Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-74

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Dr. Patrick Doyle**
APPEARANCES:	**The Appellant, [text deleted], did not appear;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**October 25, 2007**
ISSUE(S):	**1. Entitlement to Permanent Impairment benefit for Thoracic Outlet Syndrome.** **2. Entitlement to Permanent Impairment benefit for scarring.** **3. Entitlement to Permanent Impairment benefit for loss of rib.**
RELEVANT SECTIONS:	**Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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

Reasons For Decision

The Appellant was injured in a motor vehicle accident on August 12, 1998. She experienced pain in her back, left arm and neck, and suffered from occipital pain and headaches. She experienced a head injury and/or memory loss.

The Appellant also developed numbness and tingling in her hand and arm. She consulted and was examined by [Appellant's Neurologist], and was also treated by [Appellant's Thoracic Surgeon].

[Appellant's Thoracic Surgeon] ultimately diagnosed the Appellant as having Thoracic Outlet Syndrome. Following this diagnosis, she underwent surgery for this condition, which entailed the loss of a rib and scarring.

The Appellant sought permanent impairment benefits for the condition of Thoracic Outlet Syndrome, as well as for scarring and for the loss of the rib.

However, MPIC took the position, first that she did not necessarily suffer from Thoracic Outlet Syndrome, and then, following confirmation of that diagnosis and surgery for the condition, that this was a result of a pre-existing condition and was not a result of trauma from the motor vehicle accident.

On February 28, 2002 an Internal Review Officer for MPIC upheld a case manager's decision that there was no permanent impairment benefit available for a thoracic outlet syndrome per se. The decision found that such an award is available only if a Thoracic Outlet Syndrome causes a permanent impairment of either the sensory or motor functions of nerves in the upper body and that, if Thoracic Outlet Syndrome was the correct diagnosis, only the scarring left by the surgical procedure would attract permanent impairment benefit.

The Appellant also sought Internal Review of her case manager's decision dated October 20, 2003. That decision recognized that Thoracic Outlet Syndrome was the correct diagnosis for the

Appellant, but found that the cause/effect relationship between the diagnosis and the incident in question could not be established on the basis of medical probability.

An Internal Review Officer found, on November 7, 2003, that the Appellant's condition had not resulted from traumatic injury. The Internal Review Officer relied upon a report by [MPIC's Doctor] of MPIC's Health Care Services dated September 16, 2003 and found that the Appellant had not shown that she had begun to experience parasthesia within two (2) weeks of the accident. He found that where the condition results from a traumatic injury the symptoms involving the affected nerve roots can be expected to develop within days or weeks of the traumatic event, and so the Appellant's condition was not caused by the motor vehicle accident.

It is from these decisions of the Internal Review Officer that the Appellant now appeals.

Submission for the Appellant

The Appellant did not testify or participate at the hearing into her appeal. Although the Commission staff attempted to accommodate the Appellant's reluctance to appear at an appeal hearing, and invited the Appellant to participate via teleconference, the Appellant clearly indicated that she wished for the Commission to proceed without her.

Accordingly, the panel, without the benefit of any verbal submission or sworn testimony by the Appellant, could only rely on the documents on the file and written communications submitted by the Appellant.

Many of the Appellant's communications were handwritten. She also submitted several reports, including medical reports from [Appellant's Thoracic Surgeon], her surgeon and caregiver, in

addition to medical articles on the subject of Thoracic Outlet Syndrome and court decisions in other cases considering this condition.

[Appellant's Thoracic Surgeon's] reports clearly expressed his view that the Appellant suffered from Thoracic Outlet Syndrome and that it was a result of injuries from the motor vehicle accident.

The Appellant's family doctor, [Appellant's Doctor #1], stated, on J. 21, 1999:

> [The Appellant] has had ongoing problems of pain to her hands following the accident and I have noted in my records that she had some numbness to her right hand with the positive phalens test in December. Recent EMG studies of May 4 show that she had the carpal tunnel of mild degree.

On March 6, 2002, [Appellant's General Surgeon] reported that he had examined the Appellant and did not feel she was suffering from carpal tunnel syndrome. He opined that if anything, she may have had some element of ulnar nerve compression, but did not feel that surgery would benefit her symptomology at that time. He recommended a neurological consultation if her symptoms continued.

[Appellant's Neurologist] reported on February 12, 2001. He noted her reports of hand problems and feeling that her grip was not strong, with difficulty picking up things and numbness which waxed and waned.

[Appellant's Neurologist] stated:

> [The Appellant] has no evidence of any peripheral nerve impingement. The description of her symptoms in the face of normal nerve conduction studies is consistent with a post-traumatic thoracic outlet syndrome. Given that these symptoms have been present for two and a half years, I do not think it likely that it will resolve. On the other hand, I do

> not think the symptoms are bad enough to warrant any rib resection or other thoracic outlet surgery to relieve. At this point it would be something that she will be left having to cope with.

[Appellant's Thoracic Surgeon] provided a report on December 11, 2001. He diagnosed bilateral symptomatic Thoracic Outlet Syndrome, left worse than right. He stated:

> It would appear that her symptoms began following a motor vehicle accident that occurred in [text deleted] on August 12th 1998. She was the seat belted passenger in a Nissan truck that was stops and under section (sic). They (sic) fully loaded semi trailer truck struck the left rear aspect of their vehicle. She was taken to hospital, x-rayed and released. The pain in her back and left arm was experienced immediately following the accident. Within two weeks the pain in her neck was persistent, and she began to experience paresthesiae in the ulnar two fingers of both hands.
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> . . .
>
> In summary, I believe that these symptoms and findings are in keeping with the diagnosis of symptomatic thoracic outlet syndrome. I also believed that the syndrome has resulted directly from the 1998 body vehicle accident.

[Appellant's Thoracic Surgeon] reported again on J. 10, 2003. He described surgery which the Appellant underwent, involving a permanent removal of her first rib by surgical means. The resulting scar was measured by her family physician, [Appellant's Doctor #2], at 9 centimeters in length and within line in breadth, perhaps 1 mm.

[MPIC's Doctor], of MPIC's Health Care Services, questioned the idea that the Appellant's condition was caused by the motor vehicle accident. [Appellant's Thoracic Surgeon] reported on May 3, 2004 indicating that [MPIC's Doctor] was correct in his opinion that the bands and condensations of fibrous tissue were present prior to the accident. However, [Appellant's Thoracic Surgeon] did not agree with [MPIC's Doctor's] opinion that the medical evidence indicated that the Appellant's onset of neurological symptoms was quite distant from the incident in question:

> This is not my understanding in [the Appellant's] case.
>
> She tells me that the hand weakness began immediately following the accident and the numbness and tingling occurred within three weeks following the accident. In my experience these symptoms were directly related to the accident itself.
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> . . .
>
> With all due respect to [MPIC's Doctor], I am considered to be an expert in the condition of thoracic outlet syndrome and it is my expert opinion that the cause and relationships were directly attributed related to the accident. . .
>
> In my experience, the congenital bands are always present in cases who developed the condition of symptomatic thoracic outlet syndrome. It is the pre-existing congenital anomaly that "set up" a patient for the beginning of this syndrome. In half of my patients symptoms begin, as per their history, as a consequence of the activities of daily living whether those activities were work related or home related. The other 50% develop the symptoms within days or weeks from a specific traumatic incident. There is absolutely no doubt whatsoever that [the Appellant] did not have the symptoms prior to the accident. Immediately following the accident she developed symptoms of weakness in the hand and within the three weeks she had the tell tale tingling in her fingers, diagnostic of symptomatic thoracic outlet in the post-traumatic circumstance.

[Appellant's Thoracic Surgeon] reported again on October 12, 2004. He noted in that letter:

> . . . In and of itself tingling in the fingers is not per se diagnostic of thoracic outlet but put together with the other domains of her syndrome it certainly, in my view, supports the diagnosis of thoracic outlet syndrome.
>
> . . .
>
> The fact that she is significantly improved following decompression of her brachial plexus again supports the contention that she has had thoracic outlet syndrome all along.
>
> Finally, we see this condition in one of two broad clinically (sic) settings. First, we see some patients who develop the syndrome spontaneously through the acts of daily living and in the second group we see patients who develop the syndrome following specific traumatic events.
>
> In [the Appellant's] case there is no doubt in my mind that her thoracic outlet syndrome was fairly classical and it followed as a result of a particular accident. She had the congenital underlying bands and the accident precipitated the onset of symptoms. Furthermore, the significant relief of her symptoms by surgical treatment is further confirmation in my view.

The Appellant referred to the symptoms in her hands and fingers in a letter to her case manager dated February 18, 1999. She stated:

> 2. Though [Appellant's Neuropsychologist] sees a drop in the strength of my right hand (actually its (sic) my left hand that is the weakest, they must have made a mistake writing it down.) further, both hands are not as strong as they used to be before the accident but my left is the worst. [Appellant's Neuropsychologist] has told me he is going to recommend therapy to strengthen my hands, but I have concerns with treatment without knowing the cause. Don't get my wrong, I am all for continued therapy with [text deleted] for my hands to strengthen them, but what is causing the constant numbness and tingling, the feeling of pins and needles, the total no feeling in my two fingers, plus up my arm in the morning. (will exercise make the numbness and tingling go away?) Everyone says "Oh! Was this like this before the accident? Did you have carpet (sic) tunnel before the accident?" Well no [text deleted], I absolutely did not have any numbness, any tingling or feelings of pins and needles and no loss of strength in my hands and I want to know why I do now.
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> . . .
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> I don't want to just strengthen my hands, I want the tingling and numbness to stop! I want to sleep like a baby again so I am at my peak during waking hours (I don't want to resort to sleeping medication if at all possible.) I don't want to continue to suffer these headaches. It's been 8 months of sever (sic) headaches, numbness, weakness and tingling, backaches, and sleepless nights. . .

Also in the Appellants (sic) indexed file were reports from [Appellant's Neuropsychologist], a Clinical Psychologist and neuropsychologist and from Occupational and Physical Therapists.

In her handwritten submission, undated and entitled "Arguments", the Appellant refers to her reporting numbness, weakness and upper limb pain to her physiotherapist. She also refers to her reports to the VON nurse, who assessed her requirements for personal care assistance, of difficulties with her arms and hands regarding vacuuming etc. She refers to [Appellant's Neuropsychologist's] assessment of her hand functioning. In the handwritten submission, she refers to [MPIC's Doctor's] "false statements", and notes that they are "misleading and out of context".

The Appellant also referred to the "interference effect" of her other symptoms which hindered her reporting of the symptoms in her arms and hands at the time.

In a letter dated July 21, 1999 to her case manager, the Appellant stated:

> If I had not been hurt I would not be going through this, why should I loose (sic) half the strength in my hands, be in pain, have my wrists/fingers arms go numb plus on and on and not get fixed, in fact, be made to feel I'm being a fraud. If this was related to anything else I would not be bothering you. The symptoms were immediate following the accident. (though I believe my complaints were more to [Appellant's Physiotherapist #1] (whom I saw more) then (sic) [Appellant's Doctor #1] at the start because I was hurting more elsewhere at first and I thought my arms may be going numb because I was only able to sleep on my one side for 6 months, where I normally always slept on my stomach, plus I kept forgetting to tell him I wanted to look into my hands, I was more concerned with my memory which was an embarrassment at work plus other things. . .

Submission for MPIC

Counsel for MPIC submitted that the issue in this appeal comes down to whether the Thoracic Outlet Syndrome of the Appellant was caused by the motor vehicle accident or not. He indicated that the important keys to answering this question lay in the patient's history (when the complaints began and how consistently they were reported by the patient) and the surgical reports (any evidence that demonstrated trauma to the area in question that would have led to Thoracic Outlet Syndrome).

MPIC called [MPIC's Doctor] as a witness. [MPIC's Doctor] explained the condition of Thoracic Outlet Syndrome. He discussed the importance of obtaining an accurate patient history in assessing causation of that condition. In his view, symptoms should appear within a week or two after trauma, if the Thoracic Outlet Syndrome symptoms were induced by trauma.

He also reviewed the common findings which a surgeon might make when operating on a patient with Thoracic Outlet Syndrome. He described the difference in what a surgeon might see in non-traumatic induced Thoracic Outlet Syndrome.

[MPIC's Doctor] concluded that there was nothing in the Appellant's clinical history or in the surgical report and surgical history which indicated trauma causing her symptoms and Thoracic Outlet Syndrome condition. The fact that the Appellant did not report symptoms in her hands and arms until February 1999 and that [Appellant's Thoracic Surgeon's] post-surgical report did not show evidence of trauma in the area led him to conclude that the Appellant's Thoracic Outlet condition was caused by factors other than the motor vehicle accident.

Counsel for MPIC submitted that the evidence did not show any trauma induced Thoracic Outlet Syndrome. There was no hematoma, scar tissue, or indication of traumatic injury in the area. Congenital anomalies, such as fibre bands, were identified. In addition, he submitted that there was no evidence of paresthesia until the Appellant's letter of February 18, 1999, six (6) months after the accident.

Her references in the early months following the motor vehicle accident to any hand numbness or tingling, were vague and non-specific, dealing only with minor references to decrease of strength in the upper extremities etc.

Counsel for MPIC submitted that if the Appellant did suffer from Thoracic Outlet Syndrome, it stemmed from a biological predisposition to fibrous bands, and may even be connected to the Appellant's sleep patterns prior to the motor vehicle accident. He submitted that although [Appellant's Thoracic Surgeon] had opined that the Appellant's condition was due to the motor

vehicle accident, his opinion was based on the Appellant's poor reporting of her history, since [Appellant's Thoracic Surgeon] was of the impression that the Appellant had reported symptoms in her hands in the first few weeks following the motor vehicle accident, when in fact, the documentary evidence on file did not support this.

Discussion

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 onus is on the Appellant to show, on a balance of probabilities, that she suffered a physical impairment because of the accident. In this matter, the Appellant must establish that the condition of Thoracic Outlet Syndrome was caused by the motor vehicle accident, in order to establish her entitlement to permanent impairment benefits under the Act and Regulations.

MPIC takes the position that the Appellant's condition and symptoms were not caused by the accident, and points to the absence of signs of trauma in the surgical reports and to the absence of reported symptoms in the affected area until February 18, 1999, six (6) months after the accident.

[Appellant's Neuropsychologist], a clinical psychologist and neuropsychologist, conducted a neuropsychological assessment of the Appellant and provided a report dated March 8, 1999. In his report, he noted the Appellant's report of difficulty with her hands:

> [The Appellant] reported that soon after discharge, she noted she needed "two hands to open doors". Thus I had speculated as to whether the decreases we found in strength and speed are related to this initial symptom she noted.

[Appellant's Neuropsychologist] concluded that these changes in hand speed and strength were not likely related to a concussion:

> 5. However, it is less likely that the changes in hand speed and strength are related to the concussion. Motor changes are generally more associated with significant periods of consciousness, and clearly defined abnormalities on CT. However, it is certainly possible that [the Appellant] may have sustained a soft tissue injury, or other peripheral injury that would have affected hand function.

However, the Appellant did not meet with [Appellant's Neuropsychologist] and report these symptoms to him, until February of 1999.

[Appellant's Neuropsychologist] suggested an occupational therapy assessment, and a report was provided by [Appellant's Occupational Therapist], dated March 9, 1999. [Appellant's Occupational Therapist] stated:

> Information was obtained through review of medical reports provided with your referral and interview with client. [The Appellant] reports a history of injury consistent with that outlined in the medical reports and therefore her history will not be repeated here. [The Appellant] states that she does not recall the details surrounding the MVA and is not aware of the mechanism of injury to her hands. [The Appellant] does recall reduced sensation in her hand immediately following the accident, resulting in her frequently dropping objects held in the hands.

The occupational therapist did not comment on the cause of this condition, but recommended hand strengthening programs and the use of an ice pack.

[Appellant's Doctor #1], the Appellant's family physician, provided a report dated J. 21, 1999, which stated:

> [The Appellant] has had ongoing problems of pain to her hands following the accident and I have noted in my records that she had some numbness to her right hand with the positive phalens test in December. Recent EMG studies of May 4 show that she had the carpal tunnel of mild degree.

[Appellant's General Surgeon], examined the Appellant on September 24, 1999. His report of March 6, 2000 concluded that the Appellant was not suffering from carpal tunnel syndrome.

A neurology consultation with [Appellant's Neurologist], resulted in a report dated February 12, 2001. [Appellant's Neurologist] stated:

> . . . Additionally, she noted hand problems. She felt her grip was not as strong. She had difficulty picking up things. Also, she has noticed numbness which has waxed and waned since. . . .
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> . . . [The Appellant] has no evidence of any peripheral nerve impingement. The description of her symptoms in the face of normal nerve conduction studies is consistent with a post-traumatic thoracic outlet syndrome. Given that these symptoms have been present for two and a half years, I do not think it likely that it will resolve. On the other hand, I do not think the symptoms are bad enough to warrant any rib resection or other thoracic outlet surgery to relieve. . . .

The Appellant's diagnosis of Thoracic Outlet Syndrome is noted in a report from [Appellant's Thoracic Surgeon], dated December 11, 2001:

> It would appear that her symptoms began following a motor vehicle accident that occurred in [text deleted] on August 12th 1998. She was the seat belted passenger in a Nissan truck that was stops (sic) and (sic) under (sic) section (sic). They (sic) fully loaded semi trailer truck struck the left rear aspect of their vehicle. She was taken to hospital, x-rayed and released. The pain in her back and left arm was experienced immediately following the accident. Within two weeks the pain in her neck was persistent, and she began to experience paresthesiae in the ulnar two fingers of both hands.

[Appellant's Thoracic Surgeon] concluded that the symptoms and findings were in keeping with the diagnosis of symptomatic Thoracic Outlet Syndrome and stated he believed that the syndrome had resulted directly from the 1998 body vehicle accident.

[Appellant's Thoracic Surgeon] operated on the Appellant on November 18, 2002, for left-sided

surgical decompression of her brachial plexus. He reported:

> The rib was hinged backwards and in doing so we could appreciate 2 bands trapping the lower elements of the brachial plexus. First, there was an anterior band running from the rib laterally in front of the lower plexus to the rib at its head.
>
> Secondly, there was a condensation of fibrous tissue along the lead edge of scalene and medius muscle running from the insertion to the rib laterally and running behind the plexus and inserting on the C7 transverse process centrally. These bands were excised and the scalene medius muscle attachment was released. The first rib was then removed using a variety of rib cutting instruments.

[MPIC's Doctor] reviewed the file, including [Appellant's Thoracic Surgeon's] reports, in a Memorandum dated September 16, 2003. He commented that the findings noted by [Appellant's Thoracic Surgeon] upon surgery did not reflect a traumatic event that might have occurred to the Appellant's cervical spine, to cause the Thoracic Outlet Syndrome.

He also noted that the reports on file did not indicate that the Appellant had sustained an injury to the neck or upper extremities resulting in development of paresthesia (numbness or tingling) involving her upper extremities shortly after the incident in question. He noted that the first documentation of symptoms that might be in keeping with a nerve compression syndrome were not until February 18, 1999, approximately six (6) months following the incident in question. The distant onset of neurological symptoms caused him to question a cause/effect relationship between the diagnosed thoracic outlet syndrome and the incident in question, on the balance of medical probability.

These opinions were confirmed by [MPIC's Doctor] in his verbal testimony at the appeal hearing. Relying upon [MPIC's Doctor's] opinion, the Internal Review Officer supported the conclusion that the evidence did not support the view that the Appellant's condition developed as a result of the automobile accident.

> [Appellant's Thoracic Surgeon] is prepared to draw a link between your accident and the development of the outlet syndrome. I note, however, that he expressed this opinion on the basis that you had begun to experience paresthesia within two (2) weeks of the accident. (see his report of December 11, 2001) This does not seem to be the case.

[Appellant's Thoracic Surgeon] provided two (2) further reports. The first, dated May 3, 2004, addressed [MPIC's Doctor's] concern that "*the medical evidence indicates that [the Appellant's] onset of neurological symptoms occurred quite distant from the incident in question*". [Appellant's Thoracic Surgeon] stated:

> This is not my understanding in [the Appellant's] case.
>
> She tells me that the hand weakness began immediately following the accident and the numbness and tingling occurred within three weeks following the accident. In my experience these symptoms were directly related to the accident itself.
>
> . . .
>
> In my experience, the congenital bands are always present in cases who develop the condition of symptomatic thoracic outlet syndrome. It is the pre-existing congenital anomaly that "set up" a patient for the beginning of this syndrome. I half of my patients symptoms begin, as per their history, as a consequence of the activities of daily living whether those activities were work related or home related. The other 50% develop the symptoms within days or weeks from a specific traumatic incident. There is absolutely no doubt whatsoever that [the Appellant] did not have the symptoms prior to the accident. Immediately following the accident she developed symptoms of weakness in the hand and within three weeks she had the tell tale tingling in her fingers, diagnostic of symptomatic thoracic outlet in the post-traumatic circumstance.

[MPIC's Doctor] commented upon this in a report dated J. 18, 2004 noting that the reports on the file did not contain documentation indicating the Appellant reported difficulties with hand paresthesia until approximately six (6) months after the incident in question.

[Appellant's Thoracic Surgeon] responded on October 12, 2004 to note that tingling of the fingers in and of itself is not per se diagnostic of Thoracic Outlet Syndrome, but that he had relied upon other aspects of her condition in forming his conclusion. He stated:

> In [the Appellant's] case there is no doubt in my mind that her thoracic outlet syndrome was fairly classical and it followed as a result of a particular accident. She had the congenital underlying bands and the accident precipitated the onset of symptoms. Furthermore, the significant relief of her symptoms by surgical treatment is further confirmation in my view.

As the Appellant did not testify or make a verbal submission at the hearing, the panel has carefully reviewed the documents on the file, and paid particular attention to evidence of the Appellant's reporting of arm, hand or upper extremity complaints. As counsel for MPIC pointed out, there are a number of early caregiver reports which make no mention whatsoever of hand and arm complaints.

On the other hand, a physiotherapy report from [Appellant's Physiotherapist #1] dated September 2, 1998 checked off "yes" in the box beside "upper limb pain/numbness/weakness", although the report does not list such complaints under "relevant significant physical findings in order of significance."

A report of investigation/discussion by the Appellant's case manager, dated September 21, 1998, notes the Appellant's complaints regarding her "upper extremities", and that "she has decreased strength bilaterally upper extremities."

In a report of investigation/discussion dated September 24, 1998 the case manager notes the Appellant complained that she "can't extend arms out – could not do vacuuming/lifting."

In a report dated October 1, 1998 completed by a VON nurse, it was noted that the Appellant felt she required assistance to sweep, vacuum and wash floors.

> . . . Has difficulty with back and forth motion of her arms. Can assist with laundry, but unable to carry large baskets of clothes. Helps to grocery shop, but does not carry

supplies.

The next physiotherapy report, completed by therapist [Appellant's Physiotherapist #2], who saw the Appellant on October 8, 1998, makes no mention of upper limb difficulties.

The bulk of caregiver reporting which followed addressed, for the most part, difficulties the Appellant was having with memory lapses, potentially as a result of her head injury.

Then, in a letter to her case manager dated February 18, 1999, the Appellant directly addressed the difficulties with her hands and arms. She stated:

> 2. Though [Appellant's Neuropsychologist] sees a drop in the strength of my right hand (actually its (sic) my left hand that is the weakest, they must have made a mistake writing it down.) further, both hands are not as strong as they used to be before the accident but my left is the worst. [Appellant's Neuropsychologist] has told me he is going to recommend therapy to strengthen my hands, but I have concerns with treatment without knowing the cause. Don't get me wrong. I am all for continued therapy with [text deleted] for my hands to strengthen them, but what is causing the constant numbness and tingling, the feeling of pins and needles, the total no feeling in my two fingers, plus up my arm in the morning. (will exercise make the numbness and tingling go away?) Everyone says "Oh! Was this like this before the accident? Did you have carpet (sic) tunnel before the accident?" Well no [text deleted], I absolutely did not have any numbness, any tingling or feelings of pins and needles and no loss of strength in my hands and I want to know why I do now.

The question for the Commission is whether [MPIC's Doctor] and the Internal Review Officer were correct in their view that the Appellant did not experience or report hand and arm symptoms consistent with a traumatic onset of thoracic outlet syndrome, until some six (6) months after the accident.

As the Appellant did not testify or make a verbal submission at the hearing, the panel was left only with any written submissions she may have made on this issue. In her Notice of Appeal dated January 14, 2004, the Appellant states:

> Before the accident, my medical records clearly demonstrated that I had no previous health conditions. However, in addition to numerous other painful and immediate ailments caused by the accident, within a few days of being "t-boned" by the "semi", clear symptoms of nerve root damage did, in fact, develop. Although I tried to downplay/ignore these odd symptoms originally, in light of the very real pain that the other injuries were presenting, as the acute pain subsided these symptoms persisted and became both more puzzling and problematic. This condition, which eventually came to be diagnosed as Thoracic Outlet Syndrome by one of Canada's renowned experts in this field, was witnessed by numerous people immediately after the accident.

The Appellant also provided notes, in her own handwriting, which were faxed to the Commission on April 7, 2005. In her notes, she refers to the indications of upper limb pain, numbness and weakness in the September 2, 1998 physiotherapy report, less than one (1) month after the motor vehicle accident.

She also reviews the September 24, 1998 reference to her inability to hold her hands out.

In regard to the October 1, 1998 report of the VON nurse, her notes indicate:

> "Presently resides. . "
> Assistance with meal preparation not required as prepared by [text deleted] residents (as was all house keeping)
> Require help with sweeping, to vacuum, mop floors, because has difficulty with back and forth motion of her arms.
>
> My arms – hands didn't want to work right weak/weird "hands"/arms would not grip vacuum. Couldn't turn door knob's (sic) or turn keys in locks; (fingers/hands wouldn't wk. could not pick up sm. Items from off counter
> Fingers wouldn't work
> Couldn't finish skirting hands to weak to hold tools, fingers not work to hold screws etc.
>
> *I thought when my body healed & swelling whent (sic) down the above would naturally "go away" My left side at 2-3 months still very swollen – able to lie on rt side at this time for a few moments to lie on lt. side impossible, I could lie on stomach for a few seconds only.

The difficulty which the panel faces is that the Appellant chose not to testify in regard to these matters and to subject such evidence to cross-examination. Although there are some references in the documents to the Appellant's condition in the early weeks and months following the motor

vehicle accident, her failure to provide viva voce evidence which could be tested by cross-examination and credibility assessments significantly weakens the strength of her evidence.

Accordingly, the panel is left with the minor references to upper body and arm weakness on the file from 1998 and the Appellant's reports to her case manager and to some of her caregivers, including [Appellant's Doctor #1], [Appellant's Neuropsychologist] and [Appellant's Occupational Therapist], in February and March of 1999. Other reports from the period immediately following the accident do not mention these issues.

The panel is of the view that, having regard to the onus which lies upon the Appellant to establish, on a balance of probabilities, that she suffers from a permanent impairment which was the result of the motor vehicle accident, the Appellant has failed to meet the onus upon her of showing that her condition of Thoracic Outlet Syndrome was caused by the motor vehicle accident.

The panel acknowledges that, had the Appellant chosen to provide testimony, she may have been in a position to provide sufficient evidence of the early onset of her symptoms. However, without such confirmation, we are unable to conclude, simply from the limited and conflicting reports and the documents contained in the file regarding the months immediately following the accident, that the Appellant's symptoms appeared within a proximate enough period to the motor vehicle accident to meet the onus upon her of establishing causation, on a balance of probabilities.

The opinion of [Appellant's Thoracic Surgeon] appears to have been based, at least in part, on the Appellant's report of proximate symptoms, and she has failed to establish this fact, based

upon the evidence before us alone. The Commission requires further evidence from the Appellant to meet this onus, and in the absence of testimony from her, we find that she has failed to provide sufficient evidence to do so.

Therefore, the Commission finds that the Appellant has failed to demonstrate sufficient evidence to establish that her condition was caused by the motor vehicle accident. We find that she is not entitled to permanent impairment benefits as a result. The decisions of the Internal Review Officer dated February 28, 2002 and November 7, 2003 are confirmed and the appeals of the Appellant are hereby dismissed.

Dated at Winnipeg this 14th day of December, 2007.

LAURA DIAMOND

MARY LYNN BROOKS

DR. PATRICK DOYLE