Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]**
**AICAC File No.: AC-96-36**

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| **PANEL:** | **Yvonne Tavares, Chairperson**<br>**Colon Settle, Q.C.**<br>**Wilson MacLennan** |
| **APPEARANCES:** | **The Appellant, [text deleted], appeared on her own behalf, accompanied by her husband, [text deleted]; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Joan McKelvey** |
| **HEARING DATE:** | **March 12, 2001** |
| **ISSUE(S):** | **1. The assessment of permanent impairment benefits; and**<br>**2. Continuation of income replacement indemnity.** |
| **RELEVANT SECTIONS:** | **Sections 107, 109, 110(1)(d), 115, 127 of the MPIC Act, Section 7 of Manitoba Regulation No. 37/94 and Manitoba Regulation 41/94 of the MPIC Act.** |

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.**

# Reasons For Decision

The issues before the Commission relating to [the Appellant's] appeal can be stated as follows:

1. the assessment of Permanent Impairment benefits; and

2. continuation of Income Replacement Indemnity.

1. **Permanent Impairment Benefits**

On August 20th, 1994, the Appellant was a passenger in a vehicle involved in a head on collision on [highway]. Her injuries included a fractured clavicle, a fractured left wrist and numerous lacerations and bruises. As a result of those injuries, the Appellant sustained permanent physical impairments which, pursuant to s. 127 of the MPIC Act, entitle her to a lump sum indemnity in accordance with the regulations to the MPIC Act. The Appellant is appealing the Internal Review Decision dated October 25, 1999 with respect to the amount of the lump sum indemnity as calculated by MPIC.

Section 127 of the MPIC Act provides that,

> **Lump sum indemnity for permanent impairment**
>
> 127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500, and not more than $100,000 for the permanent impairment.

The regulations set out the amount available for each type of permanent impairment as a percentage of the total amount available.

The Internal Review Decision dated October 25th, 1999, confirmed the Adjuster's decision of June 8, 1999, which had determined a total permanent impairment benefit of 13.15%. This impairment benefit had been calculated as follows:

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| • Loss of shoulder function | 2.91% |
| • Reduced forearm motion | 2.00% |
| • Reduced wrist motion | 2.94% |
| • Reduced hand motion | 0.5% |
| • Clavicle fracture, malalignment and disfigurement | 2.0% |
| • Supra-orbital nerve damage | 1.0% |
| • Facial scarring | 1.8% |
| Total | 13.15% |

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The total of 13.15% when applied against the $100,000.00 maximum impairment benefit payable (1994) translates into a total impairment benefit in the amount of $13,150.00.

The Adjuster's decision had been based upon an Inter-departmental Memorandum from [text deleted], Medical Consultant of the MPIC Claims Services Department. In this memorandum, [MPIC's doctor] set out his opinion with respect to the permanent impairment benefits related to the Appellant's right upper limb injuries. [MPIC's doctor] had referred to the report dated February 6th, 1999, from [text deleted], physiotherapist. In her report, [Appellant's physiotherapist] had set out range of motion measurements of the Appellant's right shoulder, elbow, wrist and digits taken during an evaluation of the Appellant on January 19th, 1999. Relying on this report, [MPIC's doctor] evaluated the Appellant's permanent impairments in accordance with the Manitoba Public Insurance Schedule of Permanent Impairments, which is Regulation 41/94 to the MPIC Act.

Impairment ratings for the scar resulting from the facial laceration and supra-orbital nerve damage had been previously performed. The Appellant had been advised and payment had been forwarded with respect to those permanent impairment benefits in a letter dated May 10th, 1996. The Appellant had also sought an Internal Review of that decision. In his letter dated July 31st, 1996, the Internal Review Officer upheld the Claim's decision. These earlier awards were combined in the Claim's decision dated June 8th, 1999, in order to summarize the Appellant's total entitlement.

The Appellant presented no medical evidence at the hearing of the appeal to contradict the report of [Appellant's physiotherapist] or to suggest that an impairment had been overlooked when her entitlement had been assessed.

Upon a careful review of the Schedule of Permanent Impairment Benefits and relying upon the measurements as taken by [Appellant's physiotherapist], the Commission finds no reason to disturb the permanent impairment benefit as calculated by MPIC. Accordingly, the Commission confirms that aspect of the decision of the Internal Review Officer dated October 25th, 1999.

2. **Continuation of Income Replacement Indemnity Benefit**

Prior to the motor vehicle accident ('MVA') of August 20th, 1994, [the Appellant] was involved in the family farm operation with her husband on their farm near [text deleted], Manitoba. [The Appellant] was responsible for all indoor homemaking activities prior to the MVA. In addition, she tended a flower garden, did yard work, assisted in tending the cattle, babysat for six grandchildren ages [text deleted], assisted with grain farming by driving the combine and harvesting grain, and arranged wedding decorations and food in the surrounding area for weddings. She was unable to continue with that employment after the MVA, due to the injuries she sustained in the accident.

MPIC classified [the Appellant] as a full-time earner and determined that she was entitled to an income replacement indemnity ("IRI") in the amount of $674.79 bi-weekly (which amount was indexed annually to account for inflation in accordance with s. 165 of the MPIC Act). This amount of IRI was paid by MPIC to the Appellant from August 28,

1994 to January 27, 1999, when it was reduced in accordance with a Claim's decision dated January 27, 1999 made by the Appellant's Adjuster. The Claim's decision was appealed to the Internal Review Office and subsequently varied by an Internal Review Decision dated October 26, 1999. The Appellant is appealing the reduction of the IRI in accordance with that Internal Review Decision.

In the Claim's decision dated January 27th, 1999, [text deleted], Senior Injury Specialist with MPIC, notified the Appellant that MPIC had completed a two-year determination of her employment potential pursuant to Section 107 of the MPIC Act. Section 107 of the MPIC Act provides as follows:

> 107 From the second anniversary of an accident, the Corporation 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 referred to in Section 81 (full-time or additional employment) or Section 82 (more remunerative employment), or determined under Section 105.

MPIC advised the Appellant that they had determined that she had the capacity to work in retail sales as a sales clerk. Under Schedule C of the Regulations to the MPIC Act, the corresponding entry-level income for that occupation was $15,353.00 annually.

The Claim's decision of January 27th, 1999, went on to inform the Appellant that she would be afforded a one-year grace period during which MPIC would continue to pay IRI to enable her to find employment and transition into the work force. After the year had passed, MPIC would reduce her IRI by her actual earnings or by $15,353.00 as outlined in Schedule C, whichever was greater.

The two-year determination completed by MPIC was based upon a Functional Assessment and a Transferable Skills Analysis completed by [vocational rehab consulting company]. The primary objective of the Functional Assessment was to determine the physical abilities of the Appellant as related to function. [Text deleted], the occupational therapist who performed the Functional Assessment, summarized her findings in a report to MPIC dated February 12, 1998. She suggested that [the Appellant] should not work above the **Light Work** category (light work is defined in the National Occupational Classification as handling loads of 5 kg but less that 10 kg). Lifting and carrying were not recommended on a frequent basis as firm grasping was limited to "occasional". Finally, based on the Assessment results, the occupational therapist suggested that [the Appellant] could tolerate an 8-hour workday – no apparent limitations with sitting and walking (with regular breaks), standing could be tolerated for 6 hours (at 60-minute durations).

The Transferable Skills Analysis (the "TSA") was completed by [text deleted], rehabilitation consultant, to assess the Appellant's skills and abilities with respect to alternate employment. In her report to MPIC dated March 30, 1998, [Appellant's rehab consultant] described the Appellant's residual symptoms from the injuries sustained in the MVA. At the time of the TSA, the Appellant continued to suffer from constant pain at her anterior forehead and scalp, secondary to lacerations suffered in the MVA and pain in her chest, right intrascapular and right arm regions with neck extensions.

[Appellant's rehab consultant] also reviewed reports from [text deleted], an occupational therapist with [rehab clinic], and [Appellant's physiatrist], [text deleted]. [Appellant's

occupational therapist #2] indicated that [the Appellant] was approaching a plateau in terms of her functional abilities but her physical abilities were consistent with her pre-injury occupation of flower arranging/decorating, however she was functioning below the requirements of the farm work. [Appellant's physiatrist] concurred with the [rehab clinic] report, stating that, "her current functional ability is consistent with her pre-injury occupation of flower arranging, but not adequate for the physical requirements of farm work".

The TSA identified the occupations of counter clerk (retail), cashier, floral arranger, retail salesperson and wedding consultant as potentially suitable for [the Appellant]. However, based on a review of HRDC statistics and local employer contacts, [Appellant's rehab consultant] concluded that the occupations of floral arranger, cake decorator, seamstress and counter clerk in a craft store were potentially suitable for [the Appellant] and available in the local labour market.

[MPIC's Senior Injury Specialist] also sought an opinion from [text deleted], Clinical Psychologist, with regards to the Appellant's psychological and emotional status and her ability to work. In her report dated October 5, 1998, [Appellant's psychologist] wrote that,

> "I am writing to confirm that [the Appellant's] psychological status does appear to have stabilized significantly over the course of the past few months. She has responded well to a trial of anti-depressant medications and a variety of cognitive behavioural interventions aimed at helping her cope more effectively with chronic pain and reducing her level of depression.
>
> You requested my opinion regarding this client's readiness to embark upon a job search and to maintain employment outside the farm setting. I indicated to you my belief that she might be able to hold down part-time sedentary work, but did

> caution you that this was likely to be a significant stressor for her. She has not worked off the farm since she was in her late teens, and she continues to play quite a valuable role (albeit an unpaid one) on the farm through her provision of child care for her grandchildren. In addition to the stress that will be engendered simply be looking for suitable positions, [the Appellant] will also have to overcome some residual driving anxiety".

As previously noted, [the Appellant] sought an internal review from the Claim's decision of January 27, 1999. In the Internal Review Decision of October 25th, 1999, the Internal Review Officer varied the Claim's decision to take into account the fact that the Appellant was not able to work full-time, and since the accident, had not been capable of full-time employment. Accordingly, the Internal Review Officer directed that, for the duration of the one-year "grace period", the Appellant's IRI would be reduced by one-half of the net income from the determined employment. This was based upon the opinion expressed by [Appellant's psychologist], in her October 5, 1998 report, that the Appellant was at that time capable of part-time employment. The Internal Review Officer went on to advise that once the grace period expired, the Appellant's IRI would be calculated in the manner set out in the original decision letter from the Adjuster dated January 27th, 1999.

At the hearing of her appeal, the Appellant submitted that she does not have the reliable strength and stamina necessary for full-time work. She testified that since the MVA she has lost steadiness, strength and mobility and cannot lift heavy objects. She also advised that her sleep deprivation has worsened. Due to high levels of pain, she cannot sustain fully supine or prone positions, and as a result sleeps either in a reclining chair or in a bed that allows her to elevate her head. Typically, she manages 3-4 hours of sleep per night,

and supplements this with occasional naps. She loses her voice and has anxiety attacks, all of which would prevent her from holding down a full-time job.

In support of her position, the Appellant submitted a further report from [Appellant's psychologist], to provide an update on the issue of her employability. In her report dated January 18, 2001, [Appellant's psychologist] states that,

> "When I first became involved with this client, it was clear that she was both too depressed and too anxious to be considered for employment off the farm. With the subsequent resolution of the intense emotional disturbance, it was my appraisal that there were no longer any acute psychological barriers to employment. However, this did not mean that I viewed her to be employable. She has consistently struggled with debilitating levels of pain and fatigue. Her sleep quality is poor and likely to remain so, given the nature of her physical problems. During many of our appointments, it is clear that her pain and fatigue are interfering with certain aspects of cognition, including memory functioning and problem-solving. She has done as much as she possibly can to pace herself adequately at home and in her many community involvements. Even so, there are times at which she experiences flare-ups that leave her at a very low functional level for a period of a few days to a few weeks. Pragmatically speaking, it would appear to be impossible for [the Appellant] to find and sustain employment given her problems with pain and fatigue and the resultant functional decline she experiences during flare-ups".

A report from [text deleted], the Appellant's general practitioner was also submitted in support of the Appellant's position. In his report dated March 1st, 2000, [Appellant's doctor] states that,

> "There's no doubt that this lady suffers from several impairments resulting from a motor vehicle accident in August of 1994. These impairments have resulted in her unable to work on the farm for which she trained and has done for most of her life. Employment opportunities in her area is also quite limited and she is unable to drive for significant distances to reach employment in other communities. Given the fact that there are many other younger, healthier people also seeking the same kind of work that she would be able to accomplish, it is clear that this lady is at this point in time unemployable and will remain unemployable for the rest of her life".

The Appellant further submitted that most of the employment opportunities near her home in the retail sales area would be located in either [text deleted] or [text deleted], both of which are approximately 40 to 50 miles away from her home. She added that she does not feel safe driving the round-trip distance from her home to [text deleted] or [text deleted]. In response to the conclusions reached in the Transferable Skills Analysis, the Appellant advised that she could no longer do any floral arranging or cake decorating because she does not have the requisite dexterity in her right hand. Further, she testified that she did not have any experience working as a seamstress and the inability to properly grip with her right hand effectively prevented her from any position which involved reliance upon her right hand. Lastly, she reiterated that she was also prevented from many tasks because of the inability to lift over 10 kg.

**Discussion**

Throughout the hearing of this matter, [the Appellant] presented herself in a very forthright and honest manner. The Commission found [the Appellant] to be a credible individual, who had cooperated fully with her caregivers and worked diligently throughout her rehabilitation process to restore her functional status. Upon consideration of the totality of the medical evidence before us, and the Appellant's own testimony, the Commission finds that the two-year determination completed by MPIC was premature and the resultant reduction of IRI was not warranted.

In our view, the medical evidence on the file which substantiated the ability of the Appellant to participate in employment outside of the home was insufficient. The Adjuster chose to rely on a comment made by [Appellant’s psychologist] that the

Appellant might psychologically be ready to commence part-time employment. [Appellant's psychologist] is clear in her report of January 18, 2001, clarifying her earlier correspondence indicating that part-time employment might be possible, that her opinion is that "it would appear to be impossible for [the Appellant] to find and sustain employment".

The results of the Transferable Skills Analysis are also not definitive. The Functional Assessment had determined that the Appellant was only capable of occasional firm or fine grasping with her right hand. It was clear from the Appellant's testimony before the Commission that she was unable to participate in any type of employment which would require manual dexterity in her right hand. This fact ought to have been taken into account by the rehabilitation consultant when she concluded that the Appellant could undertake employment as a floral arranger, a cake decorator or a seamstress.

In addition, as part of the two-year determination process, the Adjuster was required to consider the requirements of Section 109 of the MPIC Act, which states as follows:

> "**Considerations under Section 107 or 108**
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> 109(1) In determining an employment under Section 107 or 108, the corporation shall consider the following:
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> (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 under this Part;
>
> (c) the regulations.
>
> **Type of employment**
>
> 109(2) An employment determined by the corporation must be

(a) normally available in the region in which the victim resides; and

(b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis."

The Appellant gave oral testimony at the hearing of this appeal that retail sales occupations within the vicinity of [text deleted], Manitoba, were virtually non-existent. This was also confirmed by the Labour Market Analysis completed by [Appellant's rehab consultant] as part of the Transferable Skills Analysis. In her report, [Appellant's rehab consultant] noted that,

> "The occupations outlined in the NOC & Career Handbook Review, and CHOICES CT Review were considered in relation to the [text deleted] MB and surrounding area labour market. As [text deleted] is a relatively small community, labour market information was gathered for [text deleted], [text deleted], [text deleted] and [text deleted] which are all located approximately 45 minutes to an hour outside of [text deleted]".

Putting aside the consideration of whether the Appellant was physically capable of performing the physical demands of the determined employment, requiring the Appellant to drive to [text deleted] or [text deleted], a round trip distance of approximately 100 miles was not a reasonable or practical solution for employment for this Appellant at the time of the two year determination in January 1999. This is particularly the case given that the Appellant suffered from anxiety related to driving. This Commission therefore finds that the Adjuster failed to satisfy the requirements of subsection 109(2) of the MPIC Act in relation to this Appellant.

The Internal Review decision and the Adjuster's decision both make reference to the Appellant's apparent refusal to seek employment off the farm. Normally, this would

disentitle a claimant to further benefits pursuant to ss. 160(c) of the MPIC Act. Subsection 160 (c) provides that,

> "**Corporation may refuse or terminate compensation**
>
> 160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person
>
> (c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment."

No evidence was presented at the hearing of the appeal of [the Appellant's] refusal to seek employment off the farm, and ss. 160(c) was not cited by either the Adjuster or the Internal Review Officer in either of their reasons for decision (although, this appears to be the justification for the reduction of IRI during the 1-year grace period). Nevertheless, this Commission finds that there is insufficient evidence that [the Appellant], without valid reason, refused a new employment. Even if that were so, without a clear warning or notice given by MPIC to [the Appellant], that her benefits would be in jeopardy if she failed to cooperate, we find insufficient grounds upon which to reduce or terminate [the Appellant's] IRI on the basis of subsection 160(c) of the MPIC Act.

The decision of MPIC's Internal Review Officer does call for one, further comment; we refer to [MPIC's Internal Review Officer's] decision that, once the one-year "grace period" expires the Appellant's IRI would be calculated in the manner set out in the original decision letter from the adjuster dated January 27, 1999 (i.e. MPIC would reduce her IRI by her actual earnings or by $15,353.00 as outlined in Schedule C, whichever was greater). Notwithstanding our conclusion that the two-year determination completed by MPIC was premature and the resultant reduction of IRI was not warranted, we are also

mindful that, there is no documentation on the file that suggests that [the Appellant] is presently capable of anything greater than part-time employment. Therefore, there was no justification for reducing her IRI by the full amount of the net income from the determined employment after the expiration of the one-year grace period.

Follow-up reports were obtained by MPIC from [text deleted], physiotherapist, who had re-evaluated [the Appellant] on May 16, 2000. In her report of May 24, 2000, [Appellant's physiotherapist] notes that,

> "Her present level of function has certainly been maintained by regular physiotherapy sessions (which now include acupuncture). Her present level of function from her self-report is not consistent with competitive employment. The best way to address her level of functioning for competitive employment would be to re-evaluate her functional status by doing a functional capacity evaluation (FCE). It would be beneficial to have a consistent comparison by utilizing the same testing methodology as arranged previously with [text deleted]."

In her report of October 25th, 2000, she states that,

> "This client's function fluctuates from day-to-day and week-to-week. The physiotherapy treatment only serves to maintain and or temporarily improve the clients symptoms and function within a sedentary to light category. A Functional Capacity Evaluation related to her previous job demands would be required to more specifically state what job demands she is presently capable of."

**DISPOSITION:**

For the foregoing reasons, [the Appellant's] Income Replacement Indemnity will be reinstated as of January 27, 1999 at the level calculated by reference to her pre-MVA full-time occupation, with interest from the dates when each installment respectively fell due until the date of actual payment.

Further to [Appellant's physiotherapist's] recommendation that the best way to address the Appellant's level of functioning for competitive employment would be to re-evaluate her functional status by doing a Functional Capacity Evaluation, the Commission directs that if MPIC so chooses, a current Functional Capacity Evaluation be undertaken with a view to determining a suitable employment for the Appellant, if at all possible. Any failure by [the Appellant] (without a valid reason) to cooperate in the completion of any reasonable program arranged by MPIC pursuant to this decision shall entitle MPIC to invoke the provisions of Section 160 of the Act.

Dated this 7th day of May 2001.

**YVONNE TAVARES**

**COLON SETTLE, Q.C.**

**WILSON MACLENNAN**