

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-220**

PANEL: Ms Laura Diamond, Chairperson
Ms Sandra Oakley
Ms Carole Wylie

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: February 12 & 13, 2008

ISSUE(S): Entitlement to further permanent impairment benefits

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 41/94, Schedule A, Division 2, Subdivision 3, Section 13(i)

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 27, 1997. As a result of the accident, the Appellant sustained a sprained or fractured right foot as well as a closed head injury. As a result of this closed head injury, the Appellant developed a pattern of increasingly frequent and serious seizures. She had a history of infrequent mild seizures prior to the accident.

The Appellant received psychological treatment and also underwent a surgical procedure to help address the seizures. As a result of this surgery, treatment and medication, the seizures were only partially controlled.

MPIC assessed the permanent impairment benefits which it believed the Appellant would be entitled to under Section 127 of the MPIC Act.

By letter of June 11, 2004, the Appellant's case manager indicated that MPIC's Health Care Services Team had awarded the following impairments:

- Organic brain syndrome 55%
- Non-psychotic mental disorder – psychological difficulties 50%
- Alteration of cerebral tissue 5%

After applying the table of successive remainders, pursuant to the regulations, the Appellant's total impairment entitlement was found to be eighty-three (83%) percent of the maximum.

The Appellant sought an Internal Review of this decision. The Internal Review Officer reviewed the medical information on the file, including reports from [MPIC's Doctor] and [MPIC's Psychologist] of MPIC's Health Care Services Team, and found that the case manager's award of impairment entitlement to eighty-three (83%) percent of the maximum was supported by the medical information on the Appellant's file. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and submission for the Appellant

Counsel for the Appellant indicated, by letter dated October 29, 2007 to the Commission, that:

The main issue to be dealt with is that the epileptic seizures which [the Appellant] continues to suffer from be properly considered in the application of the regulations and ultimately in the calculation of the benefits to which [the Appellant] is entitled.

Further, counsel for the Appellant indicated that the basis for the appeal was under Manitoba Regulation 41/94, Division 2, Subdivision 3, Section 13(i).

The Commission heard evidence from the Appellant's husband. He gave evidence regarding the Appellant's background, their marriage, and their history of living, working and raising children in Manitoba.

He described the Appellant's activity level, including work both outside of and in the home. He also described the changes in the Appellant following the motor vehicle accident. He described this as "day and night". Before the motor vehicle accident, the Appellant had been very active and responsible, working, looking after the finances of the home, looking after the household, cooking and cleaning. She had been very outspoken, and never shy or nervous.

After the motor vehicle accident, the Appellant could not care for herself or her home and needed to have someone looking after her. She did not want to go out of the house, was not able to do housekeeping and began having problems with seizures. He described the nature of the seizures, indicating that the Appellant would bite her teeth and tongue and that her body would shake. They would last for up to two (2) minutes, or longer.

Upon cross-examination, the Appellant's husband was questioned regarding investigations for seizures which the Appellant had undergone before the motor vehicle accident, arising out of a clinical history of short blackouts which caused her caregivers to query a seizure disorder.

He indicated that these seizures were different from the ones that she experienced after the motor vehicle accident. Prior to the motor vehicle accident, she had been experiencing some dizziness and vagueness and the doctors wanted to investigate. He also indicated that his wife had sometimes suffered from depression in the Fall, and that she had experienced some visual hallucinations for many years before the motor vehicle accident, although they never really affected her work.

The Appellant's husband described the Appellant's treatment by her general practitioner, [Appellant's Doctor #1], and a referral to [Appellant's Neurologist #1] for testing. It was [Appellant's Neurologist #1's] opinion that the motor vehicle accident was causing her to have seizures and she was referred to [Appellant's Neurosurgeon]. [Appellant's Neurosurgeon] performed surgery in the Fall of 1998.

The Appellant's husband testified that after the surgery the nature and frequency of her seizures changed. They seemed, then, not so severe as they had been before, with not as much biting of her tongue and grinding teeth.

They tapered off for a period, but then increased again. He testified that these seizures recur now five (5) or six (6) times a month. They are not as severe as the pre-surgery seizures. She seems, at those times, not to know her surroundings and to drop whatever she is holding.

The Appellant also sought treatment at [Hospital #1] of [text deleted], where she was referred by a neurologist from [Hospital #2], [Appellant's Neurologist #2].

At the hospital in [text deleted], the Appellant was monitored by machines which recorded her seizure activity. However, the Appellant's husband disputed the report which was issued, following the assessment by [Hospital #1], questioning the quality of the testing and the assessment. He also indicated that he was not happy with the conclusions of the report which indicated that the Appellant suffered from psychogenic non-epileptic seizures and that the cause of these events was related to stress.

Counsel for the Appellant submitted that the Appellant still suffers from post-traumatic epileptic seizures. Prior to the motor vehicle accident she did not have any problems with epilepsy and had received no treatment for epileptic seizures.

Before the motor vehicle accident she worked and led a busy active lifestyle caring for her household and for others. The motor vehicle accident had totally changed her life and severely disrupted her activities of daily living. Her husband has to be home to take care of her and make sure that she is very careful around things like stoves, fires, etc. She requires almost constant supervision for the performance of her daily activities. She may also suffer from side effects from the medications she is taking.

The motor vehicle accident was deemed to be the cause of major post-traumatic epileptic seizures which the Appellant suffered following the accident. Counsel submitted that these post-traumatic episodes had not ended. He questioned both the conclusions of the doctors at [Hospital #1] and of [MPIC's Doctor], [text deleted], who also gave evidence at the hearing into the

Appellant's appeal. He noted that the Discharge Summary from [Hospital #1] had not been signed by the attending physician, [Appellant's Neurologist #3], but rather had been prepared by a resident.

He also submitted that because [MPIC's Doctor] had taken the position that the Appellant's seizures were not post-traumatic or epileptic, MPIC had made no assessment of permanent impairment benefits for epilepsy, and clearly made no effort to assess whether the Appellant falls within the terms set out under Section 13(i) of Subdivision 2.

Counsel also referred to the reports of [Appellant's Psychologist], a consulting clinical psychologist who treated the Appellant. [Appellant's Psychologist], who treated the Appellant for over two (2) years, gave his opinion that the nature of the seizures that the Appellant is having are not psychological in nature, but rather are organic, stating:

. . . I believe it is likely that psychological factors help increase the frequency of her seizures, but that they are primarily neurological, rather than psychogenic, in nature.

Counsel submitted that the Appellant still suffers from post-traumatic epileptic seizures, and that the Commission should apply common sense to a tragic situation by finding that the Appellant should be awarded a permanent impairment benefit for post-traumatic epilepsy pursuant to Division 2, Subdivision 3, Section 13(i) of the permanent impairment schedule.

Evidence and Submission for MPIC

Counsel for MPIC took the position that the Appellant's permanent impairment benefits had been properly assessed and calculated pursuant to the MPI Permanent Impairment Schedule. The Appellant received the maximum impairment award, five (5%) percent, for a severe

alteration of brain tissue, due to the removal of brain tissue during the course of surgery performed by [Appellant's Neurosurgeon] on December 9, 1998.

She also received an award for organic brain syndrome under Division 9, Subdivision 1, Item 2 of the Regulation. This award was arrived at after an exhaustive review of the relevant medical evidence conducted by [MPIC's Psychologist], who concurred with the assessment of her treating psychologist, [Appellant's Psychologist].

The Appellant also received an award for non-psychotic mental disorder under Division 9, Subdivision 3, Item 10 of the Regulation. [Appellant's Psychologist] had taken a similar, although somewhat different approach to the assessment of this aspect of the permanent impairment rating, by referring to a personality disorder under Division 9, Subdivision 4. He did however, also take into account some of the factors set out in the non-psychotic mental disorders provisions relied upon by [MPIC's Psychologist], where there was some overlap. This resulted in a fifty (50%) percent rating.

The impairment identified by counsel for the Appellant, and at issue in the hearing was an impairment regarding the spinal cord and brain, for post-traumatic epilepsy.

In this regard, the Commission heard evidence from [MPIC's Doctor] of MPIC's Health Care Services Team.

[MPIC's Doctor] had considered the specific provision put forward by counsel for the Appellant (Division 2, Subdivision 3, Item 13(i)) in a Memorandum dated January 14, 2008. In this report, and in her evidence before the Commission, she noted that between the date of the accident and

December 1998 when the Appellant underwent brain surgery, the Appellant's seizures had a distinctive physiological character to them. Neurologists treated and diagnosed complex partial seizures with secondary generalization, and provided the opinion that the closed head injury sustained at the time of the motor vehicle collision was a precipitating factor leading to seizure recurrence in the Appellant. MPIC's medical consultants believed that this was an exacerbation of a pre-existing condition in a manner sufficient to ultimately alter its natural history.

[MPIC's Doctor] also reported that the seizure frequency was dramatically reduced following the Appellant's surgery. Subsequent to the assessment done in [text deleted], by EEG video monitoring in the Epilepsy Monitoring Unit of [Hospital #1], it was concluded that the Appellant was suffering from a new spell of episodes which the [text deleted] team felt were likely secondary to psychogenic non-epileptic seizures.

Based on this information, [MPIC's Doctor] concluded that the probable diagnosis was that the Appellant's spells were related to psychogenic non-epileptic seizures and that there was no surgical recommendation, as the basis of the seizures was not determined to be organic. Therefore, there was no assignment of a permanent impairment benefit made on the basis of epilepsy and/or post-traumatic seizure.

On cross-examination, [MPIC's Doctor] responded to questions regarding [Appellant's Psychologist's] report and his stated view that the Appellant's seizures were primarily neurological rather than psychological.

[MPIC's Doctor] indicated that while [Appellant's Psychologist's] observations and assessments were important information taken into account by MPIC's medical consultants, she was of the

view that as a psychologist, he did not have the expertise to diagnose a neurological condition, particularly, when this opinion differed from the assessment made by [Appellant's Neurologist #3], the neurologist in [text deleted]. [MPIC's Doctor] testified that she accepted [Appellant's Neurologist #3's] assessment of the effects of stress upon the Appellant's seizures, as his expert opinion based upon the investigations which he did. She applied this medical information to the impairment manual to rate the Appellant's condition on the basis of [Appellant's Neurologist #3's] opinion that this was a psychological condition.

Counsel for MPIC also relied upon the report of [MPIC's Psychologist], who took into account what he described as "pseudoseizures as described in the report prepared by the [Hospital #1]". [MPIC's Psychologist], in his report dated May 19, 2004, considered the report from [Hospital #1], as well as the assessment of [Appellant's Psychologist]. He noted that there was some overlap in the elements described under Division 9, Subdivision 3 (non-psychotic mental disorder) and Subdivision 4 (personality disorders) referred to by [Appellant's Psychologist], and suggested a more comprehensive approach resulting in a fifty (50%) percent rating (10% more than the assessment by [Appellant's Psychologist]).

Counsel for MPIC submitted that the Appellant had been fairly and adequately compensated pursuant to the MPI Permanent Impairment Schedule and that the appeal should, accordingly, be dismissed.

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.

Manitoba Regulation 41/94, Schedule A, Division 2, Subdivision 3, Section 13(i)

(i) Posttraumatic epilepsy, syncope, cataplexy, narcolepsy and other neurological disorders and disturbances of consciousness;

...

(ii) a disorder or disturbance that severely disrupts the performance of the activities of daily living and required an almost constant supervision for the performance of such activities, including the side effects of medication;

50 to 80%

The Commission notes that MPIC has accepted that the Appellant's seizure condition was exacerbated by the motor vehicle accident. However, it is MPIC's submission that, following the Appellant's surgery by [Appellant's Neurosurgeon], the nature of these seizures changed. In MPIC's submission, while the Appellant is entitled to permanent impairment awards regarding the alteration of cerebral tissue, organic brain syndrome, and a non-psychotic mental disorder, she does not meet the requirements set out in the schedule, for a permanent impairment benefit for post-traumatic epilepsy.

The onus is on the Appellant to show, on a balance of probabilities, that she suffers from a permanent impairment for which she is entitled to a benefit under the post-traumatic epileptic section of the Regulation.

The Commission has reviewed the evidence at the hearing and on the file, as well as the submissions of the parties.

The Commission accepts the report from the [Hospital #1] as the best and most recent neurologic evidence regarding the Appellant's condition.

We also accept [MPIC's Doctor's] evidence as the expert evidence of a medical consultant,

recognizing that she is not and does not claim to be a neurologist. We accept her analysis and her explanation of the analytical approach that she and the MPIC Health Care Services Team employ in reviewing and assessing files, particularly in such complex medical cases as the Appellant's.

In a report dated January 14, 2008, [MPIC's Doctor] wrote:

The assignment of impairment benefit for organic brain syndrome (55%) and non-psychotic mental disorder (50%) took into consideration the psychogenic effects resulting from the motor vehicle collision. This assignment would be considered inclusive of the diagnosis provided by [Appellant's Neurologist #3] in 2002 that the claimant's presentation of episodes appearing to be seizure-like was on the basis of psychogenic, non-epileptic etiology; more specifically, a reaction to stress.

[MPIC's Doctor] indicated her willingness to address and consider new medical evidence, should such information be presented. Unfortunately, in this case, the Appellant has not put forward medical evidence from any specialists. Counsel for the Appellant relied, for the most part, upon the reports of [Appellant's Doctor #1], whose report does not address any possible distinctions between organic and psychogenic seizures or episodes. He also relied upon the report from [Appellant's Psychologist].

As noted, the onus is on the Appellant to show, on a balance of probabilities, that she suffers from a permanent impairment for which she is entitled to a benefit under the post-traumatic epileptic section.

However, the Commission has not been provided with any medical evidence that the Appellant has continued to suffer from non-psychogenic seizures following her surgery.

The Appellant's husband provided information to [Hospital #1], which is set out in that discharge summary, indicating that the Appellant's seizures have changed since her surgery. He testified that after surgery her seizures were of a different kind and seemed to be not as severe as before, without the tongue biting and teeth grinding which she had suffered from in the past. His testimony was that her seizures were different. She would become unaware of her surroundings for a while, whatever was in her hand might drop to the floor, and it might take a while for her to "come back".

These descriptions are consistent with the assessments of [MPIC's Doctor] and of the specialists in [text deleted] that the Appellant is now suffering from "episodes" or "events" of a psychogenic nature. We find that there is no convincing evidence from [Hospital #1], or any other physician (including the Appellant's general practitioner), that she has had any organic, non-psychotic seizures since her surgery.

It was the position of counsel for the Appellant that the Appellant should be entitled to permanent impairment benefits pursuant to the post-traumatic epilepsy section, as she still remains at risk for epileptic seizures and is required to take medication in that regard. As such, counsel for the Appellant argued that she still fits the criteria under Sections 13(i), as there is still a risk of seizures.

The panel does not agree that the Appellant should be eligible for permanent impairment benefits under a section of the Regulations which does not apply to her actual medical condition, as assessed by specialists in that field. The Discharge Summary from the [Hospital #1] is clear that the events the Appellant is suffering are psychogenic and non-epileptic in nature. Accordingly, they do not fall under the definition which would attract a permanent impairment benefit under

Section 13(i). This applies only to post-traumatic epileptic seizures.

Clearly, the Appellant has suffered and still suffers from extreme health problems as a result of the injuries caused and/or exacerbated by the motor vehicle accident. These injuries have been addressed, however, through the permanent impairment awards which have been awarded to the Appellant by MPIC, and which the Internal Review Officer considered in her Internal Review decision.

Accordingly, the Commission dismisses the Appellant's appeal and hereby confirms the decision of the Internal Review Officer dated August 25, 2004.

Dated at Winnipeg this 18th day of March, 2008.

LAURA DIAMOND

SANDRA OAKLEY

CAROLE WYLIE