

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *W.M. v. Saskatchewan Government Insurance,*  
2007 SKAIA 096  
**Date:** 20071105  
**File:** 027 of 2007

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**BETWEEN**

**W.M., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**W.M., Applicant**  
**Elizabeth Flynn, for the Respondent**

***Before:*** **Peter Bergbusch, Chair**  
**Jean MacKay, Commission Member**  
**Barbara Tomkins, Commission Member**

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

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Heard at Regina, Saskatchewan  
October 4, 2007

## DECISION

[1] The Appellant, W.M., was injured in a motor vehicle accident on August 22, 2005. He applied to Saskatchewan Government Insurance (“SGI”) for and received benefits under Part VIII – the no-fault provisions – of *The Automobile Accident Insurance Act* (“the Act”).

[2] Eventually, by letter dated December 22, 2006, SGI advised the Appellant that it was satisfied that all injuries that occurred in the vehicle accident had resolved and that any on-going problems related to pre-existing problems and not to the vehicle accident. Therefore, no further benefits would be provided to him.

[3] The Appellant did not agree with SGI’s conclusion and appealed the decision.

## ISSUE

[4] The Appellant suffered a number of injuries in the accident. SGI has conceded that he suffered an injury to his right wrist; SGI says and the Appellant did not dispute that this injury has resolved to its pre-injury condition. The only matter in issue is whether an impairment in the function of his right thumb was caused or aggravated in the vehicle accident or whether the condition wholly pre-existed the accident.

[5] Our findings of fact and our analysis, therefore, will be primarily confined to matters relating to the Appellant’s right thumb.

## FACTS AND FINDINGS

### **Documentary Evidence:**

[6] For purposes of our decision, it is important to note at the outset that the Appellant has suffered a number of injuries to his right wrist since at least 1981. A 1993 injury resulted in surgery to fuse the joint; there were two subsequent surgeries consequent on that. The prior wrist injuries are noted in all or virtually all of the reports mentioned below in respect of the August 2005 accident injuries.

[7] Following his accident, the Appellant went to the hospital emergency department. A report from that visit shows that the emergency physician noted right wrist pain and left

wrist tenderness. The physician ordered an x-ray of the right wrist; the x-ray showed that there was no fracture. While the physician's treatment is not recorded on the report, the Appellant said that the emergency physician placed his right hand in a sling and recommended that he apply ice.

[8] The Appellant attended on his family physician on August 26, 2005. Dr. Newton diagnosed bilateral forearm bruising and placed the Appellant's right wrist and forearm in a cast to ensure it was totally rested.

[9] On the drawing in his Application for Benefits completed on August 29, 2005, the Appellant showed that he had injured his left forearm and right hand and wrist in the accident. He indicated that the injury to his right wrist was most severe and, in addition, he described numbness in his right wrist and hand.

[10] On September 13, 2005, the Appellant saw Dr. Beggs, an orthopaedic surgeon, when he went to the cast clinic to have the cast removed. On his report, Dr. Beggs noted a diagnosis of ulnar tunnel syndrome.

[11] When the Appellant saw Dr. Newton on September 26, 2005, Dr. Newton diagnosed bruising to the right wrist and some right ulnar paraesthesia. He noted some loss of movement in the wrist. He also stated that Dr. Beggs had recommended physiotherapy and further testing.

[12] The Appellant had a Functional Abilities Evaluation performed by an occupational therapist at the Stapleford Physiotherapy Clinic ("Stapleford") on September 26, 2005. In her report the occupational therapist detailed her findings as follows:

**GENERAL CLINICAL FINDINGS**

- Right wrist fusion, maintained in a neutral position with no active or passive ranges of motion.
- When resting on the table, a flexion deformity the 1<sup>st</sup> digit MCP<sup>1</sup> joint of the right hand was noted, with the IP joint of the same digit held in hyperextension.
- [The Appellant] was unable to actively extend the MCP joint of the right thumb. Instead, attempted extension of the MCP joint caused hyperextension of the IP joint; with the MCP joint maintained in a flexion position.

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<sup>1</sup> Metacarpophalangeal joint

- When placing the MCP joint in extension (passively), palpation of the area around the MCP joint towards the wrist revealed that the IP joint flexion or extension caused snapping/irregular gliding of the Extensor Pollicis Longus, Abductor Pollicis Longus or Extensor Pollicis Brevis tendons.
- Impression: [The Appellant]’s current problems appear to resemble the following: (?) Traumatic boutonniere deformity of the thumb or (?) rupture of the ulnar collateral ligament of the right thumb (skier’s thumb) or (?) peripheral nerve damage.

#### **GRIP STRENGTH**

- Marked limitations on grip strength measurements for the right (dominant) hand, compared to the left.
- Abnormal wrist and thumb position was noted on the right, with this becoming more pronounced when attempting to exert a strong grip.

#### **GRASPS**

- *Hook grasp*: [The Appellant] was able to form this grasp, but reported lateral right wrist dorsum pain. Weakness noted with this grasp.
- *Cylindrical grasp*: This grasp was associated with reports of increased pain and excessive MCP joint flexion and, as a result, an abnormal right thumb position around the object. Weakness noted.
- *Spherical grasp*: Excessive right thumb MCP joint flexion, with a reported increase in pain. Weakness noted.
- *Key grasp*: Weak grasp together with difficulty positioning the thumb to oppose the index finger at the mid phalange. He was able to position the thumb so that it opposes the 1<sup>st</sup> phalange only.

#### **MANUAL DEXTERITY**

- *Fine manual dexterity*: [The Appellant] demonstrated marked difficulty with functional opposition, as he had difficulty controlling the thumb positioning (i.e. CMP joint flexion with IP joint flexion). His apprehension ability was limited, as he did not have any wrist extension range of motion.
- *Medium manual dexterity*: Attempts to participate in medium manual dexterity tasks brought on an awkward right thumb position with exaggerated MCP joint flexion and IP joint extension. In addition, his level of productivity for medium manual dexterity tasks was markedly influenced by the injury.

[13] In her summary, the physiotherapist concluded that the Appellant was not able to meet his pre-injury job demands. She suggested he might benefit from a consultation with an orthopaedic surgeon, a referral to the Hand Program at the Wascana Rehabilitation Centre (“Wascana”), or both.

[14] On October 4, 2005, a physiotherapist at Stapleford provided her report. She did not note her own findings or, at least, did not report them as such. She reported instead that the Appellant complained of a change in the fused position of his hand and wrist, decreased strength and deformity in his right thumb. Her diagnosis was recorded as “injury (R) wrist,

Possible tendon/nerve injury”. She recommended a referral to the Hand Clinic. She further indicated that he required exercises for thumb strengthening and mobilization for his thumb.

[15] In his October 18 report, Dr. Newton recorded a diagnosis of right wrist injury. He also questioned whether there might be a tear in the Appellant’s extensor tendons. He referred the Appellant to Dr. Beggs for reassessment.

[16] While awaiting that appointment, the Appellant attended Wascana’s Hand Clinic. Its physiotherapist provided her report of an October 6 examination of the Appellant. She noted an injury to the extensor pollicis brevis tendon as her primary diagnosis and, among her findings, indicated that the Appellant was unable to extend the proximal phalanx of the thumb actively, though extension was full passively. She recommended further investigation of the thumb injury and provided a “resting splint” for his right thumb.

[17] The Appellant saw Dr. Nair, a neurologist, on November 8, 2005. Dr. Nair conducted tests that disclosed no nerve damage in his right forearm or fingers.

[18] On November 10, the Appellant saw Dr. Beggs. His report regarding this examination speaks only to the Appellant’s wrist. There is no mention that the Appellant complained about or that Dr. Beggs examined his right thumb.

[19] The Wascana Hand Clinic provided a further report of its December 14, 2005 examination of the Appellant. Their findings involve the Appellant’s thumb and wrist. Specifically, they record swelling in the right ulnar wrist, altered sensation in his forearm and hand, no active extensor pollicis brevis contraction, hypermobility at the distal radioulnar joint and the ulnocarpal region, and mild swelling in the area. The physiotherapist recommended that the Appellant continue to wear the resting splint and that he avoid heavy lifting.

[20] The Appellant next saw Dr. Beggs on February 14, 2006. At this visit, Dr. Beggs found:

He has been left with a hypermobile right thumb metacarpophalangeal joint. This is leading to a progressive loss of grip strength. To that end, the plan is to book him for a right thumb metacarpophalangeal joint fusion. Hopefully, this will stabilize

him to a point where he can have an effective pinch grasp. He certainly has a number of abnormalities in that hand, and he is unlikely to return to full function but this will hopefully get him on his way towards returning to a reasonable quality of life.

[21] At this juncture, SGI sought an opinion from its medical consultant. The specific questions posed to the consultant were whether the thumb surgery was required as a result of the vehicle accident or whether it related to pre-existing or other problems. The consultant was also asked whether the thumb injury – whatever its cause – would prevent the Appellant from performing his work duties.

[22] Also at about this time, the Appellant was discharged from Wascana's hand program. Based on a note of a conversation between Wascana's physiotherapist and SGI on March 24, 2006, it appears that the discharge was primarily based on the fact that treatment would not be required until the surgery was completed.

[23] Dr. Taillon, SGI's medical consultant, provided his report on April 21, 2006. He recommended that the Appellant be assessed by an upper extremity assessment team for an opinion on whether and to what extent the Appellant's thumb difficulty related to the vehicle accident. Dr. Taillon stated that information on file showed that the Appellant did not meet his job demands but he also noted that the information should be updated and suggested that the assessment could also include consideration of the Appellant's ability to complete his job demands.

[24] The file was then referred to Dr. Alport who was asked to arrange the recommended assessment if he thought that was the best way to apportion the Appellant's injuries between the vehicle accident and his pre-existing conditions.

[25] Dr. Alport responded by letter dated June 26, 2006. Dr. Alport traced reports of the thumb injury and noted that, while the Appellant had complained that his right wrist and fingers were numb and tingly during his initial interview, he did not say that they were not moving as they had prior to the accident. Similarly, he had indicated numbness in his wrist and hand on his Application for Benefits but had not said that there was any problem with the way they functioned.

[26] Dr. Alport said that while the chronology of reports referred to wrist discomfort and a possible injury to the extensor tendon in the right thumb, Dr. Beggs' diagnosis of a hypermobile thumb joint was the first such finding. In addition, no one had postulated a specific right thumb injury. Dr. Alport stated that "[t]o have ruptured the ligaments severely enough that it resulted in permanent thumb hypermobility, there would have been significant findings at the thumb joint . . . but no one documented any such finding." He said an injury of that nature would not be overlooked as there would be significant swelling and significant pain.

[27] Dr. Alport said that the diagnosis was confusing: If there was a tendon rupture, the fusion surgery proposed by Dr. Beggs was not what would be indicated to repair it. If there was a hypermobile MCP joint in his thumb, one would expect documented evidence of a significant thumb injury. Dr. Alport thought the answers to his questions might be found in a review of records relating to the Appellant's prior injuries and he suggested that SGI obtain them. In the meantime, he was not convinced that the thumb injury – whatever its nature – was caused in the vehicle accident.

[28] SGI decided to refer the Appellant for an independent medical examination (IME) and the Appellant consented. Dr. R. Y. McMurtry, an orthopaedic surgeon in Edmonton, conducted the IME.

[29] Dr. McMurtry examined the Appellant on July 26, 2006 and provided his report dated August 8, 2006. He reported that the Appellant complained that he could not straighten his right thumb, that it had decreased strength and numbness and tingling. The Appellant also said that it looked abnormal compared to his left thumb. The Appellant insisted that his thumb was not like that prior to the August 22, 2005 vehicle accident and that he had pain and numbness in his hand and wrist immediately following the accident.

[30] Dr. McMurtry noted that the wrist had been x-rayed multiple times but there were no x-rays taken with a thumb-centered view or stress x-rays of the MP joint.

[31] Dr. McMurtry noted the Appellant's prior history regarding his wrist including surgery in 1980 or 1981 due to Kienbock's disease, a wrist fusion in 1994 and surgery in

1996 to remove the plate that was inserted in 1994. The Appellant advised Dr. McMurtry that throughout his wrist problems, there had been no indication of problems with his thumb.

[32] On examination, Dr. McMurtry did not find instability of the right distal radioulnar joint which had been noted in other examinations. In regard to the thumb, he found:

- Subluxation of the extensor pollicis longus: This meant that the Appellant could hold his thumb in extension but once he flexed it, he could not restore it to an extended position. The extensor pollicis longus could be seen to sublux; this meant that the tendon slipped over the joint and that, in effect, whereas the tendon was supposed to extend the joint, it acted as a flexor. This explained the abnormal position of the thumb.
- Instability and insufficiency of the ulnar collateral ligament at the level of the MP joint:
- Power rated at 4 of 5 in both grip and pinch strength: This was discernibly different from the left thumb but still showed demonstrable strength.

[33] Based on his examination, Dr. McMurtry gave the following impression:

1. Old wrist problems leading to a fusion with the onset of the problem being Kienbock's disease.
2. Instability of the MP joint of the right thumb with ulnar collateral ligament insufficiency.
3. Subluxation of the extensor pollicis longus tendon, right thumb, resulting in abnormal posturing of the MP and IP joints.
4. Radial nerve neuroma at the level of right wrist.

[34] He said that the first and fourth of these were clearly unrelated to the vehicle accident. The evidence that the other two were related to the accident was only the history provided by the Appellant; Dr. McMurtry stated that he was not aware of any evidence corroborating that these injuries occurred in the vehicle accident.

[35] Dr. McMurtry further opined that the Appellant was capable of light duties pending his surgery.

[36] After receiving Dr. McMurtry's report, the Appellant's claim was again submitted to Dr. Alport. In the meantime, however, SGI had obtained the records of the Appellant's prior workers' compensation claims. These had a significant effect on Dr. Alport's view of the matter.

[37] In his second opinion dated December 4, 2006, Dr. Alport highlighted a report from Dr. Skeet, a physician for the Saskatchewan Workers' Compensation Board, who had examined the Appellant in February 1996 after he suffered a work injury to his wrist. In the course of that examination, Dr. Skeet had described findings regarding the Appellant's right thumb that Dr. Alport said were "exactly the same" as those found by Dr. McMurtry at his examination. As the Appellant had had the problems in 1996 – nine years before the vehicle accident – Dr. Alport said, the thumb problems were shown to be unrelated to the vehicle accident.

[38] Based on this report SGI advised the Appellant by letter dated December 22, 2006 that it did not accept that the thumb injury and consequent surgery were necessary as a result of the vehicle accident and that no further benefits would be paid. Similarly, SGI concluded that the Appellant's then current wrist problems had pre-existed the accident and he was advised that no further benefits would be payable with regard to the wrist. Thus, all benefits to the Appellant were terminated.

[39] Following termination and perhaps in anticipation of this appeal, SGI provided the historical information regarding the Appellant's prior workers' compensation claims to Dr. McMurtry and sought his further response. Dr. McMurtry responded by letter dated June 5, 2007.

[40] In reviewing the history, Dr. McMurtry noted in particular a report from Dr. Turnbull dated December 1, 1993 in which, following an injury at a fish processing plant, the Appellant was seen at a walk-in clinic and "was described as having a sprain of his right

wrist and right thumb.” He identified at least three prior incidents where the Appellant’s hand and wrist were injured; these occurred in 1981, 1990 and 1993.

[41] As was Dr. Alport, Dr. McMurtry was particularly influenced by Dr. Skeet’s February 27, 1996 report. He said that he agreed with Dr. Alport that his findings were similar to Dr. Skeet’s reported findings, whereas the Appellant had told him that the thumb problems were new.

[42] He said that considering all of the information, including his own examination of the Appellant, “it appears that [the Appellant] had his complaints previously.” Later in the report, he said, “In view of the foregoing documented findings, his account to me of his history is not credible. In the realm of possibilities, I feel that his thumb problems were pre-existent.”

**Oral Evidence:**

[43] The Appellant’s father gave evidence at the appeal, as did the Appellant’s partner. Each spoke about the Appellant’s abilities before and after the accident.

**The Appellant’s father:**

[44] The Appellant’s father testified that the Appellant had been very helpful to him prior to the accident, doing yard work, cleaning and draining the pool, building a fence and similar activities. After the accident, he said, the Appellant tried to help but was unable to do so. According to the Appellant’s father, the Appellant simply did not have adequate power in his hand.

**The Appellant’s partner:**

[45] The Appellant’s partner said that before the accident, the Appellant did dishes and yard work and that he did maintenance work on their vehicles. After the accident, she said, he was not able to do these activities. She said that over time, his ability improved but “not much”. Since his surgery, his abilities have improved substantially although she said he still has to adjust the way he hold tools – such as the rake – to make sure his thumb is supported.

She said that although his ability has improved since the surgery, he has not achieved the level that he had prior to the accident.

The Appellant:

[46] The Appellant testified as well. He said that he worked three jobs in the course of each year and that all involved heavy labour and some degree of hand dexterity. Some involved the operation of heavy equipment. For all but the latter, he wore a brace; he did not wear the brace to operate heavy equipment because it required his shoulder and elbow to compensate for his fused wrist. There was not room within the cab for this kind of movement so he worked without the brace in those confined quarters.

[47] He said that he was not able to either do heavy labour or operate heavy equipment after the accident. Eventually, he collaborated with staff at Wascana and they designed a small brace that covers only the base of his hand. With this, his hand grip is improved, vibration is muffled and he is optimistic that he will be now able to operate heavy equipment.

[48] The Appellant admitted that his right wrist had been injured many times in the past – in 1981, 1990, 1992, 1993, and 1997. He said his thumb restriction was reduced after the plate was removed from his wrist in November 1996 but that, while it was not “100%”, the painful tingling was reduced, the thumb was functional and it did not prevent him from working at heavy labour. After the accident, he said, he was unable to do this work. He said that the problem with his thumb was different and much more severe after that accident than it had been before. At that time, he noticed that his thumb sat lower, its use was compromised and his grip strength was lessened.

[49] The Appellant agreed with SGI’s counsel that he had not complained of an injury to his thumb until some time after the accident. He said that he did not think in terms of his thumb having been injured in the accident; he thought that his hand had been injured. He said that at the hospital on the day of the accident, his hand and arm were placed in a sling and a few days later they were casted. Until the cast was removed two weeks later, he did

not attempt to use the thumb and so he did not notice the difficulty with his thumb until the cast was removed.

[50] The Appellant also admitted that he had not disclosed any prior injury to his thumb in the course of his treatment. He said that in fact he had not injured his thumb in any prior incident. It appears he thought the thumb restriction was incident to his prior wrist injury as opposed to a separate injury. Further, he said, there was nothing wrong with his thumb prior to the accident. While it did not extend as far as his other thumb, he could use it in his work without restriction. He did not view this as an injury or a problem.

[51] The Appellant was adamant that his thumb was injured in the August 2005 accident. When asked by SGI Counsel whether it had been caused in the vehicle accident, the Appellant answered that it “definitely” had. When asked if the injury was pre-existing, he said that it was not. He said after the accident his grip strength was reduced and consequently his ability to lift was reduced. The painful tingling he had experienced before December 1996 and afterward became virtually constant. Simply put, he said that he could use his thumb and could work before the vehicle accident and that after the accident, he could not.

Dr. John Alport:

[52] Dr. Alport, a medical consultant for SGI, testified that he had reviewed the Appellant’s records for some years back. He noted that the Appellant had pre-existing wrist problems for at least twenty years and that what started as right wrist problems came to involve the thumb.

[53] At the outset, Dr. Alport conceded that the Appellant had suffered further injury to his right wrist in the vehicle accident. However, he did not accept that there had been an injury to the Appellant’s right thumb in the accident.

[54] Dr. Alport said that he compared Dr. McMurtry’s 2005 findings to those of Dr. Skeet in 1996. While Dr. McMurtry diagnosed subluxation of the extensor pollicis longus and Dr. Skeet did not, Dr. Alport said that Dr. Skeet’s findings could not be explained by

anything other than subluxation of the tendon of one of the pollicis extensor muscles. Thus, he said, the findings were the same. So, as well, were the findings at the Wascana Hand Clinic. Therefore, in his opinion, the Appellant's right thumb condition was exactly the same or remarkably similar before and after the accident.

[55] Dr. Alport testified that he could not see why or how the damaged tendon could have healed or improved in the years prior to the accident; he said that once the tendon had found a "comfortable place", there was no incentive for healing. Further, he said, there are degrees of slippage but once an extensor becomes, in effect, a flexor, the degrees are irrelevant. The Appellant's extensor had become a flexor.

[56] Further in support of his opinion, Dr. Alport testified that in the course of his review, he did not find that the Appellant complained of nor is there any record of any injury to his thumb at the time of or after the vehicle accident until he attended physiotherapy in late September 2005. Dr. Alport said an injury of this nature would be very painful and unlikely to be overlooked. If the Appellant had complained of an injury to his thumb, emergency physicians would have been very careful to examine the thumb and document the complaint and any relevant findings. He said physicians are very careful with complaints involving lack of movement in a joint since neglect of this kind of injury can lead to lawsuits.

[57] For all of these reasons, Dr. Alport believes that the Appellant's right thumb injury was shown to have pre-existed the 2005 vehicle accident.

[58] Dr. Alport testified that a person with an injury of this nature would function quite well. A dysfunction of the thumb would be more serious if flexion was restricted whereas, he said, a dysfunction in extension would only affect the Appellant's ability to extend his thumb. As extension is not necessary to gripping and lifting, he said, the Appellant's restricted ability would not be serious.

## ONUS OF PROOF

[59] In *Collis v. Saskatchewan Government Insurance*<sup>2</sup> the Saskatchewan Court of Queen's Bench considered the question of who held the onus of proof in appeals under the no-fault provisions of the *Act*. Justice Wimmer stated:

Cases dealing with disability insurance contracts hold that the insured has the onus of establishing that he or she is disabled within the meaning of the policy and, having done so, the onus shifts to the insurer to prove that benefits are not, or are no longer, payable. Also, the fact that the insurer at one time accepted the claim may weigh the balance in favour of the insured.<sup>3</sup>

[60] The question before us is whether the Appellant has established that he was disabled within the meaning of the "policy". (The policy, for purposes of this decision, is the *Act* itself.) If he has not done so, the matter ends but, if he has, the onus will shift to SGI.

[61] In this case, it is clear that the Appellant has established that he was disabled as a result of the vehicle accident; indeed, SGI has not suggested otherwise. SGI has conceded that the Appellant suffered an injury to his wrist and hand and, until Dr. Alport's June 26, 2006 report suggested otherwise, his right thumb. SGI paid the Appellant benefits and accepted responsibility for those injuries.

[62] As such, in accordance with *Collis*, the Appellant has met the burden to prove that he was disabled in the vehicle accident and the onus is then shifted to SGI to prove, on a balance of probabilities, that benefit are not payable in respect of the condition of his right thumb.

[63] In this regard, we note that in *Job v. Saskatchewan Government Insurance*<sup>4</sup>, Justice Matheson of the Saskatchewan Court of Queen's Bench concluded the identical issue in accordance with *Collis* and his decision in this respect was confirmed in the Court of Appeal.<sup>5</sup>

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<sup>2</sup> 1998 CanLII 13463, 165 Sask. R. 108

<sup>3</sup> paragraph [5]

<sup>4</sup> 2992 SKQB 479 (CanLII)

<sup>5</sup> 2004 SKCA 164 (CanLII)

## ANALYSIS

[64] The issue for our determination in this appeal is narrow: Did the Appellant suffer an injury to his thumb in his 2005 vehicle accident that necessitated the subsequent surgery to fuse the metacarpophalangeal joint in his right thumb or did the injury and consequent restriction exist prior to the accident?

[65] SGI has concluded that the injury pre-existed and its conclusion is based on two premises: first, that the Appellant's thumb restriction and function after the accident was in fact identical to that prior to the accident and, second, that he did not report a thumb injury after the accident.

[66] Dr. Alport, on behalf of SGI, drew our attention to the fact that the Appellant had suffered an injury to or that affected his thumb in a previous accident some years prior and that his thumb function was restricted as a result. He said that the restriction reported prior to the 2005 vehicle accident was identical to that found by Dr. McMurtry after the accident.

[67] In further support of his view, Dr. Alport noted that the Appellant did not complain of an injury to his thumb at the time of the accident or for some time thereafter and that there is no notation of restriction or injury to his thumb until Stapleford's September 26, 2005 report, over a month after the accident.

[68] Dr. Alport is of the view that the Appellant's thumb injury pre-existed the accident and that there is no evidence that it was caused in the accident except the Appellant's assertion that it was. Dr. Alport said the documentary evidence does not corroborate the Appellant's evidence in this respect. SGI relied on Dr. Alport's opinion in reaching its decision that benefits were not indicated as the injury was not caused in the accident.

[69] The Appellant, on the other hand, said that the function of his thumb was definitely different after the accident than it was before. He admits that he had restricted function before the accident but it was not of such nature or degree that it interfered with his activities; after the accident, he said, he was unable to do many things that he did without difficulty before the accident.

[70] The Appellant also admitted that he did not specifically report any injury to his right thumb or restriction in its function until some time after the accident. He said that he viewed the injury as one to his hand, not specifically to his thumb. He further said that from the day of the accident until the cast was removed on September 13, 2005, his hand and wrist were either in a sling or a cast and that they were swollen and painful. For these reasons, he did not have the use of his thumb and did not know that it had been injured.

Reporting:

[71] We are satisfied that the Appellant did not report an injury to his right thumb at the time of his attendance at the Emergency Department on the day of the accident or until his visit to Stapleford in September 2005. However, we are not satisfied that this failure is, in this case, particularly significant. We accept the Appellant's evidence that, given his treatment for some weeks after the accident involved immobilization of his hand, wrist and forearm and given that there was swelling and pain in the area including and in close proximity to his thumb, he did not identify a specific thumb injury until some time later.

[72] Dr. Alport stated: “[t]o have ruptured the ligaments severely enough that it resulted in permanent thumb hypermobility, there would have been significant findings at the thumb joint . . . but no one documented any such finding.” He said that even if the Appellant did not report an injury to his right thumb, it is very unlikely that the hospital emergency physician would have missed it when the Appellant was examined on the day of the accident. He said that physicians would expect to be sued if they missed an injury like this.

[73] However, there is a report from an orthopaedic surgeon who operated on the Appellant in 1994 where it is specifically indicated that he had full range of motion in his thumb by February 1996. Similarly, a hand surgeon who examined the Appellant in 1994 noted that the function of his extensor tendons was not affected.

[74] These physicians focused their attention on, *inter alia*, the examination of the Appellant's thumb and found no dysfunction. Yet Dr. Alport, this Commission and even the Appellant are satisfied that there was dysfunction at the time. This cannot be explained without consulting the physicians involved but it does cause us to question Dr. Alport's

certainty that a restriction such as the Appellant's is unlikely to be missed by an examining physician. In this regard, we note that we also did not have evidence from the emergency room physician which might have clarified the matter.

[75] Without that opportunity for clarification, we are not able to conclude whether the emergency room physician examined the Appellant's thumb and found no injury or whether it was not examined. Given the reports from the 1994 and 1996 examinations referenced above, we are certainly not as confident as Dr. Alport that such an injury or restriction is unlikely to be missed.

[76] We are satisfied that the Appellant did not report an injury to his right thumb at the time of the accident and that no such injury was documented at the time of his emergency examination. For reasons given above, we do not think this precludes a conclusion that such an injury in fact occurred in the accident in August 2005.

Pre-Existing Injury:

[77] We accept the Appellant's evidence that prior to the 2005 accident, he never viewed his thumb as injured or even as really restricted since it did not interfere with his function and that his attention was to his wrist which had been significantly injured and eventually fused. As Dr. Alport testified, "I don't think it was a big problem to him" and "It's not very disabling". The Appellant's evidence is consistent with Dr. Alport's opinion in this regard. We therefore do not view the fact that he did not disclose a prior injury or restriction of his right thumb at the time of his accident or in his Application for Benefits as significant.

[78] We do not accept that the Appellant did not disclose the prior restriction to his caregivers. He testified and we accept that he discussed his post-2005 accident thumb difficulties with caregivers by comparison to its function prior to the accident. While he may or may not have used the specific words "My thumb had restricted movement before the accident," he said that he told them that it did not function after the accident as it had before. We believe him. It is also likely that he indicated – as he said he did – what his thumb could do before the accident compared to afterward; this disclosure would necessarily indicate the prior restriction.

[79] We are satisfied that the Appellant had suffered prior injury to his right wrist and that his thumb was either also injured or consequently affected. A report respecting his 1993 work accident records that he was initially diagnosed by a walk-in clinic with a sprain of his right wrist and a sprain of his right thumb. There is no subsequent record confirming that thumb injury or any treatment specifically directed to it. However, it is evident that the function of the Appellant's right thumb was restricted at least from 1994 onward. The Appellant has admitted this.

[80] We have Dr. Alport's detailed evidence and written opinion that Dr. Skeet's findings in February 1996 were "exactly the same" as those of Dr. McMurtry in August 2006. We accept Dr. Alport's evidence that the findings Dr. Skeet reported are only consistent with subluxation of the tendon of the extensor pollicis longus and that Dr. McMurtry reported similar findings. We accept therefore that, both before and after the August 2005 vehicle accident, the Appellant had what Dr. McMurtry described as "subluxation of extensor pollicis longus tendon, right thumb, resulting in abnormal posturing of the MP and IP joints." We also agree that the tendon was not torn prior to or after the 2005 vehicle accident.

[81] However, we do not agree that the restrictions reported by Dr. Skeet and Dr. McMurtry were exactly the same for the following reasons:

- Dr. Skeet measured grip strength in 1996 when he examined the Appellant and found that the grip strength in the Appellant's right thumb was "slightly" less than for his left. Stapleford, following the accident in 2005, found a "marked" limitation when comparing the grip strength of the Appellant's right thumb to that of his left. Dr. McMurtry did not have measuring equipment available but on his 2006 examination noted that grip strength was "discernably different" in the right thumb than in the left, though there was still demonstrable strength. It appears to us, therefore, that Dr. McMurtry's finding of subluxation was not, to use Dr. Alport's words, "exactly the same" as that of Dr. Skeet. We think the degree of subluxation must have been different or there would not have been different findings regarding grip strength.

- We accept Dr. Alport’s evidence that once the tendon had reached the point where it acted, in effect, as a flexor rather than an extensor, the impact on the Appellant would be virtually the same. However, we do not have evidence that the degree of restriction at the time of Dr. Skeet’s examination was such that the extensor had become a flexor. It had done so by the time of Dr. McMurtry’s examination.
- We think it is significant that Dr. McMurtry, when he responded to Dr. Alport’s suggestion that the findings were “exactly the same”, did not confirm this but carefully stated that his findings regarding abnormal posturing of the thumb “sound similar to those of Dr. Skeet.”
- While Dr. McMurtry might have been surprised to learn, after his examination, that there had been similar findings prior to the vehicle accident, this does not mean that the thumb’s condition could not have been worsened in the accident. In fact, Dr. McMurtry additionally found instability of the metacarpophalangeal joint of the right thumb; this was not among Dr. Skeet’s findings.

All of these suggest that the findings by Drs. Skeet and McMurtry regarding subluxation were similar but not identical.

[82] We next consider the nature of the differences.

[83] The Appellant testified before the Commission and also related to his care providers that the restriction was significantly different after the accident than before. He said that before the accident, his thumb lay lower than normal on his palm and could not be extended; after, the thumb lay much lower on his palm than it had before. More significantly, he said that, prior to the accident, the restriction to his thumb did not cause him more than incidental – if any - difficulty in his work and activities of daily living, whereas after the accident, his grip and lifting strength were significantly reduced and his pain was significantly increased. We thought this evidence was credible.

[84] There is evidence corroborating the Appellant’s testimony in this respect. Prior to the 2005 vehicle accident, the Appellant held three jobs over the course of each year. Each

of these jobs involved heavy labour including heavy lifting and gripping. Following the accident, Stapleford advised that he was not able to manage his pre-accident duties and Dr. McMurtry in August 2006 advised that he was capable of light duties only. These opinions are consistent only with an injury or restriction that was worse at the time of those examinations than it had been prior to August 22, 2005 when the Appellant managed the heavy work.

[85] Another significant factor lies in the fact that, as noted above, in addition to finding subluxation of the extensor pollicis longus, Dr. McMurtry found instability in the thumb joint. There is no evidence that this finding was made prior to the vehicle accident but it was certainly documented afterward by both Dr. McMurtry and Dr. Beggs. Indeed, the Appellant's surgery was undertaken to address this condition and Dr. McMurtry opined that the recommended surgery was appropriate.

[86] As was discussed above, there is no evidence that the Appellant found his thumb's pre-accident condition disturbing or difficult to manage and no indication that treatment of any nature was recommended or appropriate. Yet in February 2006, Dr. Beggs diagnosed a hypermobile right thumb metacarpophalangeal joint and recommended surgical fusion of the joint. The surgery was done in December 2006. Since the surgery, the Appellant's right thumb function, with the assistance of various braces, has improved significantly and he is optimistic that he will shortly be able to manage various tasks that were previously beyond his physical capability. This leads to the conclusion that the instability of the thumb joint was a new condition that did not exist prior to the Appellant's 2005 vehicle accident or, at the very least, that it was an aggravation of an existing condition.

[87] For all of these reasons we accept the Appellant's evidence and have concluded that the function of his thumb was significantly different and significantly less functional after the 2005 accident than it was before.

[88] We are supported in our conclusion by Dr. Alport's evidence that a person who had suffered previous injury to the area would be predisposed to further injury to that area; that is, such predisposed person might be injured more easily or more seriously or both. Specifically in regard to his thumb, there is record of a prior sprain. Certainly, there is no

question but that the Appellant has suffered repeated serious injuries to his right wrist and that his right thumb was certainly affected, if not injured. Specifically in regard to the instability of the metacarpophalangeal joint, Dr. Alport said that might be the result of “repeated injury to the area” or of a single injury. Our conclusions are consistent with this evidence and nothing else has been put forward as a possible or likely cause.

[89] Therefore, we are satisfied that SGI’s conclusion is based on faulty premises. That is, we are not satisfied that the Appellant’s failure to specifically report an injury to his thumb shortly after the accident is significant or can be taken to prove that there was no injury. We are also satisfied that the Appellant’s function after the accident was significantly different than it had been before.

[90] The difficulty with SGI’s position in this matter lies in the somewhat circular nature of its reasoning. In essence, SGI has said that there was no thumb injury in the 2005 vehicle accident because none was specifically reported and there being no new thumb injury, the condition of the Appellant’s thumb was the same after the accident as before. That being the case, there was no new injury to compensate. Indeed, Dr. Alport said in the course of his evidence, “I would not feel so confident in this if there was injury documented to the thumb.”

[91] For reasons given above, we have concluded that there **was** an injury to the thumb in the 2005 vehicle accident and the fact it was not immediately documented is not significant in this case.

## **CONCLUSION**

[92] The only explanation that can make sense of the reports of historical examinations and treatment of the Appellant’s right hand, wrist and thumb and his current condition is that he was further injured at the time of or after the August 2005 accident. There is no evidence of injury after the 2005 vehicle accident and we have no alternative, therefore, but to conclude that the Appellant suffered an injury in the 2005 vehicle accident that caused increased dysfunction and restriction in his right thumb and instability in the MCP joint of his right thumb.

[93] In reaching this conclusion, we are especially mindful that SGI bears the onus of proof in this matter. It may be that evidence from Dr. McMurtry or Dr. Beggs might have led us to a different conclusion; however, that evidence was not offered.

[94] Therefore, the injury and its consequences must be SGI's responsibility pursuant to Part VIII of *The Automobile Accident Insurance Act*. The Appellant is entitled to all benefits regarding the injury to his right thumb and consequent surgery including but not limited to those for income replacement, rehabilitation, related expenses and permanent impairment, if any.

[95] In closing, we wish to acknowledge the fair and direct manner in which both the Appellant and Dr. Alport presented their evidence. We thought that both the Appellant and Dr. Alport, while testifying from positions of interest, testified honestly and directly. Both candidly gave evidence that was occasionally disadvantageous to their respective positions. Their balanced approach was helpful to our deliberations.

#### **COSTS**

[96] Since the Appellant has been successful in his appeal, he shall have his costs in accordance with section 193(11) of the *Act* and section 96 of the regulations. In this regard, the Appellant may recover all reasonable expenses relating to this appeal and incurred from the date of filing to the date of this decision to a maximum of \$2500.00. In addition, he shall be refunded his appeal fee.

**Dated** at Regina, Saskatchewan, on November 5, 2007.

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Peter Bergbusch, Chair

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Jean MacKay, Commission Member

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Barbara Tomkins, Commission Member