

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *B.I. v. Saskatchewan Government
Insurance, 2007 SKAIA 061*
Date: 20070511
File: 067 of 2006

BETWEEN

B.I., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
B.I., Applicant
Dale Brown, for the Respondent

Before: **Jane Lancaster, Q.C., Chair**
Stephanie Pfefferle, Commission Member
Darleen Topp, Commission Member

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

Heard at Prince Albert, Saskatchewan
March 20, 2007

DECISION

[1] The Appellant, B.I., has appealed three decisions of Saskatchewan Government Insurance (SGI) regarding his entitlement to benefits under Part VIII of *The Automobile Accident Insurance Act* R.S.S. 1978, c. A-35 (the *Act*).

[2] On November 16, 1998, the Appellant was the restrained driver of a tow truck that struck another vehicle in the intersection. The Appellant hit his head on the back window and his forehead on the steering wheel.

[3] When he went to the hospital, he was treated for bruising around his right eye, bruising on his torso from the seatbelt and numbness in his right hand. He was diagnosed with:

- WAD II
- Low Back Pain I
- Cervicogenic headaches
- Left vertebral artery occlusion
- Concussion, which resulted in temporary change in vision

[4] The Appellant tried to continue his occupation as a tow truck operator and salvage operator, but he experienced difficulties using his right hand, especially for heavy lifting, and holding on to objects. In addition, he continued to experience severe headaches which affected his ability to work.

August 23, 2004 Decision Letter – Income Replacement Benefits

[5] The Appellant received a letter from SGI on August 7, 2003 in which SGI advised that, pursuant to section 132 of the *Act*, because he was unable to hold his original employment, SGI could determine appropriate employment taking into consideration his situation. The appropriate occupations were deemed to be:

- a) Security guard and related occupations
- b) Truck drivers

- c) Dispatchers and radio operators
- d) Retail trade managers (salvage dealer, parts manager)
- e) Customer service, information, and related clerks (order desk-parts, customer service – auto)

[6] The Appellant was given 14 days to review the list of occupations and to advise SGI which occupation he chose.

[7] As the Appellant did not respond within the required 14 days, SGI wrote to him on August 28, 2003 advising that as he was at maximum medical improvement, and it was 2 years (actually almost 5 years) after the motor vehicle accident, and as he had not chosen from the list of occupations, SGI had determined his employment as a tow truck operator. The Appellant was also informed that one year from the date of this determination (August 28, 2004), his income replacement benefit would be adjusted to take into consideration the biweekly income replacement benefit of the determined employment (tow truck operator).

[8] The Appellant was receiving an income replacement at the time of \$674.74 (amount calculated as of 2004).

[9] On August 28, 2004, SGI advised the Appellant that the income of his determined employment was greater than the income replacement he was currently receiving and so pursuant to subsection 129(1)(d) of the *Act*, his income replacement was terminated.

December 13, 2004 Decision Letter – Permanent Impairment Benefits

[10] The Appellant received permanent impairment for a right elbow scar at 4.5%, and a forehead scar at 3.0% for a total of 7.5 % permanent whole body impairment.

August 8, 2005 Decision Letter – Permanent Impairment Benefits

[11] The Appellant received an additional 0.6% permanent impairment for his right elbow scar.

Preliminary Issue:

[12] Counsel for SGI took the position that the Appellant had appealed the August 28, 2003 decision letter to the Automobile Appeal Commission on June 6, 2006 and this appeal was prior in time to the September 12, 2006 date when mediation on this matter had officially terminated. Although section 191(1)(b) of the Act provides that an appeal should be filed 60 days after the date of the letter from the mediator that mediation had terminated, we take the view that neither party is prejudiced and we have jurisdiction to review SGI's decision on determination of employment as well as the issues relating to his permanent impairment benefits.

STANDARD OF REVIEW

[13] The Commission has the jurisdiction under section 193(7) of the *Act* to set aside, confirm or vary a decision of SGI or make any decision that SGI is authorized to make pursuant to Part VIII of the *Act*.

[14] The Court of Appeal for Saskatchewan addressed the standard of review applicable for appeals to this Commission in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA89. The Court in that case noted that more than one standard of review was indicated by the legislation and the appropriate standard of review depends on whether SGI has discretion to grant or deny the particular benefit claimed.

[15] SGI has discretion regarding when the process of determining an employment begins under section 132, "... [F]ollowing the second anniversary of the date of an accident...". In fact, in the Appellant's case, it was started about 5 years after the accident. However, once the determination process begins, SGI must comply with the legal framework as per sections 132, 134 and 129(1)(d) of the *Act* and sections 17 and 25 of the *Personal Injury Benefits Regulations* (the *Regulations*).

[16] There is no discretion with regard to this benefit and accordingly, the standard of review is correctness. As well, since SGI terminated the Appellant's income benefits

pursuant to the determination process, it has the burden of proof on a balance of probabilities.¹

LAW AND ANALYSIS

The legal framework for the determination process scheme is as follows:

Determination of Employment After Second Anniversary of Accident

132 Following the second anniversary date of an accident the insurer may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112...²

Factors Applicable to Determinations Pursuant to Sections 132 and 133

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

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved pursuant to this Part;
- (c) whether the employment is available in the region of Saskatchewan in which the victim resides;
- (d) the employment that the victim is able to hold:
 - (i) a regular and full time basis; or
 - (ii) if it would not be possible for the victim to hold employment on a regular and full time basis, on a part time basis;
- (e) any other prescribed factors.³

[17] There are no specific “prescribed factors” applicable under the *Regulations*.

[18] Section 17 of the *Regulations* states:

¹ *Job v. Saskatchewan Government Insurance*, 2004SKCA 164

² Section 112 applies to a fulltime earner at the date of the accident. Sections 113 and 131 apply to people who would have held more remunerative employment but for special circumstances, or people who were temporary earners, part time earners or non-earners.

³ Section 133 refers to determination of employment for a student or a youth.

For the purposes of clause 134(c) of the *Act*, an employment is available to a victim in the region of Saskatchewan where the victim resides when, at the time the insurer determines an employment for the victim:

...(b) the employment or the category of employment exists and is likely to continue as an employment or category of employment within the foreseeable future.

Also, section 25 of the Regulations directs the reader to Appendix A when considering classes of employment and gross yearly employment income when an employment is determined under section 132, as follows:

25 The classes of employment and the corresponding gross yearly employment incomes set out in Appendix A apply to calculating the gross yearly employment income pursuant to the following provisions of the *Act*...

(f) Section 132 in the case of an employment determined pursuant to that section.

[19] The income replacement benefit ends completely or is reduced one year after the date the victim is able to hold a “determined” employment.

Termination of Income Replacement Benefit

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:

...(d) one year has expired from the day the victim is able to hold an employment determined for the victim pursuant to section 132 or 133;

(2) Notwithstanding clause (1)(d), if a victim falls within the circumstances described in subsection 139(1), the victim’s income replacement benefit is to be reduced pursuant to section 139 and is not to be terminated pursuant to subsection (1).

Determination of employment:

The Appellant’s injuries, in particular, his severe headaches and numbness in the fingers of his right arm, were such that following rehabilitation, he was unable to return to his job towing cars for salvage and selling salvage on a full time basis.

Once the Appellant was rehabilitated to the maximum medical improvement, SGI arranged to have him assessed to ascertain what he could and could not do, and if he could be returned to the work force and under what conditions:

- (1) FIT Reassessment Report dated September 23 and 24, 2002
- (2) N.R.C.S. Transferable Skills Analyses Report with attached Job Profiles done on May 1, 2003.
- (3) Residual Capacity Evaluation from Kinetick for Initial Assessment done on May 14 and 15, 2003
- (4) Physical Work Performance Evaluation Summary done on May 16, 2003.

[20] As a result of these assessments, SGI wrote to the Appellant on August 7, 2003, advising that he was capable of holding employment in the following occupations outlined in paragraph [5].

[21] The Appellant was asked to choose one of these categories and as he did not, SGI advised that they would choose one of the categories for him.

[22] As a result, in an August 28, 2003 letter, SGI selected a “determined occupation” for him as a Tow Truck operator. Under Appendix “A” of the *Regulations* then in force this occupation had an average annual income of [amount] or [amount] bi-weekly (as of August 23, 2004).

[23] For the Appellant’s purposes, this meant that if he did not find employment within one year of August 28, 2003, his actual income replacement benefit of [amount] biweekly (as of August 23, 2004 based on his previous occupation) would cease as effective August 29, 2004, his determined employment would be greater than his current income replacement benefit.

Permanent Impairment Issues

[24] The Appellant also raised the issue of the determination of his permanent impairment benefits, in particular, a scar over his right eyebrow, a scar on his neck, loss of vision to his right eye, and loss of strength and function in the grip of his right hand.

[25] The Appellant had been assessed for permanent impairment for his right elbow scar (5.1%) and forehead scar (3.0%) with an additional 2% due to alteration of his cerebral tissue following concussion.

[26] The Appellant was of the view that his forehead scar had not been properly considered as it was not a flat scar, but an indentation which he felt was prominent and therefore was “conspicuous and holds one’s attention” within the meaning of Class 4, Table 15 of the *Regulations*.

[27] In this case, we are of the view that SGI’s decision cannot be upheld on the Appellant’s forehead scar. In coming to this decision we have given consideration to the *viva voce* evidence of the Appellant, the photographs of the injury as well as our own observations.

[28] Part 2 Disfigurement, Division 2 Disfigurement of the Face in the *Regulations* provides instructions for the determination of permanent impairment benefit (PIB) in relation to facial disfigurement. First, it divides the face into what it calls “anatomical elements”. Next, it provides guidelines for the determination of the appropriate PIB when there is alteration in form and symmetry of the face, scarring or both.

[29] In the Appellant’s case, SGI concluded that he had a flat scarring of 3 cm². This conclusion was, we understand, based on an examination of photographs of the Appellant’s forehead and measurement made by Tracy Procknow.

[30] This was considered a scarring affecting one anatomical element and, therefore, to be compensated in accordance with Table 15. For ease of reference, the relevant portion of Table 15 is reproduced below:

Table 15. Evaluation of Physiognomy Impairments

[Item 3 in Division 2]
EVALUATION OF PHYSIOGNOMY IMPAIRMENTS

Class of physiognomy impairments	Changes in the form and symmetry	Cicatricial Impairment	Max. Disfig.
Class 1 No impairment	Inconspicuous change	Inconspicuous Impairment	---
Class 2 Very minor impairment	Very minor change	Conspicuous Impairment 1% per cm ²	3%
Class 3 Minor impairment	Conspicuous change and: (a) affecting one anatomical element: 3% (b) affecting two anatomical elements: 4% (c) affecting more than two anatomical elements: 7%	Conspicuous Impairment and: (a) flat scar: 1% per cm ² (b) faulty scar: 2% per cm ²	7%

[31] While he assessed PIB at 3%, Dr. Taillon neglected to indicate the Class on Table 15 from which he drew the percentage. However, we can deduce that he considered the Appellant's scar as a Class 2 flat scar. We are satisfied that Dr. Taillon considered the Appellant's scar as a conspicuous change affecting one anatomical element under subsection (a) of Class 3 impairments.

[32] The Appellant, by bringing the appeal and in his evidence, has taken the position that an award of 3% is not adequate. He characterizes the deformity as a "hole" in his forehead.

[33] Since no one has suggested that the Appellant's disfigurement affects more than one facial element (forehead), and we are satisfied that it does not, we are left to consider these questions as follows:

- (1) Is the Appellant's forehead scar a flat surface scar or a faulty scar?

- (2) Is the classification of the Appellant's facial disfigurement as Class 3 appropriate or is his scar a conspicuous change that holds one's attention?

[34] We are satisfied that the Appellant's scar is a faulty scar and should be calculated at 2% per cm².

[35] We are also satisfied that the classification as Class 3 is appropriate. The Commission had opportunity to view photographs of the Appellant's face in the photographs taken by Ms. Procknow and Ms. Lesyk. We also had opportunity to observe the injury in the course of the hearing.

[36] The Appellant's disfigurement is not inconspicuous and cannot, therefore, be properly classified as Class 1 or Class 2. On the other hand, while conspicuous, it does not hold one's attention. This Commission considered the question of the distinction between a disfigurement that is conspicuous and one that is conspicuous and holds one's attention.

[37] In *O.I. v. Saskatchewan Government Insurance*⁴, the Commission accepted that Class 3 impairment was scarring or a change in form or symmetry that is easily recognized by an observer but is not the focus of the overall observation of the person's face. The Commission accepted that for Class 4 impairment, there must be a noticeable change in the tissues that is the complete focus for an observer for some period of time.

[38] In our view, the Appellant's facial disfigurement most readily fits within the Class 3 definition. While one might notice the scar, one's attention is not generally focused on it; it would certainly not be the complete focus for an observer. It is not a hole, but rather an indentation and skull x-rays did not show any bone changes.

[39] With regard to the Appellant's neck abrasion, we accept the opinion of Dr. Taillon that this injury was not the result of the motor vehicle accident. There is no report of any lacerations or abrasions on the Appellant's neck at the time of the accident.

[40] In addition, we agree with the assessment of Dr. Taillon, based on the reports of Dr. Blackwell that there was no permanent impairment to the Appellant's eyes and any injury

has been completely healed. Therefore, we uphold SGI's decision that the Appellant is not entitled to receive permanent impairment for an ocular injury.

[41] With regard to the Appellant's loss of strength and function of his right hand, the *Act* and *Regulations* 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.

[42] The *Act* does not define "permanent impairment" beyond the reference in section 153 to a "permanent anatomical or physiological deficit". The *Regulations* are also silent other than saying compensation shall be determined based on Appendix B.⁵

[43] SGI has a statutory duty under section. 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*. The assessment of Ms. Lesyk regarding the Appellant's grip strength as well as the testimony of Mr. Usher confirm that there is a significant lack of strength and grip between the Appellant's right and left hand.

⁴ 2005 SKAIA 067

⁵ 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."

[44] Loss of strength and grip is not identified as compensable in the *Regulations* dealing with permanent impairment, in particular, Appendix B.

[45] The issue for this panel is whether the statutory duty on the insurer to use Appendix B “as a guide” if the impairment is not listed,⁶ and potentially allows the panel to create a new heading for permanent impairment dealing with loss of strength and grip.

[46] We are aware of the case of *T.V. v Saskatchewan Government Insurance*⁷ in which [T.V.] was successful in appealing a determination for permanent impairment for the loss of strength of his forearm and hand. In that case, the Saskatchewan Automobile Injury Appeal Commission found that T.V.’s loss of strength was not properly compensated by using the range of motion of the wrist, and that it was objectively documented and was permanent. SGI was ordered to assess the permanent impairment for loss of function and strength to T.V.’s right forearm and hand pursuant to s. 156(2) of the regulations.

[47] We respectfully disagree with the *T.V.* case. Our analysis of Appendix B convinces us that there is nothing to indicate that loss of strength was intended to be included as a basis for compensation. We are of the view that if loss of strength was intended to be included in the Personal Injury Benefits Regulations, it would be specifically outlined in the regulations as permanent impairment for loss of range of motion is set out.

[48] We therefore conclude that the *Act* and *Regulations* did not intend to allow the existence of loss of strength as a basis for compensation for permanent impairment. In addition, we are of the view that there is nothing in Appendix B that could be used “as a guide” to award compensation for loss of strength.

Job Determination

[49] The Residual Capacity Evaluation Report noted the following impairments and limitations:

⁶ *D.E. v. SGI*, 2005SKAIA014

⁷ 2004SKAIA054

- Constant headache
- Decreased grip strength/grasp of the right hand
- Lightheadedness/dizziness particularly in forward flexed positions
- Elevated heart rate and shortness of breath related to deconditioning
- Nosebleed developed during squatting.

[50] The Functional Capacity Evaluation Summary of Findings stated:

[The Appellant] presented as independent with respect to personal care and household tasks. He has also resumed a fairly active lifestyle in terms of leisure activities which include raising horses and traveling to rodeos to run chuck wagon teams during the summer months.

[The Appellant's] main expressed issues were with respect to work activities. Prior to his motor vehicle accident, [the Appellant] was working on a self-employed basis as a tow truck operator and salvage operator in [town]. He owns his own scrap yard and his business is mainly related to attaining vehicles for scrap purposes, either for parts or for crushing.

[The Appellant] has returned to work in his salvage yard and he relates that he often spends long hours of 10 to 16 hours per day at the scrap yard, however, feels that he accomplishes very little during the time. His business (for whatever reason) has decreased from 300 cars annually to approximately 75 cars annually. Some of the issues he continues to note as difficulties include general levels of fatigue as well as reduced right arm function including reduced right grip strength.

During the Functional Capacity Evaluation, [the Appellant] demonstrated the ability to work at a medium level, which would be consistent with work over a 8 hour day. His main limitations during assessment were decreased right grip strength and grasp of the right hand, lightheadedness/dizziness in forward flexed postures and an elevated heart rate and shortness of breath related to deconditioning. In comparison to job demands on file, [the Appellant] does reasonably meet the job demands as a tow truck operator, however, he is not a match for job demands of a salvage operator. There were observed inconsistencies in right hand function during the Functional Capacity Evaluation. At times [the Appellant] demonstrated the ability to grasp only with his thumb and index finger on his right hand, while at other times he demonstrated a full composite flexion pattern with all of his fingers on his right hand when performing activities such as doing up nuts and bolts or manipulating other objects.

[51] The N.R.C.S. Transferable Skills Analysis Report with attached Job Profiles was carried out by Magan Braun, Rehabilitation Consultant. In addition, she conducted a Labour Market Analysis.

[52] She concluded that the following occupations have been identified as potentially suitable positions for the Appellant based on his education, training, experience, and functional abilities. They are:

- NOC#0621 Retail trade Manager (Occupational titles include Salvage dealer, Parts Manager)
- NOC#6651 Security Guards and Related occupations (Occupational titles limited to Commissionaire, Preboarding security, and Gate Attendant to remain within limitations set by FIT.)
- NOC#7411 Truck Drivers (Occupational titles include: Tow truck driver)
- NOC#1471 Dispatchers and Radio Operators (Occupational titles include: tow truck dispatcher, taxi dispatcher.)
- NOC#1453 Customer Service, Information and Related Clerks (Occupational titles include: Order desk (parts), Customer Service (auto).

[53] Ms. Braun advised in her report: “It should be noted that at the time of this consultant’s interview with the Appellant, he indicated that he did not want to pursue alternative employment and that he wanted to be able to fully return to his pre-accident employment. He has attempted a return to work since his discharge from FIT, however has not been able to return to full duties as a result of remaining limitations.”

[54] The Appellant testified at the hearing and took issue with the conclusion that he was capable of working an 8 hour day consistently. He testified that he suffers frequent headaches and the pain from the headaches is such that he is dizzy and unable to work. He says some days he can handle the headache pain but he cannot predict when and for how long he is incapacitated by the headaches. He indicated to assessors that physical labour increased the likelihood that he would experience headaches.

[55] In addition, he indicated that his right forearm and 3 fingers of his right hand are numb and even though he tries to compensate in his work by using his left hand with aids to assist him, he is clumsy with his tools, dropping them, and on at least one occasion cutting his right hand severely, but not being aware of the injury due to lack of sensation.

[56] In his testimony, he testified that since the accident he needs to have someone accompany him in case he has a bad headache or injures himself. He testified that this affects his self esteem as he had prided himself on his self sufficiency and physical abilities before the motor vehicle accident.

[57] Before the Appellant's motor vehicle accident, he was renting a building in [town], and operated a salvage contract with [the First Nation] to pick up derelict vehicles for scrap, and operating a tow truck with an old type of boom and sling.

[58] It is unclear what happened to the Appellant's shop in [town], although it appears it was seized by the landlord over a rental dispute. In addition, the Appellant no longer has a tow truck as he indicated that it had broken down and it was not worth the money to repair it.

[59] At the present time, the Appellant appears to be working repossessing cars for [employer] using a borrowed ¾ ton truck on which he pays a monthly fee. As he can set his own hours and work when he can, he testified that he is able to manage with his current disabilities albeit with little financial gain.

[60] The Appellant's situation regarding the determination process is somewhat unique in that he has been determined into an occupation which he previously was working. In addition, he had indicated that he had no interest in any vocational training or employment that was different than his previous employment of salvage and tow truck operator. He would like to return to the situation he was in prior to the accident, but because of the headaches and right hand weakness, he is not able to do so.

[61] The only basis upon which a person can challenge the "determination" is that the insurer has not appropriately considered the factors set out in section 134. It is on that basis that we must consider in the Appellant's case.

[62] The Appellant was classed as a full-time worker as per the definition set out in section 14 of the *Regulations* and income benefits were paid as per section 112 of the *Act* and section 20 of the *Regulations*.

[63] Under the “no fault” provisions of the Act, if an injured worker is unable to return to his or her former job after two years of rehabilitation, SGI assesses the worker’s residual earning capacity, meaning “what are the worker’s present earning capabilities?” SGI is to consider the worker’s education, training, work experience, current abilities, etc to “determine what kind of occupation the person may be able to perform.” If that occupation pays less than the former job, SGI pays the difference between the income earned at the former job and the worker’s current earning capacity.

[64] The Appellant was determined into an employment after the second anniversary of his accident as per section 132 of the *Act*: “Following the second anniversary of the accident, the insurer may determine an employment for a victim of an accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112 or 113 or determined pursuant to s. 131.” In this case the determination was about five years post accident.

[65] The determination process under the *Act* requires SGI to put its ‘mind’ to whether there is any particular employment in the region of the province where the Appellant resides and that he can perform. The *Act* does not require that SGI actually find a job for him nor does it provide he will continue to receive his original income benefit until he actually gets a job.

[66] SGI hired medical and vocational professionals to assist in determining employment. The Residual Capacity Evaluation (RCE) assessment took place at Kinetic at Saskatoon City Hospital on May 14 and 15, 2003. The team was comprised of an occupational therapist, psychologist and medical doctor. At the conclusion of the assessment, the team provided their opinion that the Appellant was capable of returning to a medium level with endurance levels appropriate to work over an 8 hour workday. This was seen as a general match for activities as a tow truck driver, but was not a match for the functions as salvage operator. We note the team’s comments:

[The Appellant] has had a vocational rehabilitation counselor involved with his treatment, including his graduated return to work. Given the self-employed nature of his job and the fact that he often works alone, there has been little identified in the way of accommodation which would make a

significant difference in his function other than needing to fully utilize lifting aids such as cranes available at work.

[The Appellant] does identify pieces of equipment such as a tow truck with a wheel lift and loader, which he feels would make a difference to his level of independence with work/business activities. However, without onsite assessment of how this might affect him, it is not possible to comment on this.

[67] In addition to the RCE report, SGI also had a Transferable Skills Analysis and a Labour Market Survey completed by Magan Braun of NRCS Consultants. Based on her report, the Appellant was provided 5 occupations from which to choose employment.

[68] The Appellant did not choose one of the occupations, so SGI chose the occupation of tow truck operator for him. This employment was one that the Appellant had indicated to Ms. Braun that he wanted to keep working (tow truck and salvage) and to perform more of his required duties rather than look at alternative employment.

[69] The Appellant says that he can probably work at a medium level but not for 8 hours a day consistently. He testified that on occasion he can work for 8-10 hours and then the next day he may be unable because of his headaches to work for more than 2 hours. Being self employed allowed him to be flexible with regard to his work hours.

[70] We accept the Appellant's evidence that headaches are a predominant residual effect for him and that these headaches are exacerbated by forward flexing and physical exertion.

[71] It appears that all of the Appellant's assessors were of the view that the Appellant was self employed and, therefore, would be able to manage any effects that headaches may have on his job. None of the assessors put their mind to what effect his headaches had on the Appellant's ability to work as an employee to a tow truck operator. The Appellant advised that he had approached tow truck operators for a job and was informed that they required steady and consistent hours of work and, in addition, they expressed concerns that the Appellant's numbness in his right hand caused them safety concerns not only for the Appellant but to anyone who was working with him.

[72] We agree with counsel for SGI that the Appellant did not challenge that the determined employment was not related to his qualifications and experience. The

Appellant testified that he was attempting to do the job with limitations until his tow truck was damaged.

[73] The sole question in our minds is whether the Appellant is capable of doing the job for 8 hours a day on a full time basis. We accept Mr. Usher's comments that the RCE does not determine whether the individual can work full time or part time and the benchmark is what the person's prior routine was.

[74] SGI requested that NRCS undertake further research into the position of a tow truck operator which was undertaken by Ms. Berg who interviewed a number of towing companies in Saskatoon as to duties of a tow truck operator. This information was provided to Mr. Usher of Kinetick and he confirmed that in his opinion, the Appellant had the ability to perform these tasks particularly if the tow truck in question was a wheel lift tow truck rather than the older sling/boom truck that the Appellant had used.

[75] Counsel for SGI also referred us to the decision in *Gerald Job v. Saskatchewan Government Insurance* 2002 SKQB479; 2004SKCA164. In particular we are referred to Mr. Justice Matheson's comments in the lower court: "For a court, without any real basis therefore, to substitute its opinion for that of experts would equally be the epitome of injudiciousness".

[76] As we have said in previous decisions, SGI is entitled to rely on the reports of its experts. As in *Job, supra*, in the Appellant's case, SGI complied with the statutory scheme for the determination process.

[77] This case is complicated by the fact that the Appellant was determined into an occupation that he had been doing prior to the accident, and to some extent, after the accident. It is an occupation that the Appellant has indicated a strong preference, in fact, stating that he was not interested in considering other vocational options. It is an occupation that it is likely he would still be working except for the fact that his tow truck was damaged and his finances did not allow him to repair or replace the vehicle.

[78] If we determine that SGI was in error in determining the Appellant met the factors of physical abilities in subsection 134 (a) or is not capable of regular and full time basis; or if not at full time, but on a part-time basis pursuant to subsection 134 (d), then SGI's decision letter of August 23, 2004 is set aside and the Appellant will receive income replacement benefits.

[79] It is clear that the Appellant has some ability to work and it is not up to SGI to find him employment nor to provide him with appropriate equipment so he can work for himself. Our decision does not preclude SGI from determining the Appellant into employment or for the Appellant to insist that he only can work for himself.

[80] We are of the view that the impact of the Appellant's headaches on his ability to be employed full time for 8 hours per day on a regular and full time basis was not appropriately considered. In addition, the impact of loss of strength of his right hand and numbness in his fingers was considered by Mr. Usher in determining his ability to do required tasks of the employment, but there is no evidence if the Appellant's right hand disability was considered as a safety issue for himself or others.

[81] Therefore, SGI's decision letter of August 23, 2004 is set aside.

CONCLUSION

[82] SGI's decision to determine the Appellant into the category of tow truck operator is set aside.

[83] His income replacement benefit is reinstated retroactive to the date it was terminated, and payable together with prejudgment interest.

[84] With regard to permanent injury benefits, the Appellant was successful in the re-assessment of his forehead scar. We do not find him eligible for permanent injury benefits for loss of strength in his right hand grip, nor his neck abrasion, nor loss of vision in right eye. We note that there is a report from Dr. Gore-Hickman dated September 2, 2005 where there is mention for the first time that the Appellant may suffer from right TMJ muscle pain. This is the only mention of the Appellant suffering this condition and in our view,

there is not sufficient evidence that this condition was caused by the 1998 motor vehicle accident.

[85] As the Appellant has been partially successful in this appeal, he is entitled to a refund of his appeal fee and reasonable costs capped at \$2,500.

Dated at Regina, Saskatchewan, on the 10th of May 2007.

Jane Lancaster, Q.C., Chair

Stephanie Pfefferle, Commission Member

Darleen Topp, Commission Member