on May 2, 2000 and reported:

“Enclosed is a copy of your nerve study.

“This shows that you have a mild carpal tunnel. This means that there is compression at the median nerve at the wrist. I am not sure whether surgical release is indicated at this time. The primary reason to release the carpal tunnel would be persistent numbness that interfered with the use of the hand. This would have to be your main complaint of your arm before we would do surgery.”

[9] The Appellant received therapy at Kinetik from January 5 to May 10, 2000. He attended all scheduled appointments and continued farming throughout. SGI provided funding for a worker to assist with heavy activities.

[10] In the Occupational Therapy Discharge Summary, Ms. Kingston stated in part:

“...Sensory status of the right hand remained impaired. A nerve conduction test of April 14, 2000, indicated there was median nerve entrapment of the right carpal tunnel.

“Review of the IRC Consultants reports indicated that [the Appellant] was able to perform the majority of his work on the farm. However, it is the opinion of the undersigned that due to the nature of his upper extremity pathology, [the Appellant] is unable to repeat these activities as required throughout the day as it produces an inflammation in his symptomatology (sic) with increased pain and swelling and subsequently decreases function.

#### **Outcome**

“Although strength and range of motion has improved in his right upper extremity, [the Appellant] continues to have exacerbation of symptoms when he exceeds limits of weights and/or frequency or repetitive nature of activity. There is also indication of sensory deficits due to median nerve entrapment at the right wrist. Due to nerve entrapment the following precautions should be taken:

1. Avoidance of vibrating tools.
2. Avoidance of repetitive flexion and extension activities.
3. Gripping or pinching objects while wrist in a flexed position.
4. Gripping objects with your wrist bent towards you (sic) little finger.

“There is a high risk of further injury to the right upper extremity should he pursue all aspects of farm work. It is necessary for [the Appellant] to self-limit his activities so as to minimize the extent of inflammation and pain in his right upper extremity and maximize his functional abilities throughout work and home activities...”

[11] The Appellant underwent a physical work performance evaluation at Kinetik on August 30 and 31, 2000. The evaluation tested the Appellant for dynamic strength, position tolerance, mobility, fine motor skills, balance, coordination, and endurance and was tailored to challenge his upper extremity. The testing was carried out over two days to determine his tolerance for repetitive tasks required in his farming operation.

[12] Michael Saretsky, physical therapist and evaluator, commented the Appellant's overall level of work could not be definitively evaluated due to the modifications in testing recommended by the Appellant's hand therapist. Because of this, Mr. Saretsky reported it was difficult to predict whether the Appellant could sustain this level of work for an 8-hour day.

[13] Mr. Saretsky stated according to the job description provided by the occupational therapist<sup>1</sup> that the Appellant did not match the job requirements for a farmer. Specifically, he did not match in floor to waist life, waist to eye level lift, two-handed carry, gross manipulation and fine motor skills.

[14] The Appellant referred particularly to the therapist's comments that pain scores were very high for all the fine motor tasks and that his abilities were significantly limited on the second day due to pain, reportedly from participation in activities on day 1 of the evaluation. At the appeal hearing he reported that he still has a lump across his fingers probably from where the throttle of the bike crushed his hand and that repetition causes bruising and swelling. He said he always has pain and that even holding onto the steering wheel after 15 – 20 minutes causes burning that progressively gets worse and radiates up to his forearm.

[15] On November 2, 2000 Ms. Hancharuk, occupational therapist, conducted a second work-site assessment for the farm.<sup>2</sup> She stated in the background information of a third farm visit in January 2003 that:

“...recommendations and implementations were done on July 30, 2001. Since my previous visits, I understand Saskatchewan Government Insurance provided equipment through purchase or cost share arrangement with the client. Most of the equipment identified and

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<sup>1</sup> Colleen Hancharuk, Innovative Rehabilitation Consultants

<sup>2</sup> Ms. Hancharuk conducted an initial farm worksite assessment on October 21, 1999

purchased was to allow [the Appellant] to continue to farm independently. It was through this equipment that [the Appellant] stated allowed him to become 85% independent in his farming operation. Having said that, before the equipment was purchased, he felt it should have provided him complete independence but stated unfortunately it hasn't."

[16] On June 8, 2001, Dr. Jutras, SGI medical consultant, determined that the Appellant was entitled to a 4.5% permanent impairment benefit for loss of range of motion to his right wrist.<sup>3</sup> The Appellant disagreed with Dr. Jutras's assessment and requested a review hearing by SGI.

[17] On September 4, 2001 Dr. Jutras replied to SGI that "(T)he SGI Regulations do not deal directly with permanent impairment for loss of strength related to the wrist injury. This impairment is included in the range of motion impairment figure. Therefore, there would be no further permanent impairment available for this type of injury."

[18] At the appeal hearing before this Commission, the Appellant submitted a copy of a page from SGI's *Guide to Personal Injury Protection*.<sup>4</sup> Under Part 5, Permanent Impairment Benefit, "Who Decides" it reads:

"The extent of your impairment and the level of compensation are determined *in consultation with your attending medical practitioner and SGI's medical consultants*, based on the regulations of the Automobile Accident Insurance Act..."  
(emphasis added)

[19] The Appellant testified no one to his knowledge ever consulted his doctor but rather his doctor was directed to measure the loss of range of motion in his wrist. He stated SGI is not following it's own guidelines.

[20] Ms. Henderson, appeals officer for SGI, replied that the *Guide* is intended for general information and assistance to claimants only. She also commented that the wording used under the Permanent Impairment Payment part, "Who Decides", the 2002 *Guide* has been changed. It now reads "(T)he extent of your impairment and the corresponding level of benefits *are determined by SGI's medical consultants, using information provided by your caregivers*."<sup>5</sup>  
(emphasis added)

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<sup>3</sup> a typographical error stating "left wrist" rather than "right wrist" was noted

<sup>4</sup> 1999 *Guide*

<sup>5</sup> pg. 16 *Personal Auto Injury Insurance – Your Guide to No Fault Coverage*

[21] On March 7, 2002, Dr. Jutras wrote SGI that no further permanent impairment benefits were payable for hand weakness:

“...You are wondering whether the EMG Report indicating that there is some mild entrapment of the median nerve is responsible for the weakness in his hand.

“I don’t have any medical evidence to suggest that it is related. The information that I have on hand indicates that the weakness would be more of a non-specific weakness related to the fracture, and this again, has been taken into account with the range of motion permanent impairment.

“I would think that if he was having significant weakness related to the median nerve entrapment that Dr. Clapson would have commented on that in his May 2, 2000 letter.

“If there is concerns that there is ongoing weakness of the hand and that it may be related to the carpal tunnel, then I think he should be reviewed by his plastic surgeon to determine if this is the case, and if so, whether or not surgery is indicated. If this was the case, then he would not be at maximum medical improvement until surgery was performed. However, I am not certain this is the case, and until I have further information indication that the median nerve entrapment is leading to weakness of the hand, then no permanent impairment will be assigned.”

[22] On April 19, 2002 Ms. Petrisor advised the Appellant that SGI was terminating his income replacement benefit on April 25 because with the additional equipment provided that he was now substantially able to perform the essential duties of farming.<sup>6</sup> She also requested information about the Appellant’s loss of income as a refrigeration technician so that a review could be done to determine if he was entitled to additional income benefits for this employment. The Appellant requested a review of the decision to terminate his income replacement benefits.

[23] A radiology report of the left clavicle dated May 7, 2002 showed a displaced but stable deformed healed fracture of the left collar bone. On June 4, 2002 Dr. Jutras assessed this report and determined that the Appellant was entitled to a further 2% permanent impairment for a minor to moderate change in form and symmetry for the left clavicle.

[24] An internal review hearing of SGI’s decisions dated July 10, 2001 (permanent impairment) and April 19, 2002 (termination of income benefits) took place in [town] on July 22,

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<sup>6</sup> equipment provided – *Dragonspeak* software, impact tools and baler (the baler was cost-shared between SGI and the Appellant)

2002. On August 9, 2002, Arlene Federko, injury appeals representative, advised the Appellant that SGI's decisions were upheld.

[25] According to her letter, the Appellant wrote:

(re permanent impairment)

"I believe that I am entitled to receive a benefit for the loss of use of my right arm from the elbow down, as this is the affected area of my injury.

"I disagree with the decision of SGI's assessment of my claim for permanent impairment benefits, as it deals with a very small portion of the affected area and does not take into account that my injury has caused me a larger impairment than shown in your assessment.

"My impairment has caused my right arm to become basically useless for everyday work where any dexterity or fine motor skills are required or where strength is essential. I do not understand why this was not taken into account when the assessment was done. According to all of the tests that you gave me I have at best 50% of the strength in my right arm and am in constant pain. I felt that none of these factors were taken into account....

(re termination of income benefits)

"I believe that I should continue to receive income replacement benefit that you have discontinued.

As I am unable to do more than 80% of my work without assistance and as I am now having trouble with my left clavicle and shoulder which is starting to affect my work."

[26] Regarding the calculation of permanent impairment, Ms. Federako stated that under Appendix B, Part I, Division I, Subdivision I, Item 8(b)<sup>7</sup> of the Regulations the permanent impairment calculated by Dr. Juras should have been 2.2% and not the 4.5% paid but that SGI would not ask the overpayment be repaid.<sup>8</sup> Ms. Federko noted the Regulations do not specifically deal with loss of strength related to his wrist injury but that this impairment was included in the loss of range of motion calculation. She also advised there is no provision under the legislation to provide compensation for any pain and suffering.

[27] Regarding the termination of income benefits, Ms. Federko stated that because the Appellant is substantially able to perform the essential duties of the employment he held at the date of the accident, he is no longer entitled to an income replacement benefit.

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<sup>7</sup> Restriction of movement - wrist

<sup>8</sup> The document shows the calculation for 4.5%; it appears the "new" rather than the "old" *PIBR* may have been used however, no information was provided how the 2.2% was calculated

[28] The Appellant applied for mediation of SGI's decision on August 30, 2002 based on the following reasons:

"1) I do not agree that my disability is limited to my wrist as if claimed by SGI by is in reality from my elbow down as is described in a letter sent to SGI by Prince Albert health district on Sept. 22, 1999. As there has been no further gain in my condition since then I do not see how SGI can claim that only my wrist is involved. IF in fact my disability is confined to the lack of range of motion of my wrist how can you justify the equipment you have supplied or helped me to purchase do (sic) to the lack of strength.

"2) I do not agree that my ability to do 80% of my farm work means that I am substantially able to run the farm as I in the future must hire someone to do the 20% that I am unable to do. This along with the fact the things that I can do take much longer to do. My ability to work off the farm is another encumbrance to making a living.

"3) The word substantially is being misused in this context as it means essentially which is described in the dictionary as fundamental, basic or indispensable. If in fact the word you choose to use it does not cover my injury or in fact what has become a permanent impairment I in fact think that a 25 to 30% drop in my income is a burden that I cannot handle much longer."

[29] Mediation between the parties took place on December 18, 2002. At the mediation session, the Appellant presented a proposal to SGI that he also provided to this Commission. It outlined the work that he is unable to do and must hire out and the work that he is able to do but that takes extra time than what it normally took him prior to the accident. He estimates the direct costs for the work that he can't do and must hire out at a total of \$2,700/year and the indirect costs for the additional time it takes him to complete his farm work at \$8,400/year.

[30] Also included in the proposal was an estimate for equipment that would assist him in doing the tasks he can't or has difficulty doing by reducing his work-load. The equipment was a) hayliner - \$5,000; b) two hopper bottom bins - \$12,000 and c) bale shredder - \$18,000.

[31] The Appellant and SGI were unable to reach an agreement and mediation was terminated.

[32] On January 13, 2003 Colleen Hancharuk, occupational therapist, and Garry Derenoski, vocational consultant, completed a work-site assessment with a physical job demands analysis for the Appellant's part-time job as a refrigeration mechanic/plumber assistant at employer two

in [town]. On the same day she completed a re-assessment of the Appellant's farm requirements since the previous work assessments in 1999 and 2000.

[33] Refrigeration technician

She wrote under "job accommodation":

"(a)lthough this area was not discussed in detail, [the employer] was asked if there was any possible accommodation for [the Appellant] with his disability. [The employer] initially responded their employees have to be physically able to handle all aspects of the job and there would be none, however once he thought about other aspects of the business, he was able to give possible suggestions as in possibly sales work in the front end, problem solving, working with the warehouse unpacking supplies and shipments, and in terms of some service calls, or situations where [the Appellant's] specific skills could be utilized. He sited an example of a commercial refrigeration unit where he had to call another person in just to ensure it was done properly. He was concerned of the warranty he would have to provide and the cost of the client and needing this outside support and expertise. It is acknowledged he would not have the dexterity grasp to perform all job duties, but there may be some modifications made that would allow some work to be done within the premises."

[34] The Appellant testified he would have continued to work for employer two but for the injuries he sustained in the accident and provided a hand-written memo from [the owner] of [employer two]. It reads "[The Appellant] would have been employed full time from that 98 – present." The Appellant also stated that the owner had a different understanding of his conversation with Mr. Hancharuk regarding job accommodation. In a letter dated April 13, 2003 the owner stated "(W)e do not have a position available with [the Appellant's] limited physical abilities."

[35] Farm site assessment

In her report, Ms. Hancharuk stated she is very familiar with the Appellant, having completed an assessment and recommendations from two prior visits on October 21, 1999 and November 2, 2000. The majority of her report is repeated here:

**Background:**

"...Since my previous visits, I understand Saskatchewan Government Insurance provided equipment through purchase or cost share arrangement with the client. Most of the equipment identified and purchased was to allow [the Appellant] to continue to farm independently. It was through this equipment that [the Appellant] stated allowed him to become 85% independent in his farming operation. Having said that, before the equipment was purchased, he felt it should have provided him complete independence but stated unfortunately it hasn't.

“[The Appellant] reported he had been farming independently over the past two years but this has been with the assistance of his family, specifically his son and wife. [The Appellant] also reported approximately one year ago, he had been diagnosed with cancer, having surgery and chemotherapy treatment. He has lost a considerable amount of weight (approximately 80 pounds) and upon our visit, although appearing physically independent, he looked frail and weakened.

“...[The Appellant] reported over the past two years he has had to rely more upon his family (son and wife) to assist with farm chores. It was not clear or determined whether this was due to his non-MVA related disease or disability (cancer) or if this was not previously reported. [The Appellant] reported he did not identify to me as an Occupational Therapist on prior visits that he relied on his children, who were in high school to assist him with farm chores. His children still live at home but his son has a job off the farm, giving him less time to help out.

“Specifically, he is anxious about continuing to farm independently as his son is now [age] and planning a career outside his farm. He also reported his wife has assumed more of a role in assisting him with farm chores. As example, he stated she would spread the round bales with a pitchfork after he’s dropped them off with the tractor and tried to break them up somewhat with the front-end loader.

**Physical:**

“As mentioned, there is a noticeable change with [the Appellant’s] presentation of less weight. He is independent in mobility and there is no difference in terms of his activities of daily living independence.

“He reported his right hand, although functional in immediate or short term, does lose strength, grip and has increased pain upon any repetitive or sustained movements. *This is not different that what he reported to me on my previous visits.* (emphasis added)

**Farm Requirements in Review:**

“Livestock – The number of livestock remains about the same as my prior visits, approximately 180 [animal] and three [animal].

“Land - ...he owns one half section and rents on half, which is the same amount of land as before, although in the past year he has purchased one quarter he had previously been renting and now wants to fence it....

**Specific concerns and problem area identified by [the Appellant]**

“Hauling Bales – reported he puts up 1500 square bales per year, 1000 of hay and 500 straw. He advised approximately 700 bales were brought into his shelter and the rest are out in the field. He reported he has done and continues to do this manually and independently, generally, mainly using one hand. He reported his son has assisted him both before and after the motor vehicle accident. Their procedure has been to have one person operate the tractor and another person riding around the field on a bale stacker behind the baler...Picking up the bales is also a two-person job...Although he reported it is generally a two-person job, he reported he had baled on occasion by himself in the past. For it to be a one-person operation he would have to drop the bales one by one on the ground as they are processed through the baler. He said he would then have to purchase a bale wagon that operates behind the tractor to pick up and stack the bales mechanically. He stated currently although he can do one or a few bales independently he is not able to do this for an extended period of time. [The Appellant] has researched equipment and is proposing with (sic) a bale wagon (New Holland) it would enable him to pick and stack the bales independently. It would eliminate this being a two-person job and become a one person job. [The Appellant] reported he would still have to hire someone to stack the bales inside his Cover-All building once they are brought to the yard.

“This Therapist pointed out to [the Appellant] he did not refer to using his son for haying and baling on a pre-MVA basis. He reported he never thought of mentioning that to me previously but did report it to Saskatchewan Government Insurance.

“Bedding – He reported this is the biggest priority and the main problem area. Currently he will take large round bales to the area with his tractor and front end loader. After he cuts the string he tries to break the bale up as much as he can with the front end loader then his wife assists him as he cannot take a fork and manually pitch the hay from the round bale in the corrals to spread out throughout the corrals for bedding. He reported he can do a limited amount but is unable to grasp the pitchfork for an extended period of time.

“[The Appellant] has about six pens he uses three to four round bales to bed them on a daily basis and after that usage he brings in another round bale every second day.

“At the current time he is borrowing a neighbour’s shredder when it is not being used. He estimates it takes him approximately one half hour every day whereas a shredder takes a considerable shorter period of time.

“Feeding Animals – [The Appellant] reported this takes twice as long as he has previously done or he expected it would take. He reported for example he had 25 kids (baby goats) where he feeds by hand for approximately two and a half months before selling them. He uses eighteen, five gallon buckets of barley to feed the goats twice per day. He has been doing this independently feeding them manually (putting the five gallon pails on the back of his pickup) but he finds he is making too many trips and is not able to carry and lift after a length of time.

“[The Appellant] reported the 180 adult goats are fed approximately one month before they give birth to their kids, and then for one and a half months after to help them regain strength. He feeds the adult goats 180 pounds per day (1/2 pound each per day) again he uses his half ton truck to haul the five gallon pails filled with barley.

“The feed is presently in a granary and large canvas buckets, which are carried to and from the enclosed shop by tractor ...

“[The Appellant] reported he has difficulty shovelling, especially when the bin is low in feed and he feels a hopper bottom grain bin would provide considerable assistance in this area. [The Appellant] also suggested a bale shredder along with an attachment would allow mechanical and not manual feeding.

“For square bales of feed he feels he can physically manage two square bales, but beyond that he feels his tolerance ability is impaired and he is unable to feed his livestock.

“[The Appellant] lifted and placed a five-gallon pail of oats on our scale and it weighted 20 pounds. This was about 80% full and [the Appellant] estimated barley which is fed to the kids (goats) would be heavier weighing approximately 25 pounds.

“Fencing – [The Appellant] reported he appreciated the air stapler and find this equipment allows him to be independent with small repairs where a few posts need replacing. In doing small repairs he reports he does not have to handle the 330-foot rolls of page wire. His concern is his estimate of two miles of fencing he wants to do on the quarter section of land he purchased and that he won’t be able to do it. He estimates he would have to handle 400 posts. Again he openly identified this is a two person job...Since this is a two-person job anyway I would suggest he be the truck driver. The posts are driven into the ground with a hydraulic posthole pounder. He used this both prior to and after the motor vehicle accident

and borrows it from some of his relatives nearby. He reported prior to the accident he was able to do several miles of fence by himself but acknowledged it is a lot quicker and easier with two people.

“Miscellaneous – [The Appellant] is concerned about some maintenance work, as example, on a pre-MVA basis he did his own repair work. Recently he reported he had to put a clutch in a piece of equipment and had to hire this out.

“He also reports he finds he does not have the strength in climbing up ladders, as he has lost his grasp in his right hand. This again is reported as another concern of post MVA abilities....

**Summary/Conclusions:**

“Instructions on this file were to reassess farming operation changes within the past two years. Overall nothing has changed other than [the Appellant’s] health and physical ability, which has decreased (diagnosed with cancer). With the replacement equipment, things have gotten a lot easier and he acknowledges this.

“There are some of the above tasks that are presently a two-person operation although it had been reported [the Appellant] had managed some of these tasks independently such as breaking up round bales. However in most cases square baling requires two people. Since it is common for family members to help out on the farm it is understandable that [the Appellant] may not have thought to mention his son’s assistance provided in the past. His concern is his son is leaving the farm and will not be available to provide assistance, which enabled him to get by. However it was identified many of the tasks require two people because of the equipment, which reduces labour and the number of people.

“As well, building new fences is often a two-person operation, as the weight of fencing materials is too heavy for one person to manage.

“However there are clearly difficulties in using tools, which require [the Appellant’s] grasp such as using a pitchfork with bedding and feeding. Previous notes indicate these tasks were done independently. I am not in a position to identify if since his unrelated illness and subsequent treatment throughout the course of the past two years, [the Appellant] has lost some ability in terms of strength, grasp and tolerance and could contribute to his inability to perform tasks independently. This may need to be identified by an independent medical exam.

“[The Appellant] has been extremely motivated in obtaining his independence by use of adaptations and modifications. It is documented that many of these adaptations have been funded or cost shared by Saskatchewan Government Insurance. [The Appellant] shows a strong desire to continue to be independent in spite of his current health concerns. He continues to strive towards maintaining independence, therefore as a Therapist I can identify items suggested by [the Appellant] in terms of technology and mechanical devices will promote further independence and lessen the physical requirements taken to perform these tasks. However I am not in a position to suggest who should be responsible for cost or implementation.”

[36] The Appellant testified Ms. Hancharuk admitted to him that she had no experience or knowledge about farming. She reported what he told her and that she may have confused some of his statements. For example, he referred to Ms. Hancharuk conclusion that “...building new fences is often a two-person operation, as the weight of fencing materials is too heavy for one

person to manage.” The Appellant stated “I do lots of fencing by myself with the new equipment and I use my feet...it takes more time but I do it.”

[37] The Appellant confirmed he is unable to do or has the following tasks as a result of the injuries to his right forearm and hand:

1. Shovelling grain – his bins are flat-bottomed so he must auger the grain and he can't move the auger by himself; grasping a shovel;
2. Picking up sick or lame animals and bringing them to the barn;
3. Moving animals into the squeeze chute for trimming feet;
4. Feeding and bedding – picking up and lifting pails over the fence and breaking up hay or straw bales, grasping a pitchfork;
5. Picking up hay or straw bales or hay bales from the field.

[38] On February 19, 2003 Art Moser, personal injury representative III, advised the Appellant the work-site assessments by Ms. Hancharuk had been reviewed and SGI's decision regarding his ability to work, purchase of equipment and permanent impairment remain unchanged. He wrote in part:

“Many of the areas of concern in your proposal have been identified by the Occupational Therapist as jobs that would normally require two people to complete given your equipment. The report also indicated that unrelated health conditions could be contributing to your disability.

“Based on the worksite assessment ... we remain of the opinion that with the aids you were previously provided with, you are substantially able to complete your farming activities. We are therefore, not prepared to provide further funding for the equipment identified in your December 18, 2002 presentation.

“With respect to the permanent impairment, as no new medical information was provided the assessment of your entitlement to a permanent impairment benefit was appropriate.”

[39] The Appellant candidly advised he was diagnosed with [cancer] on November 27, 2001, underwent surgery and adjuvant chemotherapy. The weight loss was attributable to the nature of his surgery. After his surgery and treatment, the Appellant had a hernia repair and returned to his daily routine.

[40] He was upset by Ms. Hancharuk's report and the February 19 letter that unrelated health conditions could be contributing to his disability. He said it bothered him quite a bit and found it

reprehensible his cancer would be used to deny him benefits for injuries he suffered in the accident. He commented that his right arm didn't work before he was diagnosed and his right arm still doesn't work and questioned why then his having cancer should have been mentioned.

[41] Ms. Henderson summarized that SGI acknowledges the Appellant cannot work the same as before the accident but that he is able to do the essential duties of farming and therefore is no longer entitled to an income benefit under the Act and regulations. As well, she submitted that Ms. Hancharuk's work-site assessment for his part time employment as a refrigeration technician indicated the Appellant could do some work in that area and he was therefore not entitled to an income benefit. Lastly, she concluded SGI is restricted to the regulations in assessing permanent impairment and that no impairment is available for loss of strength in the hand.

## LAW AND ANALYSIS

[42] The Appellant suffered injuries covered under Part VIII of *The Automobile Accident Insurance Act* (the Act) and *The Personal Injury Benefit Regulations (PIBR)* in place at the date of loss on June 29, 1998. SGI accepted coverage and the Appellant received benefits including purchase and/or cost share of tools and equipment, income replacement and permanent impairment benefits.

[43] SGI terminated the Appellant's income benefits effective April 25, 2002 based on his being substantially able to carry out the essential duties of farming. A permanent impairment benefit of 4.5% was paid to the Appellant for loss of range of motion in his right wrist. SGI subsequently advised the correct calculation should have been 2.2% but it was not seeking repayment of the amount overpaid. As well, SGI paid another 2% permanent impairment to the Appellant for the injury to his left clavicle. The Appellant disagrees with SGI's decisions and brings his appeal before this Commission.

[44] The Appellant seeks:

- (a) reinstatement of his income replacement benefits effective April 25, 2002; and

- (b) an increased permanent impairment allowance for loss of strength and injury to his right forearm and hand..

[45] In the circumstances of this case, SGI bears the burden of proving that on a balance of probabilities its decisions for calculation of permanent impairment and termination of income benefits are reasonable (or correct).

[46] The Appellant was self-employed as a [farmer] at the date of the accident. He also worked part-time as a certified refrigeration technician at a local plumbing and heating company. His entitlement to an income benefit is set out in s. 112 of the *Act*:

**112(1)** A full-time earner is entitled to an income replacement benefit if, as a result of an accident, the full-time earner:

- (a) is unable to continue the full-time employment he or she held at the time of the accident;
- (b) is unable to continue any employment that he or she had at the time of the accident in addition to the full-time employment mentioned in clause (a);...

(2) The insurer shall calculate the income replacement pursuant to clauses (1)(a) and (b) on the basis of:

- (a) the gross yearly employment income the full-time earner earned from his or her employment, if the full-time earner holds employment in the employ of another at the time of the accident;
- (b) the greater of:
  - (i) the gross yearly employment determined in accordance with the regulations for an employment of the same class as his or her employment; and
  - (ii) the gross yearly employment income the full-time earner earned from his or her employment;

if the full-time earner is self-employed at the time of the accident;

- (c) the gross yearly employment income earned from all employment that the full-time earner is unable to continue because of the accident, if the full-time earner holds more than one employment at the time of the accident.

(3) The insurer shall calculate the income replacement benefit pursuant to clause 1(c) on the basis of the benefit that would have been payable to the full-time earner.

[47] The phrase “unable to hold employment” is defined in s. 18 of the *PIBR*:

- 18** A victim is unable to hold employment when a bodily injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that the victim:
- (a) performed at the time of the accident; or
  - (b) would have performed but for the accident.

[48] On what basis did SGI determine that the Appellant was substantially able to do the essential duties of his employment? As well, because the Appellant was self-employed but also held part-time employment, is his ability to perform essential duties of the part-time employment also required before terminating benefits?

[49] Ms. Henderson stated SGI's position was:

- (a) based on the medical evidence and the Appellant's testimony, he is able to do the essential duties of his full-time (farming) employment and is no longer entitled to an income replacement benefit; and
- (b) based on the information of the occupational therapist, the Appellant was able to return to work in the refrigeration field and is no longer entitled to an income replacement benefit.

[50] On April 19, 2002 Mr. Petrisor advised SGI's decision to terminate the Appellant's income benefits effective April 25 was because:

“With the additional equipment provided (Dragonspeak Software ½” and ¾” impact tools and baler) you are now substantially able to perform the essential duties of the employment you performed at the time of the accident....”

[51] Following an internal review, Ms. Federko advised the Appellant on August 9, 2002 that SGI's decision to terminate his income benefits was upheld. She wrote in part:

“...you say that you can't work because of the pain in your right arm and that you have no strength. You also told me that there was a lot of things around the farm that you can't do, although you agree that you can do 80% of the work.

“...In reviewing your file it is noted that you indicated to your Personal Injury Representative that you were at 80% capacity as a farmer...

“...we remain of the opinion that as you are substantially able to perform the essential duties of the employment...you are no longer entitled to Income Replacement Benefits.”

[52] What medical evidence SGI relied on to support its decision that the Appellant was able to substantially do the essential duties of farming was not referred to in either letter. No medical

evidence stating the Appellant could do the essential duties of farming as at April 25, 2002 was submitted at the appeal hearing. Moreover, there was no information provided about what are the essential duties of his farming operation.

[53] Dr. Justras, SGI's medical consultant, wrote several letters regarding permanent impairment. Arguably his letter dated March 7, 2002 indirectly deals with the Appellant's ability to work as follows:

"If there is concerns that there is ongoing weakness of the hand and that it may be related to the carpal tunnel, then I think he should be reviewed by his plastic surgeon to determine if this is the case, and if so, whether or not surgery is indicated. If this was the case, then he would not be at maximum medical improvement until surgery was performed. However, I am not certain this is the case, and until I have further information that the median nerve entrapment is leading to weakness of the hand, then no permanent impairment will be assigned."

[54] It is understood that Dr. Justras's letter was regarding permanent impairment and not income benefits however his comments do not assist SGI's position that the Appellant was able to do most of the essential tasks of farming.

[55] Alternatively, I find there is a good deal of evidence often reported by SGI's consultants leading up to the April 19, 2002 decision to terminate income benefits that the Appellant was *unable* to carry out tasks essential to his farming operation. Ms. Henderson submitted these are "old" reports but they were the ones available to SGI at the date of it's decision in 2002. In fact, the Appellant testified the last assessment done before his benefit was terminated was the functional capacity evaluation by Mr. Saretsky in 2000.

[56] Paragraph [4], September 1999, Pat Irwin, physiotherapist, P.A. Health District –

"...limitations to his right arm/hand. Until [the Appellant's] hand condition resolves he will not be able to do a substantial amount of work.

"Swelling continues and resulting pain virtually makes the hand/forearm unusable after a few minutes of continual work.

"In my professional opinion, unless this problem in the wrist/forearm resolves, [the Appellant] will never be able to return to his heating/refrigeration work, and farming will be a very expensive occupation with hiring people or equipment to do necessary work for him..."

[57] Paragraph [10], June 2000, Sharon Kingston, occupational therapist, Kinetik –

“...Sensory status of the right hand remained impaired. A nerve conduction test of April 14, 2000, indicated there was median nerve entrapment of the right carpal tunnel.

“Review of the IRC Consultants reports indicated that [the Appellant] was able to perform the majority of his work on the farm. However, it is the opinion of the undersigned that due to the nature of his upper extremity pathology, [the Appellant] is unable to repeat these activities as required throughout the day as it produces an inflammation in his symptomatology (sic) with increased pain and swelling and subsequently decreases function.

[The Appellant] continues to have exacerbation of symptoms when he exceeds limits of weights and/or frequency or repetitive nature of activity. There is also indication of sensory deficits due to median nerve entrapment at the right wrist. Due to nerve entrapment the following precautions should be taken:

5. Avoidance of vibrating tools.
6. Avoidance of repetitive flexion and extension activities.
7. Gripping or pinching objects while wrist in a flexed position.
8. Gripping objects with your wrist bent towards you (sic) little finger.

“There is a high risk of further injury to the right upper extremity should he pursue all aspects of farm work. It is necessary for [the Appellant] to self-limit his activities so as to minimize the extent of inflammation and pain in his right upper extremity and maximize his functional abilities throughout work and home activities....”

[58] In August 2000 Michael Saretsky, physical therapist, Kinetik –

**“Overall Level of Work**

Based on this evaluation we feel that it is difficult to predict whether the client can sustain this level of work for an 8-hour day.

**“Job Match**

According to the job description provided by Colleen Hancharuk, Occupational Therapist, the client’s abilities **do not match** the job requirements. Specifically, he does not match in floor to waist lift, waist to eye level lift, two handed carry, gross manipulation, and fine motor skills.”

[59] In June 2000 Ms. Kingston noted the IRC consultant’s (presumably Colleen Hancharuk) report that the Appellant *was able* to perform the majority of his work on the farm (although Ms. Kingston states her qualified disagreement). On the other hand, in August 2000, Mr. Saretsky stated that the Appellant *does not match* the job requirements for a farmer according to the description provided by Colleen Hancharuk. These two statements are seemingly contradictory and Ms. Hancharuk did not testify.

[60] Work-site assessments for the farm were carried out by Colleen Hancharuk on October 21, 1999, November 2, 2000 and January 13, 2003.<sup>9</sup> The 1999 and 2000 reports were available to SGI when the decision to terminate the Appellant's income benefit was made on April 19, 2002 but as noted earlier were not provided at the hearing.

[61] Based on the information before me, I conclude that SGI's decision to terminate the Appellant's income benefit was largely based on his saying that he could do 80% of the farm work following the purchase and cost-share of certain tools and equipment. As indicated earlier I find no evidence about what duties were considered essential to the Appellant's farm. That discussion is imperative when determining whether or not a claimant is entitled to an income benefit. The ability to do a certain percentage of work (even 80%) is by itself not sufficient to know whether a claimant can substantially do the essential duties of his or her employment.

[62] Section 129 of the Act deals with termination of income replacement benefits:

**129(1)** Notwithstanding any other provision of this Division, a victim ceases to be entitled to an income replacement benefit when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident; ...

[63] The legislation does not define "able to hold employment" but rather "unable to hold employment" as set out in s. 18 of the *PIBR* and stated in paragraph [47]. What must be determined then is what is meant by *substantially* able to perform the *essential* duties of employment? The phrase is not further defined in the legislation and the ordinary meaning of the words 'substantially' and 'essential' must be considered.

[64] *The Concise Oxford Dictionary* (Oxford: Clarendon Press, 1992) defines "substantially" and "essential":

**substantial** – **1** *adj* of real importance or value; **2** of large size or amount...*adv*  
*substantially*  
**essential** – **1** absolutely necessary; indispensable. **2** fundamental, basic

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<sup>9</sup> work-site assessment Jan. 13, 2003 also conducted for refrigeration employment

[65] Considering the above, it is my view that the Appellant's essential farming duties minimally are feeding (including but not limited to activities of lifting, hauling, shovelling, pitching), watering and bedding animals. In addition to considering the ordinary meaning of the words, the phrase must also be read in context of the overall intent of the section(s).

[66] The intent of ss. 112(1)(a), (b), 112(2)(c) and 129 of the *Act* and s. 18 of the *PIBR* is straight forward – entitlement to income benefits and termination when a claimant is able to return to work and substantially perform the essential duties of his or her job. The ordinary meaning of the phrase in context of the section must include that the ability to perform the essential tasks is reasonably sustainable and able to be carried out within a reasonable period of time.

[67] In 2003 Ms. Hancharuk attended the Appellant's farm and observed the Appellant in his work place. The majority of her report is reproduced at paragraph [35].

[68] She reported that overall nothing on the farm has changed other than the Appellant was diagnosed and treated for [cancer]. Under the **Physical** portion of her report she stated in part:

“...He reported his right hand, although functional in immediate or short term, does lose strength, grip and has increased pain upon any repetitive or sustained movements. *This is no different that what he reported to me on my previous visits.*” (emphasis added)

[69] She goes on to identify specific concerns and problem areas noting in particular hauling bales, bedding, feeding animals, fencing and miscellaneous. Ms. Hancharuk summarized tasks that are two person jobs and tasks that the Appellant was previously independent. She concluded:

“However there are clearly difficulties in using tools, which require [the Appellant]'s grasp such as using a pitchfork with bedding and feeding. Previous notes indicate these tasks were done independently. I am not in a position to identify if since his unrelated illness and subsequent treatment throughout the course of the past two years, [the Appellant] has lost some ability in terms of strength, grasp and tolerance and could contribute to his inability to perform tasks independently. This may need to be identified by an independent medical exam. (emphasis added)

“[The Appellant] has been extremely motivated in obtaining his independence by use of adaptations and modifications. It is documented that many of these adaptations have been funded or cost shared by Saskatchewan Government Insurance. [The Appellant] shows a

strong desire to continue to be independent in spite of his current health concerns. He continues to strive towards maintaining independence, therefore as a Therapist I can identify items suggested by [the Appellant] in terms of technology and mechanical devices will promote further independence and lessen the physical requirements taken to perform these tasks. However I am not in a position to suggest who should be responsible for cost or implementation.”

[70] Ms. Hancharuk’s report is unclear whether the Appellant was independent in the activities before the accident or independent at the dates of her previous reports. It seems logical that she intended he was independent before the accident based on her comments noted in paragraph [68] that nothing has changed and the loss of strength, grip and so on were as reported to her in 1999 and 2000.

[71] She also noted the additional equipment suggested by the Appellant at mediation in December 2002 will assist his independence and make the work easier for him to do. It is unclear whether Ms. Hancharuk is recommending purchase of the equipment or simply stating her professional opinion. Because of the last sentence that she is not in a position to recommend who should pay I am inclined to believe she is stating her opinion but falls short of a recommendation.

[72] Mr. Moser’s letter dated February 19, 2003 says in part: that based on Ms. Hancharuk’s 2003 farm assessment SGI was not prepared to provide further funding for the equipment and it remains satisfied that he is able to substantially complete his farm work. He also refers to the “unrelated health conditions” as possibly contributing to his disability.

[73] Ms. Hancharuk also conducted a work site assessment at employer two in January 2003.<sup>10</sup> She reported the Appellant did not have the dexterity grasp to perform all job duties but there may be some accommodation that could allow some work to be done.

[74] Ms. Hancharuk did not observe the Appellant in the workplace and her conversation with the owner about job accommodation was limited:

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<sup>10</sup> The Appellant has been unable to work as a refrigeration technician since the accident and Ms. Hancharuk did not observe him in the workplace

“(a)lthough this area was not discussed in detail, [the owner] was asked if there was any possible accommodation for [the Appellant] with his disability. [The owner] initially responded their employees have to be physically able to handle all aspects of the job and there would be none, however once he thought about other aspects of the business, he was able to give possible suggestions as in possibly sales.....he would not have the dexterity grasp to perform all job duties, but there may be some modifications made that would allow some work to be done within the premises.”

[75] The owner’s recollection of their conversation was different from what she reported. He wrote there was no position available because of the Appellant’s limited physical abilities.

[76] I don’t accept Ms. Hancharuk’s report as proof that the Appellant’s could return to work at his part-time employment with accommodation. Based on her report that discussion was not fully canvassed with the employer. The employer says no job is available but doesn’t say whether he could accommodate the Appellant. In the end neither document is particularly helpful.

[77] The Appellant strongly objected to his having cancer being used to deny him benefits. SGI is however entitled at common law to rely on an intervening cause or new act to deny or limit benefits or liability. In this instance there are several reports from different therapists<sup>11</sup> who conducted evaluations of the Appellant prior to his diagnosis. These reports document objective findings of inflammation, edema, decreased function, sensory deficits, decreased strength, etc. of the right forearm and hand. As well, the nerve conduction study showed mild carpal tunnel entrapment.

[78] Dr. Jutras commented on the likelihood of median nerve entrapment in his March 7, 2002 letter dealing with permanent impairment. While he disagreed there was any entrapment he acknowledged the weakness in the Appellant’s hand suggesting it could be related to the wrist fractures. The point is that Dr. Jutras was aware that the Appellant was experiencing weakness in his (right) hand and that this was before he had cancer.

[79] Finally, the Appellant testified that he continues to experience debilitating swelling and pain from his elbow to his finger tips after doing repetitive tasks that renders his right arm

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<sup>11</sup> Pat Irwin, PT; Sharon Kingston, OT; Michael Saretsky, PT

essentially useless. He commented that he wished his arm had been amputated so that SGI could see he can't do anything with it. While his comment is rhetorical he makes the point that once the swelling occurs loss of function is as though he doesn't have a right arm.

[80] I am overwhelmingly satisfied based on the evidence before me that the Appellant is unable to substantially perform the essential duties of his farming occupation and that he is unable to work in his part-time employment because of debilitating swelling and loss of strength in his right forearm extending from his elbow to the ends of his finger tips.

[81] SGI terminated the Appellant's income benefits in April 2002 based largely on his saying he was able to do 80% of the farm work. The decision was upheld in August 2002 following an internal review and mediation in December 2002 did not resolve their differences.<sup>12</sup> Following work site assessments by Colleen Hancharuk, SGI's position remained unchanged in February 2003 being the decision from which this appeal is brought.

[82] No determination was made of what are the essential duties on his farm or if a determination was made it was not provided at the hearing nor was it referred to in any correspondence to the Appellant. In my view, essential duties minimally include those activities performed to feed, water and bed livestock. I am satisfied the problem with the Appellant's right forearm and hand was reported by various professionals prior to his diagnosis with cancer. I am satisfied that the Appellant's cancer was not an intervening cause or a new act that SGI can rely on to limit its responsibility to pay an income benefit for purposes of this appeal.

[83] Ms. Hancharuk did not testify and there are questions arising from both of her 2003 reports.

[84] The Appellant did not meet the dictionary of occupational codes for a farmer that is described as medium level work. There is a positive history of his desire to be independent together with his tendency to over extend just to get the work done. He has continued to farm

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<sup>12</sup> the permanent impairment award was also considered

with the assistance of his family and through his own tenacity, suffering through disabling inflammation and pain and working increasingly longer and longer hours.

[85] SGI has not met its burden of proof in this case. It's decision dated February 19, 2003 that the Appellant is substantially able to complete the essential duties of his farming operation is set aside.

[86] Permanent Impairment Benefit

The *Act* and *PIBR* provide:

**153** In this Division, “**permanent impairment**” includes a permanent anatomical or physiological deficit, a permanent disfigurement, a permanent acquired brain injury or any other permanent impairment prescribed in the regulations.

**154** Subject to this Division and the regulations, a victim who suffers a permanent impairment because of an accident is entitled to a lump sum benefit for the permanent impairment.

**156(1)** The insurer shall evaluate a victim's permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

(2) If a victim's permanent impairment is not listed on the prescribed schedule of permanent impairments, the insurer shall determine a percentage for the permanent impairment using the prescribed schedule as a guide.

**36** Compensation for permanent impairments is to be determined on the basis of Appendix B.

[87] The *Act* does not define “permanent impairment” beyond the reference in s. 153 to a “permanent anatomical or physiological deficit”. The *PIBR* are also silent other than saying compensation shall be determined based on Appendix B.<sup>13</sup>

[88] Dr. Jutras assessed the Appellant's permanent impairment for loss of range of motion to his wrist at 4.5% pursuant to Appendix B, Part 1, Division 1, Subdivision 1, Item 8.b SGI

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<sup>13</sup> The 2002 Regulations provide the following definition: “**permanent impairment** – is an impairment that has become static or has stabilized during a period of time sufficient to allow optimal tissue repair and one that is unlikely to change significantly with further therapy. This time period is referred to as Maximum Medical Improvement (MMI). MMI does not preclude follow-up, maintenance or palliative care or an alteration of the medical condition with the passage of time”

subsequently advised the calculation was incorrect and should have been 2.2% but would not claw back the overpayment.

[89] The Appellant has always maintained the problem is not loss of range of motion in his wrist but the loss of function and strength of his right forearm and hand (from the elbow to finger tips) because of debilitating inflammation and pain.

[90] Loss of function was first objectively reported by Pat Irwin in 1999. She stated “(S)welling continues and resulting pain virtually make the hand/forearm unusable after a few minutes of continual work.” All therapists reported similar objective findings.

[91] In 2003 Ms. Hancharuk noted the Appellant’s subjective complaints - “(H)e reported his right hand, although functional in immediate or short term, does lose strength, grip and has increased pain upon any repetitive or sustained movements. This is no different than what he reported to me on the previous visits.” She observed difficulties with grasp and using tools such as a pitchfork and commented he was previously independent. She also confirmed the Appellant had lost some strength, grasp and tolerance but questioned whether his cancer was a related cause. I have previously commented on the latter and do not intend to do so again here.

[92] On March 9, 2000, Dr. Clapson said “I think [the Appellant] has a chronic problem in his upper extremity and I wonder if he is not continually overusing it in his job on the farm...” A nerve conduction study shows evidence of possible median nerve entrapment. On May 2, 2000 Dr. Clapson said surgery was not indicated unless there was “persistent numbness interfering with the use of the hand”. The Appellant’s complaint is loss of strength and function in his right forearm and hand from swelling rather than from numbness in his hand.

[93] On March 7, 2002, Dr. Jutras wrote:

“...I would think if he was having significant weakness related to the median nerve entrapment that Dr. Clapson would have commented on that in his May 2, 2000 letter.

“If there is concerns that there is ongoing weakness of the hand and that it may be related to the carpal tunnel, then I think he should be reviewed by his plastic surgeon to determine if this is the case, and if so, whether or not surgery is indicated. If this was the case, then he

would not be a maximum medical improvement until surgery was performed. However, I am not certain this is the case, and until I have further information indicating that the median nerve entrapment is leading to weakness of the hand, then no permanent impairment will be assigned.”

[94] In August 2002 following an internal review Ms. Federko stated the regulations do not specifically deal with loss of strength related to the wrist but that this impairment was included in the loss of range of motion calculation. She also commented the legislation does not compensate for pain and suffering. Mr. Justice Klebuc however in *Chernoff v. SGI*, 2002 SKQB 383 stated at paragraph 1 of his decision:

“...(T)he Act and the Regulations do not, in my opinion, express a clear intention to deprive persons who suffer a disabling motor vehicle injury, based in part on pain that limit a claimant’s capacity to work, from receiving compensation under s. 154 of the Act.”<sup>14</sup>

[95] Ms. Henderson submitted the Appellant was properly compensated for the permanent impairment pursuant to Appendix B.

[96] The Appellant stated he has not been compensated nearly enough for the loss of use of his forearm. He submitted Appendix B, Division 2, Subdivision 2, Part 3, item 3.1(e)<sup>15</sup> – “difficulty manipulating objects with impaired prehension confined to only one of the upper limbs, allowing independence in self-care – 30% as more appropriate. The comparative sections of the *PIBR* in place at the date of loss are: Appendix B, Division 2, Subdivision 3, item 13(c)(vi) – “difficulty in handling nonetheless allowing the use of one limb for grasping and holding, but without problems for self care – 25 to 35%

[97] Mr. Henderson pointed out that these sections refer to spinal chord and brain injury and are therefore not applicable.

[98] As stated before SGI bears the burden of proof to show that it’s decision was reasonable and according to the regulations in place in June 1998. I am satisfied that on a balance of probabilities it has not met that burden. Dr. Jutras is correct the regulations do not deal directly

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<sup>14</sup> QBG 492, Judicial Centre of Saskatoon; to the best of my knowledge as at the date of writing the within decision, the *Chernoff* case had not been appealed

<sup>15</sup> 2002 *PIBR*

with permanent impairment for loss of strength related to the wrist injury but he doesn't go far enough. The *Act* requires SGI to use the prescribed schedule as a guide if the impairment is not listed.

[99] I disagree agree the Appellant's loss of function and strength in his right forearm and hand are included in the loss of range of motion of the wrist. The Appellant testified the only reason his doctor measured the loss of range of motion in his wrist was because Dr. Jutras told him to do so. For more than two years the Appellant has said the loss of range of motion in his wrist was not the main problem.

[100] There is objective evidence from Pat Irwin, Sharon Kingston and Michael Saretsky starting in 1999 reporting the loss of function and strength in the Appellant's right forearm and hand. A nerve conduction study in 2000 was consistent with possible median nerve entrapment. Dr. Clapson said surgery was not indicated until numbness in his hand was the complaint. This was not his complaint. Dr. Jutras was not convinced there was median nerve entrapment and felt that loss of range of motion in the wrist was appropriate compensation.

[101] I reject SGI's submissions that the Appellant's loss of function and strength in his right forearm and hand are not eligible for compensation as a permanent impairment nor do I accept that it has been properly included in loss of range of motion in the wrist. It is more than that and the problem has been objectively documented and persists to the present day. I am satisfied the impairment is permanent.

[102] SGI has a statutory duty under s. 156 of the regulations to determine a percentage for the permanent impairment *using the prescribed schedule as a guide if the permanent impairment is not listed in Appendix B*. Ms. Henderson is correct the part of the regulations referred to by the Appellant deals with spinal chord and brain injuries. I am not prepared to assess the permanent impairment but I note however the descriptions referred to above in both the 1998 and 2002 regulations appear to reasonably describe the nature of the Appellant's loss of function and strength in his right forearm and hand.

[103] SGI's decision that the Appellant is not entitled to further permanent impairment is set aside.

[104] SGI is ordered to:

- i) reinstate the Appellant's income benefits effective April 25, 2002 calculated from all sources of income together with interest as set out in the *Act*<sup>16</sup>;
- ii) comply with the provisions of s. 156(2) and assess the permanent impairment for loss of function and strength to the Appellant's right forearm and hand.

[105] Further, as the Appellant has been successful in his appeal, he is entitled to a refund of his \$75 filing fee for this appeal and payment for mileage and meal allowance, as prescribed, to attend the appeal hearing.

**DATED** at Regina, Saskatchewan, on November 9, 2004.

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Beverly Cleveland, Chair

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<sup>16</sup> Pursuant to s. 193(9) of the new *Act*, the Commission has authority to award interest on the amounts not paid from the date when it should have been paid until the date of this decision at the rate prescribed under s. 210 of the new *Act* and s. 102 of the *PIBR* in accordance with the *The Pre-judgement Interest Act*