

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-47**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms Yvonne Tavares
Mr. Wilson MacLennan

APPEARANCES: The Appellant, [text deleted], was represented by her husband, [text deleted] Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Terry Kumka

HEARING DATE: October 15th, 2001

ISSUE(S): Claim for the cost of the purchase of a digital hearing aid.

RELEVANT SECTIONS: Sections 138 and 70(1) of *The Manitoba Public Insurance Corporation Act* (the "MPIC Act") and Section 10(1)(d)(v) of Manitoba Regulation No. 40/94

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

Reasons For Decision

[The Appellant] has appealed a decision of MPIC's Internal Review Officer which denied her request for reimbursement of the cost of purchasing a digital hearing aid and a directional microphone.

The motor vehicle accident giving rise to the claim occurred in [text deleted] on April 6th, 1997, when the Appellant was involved in a single vehicle roll-over. The Appellant was admitted to hospital on an emergency basis in [text deleted] and subsequently transferred to [text deleted] when her condition had stabilized.

[Text deleted], a neurologist, treated the Appellant upon her admittance to the [hospital #1] in [text deleted]. In his Case Summary dated May 7th, 1997, [Appellant's neurologist] indicated that, "Significant injuries were cerebral concussion, with associated sensorineural hearing loss and back pain, with radiation into the right leg. The patient's neurological status, as far as her cerebral function went, cleared quite quickly. There were persistent problems with decreased hearing, and an audiogram was done, which confirmed the presence of bilateral sensorineural hearing loss." In respect of her back pain, she suffered from a disc herniation and as a result surgery was performed by [Appellant's neurologist] on May 22nd, 1997.

Immediately after the motor vehicle accident, the Appellant had started complaining of decreased hearing. On admittance to hospital in [text deleted] she was reviewed for her hearing loss. At the [hospital #1], she reported her decreased hearing to [Appellant's neurologist] and underwent an audiology assessment on April 17th, 1997. The audiology assessment found mild to moderately severe sensorineural hearing loss from 500 - 8000 Hz in her left ear and moderate to severe sensorineural hearing loss from 500 - 8000 Hz in her right ear. After her audiology assessment, the patient progress notes at the [hospital #1] indicated that the patient stated "I need two hearing aids".

A follow-up audiology assessment was conducted at the [hospital #2] on July 9, 1997. The comments on the Audiologic Report indicate "Results consistent with those obtained at [hospital #1] in April '97. Audiological testing revealed a mild loss at 250 Hz sloping to a moderate to moderately severe sensorineural hearing loss bilaterally. Discrimination ability was moderately impaired bilaterally at a level of comfortable loudness".

She acknowledges that prior to the accident she had some difficulty in hearing but she was able to clearly hear anyone who spoke to her. She asserts that since the accident she is unable to hear anyone who does not speak to her directly. When a person speaks to her directly, she must read their lips in order to understand them. As a result, the Appellant has difficulty in carrying on a conversation with anyone when she is a passenger in automobile and has difficulty answering a telephone.

[Appellant's doctor #1] of the [text deleted] Clinic, who had the Appellant under his care for a number of years, provided a report dated July 28th, 1997, to the Case Manager at MPIC in respect of the status of the Appellant's health and indicated that the Appellant had had some hearing impairment. As a result on October 24th, 1997, the Case Manager wrote to [Appellant's doctor #1] and requested the following information from [Appellant's doctor #1]:

"Based on your medical report, you indicate that [the Appellant] has had some hearing impairment prior to the above motor vehicle accident.

We would appreciate receiving copies of any tests conducted prior to said accident and if her present conditions have been worsened due to the motor vehicle accident."

[Appellant's doctor #1] replied to the Case Manager in a letter dated November 3rd, 1997,

"I have passed on your request as to a report regarding [the Appellant's] hearing impairment to [text deleted] who is the Ear, Nose and Throat physician who has been seeing her. I will ask him to send you a report."

[Appellant's ENT specialist], in his response to the Case Manager's request (as to whether the Appellant's present hearing condition had worsened due to the motor vehicle accident), stated in his report dated December 2nd, 1997, that an audiogram had been carried out at the [hospital #2] subsequent to the accident which indicated a 10 decibel deterioration of hearing from 1990 for all frequencies. [Appellant's ENT specialist] further indicated that the Appellant would benefit from bilateral hearing aids.

On December 22nd, 1997, the Case Manager met with [text deleted], who is a physiatrist and a consultant to MPIC, in order to review [Appellant's ENT specialist's] medical report dated December 2nd, 1997. The Case Manager recorded this discussion with [MPIC's physiatrist] in a written memorandum dated December 22nd, 1997, which memorandum was filed by MPIC's legal counsel at the appeal hearing. This

memorandum indicates that [MPIC's physiatrist] reviewed [Appellant's ENT specialist's] report dated December 2nd, 1997, addressed the issue of causation and concluded that the Appellant was entitled to permanent impairment award in respect of her hearing loss of 3%.

The Case Manager accepted the opinion of [MPIC's physiatrist] and wrote a letter to the Appellant dated February 17th, 1998, which stated:

"This will confirm your entitlement to an impairment award arising from your accident of April 6, 1997.

The Personal Injury Protection Plan (PIPP) allows for lump sum payments where an individual sustained a permanent physical or mental impairment because of the accident. The Manitoba Public Insurance Corporation Act, Section 127 reads as follows:

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 the accident is entitled to a lump sum indemnity of not less than \$500.00 and not more than \$100,000.00 for the permanent impairment.

Based on the medical information, specifically from your physicians [Appellant's doctor #2] and [Appellant's ENT specialist], you are eligible for a permanent impairment of 7.75% of the indexed maximum of \$106,429.00 or \$8,248.25.

These benefits were calculated as follows:

1.	Scarring (lumbosacral region)	2.75%
2.	<u>Hearing loss</u>	<u>3.0%</u>
3.	Loss of vertebral lamina following a unilateral laminectomy	1%
4.	Class 2 sensory loss in a L5 nerve root distribution	1%
	Total	7.75%

We have requisitioned a cheque, under separate cover, for the said amount."

(Underlining added.)

At the appeal hearing, legal counsel for MPIC confirmed that MPIC did reimburse the Appellant for the purchase of an analogue hearing aid for her right ear subsequent to receiving [Appellant's ENT specialist's] report. However, the Appellant complained that she was unable to effectively use this hearing aid since she received it in 1997. She reports that the hearing aid must be kept at full volume, picked up a lot of static and noise every time she wore it, rang when she lowered her head and as a result, she got headaches. Because of the problems associated with the hearing aid, she did not wear it.

On or about May, 2000, the Appellant requested that MPIC approve the purchase of a digital hearing aid and a directional microphone. MPIC's Case Manager rejected her request and as a result, the Appellant made application to have this decision reviewed by an MPIC Internal Review Officer. The Review Officer in a decision dated February 28th, 2001, rejected her Application for Review and as a result, the Appellant has appealed that decision to the Commission.

The relevant legislative provisions with respect to this appeal are as follows:

Section 138 of the MPIC Act states:

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to

lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market."

Section 10(1)(d)(v) of Manitoba Regulation 40/94 states:

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (d) reimbursement of the victim at the sole discretion of the corporation for
- (v) communication and learning aides.

Section 70(1) of the MPIC Act states:

Definitions

70(1) In this part,

"**victim**" means a person who suffers bodily injury in an accident.

The two issues that must be determined on this appeal are:

1. whether the motor vehicle accident which occurred on April 6th, 1997, caused or materially contributed to the hearing loss suffered by Appellant; and
2. whether a digital hearing aid and a directional microphone are necessary or advisable for the Appellant in respect of her hearing loss.

There is no dispute between the parties that the Appellant suffers from a serious bilateral hearing loss and that she medically requires the assistance of a hearing aid. [Appellant's ENT specialist], in a letter to the Appellant dated September 10th, 2001, states that the

Appellant had a trial with a digital hearing aid and a directional microphone which she obtained from the [text deleted] and this hearing aid did provide some benefit to her. As a result, [Appellant's ENT specialist] recommended that the Appellant obtain a digital hearing aid for her right ear.

The Review Officer, relying on [Appellant's ENT specialist's] medical report dated June 27th, 2000, rejected the request that MPIC reimburse the Appellant for the cost of purchasing a digital hearing aid, not on the grounds that the hearing aid was not medically required, but on the grounds that the motor vehicle accident of April 6th, 1997, did not cause or materially contribute to the hearing loss of the Appellant.

It should be noted that on June 2nd, 2000, the Case Manager wrote to [Appellant's ENT specialist] requesting his medical opinion as to causation between the hearing loss and the motor vehicle accident. Unfortunately, [Appellant's ENT specialist] was not provided with the written memorandum of the Case Manager dated December 22nd, 1997, or the Case Manager's letter to the Appellant dated February 17th, 1998. [Appellant's ENT specialist] was also not informed by the Case Manager that MPIC not only provided a permanent impairment award of 3% in respect of the Appellant's hearing loss but also reimbursed the Appellant for the cost of purchasing a analogue hearing aid.

As a result, [Appellant's ENT specialist] was unable to consider:

1. the written memorandum dated December 22nd, 1997, reflecting a discussion between the Case Manager and [MPIC's physiatrist] on the issue of causation.

- [MPIC's physiatrist] concludes based upon [Appellant's ENT specialist's] report of December 2nd, 1997, that there is a connection between the accident and the hearing loss and [MPIC's physiatrist] recommends that MPIC grant a permanent impairment award of 3% in respect of the hearing loss to the Appellant. It should be noted that there is no reference in [Appellant's ENT specialist's] report dated June 27th, 2000, that he was provided with and had an opportunity to consider and comment on [MPIC's physiatrist's] medical opinion as reflected in this memorandum;
2. the Case Manager's letter to the Appellant dated February 17th, 1998, wherein the Case Manager advised the Appellant, based on [Appellant's ENT specialist's] medical report of December 2nd, 1997, that the Appellant was entitled to a permanent impairment award in respect of a hearing loss of 3%. The Case Manager further informed the Appellant that MPIC would requisition a cheque in the amount of \$8,248.25 to cover the permanent impairment award a portion of which represented 3% for hearing loss;
 3. that MPIC had determined that there was a connection between the motor vehicle accident on April 6th, 1997, and the Appellant's hearing loss and as a result reimbursed the Appellant of the cost of purchasing a hearing aid after this motor vehicle accident.

As a result, [Appellant's ENT specialist] was not aware, prior to writing his medical report of June 27th, 2000, that based on his medical report of December 2nd, 1997, and after review by [MPIC's physiatrist], that MPIC had concluded that there was in fact a

connection between the motor vehicle accident and the hearing loss and agreed to reimburse the Appellant in respect of the cost of a hearing aid.

It should further be noted that in preparing his report of June 27th, 2000, [Appellant's ENT specialist] does not appear to have considered nor is there any reference to the previous medical opinion he provided to MPIC in respect of causation as set out in his letter of December 2nd, 1997. [Appellant's ENT specialist] in his medical report of December 2nd, 1997, in response to a specific inquiry from the Case Manager as to the connection between the motor vehicle accident and the hearing loss stated that as a result of his review of the 1997 audiogram, stated that the Appellant's hearing loss did worsen because there was a 10 decibel deterioration of hearing from 1990.

The Commission therefore determines, that as a result of [Appellant's ENT specialist] failing to consider and review his medical report of December 2nd, 1997; the failure of MPIC's Case Manager to provide [Appellant's ENT specialist] with the documentation in respect of the Case Manager's memorandum dated December 22nd, 1997, the Case Manager's letter to the Appellant dated February 17th, 1998, and the information of the reimbursement by MPIC as to the cost of the Appellant's hearing aid, that [Appellant's ENT specialist] was not in a position to provide a full and complete medical opinion in his June 27th, 2000 report to MPIC on the issue of causation. As a result of these factors, there appears to be a contradiction between [Appellant's ENT specialist's] medical report dated December 2nd, 1997, and his report dated June 27th, 2000, on the issue of

causation. Accordingly, the Commission cannot give a great deal of weight to [Appellant's ENT specialist's] medical report of June 27th, 2000.

The Review Officer in rejecting the Appellant's claim for reimbursement, relied primarily on [Appellant's ENT specialist's] report of June 27th, 2000, and found that the Appellant had experienced progressive hearing loss prior to the accident in question commencing in 1990 and that the successive audiograms which were performed in 1990, 1994, 1997 and 2000 confirmed this fact. The Review Officer determined that there was no objective medical evidence to support any connection between the motor vehicle accident and the hearing loss which the Appellant alleged occurred after the accident.

Unfortunately, the Review Officer, in arriving at his decision to reject the Appellant's request for reimbursement of the cost of purchasing a digital hearing aid and directional microphone failed to address that:

1. MPIC, in 1997, had determined that there was a connection between the hearing loss and the 1997 motor vehicle accident;
2. MPIC, in February of 1998, had written to the Appellant informing her that she had been awarded a permanent impairment award which included a 3% award for hearing loss;
3. MPIC had reimbursed the Appellant for the cost of purchasing an analogue hearing aid after the 1997 motor vehicle accident.

The Review Officer erred in failing to consider the following material facts in arriving at his decision:

1. The Review Officer does not consider [Appellant's ENT specialist's] report dated December 2nd, 1997. It does not appear from an examination of the Review Officer's decision that he referred to or even considered that [Appellant's ENT specialist's] report dated December 2nd, 1997, which was in response to the Case Manager's request to determine whether the Appellant's hearing impairment worsened as a result of the motor vehicle accident. In his report dated December 2nd, 1997, [Appellant's ENT specialist] stated that there was a 10 decibel deterioration of hearing from 1990;
2. The Review Officer in his decision did not refer to or appear to have considered the Case Manager's memorandum dated December 22nd, 1997, which recorded a discussion between the Case Manager and [MPIC's physiatrist] in respect of the issue of causation. In this discussion, [MPIC's physiatrist] after reviewing [Appellant's ENT specialist's] medical opinion dated December 2nd, 1997, concluded that there was a connection between the motor vehicle accident and the hearing loss and recommended a 3% permanent impairment award in respect of the hearing loss;
3. In his decision dated February 28th, 2001, the Review Officer stated:

"The only issue on this Review has to do with whether your serious bilateral hearing loss results from your motor vehicle accident of April 6, 1997. If that hearing loss does result from your car accident, then you would be entitled to funding for the digital hearing aids described in the material from the [text deleted] dated December 2nd and December 29th, 2000. (You would be entitled to other benefits as well, such as a Permanent Impairment benefit and, potentially

at least, Income Replacement Indemnity benefits, but the immediate issue is the cost of the hearing aids."

(Underlining added.)

4. The Review Officer, as indicated in his decision which is quoted above, does not appear to have been aware that the Case Manager wrote to the Appellant by letter dated February 17th, 1998, and advised the Appellant that based on the medical information from [Appellant's doctor #2] and [Appellant's ENT specialist], that the Appellant was entitled to a permanent impairment award of 3% in respect of the hearing loss and that MPIC had paid this amount to the Appellant as part of a 7.75% permanent impairment award. The only basis upon which MPIC could provide a permanent impairment award of 3% in respect of the hearing loss is if MPIC concluded there was a connection between the 1997 motor vehicle accident and the hearing loss.
5. The Review Officer in arriving at his decision does not appear to have been aware that MPIC reimbursed the Appellant for the cost of a hearing aid after the motor vehicle accident. The only basis upon which MPIC could properly reimburse the Appellant was if it concluded that there was a connection between the motor vehicle accident and the hearing loss.
6. The contradiction by [Appellant's ENT specialist] of his medical opinion in respect to the issue of causation as reflected in his two medical reports dated December 2nd, 1997, and June 27th, 2000.

The Commission concludes that the Review Officer did not consider all of the relevant issues when rejecting the Appellant's claim for reimbursement of the cost of a digital hearing aid and a directional microphone. As a result, the Commission finds that the Review Officer erred in rejecting the Appellant's request for reimbursement.

The Commission accepts the testimony of the Appellant that as a result of the motor vehicle accident there was a significant hearing loss which substantially affected the quality of her life. The Appellant testified in a very direct and honest fashion as to the connection between the motor vehicle accident and her hearing loss and the Commission accepts her evidence on this issue.

The Commission upon considering:

1. the medical opinion of [Appellant's ENT specialist] dated December 2nd, 1997, and [MPIC's physiatrist's] medical opinion as set out in the Case Manager's memorandum dated December 22nd, 1997; and
2. the Case Manager's letter to the Appellant dated February 18th, 1998, wherein MPIC awards a permanent impairment award of 3% in respect of the hearing loss;
3. the payment by MPIC to the Appellant of the cost of reimbursement of an analogue hearing aid subsequent to the 1997 motor vehicle accident;
4. the testimony of the Appellant that the accident of April 6th, 1997, contributed to her hearing loss problems; and
5. Sections 138 and 70(1) of the MPIC Act and Section 10(1)(d)(v) of Manitoba Regulation No. 40/94,

determines that the Appellant has established on a balance of probabilities that the motor vehicle accident which occurred on April 6th, 1997, contributed to her hearing problems at that time.

The Commission further finds in accordance with [Appellant's ENT specialist's] medical opinion dated September 10th, 2001, that a digital aid and a directional microphone is medically required by the Appellant and will assist her with her hearing problem in her right ear.

In conclusion, the Commission finds there is a causal relationship between the Appellant's hearing problems and the motor vehicle accident of April 6th, 1997, and therefore orders that:

- A. MPIC reimburse the Appellant for the cost that she will incur in purchasing appropriate digital hearing aid and a directional microphone;
- B. this Commission retains jurisdiction in this matter and if the parties are unable to agree as to the amount of the hearing aid expenses, either party may refer this dispute back to the Commission for final determination; and
- C. the decision of MPIC's Internal Review Officer dated February 28th, 2001, is therefore rescinded.

Dated at Winnipeg this 30th day of October 2001.

MEL MYERS, Q.C.

YVONNE TAVARES

WILSON MACLENNAN