Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-42

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Mr. Wilson MacLennan** **Mr. Les Cox**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ("MPIC") was represented by Ms. Joan McKelvey.**
HEARING DATE:	**August 17, 2001**
ISSUES:	**Reinstatement of Income Replacement Indemnity Benefits;** **Reimbursement for travelling expenses incurred during trips to [text deleted], Alberta for treatment following injury;** **Cost of knee brace**
RELEVANT SECTIONS:	**83(1)(a); 136(1) of T*he Manitoba Public Insurance Act* (the "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

1. The Appellant, [text deleted] is appealing an Internal Review decision dated February 6, 2001, wherein MPIC denied her Income Replacement Indemnity Benefits (hereinafter referred to as "IRI Benefits") for a period of seven weeks following an injury she sustained July 24, 2000; reimbursement for travel expenses incurred during trips to [text deleted], Alberta for treatment following the injury and the cost of a knee brace.

2. Section 83(1)(a) of the Act states as follows:

> A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;

Section 136(1) of the Act states as follows:

> Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under The Health Services Insurance Act or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
> (b) the purchase of prostheses or orthopedic devices;
> (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
> (d) such other expenses as may be prescribed by regulation.

3. [The Appellant] was involved in a motorcycle accident on December 9, 1995 and suffered an extremely severe injury to her right leg. [Text deleted], an orthopedic surgeon who treated [the Appellant] at that time, indicates in his report to the Review Officer dated July 11, 2001 that in the opinion of both himself and the vascular surgeon who saw [the Appellant] at presentation that she would have been best served by below-knee amputation. [Appellant's orthopedic surgeon #1] states in his letter:

> However, an attempt was made to salvage her leg. Her tibia and fibula fracture eventually did heal but she had had a significant amount of muscle debrided from her lower leg. She was left with a footdrop, a weak lower leg, and no sensation over the anterior, posterior and lateral one half of her right lower leg. As well, the right subtalar motion was only 25% of normal.

Both [Appellant's orthopedic surgeon #1] and [text deleted], an orthopedic surgeon in [text deleted], Alberta who subsequently treated [the Appellant] after her accident on July 24, 2000, were of the opinion that [the Appellant] had been left with a permanent impairment of her right lower leg. [Appellant's orthopedic surgeon #2] in his report to

MPIC submitted February 12, 2001 describes the permanent impairment as follows:

> She has a permanent foot drop and possible the ankle should be fused at one time too. She also suffered a popliteal artery laceration and had severe muscle ischemia and this is another cause for her weakness of her lower leg.

4. On July 24, 2000, approximately 4 ½ years after the motorcycle accident wherein [the Appellant] injured her right leg, she was unfortunately involved in another accident which resulted in injury to her left leg. The Review Officer, in his letter to [Appellant's orthopedic surgeon #1] dated December 29, 2000 describes the accident as follows:

> She was hanging up chimes, directly overhead. She was standing on a two-foot stool which had four legs. She had stood on it previously lots of times without mishap. The stool started tipping or wobbling. She shifted her weight to the right to compensate for the wobbling and experienced "buckling" of her right knee. She said she felt a pop or crack in the right leg. She then felt herself to be falling over and over-corrected to the left. She explained that she did not want to fall to the right because there was a T.V. stand, with a T.V., only some 2 or 2 ½ feet away from her on the right side. She did not want to knock that over. She did manage to fall to the left, but landed awkwardly on her left foot. She then felt a pop or crack in her left leg. She explained that her right leg had not given out or popped or buckled in this way at any time before this particular incident.

5. [The Appellant], at the time of the accident, was residing in [text deleted], Alberta and was required to travel to [text deleted], Alberta to receive medical treatment from [text deleted], an orthopedic surgeon. [Appellant's orthopedic surgeon #2] saw [the Appellant] on July 27, 2000, determined that she had sustained a medial collateral ligament tear to her left knee, and advised her to be off work for approximately seven weeks. [Appellant's orthopedic surgeon #2] saw [the Appellant] on one other occasion, on August 16, 2000, and reported that she was feeling much better.

6. As a result of her injury to her left knee, [the Appellant] was unable to work for a period of seven weeks, and lost income that she was earning from two part-time jobs. She was

required to purchase a knee brace which she wore for a period of six weeks. As well, [the Appellant] was required to travel on several occasions to [text deleted], Alberta from [text deleted] for medical treatment following the injury she sustained on July 24, 2000.

7. [The Appellant] requested that MPIC provide her with IRI Benefits for a seven week period, reimburse her for the cost of the knee brace and for travel expenses for several trips to [text deleted], Alberta to see [Appellant's orthopedic surgeon #2].

8. The Case Manager for MPIC rejected [the Appellant's] claim for reimbursement of the above matters, and as a result, [the Appellant] requested MPIC to review this decision. The Review Officer conducted a hearing in the presence of [the Appellant] on December 27, 2000 and subsequently the Review Officer requested a medical report from [Appellant's orthopedic surgeon #1], which he received on January 11, 2001. After considering [Appellant's orthopedic surgeon #1's] medical report, the Review Officer affirmed the decision of the Case Manager in a report dated February 6, 2001.

9. In the Review Officer's letter to [Appellant's orthopedic surgeon #1], he states as follows:

> There are really two issues. First, did the 1995 injury cause the 2000 injury? In other words, can it be said that "but for" the 1995 injury, the 2000 injury would not have occurred? Secondly, can it be said that the first injury was a "material cause" of the second one? In other words, even though the injury might have occurred in any event, can it be said that the disability remaining from the first injury was a contributing factor in the occurrence of the second injury? In both cases, the standard of proof is simple probability. That is to say either or both of them can be answered "yes" if the connection of the two injuries is more probable than not.

10. The Review Officer correctly set out the two legal tests to deal with causation in these

matters. In *Athey v. Leonati et al* (1996), 140 D.L.R. (4th) 235, the Supreme Court dealt extensively with this issue. In a unanimous decision, Mr. Justice Major states:

> A. *General Principles*
> (13) Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> (14) The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
>
> (15) The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, supra. A contributing factor is material if it falls outside the de minimis range: *Bonnington Castings, Ltd. v. Wardlaw*, supra; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

11. In *Liebrecht v. Egesz et al*, 135 Man.R. (2d) 206 Justice De Graves, in arriving at his decision, cites *Athey v. Leonati et al* (supra) and states:

> (64) Causation must be proved on a balance of probabilities. But it is only necessary by that civil standard of proof to prove that the defendants' negligence materially contributed to the injury.
>
> (65) On the question of causation Major, J., for the court (S.C.C.) in Athey v. Leonati et al (1996), … restated the principle in the context of competing causes as follows:
>
> > "It is not now necessary, nor has it ever been for the plaintiff to establish that the defendant's negligence was the sole cause of the injury.
> >
> > "The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the 'but for' or material contribution test. Future or hypothetical events can be factored into the degrees of probability, but causation of the injury must be determined to be proven or not proven. (p. 245-246)
> >
> > . . .

This decision was appealed to the Manitoba Court of Appeal, and on the issue of causation, the Manitoba Court of Appeal unanimously confirmed the decision of Mr. Justice De Graves. (150 Man. R (2d) 257)

12. [Appellant's orthopedic surgeon #1], in response to a request by the review officer states in his report dated January 11, 2001:

> Your first question was – Did the 1995 injury cause the 2000 injury. In other words can it be said that but for the 1995 injury, the 2000 injury would not have occurred. In my opinion, the answer to this question is no.

[Appellant's orthopedic surgeon #1] indicates that the 1995 injury did not cause the year 2000 injury on a "but for" test.

13. However, [Appellant's orthopedic surgeon #1] does determine that the residual disability in [the Appellant's] right leg materially contributed to the occurrence of the second accident in the year 2000. [Appellant's orthopedic surgeon #1] states in his report dated January 11, 2001:

> The second question was – Whether the first injury was a material cause of the second one. In other words, even those (sic) the injury might have occurred in any event, can it be said that the disability remaining from the first injury was a contributing factor in the occurrence of the second injury. In my opinion, the answer to this question is yes. The reason for my answer is that she suffered an extremely severe injury to her right leg in September of 1995 and it was the opinion of myself and the vascular surgery who saw her at presentation that she would have been best served by a below-knee amputation. However, an attempt was made to salvage her leg. Her tibia and fibula fracture eventually did heal but she had had a significant amount of muscle debrided from her lower leg. She was left with a footdrop, a weak lower leg, and no sensation over the anterior, posterior and lateral one half of her right lower leg. As well, the right subtalar motion was only 25% of normal.
>
> <u>Therefore given the nature of her fall, it is my opinion that her residual disability in her right lower extremity caused her to fall in a much more awkward fashion than she normally would have and directly contributed to the injury that she sustained to her left knee.</u> (underlining added)

14. The Review Officer when rejecting [the Appellant's] application for review disagrees with [Appellant's orthopedic surgeon #1's] medical opinion that the residual disability in

[the Appellant's] right leg materially contributed to the injury in question.

15. In reviewing [Appellant's orthopedic surgeon #1's] opinion as set out above, the Review Officer stated:

> Most of what he says on this topic is a description of the condition of your right leg. The important part of his opinion is as follows:
>
> > Therefore, given the nature of her fall, it is my opinion that her residual disability in her right lower extremity caused her to fall in a much more awkward fashion than she normally would have and directly contributed to the injury that she sustained to her left knee.
>
> My concern with this opinion is that [Appellant's orthopedic surgeon #1] does not explain what it is about the "nature of" the fall that creates the causal link.

16. The Commission determines that the Review Officer misinterpreted [Appellant's orthopedic surgeon #1's] opinion at arriving at this conclusion. The Review Officer, in his letter to [Appellant's orthopedic surgeon #1], dated December 29, 2000, had requested [Appellant's orthopedic surgeon #1's] medical opinion and described the accident in full, as set out on page 4 of these reasons. [Appellant's orthopedic surgeon #1] was informed by the Review Officer in his letter, *inter alia*:

> She shifted her weight to the right to compensate for the wobbling and experienced "buckling" of her right knee. She said she felt a pop or crack in the right leg. She then felt herself to be falling over and over-corrected to the left. … She did manage to fall to the left, but landed awkwardly on her left foot. She then felt a pop or crack in her left leg.

17. The only information [Appellant's orthopedic surgeon #1] had with respect to the nature of the fall was provided by the Review Officer in his letter to [Appellant's orthopedic surgeon #1] dated December 29, 2000. [Appellant's orthopedic surgeon #1], in providing his medical opinion, accepted the Review Officer's description of the accident and incorporated that description into his medical opinion when referring to the nature of the

fall.

18. It was not necessary for [Appellant's orthopedic surgeon #1] to repeat explicitly the description of the accident, as set out in paragraph 4 hereof, when he expressed his opinion that the residual disability directly contributed to the injury. The Review Officer was in error when he indicates that the majority of what [Appellant's orthopedic surgeon #1] was referring to in his letter to him was a description of a condition of the leg and that [Appellant's orthopedic surgeon #1] did not provide an explanation as to what it is about the "nature of" the fall that caused the causal link.

19. The description of the accident as provided by [the Appellant] to the Review Officer clearly establishes a causal link between her residual disability in her right lower extremity and the injury she sustained to her left knee. [Appellant's orthopedic surgeon #1] does explain, contrary to the assertion of the Review Officer, why [the Appellant's] residual disability to her right lower leg materially contributed to the injury to her left knee. The wobbling of the stool, the shifting of her weight, her attempt to over-compensate to the left were all factors which contributed to the injury to the left knee. [The Appellant], however, states that immediately after experiencing a buckling to her right knee, she felt a pop or crack in her right leg and then felt herself falling over.

20. The Commission is not required to determine the sole cause of the accident with scientific precision. The Commission is entitled to make a judgement based on common sense, experience, and on the evidence as whether the residual injury to the right lower leg materially contributed to the injury to the left knee.

21. [Appellant's orthopedic surgeon #1] determined that the residual disability caused her to fall. He also found that the residual disability caused her to fall in a much more awkward fashion than she normally would have. [Appellant's orthopedic surgeon #1] determined that the injury to her left knee was the result of not only the fall, but the manner in which she fell.

22. The Review Officer failed to properly interpret [Appellant's orthopedic surgeon #1's] medical report having regard to the written description of the accident he had himself provided in his letter to [Appellant's orthopedic surgeon #1] dated December 29, 2000. As a result of misinterpreting the medical report, the Review Officer considered a number of other factors which may have contributed to the accident. However, he gave no weight to [Appellant's orthopedic surgeon #1's] medical opinion that [the Appellant's] residual injury to her right lower leg directly contributed to her fall and the manner in which she fell, all of which directly contributed to the injury she sustained to her left knee.

23. The Commission in the past has dealt with the issue of causation. In [text deleted], dated April 29, 1997 the Commission stated at page 7:

> Causation is not always based upon exact scientific principles; one must apply experience and conventional wisdom along with proof based on a balance of probabilities.

24. In *Athey vs. Leonati* [supra], Justice Major on behalf of the Supreme Court of Canada stated:

> (16) In *Snell v. Farrell*, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All

E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

(17) It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

(18) This proposition has long been established in the jurisprudence. Lord Reid stated in *McGhee v. National Coal Board*, supra, at p. 1010:

> It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

25. In *Mitchell v. Rhaman*, 149 Man. R (2d) 254, the Court dealt with the issue of causation under the MPIC Act and states:

(14) *The Interpretation Act,* R.S.M. 1987, c. I80 s. 12 states:

Enactments deemed remedial.
12 Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects.

(15) This principle of liberal construction is well accepted in “no fault” compensation schemes such as Workers Compensation and compensation for automobile accidents.

. . . For automobile accidents see:
McMillan v. Thompson (Rural Municipality) (1997), 115 Man. R. (2d) 2 (Man. C.A.),
Guiboche v. Ford Motor Co. of Canada Ltd. (1998), 131 Man. R. (2d) 99 (Man. C.A.)

(21) In the *McMillan* case (supra), the plaintiff’s claim was against a municipality for the alleged failure to keep a bridge in a proper state of repair and failure to warn potential users of the bridge of its dangerous condition. The Court of Appeal dismissed the plaintiff’s action, finding that it was barred by the *Act*. . . .

(24) Helper J.A. in her decision refers to an English case at p. 19, paras. 97 and 98, as follows:

An English case is particularly helpful. In ***Minister of Pensions v. Chennell,*** [1947] 1 K.B. 250, a bomb dropped by enemy aircraft was found unexploded by a boy and was taken home. The boy subsequently took the bomb to a public thoroughfare. He tampered with it with the result that it exploded causing injury to a girl. The issue before the court was whether the girl's injury was a war injury under the **Personal Injuries (Emergency Provisions) Act, 1939.**

Denning, J. as he then was, considered whether the injury was "caused by" the discharge of the bomb by the enemy (as required by the provisions of the **Act**). He began at p. 252:

> Much depends on the right approach. The best way is to start with the injury and inquire what are the causes of it. Sometimes there may be a single cause. More often there is a combination of causes. If the discharge of a missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of a pension, notwithstanding that there may be other causes co-operating to produce it, whether they be antecedent, concurrent or intervening. It is not necessary that the discharge of the missile or other event should be 'the' cause of the injury in the sense either of the sole cause or of the effective and predominant cause.

He concluded at p. 257:

> …applying the principles that I have stated, I am of the opinion that in this case the dropping of the bomb by the enemy was a cause of the injury and that the boy's interference was not so powerful an intervening cause as to supersede it. The injury was therefore 'caused by' the dropping of the bomb by the enemy.

(25) Helper J.A. further says at p. 25, para. 107:

> …in my view, the interpretation of s. 70(1) which does justice to the language used and is consistent with the objectives of the legislation as a whole, eliminates any requirement to determine the judicial cause of an accident.

26. The Review Officer states in arriving in his conclusion:

a) Part of what happened involved your over-correcting and falling to the left rather than the right because you wanted to avoid falling on a TV stand and TV located very close to the stool on your right. The arrangement of the furniture dictated that maneuver, not the condition of your right leg, and that maneuver accounts for your awkward landing about as readily as the residual disability in your right leg.

b) I am not rejecting [Appellant's orthopedic surgeon #1's] opinion out of hand. I agree it is possibly your residual disability made the injury you suffered worse than it might otherwise have been. It is not possible to say you would not have been injured at all in the absence of the completely different occurrence five years earlier. The test is not one of possibility in any event, which is what we are discussing here. As

> already indicated, I have to be satisfied you would probably not have suffered this injury without the residual problem with your right leg and the evidence I have falls short of that. Accordingly, this Review will confirm [text deleted] decision of August 17, 2000.

27. The Commission agrees with the Review Officer that the location of the TV stand and TV, which were situated very close to the stool upon which [the Appellant] was standing, and the manner in which [the Appellant] fell in order to avoid falling on the TV stand and TV were factors which probably contributed to the injury, or alternatively may have been conditions forming the background against which the material contributing factor – namely the residual disability to the right leg came into play.

28. The Commission agrees with the Review Officer that there were a number of causes of the accident. However, the Commission disagrees with the Review Officer in respect of the issue of causation relative to [the Appellant's] residual disability to her right leg. The Commission determines, based on the medical opinion of [Appellant's orthopedic surgeon #1] and the medical opinion of [Appellant's orthopedic surgeon #2] (referred to in paragraph 30 hereof), the circumstances surrounding the accident, as testified to by [the Appellant] (referred to in paragraphs 39-41 hereof), and having regard to its own experience and common sense, that on the balance of probabilities, the residual disability suffered by [the Appellant] to her right leg in 1995 materially contributed to the injury she sustained to her left knee on July 24, 2000.

29. One of the reasons the Review Officer erred in arriving at his decision to deny compensation to [the Appellant] was his acceptance of [the Appellant's] statement as to what [Appellant's orthopedic surgeon #2's] purported medical opinion was. The Review Officer in his report states:

> At the hearing, you quoted your orthopedic surgeon in Alberta to the effect that accidents of this sort happen to people who have never had the sort of injuries you suffered in 1995. I gathered that [Appellant's orthopedic surgeon #2] also felt that injuries of this sort also happen to people who did not have any prior disability. [Appellant's orthopedic surgeon #1] does not agree with that position. He feels that your 1995 injury contributed to your injury in 2000.

30. The Commission at the hearing of August 17, 2001 was provided with a copy of [Appellant's orthopedic surgeon #2's] report dated February 12, 2001, which was received by MPIC subsequent to the Review Officer issuing his decision on February 6, 2001. In the report, [Appellant's orthopedic surgeon #2] states:

> It is my opinion that the injury that was sustained when she fell from a stool on the 24th of July 2000, was as a result of the weakness of her right lower leg. She was using her left leg for her main support and when she fell, she injured her left knee and subsequent medial collateral ligament tear of her knee. . . .
>
> Impression: Medial collateral ligament left knee with previous compound fracture of the right tibia and fibula with permanent impairment to the right lower leg causing weakness. The right leg gave out and this is the reason for her fall plus she was standing on a chair.

31. An examination of [Appellant's orthopedic surgeon #2's] medical report, which was subsequently provided to the Review Officer after the Review Officer had issued his decision, corroborates [Appellant's orthopedic surgeon #1's] medical opinion that the residual disability in [the Appellant's] right leg materially contributed to the injury she sustained in her left knee on July 24, 2000. There is no medical evidence submitted by MPIC to the contrary.

32. Unfortunately, the Review Officer failed to communicate directly with [Appellant's orthopedic surgeon #2] in order to obtain his medical opinion prior to issuing his decision

rejecting [the Appellant's] claim for compensation. By accepting the statements of [the Appellant] as to [Appellant's orthopedic surgeon #2's] purported medical opinion, the Review Officer found conflict between the medical opinion of [Appellant's orthopedic surgeon #1] and the medical opinion of [Appellant's orthopedic surgeon #2] where no conflict ever existed. The medical opinion of [Appellant's orthopedic surgeon #2], who treated [the Appellant] for the injury to her left knee was of fundamental importance in order to permit the Review Officer to make a correct assessment on the issue of causation. In failing to obtain [Appellant's orthopedic surgeon #2's] medical opinion, the Review Officer erroneously found conflict between the medical opinions of [Appellant's orthopedic surgeon #2] and [Appellant's orthopedic surgeon #1] on the issue of causation.

33. The Commission finds that as a result of the misinterpretation of the Review Officer of [Appellant's orthopedic surgeon #1's] medical report and the failure of the Review Officer to obtain directly from the treating orthopedic surgeon, [Appellant's orthopedic surgeon #2], his opinion as to the nature of the injury and the cause of the injury, the Review Officer wrongly concluded that [the Appellant's] residual injury to her right lower leg did not materially contribute to the injury to her left knee.

34. Counsel for MPIC in an able submission argues that:

a) the injury sustained by [the Appellant] in the year 2000 was too remote from the injury she sustained in the motor vehicle accident in 1995, there being a lapse of five years between the two incidents, and as a result there is no causal connection between the two injuries.

b) given [the Appellant's] medical condition, she acted in an unreasonable fashion, and that served to break the chain of causation between the motor vehicle accident which caused the 1995 injury and the injury in the left knee in 2000.

c) there is an onus on a person who should be aware of physical limitations to act in a reasonable and careful manner to protect themselves from harm, and where they do not meet this onus, the chain of causation has been broken.

35. MPIC's Legal Counsel states:

> The Corporation cannot be responsible for all circumstances, particularly where an Appellant undertakes an activity which is contra-indicated by their condition. In this instance, the stool becoming unstable was not caused by injuries sustained in the motor vehicle accident of 1995 and, accordingly, the Corporation should not be held accountable.

36. The Commission agrees that the stool on which [the Appellant] was standing at the time of the accident did not become unstable because of the residual disability in [the Appellant's] right leg. The Commission recognizes that the instability of the stool was probably a factor in the injury sustained by [the Appellant] in 2000, but it was not the only cause of the injury. As indicated earlier in these reasons, the Commission recognizes that there were a number of factors that contributed to the injury in question, including the wobbling of the stool. However the Commission further finds that the residual disability to [the Appellant's] right leg materially contributed to the injury to her left knee.

37. On the issue of remoteness, the Commission recognizes that there is a lapse of approximately five years between the motor vehicle accident causing the residual disability to the right leg. However, having regard to the medical opinions of

[Appellant's orthopedic surgeon #2] and [Appellant's orthopedic surgeon #1] and the testimony of [the Appellant] which is referred to in paragraphs 39-41 inclusive hereof, the Commission finds a causal connection between the injury sustained in 1995 and the injury [the Appellant] sustained in 2000.

38. The Commission rejects MPIC's submission that [the Appellant] was acting unreasonably and carelessly and in disregard to her physical limitations when the accident occurred. In the Review Officer's letter to [Appellant's orthopedic surgeon #1] dated December 29, 2000 he informed [Appellant's orthopedic surgeon #1] that he was advised that [the Appellant] was standing on a two-foot stool that had four legs and that she had stood on it previously on many occasions without mishap. He further informed [Appellant's orthopedic surgeon #1] that [the Appellant] had advised him that in the past her right leg had not given out, popped or buckled when standing on a stool prior to the accident in question.

39. [The Appellant] testified at the hearing and was a very impressive witness. She gave her testimony in a very candid and direct manner and the Commission fully accepts her evidence on the issue of the causation of the injury to her left knee. The description she provided as to the manner in which the accident occurred is not inconsistent with the information she provided to the Review Officer and to [Appellant's orthopedic surgeon #2].

40. [The Appellant] further testified at the hearing that in the past, on a number of occasions, she would stand on the stool for the purpose of carrying out a variety of domestic activities. On these occasions, she never had a problem standing on the stool in carrying

out her domestic activities. In the past when standing on the stool, her right leg had never given out, popped or buckled. She also testified that she did not believe that standing on the stool was an unsafe activity for her beyond her physical limitations.

41. The Commission does not find that there was anything inherently dangerous in the domestic activity that [the Appellant] undertook on July 24, 2000 that resulted in the injury to her left knee. The purpose of a household stool is intended to be used in exactly the manner in which [the Appellant] used it; that is, to stand on the stool to carry out ordinary and regular household activities. [The Appellant] was not acting in a negligent fashion; for example, while driving a car, proceeding through a red light at a busy intersection or exceeding the speed limit at the intersection in a school zone when children were crossing the intersection. In both of these examples, a reasonable person should foresee that as a result of their negligent action, that person's automobile could come into contact with a pedestrian, causing personal injury. The Commission accepts [the Appellant's] testimony that she was aware of her physical limitations and did not exceed them when she stood on the stool in question.

42. The Commission finds that a reasonable person, with the same residual disability suffered by [the Appellant], having the same previous experience with respect of the use of the stool, could not have foreseen the accident in question. In these circumstances, a reasonable person would not have foreseen when standing on the stool that:

a) the stool would become unstable when the stool did not become unstable when used in the same fashion in the past;
b) in order to compensate for the wobbling, the person would be required to shift

their weight;

c) this action would result in a buckling of the right knee;

d) the buckling of the knee would cause that person to fall over;

e) when falling over, that person would attempt to over-correct the fall to avoid hitting a TV stand and TV two and a half feet away; and

f) as a result of all of the above, an awkward fall would occur, causing injury to the left knee to the person in question.

43. The Commission therefore does not find in the circumstances that the conduct of [the Appellant] was unreasonable or careless or negligent, and that her conduct resulted in the chain of causation being broken.

DECISION

44. Having regard to:

a) the misinterpretation by the Review Officer of [Appellant's orthopedic surgeon #1's] medical report;

b) the acceptance by the Internal Review Officer of incorrect information from [the Appellant] which resulted in the Review Officer determining that there was a conflict in the medical opinion as to causation between [Appellant's orthopedic surgeon #1] and [Appellant's orthopedic surgeon #2];

c) the medical evidence of both [Appellant's orthopedic surgeon #1] and [Appellant's orthopedic surgeon #2], who both conclude that the residual injury to [the Appellant's] right leg materially contributed to the injury to her left knee;

d) the testimony of [the Appellant] which the Commission fully accepts;

the Commission concludes that on the balances of probabilities, the residual injury to [the

Appellant's] right leg materially contributed to the injury that she sustained to her left knee on July 24, 2000.

45. Accordingly, the Commission determines;

pursuant to sections 83(1)(a) and 136(1) of the *Act*; that:

1. [the Appellant's] entitlement to Income Replacement Indemnity benefits should be reinstated for the period commencing July 24, 2000 for a period of seven weeks, and interest to the date of payment at the prescribed rate shall be added to the amount due and owing to her;
2. [the Appellant] be reimbursed for travel expenses for the medical visits to [text deleted], Alberta to see [Appellant's orthopedic surgeon #2];
3. [the Appellant] be reimbursed for the cost of the knee brace purchased by her;
4. the Commission retains jurisdiction in this matter and if the parties are unable to agree as to the amount of the Income Replacement Indemnity benefits, or the expenses in paragraph 3 or 4 above, then either party may refer this dispute back to this Commission for final determination; and
5. the decision of the MPIC's Internal Review Officer dated February 6, 2001 is therefore rescinded.

Dated at Winnipeg this 18th day of September, 2001.

MEL MYERS, Q.C.
CHIEF COMMISSIONER

WILSON MacLENNAN

LES COX