Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-95

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Mr. Antoine Frechette** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**October 30, 2002 and November 29, 2002 (in [text deleted])**
ISSUE(S):	**Was the incident that the Appellant was involved in an 'accident' within the meaning of Section 70(1) of the Act.** **Was the Appellant unable to claim compensation for bodily injury pursuant to Section 79(1) of the Act.** **Entitlement to Income Replacement Indemnity Benefits and reimbursement for therapeutic treatments.**
RELEVANT SECTIONS:	**Sections 70(1), 79(1), 81(1)(a), 136(1)(a)(b) of the Manitoba Public Insurance Corporation ("MPIC") Act and Section 5 of Manitoba Regulation 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 was employed at the [text deleted] and was a member of the [text deleted], which had a collective bargaining relationship with the Appellant's employer, the [text deleted] in [text deleted]. Unable to reach a collective agreement, the union declared a lawful strike and the

members of the union, including the Appellant, withdrew their services on October 8, 2000, and commenced picketing at the [text deleted] location.

The Appellant, who was a union steward and had been selected as a picket captain, was on picket line duty February 2, 2001. While walking on the picket line, the Appellant came into contact with an automobile and as a result thereof, complained of bodily injuries arising out of this incident. The Appellant requested that MPIC reimburse her for the cost of chiropractic treatments in respect of the injuries she sustained in the incident in question and also provide her with Income Replacement Indemnity (IRI) Benefits because she was unable to participate in the picket line activities or to find employment. MPIC has refused compensation in respect of the Appellant's claims and as a result, the Appellant made an Application for Review of the decision of the case manager.

The Internal Review Officer, in her decision dated July 31, 2001, noted that the Appellant did not request a hearing. After reviewing the entire file the Internal Review Officer rejected the Application for Review and upheld the case manager's decision dated May 14, 2001. The Appellant filed a Notice of Appeal indicating reimbursement for the cost of chiropractic treatments and for income replacement benefits in respect to the loss of strike pay and subsequently loss of salary as a result of the incident which occurred on February 2, 2001.

The initial hearing of the Appeal took place on October 30, 2002. Mr. T. Kumka, legal counsel for MPIC appeared personally before the Commission, while [text deleted], legal counsel for the Appellant, participated in the proceedings by teleconference.

At the commencement of this hearing, legal counsel for MPIC asserted that the corporation did not have jurisdiction to hear the Appeal because:

1. The Appellant was not involved in an accident within the meaning of Section 70(1), therefore was not entitled to any compensation under Part 2 of The Act.

2. That contrary to Section 79(1) of The Act, the Appellant's bodily injury in respect to the incident on February 2, 2001, was willfully caused by the Appellant.

In order to deal with these jurisdictional issues, the Commission determined it was necessary to hear evidence and, as a result, adjourned the proceedings in order that a new date for the Appeal Hearing be set in [text deleted]. The Commission advised the parties that at the [text deleted] hearing, the Commission would hear evidence and argument in respect to the jurisdictional issues, as well as the Appellant's request for reimbursement of chiropractic treatment costs and Income Replacement Indemnity (IRI) benefits.

The Appeal Commission reconvened in [text deleted], on November 29, 2002. At this hearing, [text deleted] represented the Appellant and Mr. Kumka appeared on behalf of MPIC.

The Appellant testified that:

1. On the night of February 2, 2001, the Appellant was a picket captain and was participating in a picket at the entrance of the parking lot at the [text deleted] in [text deleted], together with several co-workers and members of their families.

2. The purpose of the picketers was to communicate with members of the public who wished to attend at the [text deleted] and to persuade them not to do so.

3. While the Appellant was in the process of picketing, she was struck by an automobile which was attempting to proceed slowly through the picket line. The front of the automobile bumped into the side of the Appellant's left leg and as a result thereof, she either fell or was thrown onto the hood of the automobile.

4. The Appellant landed on her back with her arms stretched out on the hood of the automobile and the automobile then accelerated forward in a westerly direction for a short distance and stopped.

5. The Appellant jumped off the automobile and approached the driver's side of the automobile, screaming at the driver and requesting that he leave the automobile.

6. The driver did not respond to this request and the Appellant decided to make a citizen's arrest.

7. She attempted to open the door on the driver's side of the car but it was locked.

8. The driver's window was open and she reached into the automobile with her right arm and grabbed the driver's coat. Her purpose in carrying out this act was to detain the driver at the [text deleted] parking lot in order to permit the [text deleted] police to attend at the site of the incident to conduct an investigation in respect of her complaint against the driver of the automobile.

9. After grabbing the driver's coat, the window on the driver's side of the automobile was raised and was tightened around her arm and the automobile then commenced moving forward, dragging her a short distance while she was holding on to the driver's coat.

10. The automobile then stopped and the Appellant was able to remove her arm from the automobile. The automobile then turned around and proceeded to leave the parking lot.

11. She never intended to cause harm to herself when participating in the picket line, picketing in front of the automobile in question, or when she inserted her arm into the automobile. She never anticipated an automobile would bump into her while she was picketing or that while her right arm was inserted inside of the automobile, the driver would proceed to drive the automobile while her arm was holding the driver's coat.

12. She received bodily injury as a result of this incident.

The driver of the vehicle, [text deleted], also testified that:

1. He resided in the town of [text deleted] and he was a singer with a rock band called [text deleted]

2. On the evening of February 2, 2001, the band had a musical engagement at [text deleted] which is located beside the [text deleted] and access to both places is through the entrance of the [text deleted] parking lot where picketing was taking place.

3. [Text deleted] was operating an automobile and arrived at the entrance of the [text deleted] parking lot at approximately 8:15 p.m., was late for a sound check he was required to perform on his musical equipment and therefore, he was very anxious to attend at [text deleted] for that purpose.

4. The Appellant was picketing at the entrance of the parking lot blocking his automobile from entering the parking lot.

5. Both the passenger and himself yelled out of the window of the automobile and requested the Appellant permit the automobile to enter the parking lot and he also honked the car horn.

6. The Appellant did not respond and continued to block the automobile from entering the parking lot and, in frustration, he slowly moved the automobile forward.

7. The Appellant lunged onto the hood of the automobile with her hands and knees and then came off from the automobile.

8. The Appellant then proceeded to reach into the automobile and grabbed him by the neck and wouldn't let go. He became scared, panicked and drove the automobile forward to get away from the Appellant.

9. The Appellant eventually let go of his neck and started chasing the automobile.

10. The other picketers starting coming towards the automobile and as a result he reversed the automobile and drove back to [text deleted].

11. He did not consider leaving the automobile when it was being blocked in order to attempt to persuade the Appellant to remove herself from the front of the automobile. Instead, he decided to move the automobile forward and hoped this movement would persuade the Appellant to remove herself from the front of the automobile.

12. He recognized that his actions in moving the automobile forward were provocative but he was late for his usual engagement and he was anxious to attend at the [text deleted] to conduct a sound check of musical equipment.

13. He never intended to injure the Appellant when he moved the automobile forward with the Appellant's hand inside the automobile and acted out of fear and panic at that time.

The Commission was provided with a copy of a video made by a member of the security personnel employed by the [text deleted]. The video captures the essential events in question and indicates some discrepancies in respect to the testimony of both the Appellant and [text deleted]. The Commission recognizes that the events took place on February 2, 2001, approximately 21 months prior to either witness testifying, and at a time when both witnesses were under a great deal of stress. [Text deleted] erred in testifying that the Appellant lunged onto the hood of the car with her hands and knees. The Appellant acknowledged that in her

report to MPIC she erred in indicating that the automobile came into contact with her right leg when in fact the video indicates the automobile came into contact with her left leg.

The Commission finds that both the Appellant and [text deleted] were attempting to the best of their ability to sincerely recollect these events and does not find that both witnesses' discrepancies were significant and do not affect their credibility.

Jurisdictional Issue - Accident

1. The Appellant was not involved in an accident within the meaning of Section 70(1), therefore was not entitled to any compensation under Part 2 of The Act.

Legal counsel for MPIC asserted that the Commission did not have jurisdiction to hear the appeal because an accident did not occur within the meaning of the Act entitling the Appellant to compensation.

Section 70(1) of the MPIC Act is the Definition section and the following definitions are relevant to the issue raised by MPIC's legal counsel:

> **70(1) Definitions**
> a. **"accident"** means any event in which bodily injury is caused by an automobile;
> b. **"bodily injury"** means any physical or mental injury, including permanent physical or mental impairment and death;
> c. **"bodily injury caused by an automobile"** means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile.

Section 81(1)(a) of the MPIC Act states:

> **Entitlement to I.R.I.**
> **81(1)** 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)(a) of the MPIC Act States:

> **Reimbursement of victim for various expenses**
> **136(1)** 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.

Legal counsel for MPIC submitted that in order to obtain IRI or to obtain reimbursement for the cost of chiropractic treatments under the Act, the Appellant must have been involved in an accident within the meaning of the Act. Since no accident occurred involving the use of an automobile, the Commission did not have jurisdiction to hear and determine the merits of the appeal.

This issue is a matter of first impression for the Commission and the Commission notes that the Manitoba Court of Appeal has addressed this issue in the following cases:

1. *McMillan v. Thompson (Rural Municipality)*, [1997] 144 D.L.R. 4th (53), [1997] CarswellMan 68,(1997) M.J. 67 (Man. C.A.)
2. *Mitchell v. Rahman et al* decided February 14, 2002, docket A100-30-04816
3. *Guiboche v. Ford Motor Co. of Canada Ltd*., 1998 CarswellMan 441, 131 Man. R. (2d) 99, 187 W.A.C. 99, 6 C.C.L.I. (3d) 217 (Man. C.A.)

Mr. Justice Philp in *Mitchell v. Rahman* (supra) neatly summarizes the decision of the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia* [1995] 9 W.W.R. 305 as follows:

> "19 The leading Canadian case on the interpretation of automobile no-fault benefit schemes is *Amos v. Insurance Corp. of British Columbia* [FN11]. In that case, the

plaintiff was attacked by a gang of six men as he was driving his van. In the course of the attack, he was shot by one of the gang members. He suffered serious, disabling, and permanent injuries. The issue in the case was whether his injuries (resulting from the shooting, the van itself was not involved in a collision) were "caused by an accident that arises out of the ownership, use or operation of a vehicle" so as to entitle him to no-fault benefits under Part VII of the *Revised Regulation (1984) under the Insurance (Motor Vehicle) Act*, B.C. Reg. 447/83. Major J., writing for a unanimous court, concluded (at para.27):

> The appellant's injuries arose out of the ownership, use and operation of his van. They originated from, flowed from, or were causally connected with its ownership, use and operation. Neither can it be said that there was an intervening act, independent of the ownership, use or operation of the vehicle, which broke the chain of causation.

20 In reaching that conclusion, Major J. endorsed a broad and liberal interpretation of the no-fault benefits scheme. He wrote (at para. 28):

> The words in [the regulation] chosen by the legislature are broad and should be interpreted to give meaning to the legislative intention that extends coverage where some connection is found between ownership, use or operation of a vehicle and the injuries sustained as a result of an accident.

21 Major J. cautioned that "while s. 79(1) must not be stretched beyond its plain and ordinary meaning, it ought not to be given a technical construction that defeats the object and insuring intent of the legislation providing coverage" (at para. 17). He posited a two-part test to be applied in interpreting the section (*ibid*).:

> 1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
>
> 2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?
>
> [underlining in original]

The two-part test, he wrote, "summarizes the case law interpreting the phrase 'arising out of the ownership, use or operation of a vehicle', and encompasses both the 'purpose' and 'causation' tests posited in the jurisprudence" (*ibid.).*

Mr. Justice Philp also reviewed the decisions of the Manitoba Court of Appeal in *McMillan v. Thompson (Rural Municipality* (supra) and *Guiboche v. Ford Motor Co. of Canada Ltd.* (supra):

> 22. *Amos v Insurance Corp. of British Columbia* was followed by this court in *McMillan v. Thompson (Rural Municipality).* In that case, the plaintiffs had suffered

severe injuries in a single-vehicle accident when the truck in which they were travelling drove into a washout on a bridge on a municipal road. The court concluded that the plaintiffs' injuries were "caused by ... the use of an automobile." The plaintiffs were, therefore, barred by s. 72 of the *Act* from suing the municipality for its failure to keep the bridge in proper state of repair or to warn potential users of the bridge of its dangerous condition.

23. Helper J.A. described Part 2 of the *Act* as "an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile" (at para. 54). She reasoned (at para. 106):

> While there must be a connection between the automobile and the injuries, judicial cause, or proximate cause is not required by the legislation. The legislation does not address the cause of the accident, only the cause of injuries.

24. For his part, Kroft J.A., in concurring reasons, opined that although a traditional consideration of causation (that is, judicial cause) is not required under Part 2 of the *Act*, there must be a "consequential connection" between the automobile and the injuries. He wrote (at para. 137):

> It is true that inquiries into fault and effective negligence have been made unnecessary in determining whether coverage is available. Nonetheless, if a tort action is to be barred, the words "bodily injury ... caused ... by the use of an automobile" clearly do require a demonstration of consequential connection between the use of an automobile on the one hand and the bodily injuries suffered by the claimant on the other.

25. In that decision, also in concurring reasons, I had occasion to comment (at paras. 20 and 25):

> It would seem ... that a much broader application of the "purpose" test has been adopted, one that does not require that the accident be one "which the common judgment in ordinary language would attribute to the utilization of an automobile as a means of different forms of accommodation or service." It is hard to imagine an accident occurring when an automobile was being driven, or even when it was parked, that would not satisfy the "purpose test" as it is now posited.
>
> ... The words "bodily injury caused by an automobile, caused by the use of an automobile" found in Part 2 of the **Act**, in my view, should be given the same broad and liberal construction which the court applied in [*Amos v. Insurance Corp. of British Columbia*] to the insuring provision in the regulation....

26. The application of Part 2 of the *Act* came before the court again in *Guiboche v. Ford Motor Co. of Canada Ltd*. In that case, the appellant had suffered injuries in a single-vehicle accident and alleged in a statement of claim against the manufacturers of his vehicle and its seat belts that the injuries were caused by faulty seat belts. In confirming the order dismissing the action on a summary judgment application, Monnin J.A., writing for the court, observed (at paras. 9-10):

> Whether a defect exists in a road, as in [*McMillan v. Thompson (Rural Municipality)*], or in a seat-belt, as in this case, the result remains the same: if the injury is ultimately related to the use or operation of a motor vehicle in Manitoba, an injured party is barred from pursuing his claim.
>
> The amendments brought to [*The Manitoba Public Insurance Corporation Act*] in 1993 to introduce in Manitoba a no-fault system are far reaching. This case is another example of how far the legislature went or to what extent common law rights which previously existed have been clawed back.
>
> 27. In both *McMillan v. Thompson (Rural Municipality)* *and Guiboche v. Ford Motor Co. of Canada Ltd.*, the plaintiffs suffered bodily injuries while they were using an automobile. The two-part test in *Amos v. Insurance Corp. of British Columbia* (addressing purpose and causation) was clearly satisfied, and in the circumstances of both cases, any difference in the interpretation of the phrases "arising out of" and "caused by" was of no moment..."

The Commission finds that the two-part test in *Amos v. Insurance Corp. of British Columbia* (addressing purpose and causation) is clearly satisfied in this case. The Appellant's injuries arose:

> a) out of the use and operation of an automobile;
>
> b) originated from or flowed from or were causally connected to the use and operation of the automobile; and
>
> c) unlike the decision in *Guiboche v. Ford Motor Co. of Canada Ltd.* (supra) there was no intervening act independent of the use or operation of the vehicle which broke the chain of causation.

There was a clear and consequential connection between the automobile and the injuries. The Commission, therefore, concludes that the incident in question was an accident within the meaning of the term "accident" as defined in Section 70(1) of the Act being an event "in which bodily injury is caused by an automobile."

The Commission, therefore, rejects the submission of MPIC's legal counsel in respect to this issue.

Was the Appellant Unable to Claim Compensation For Bodily Injury Pursuant to Section 79(1) of the Act

Section 79(1) of the Act states:

> **No compensation to victim who intends accident**
> **79(1)** No compensation is payable under this Part to a victim, or any dependant of the victim, in respect of bodily injury to the victim that is the result of an accident that was wilfully caused by the victim.

MPIC's legal counsel submitted that pursuant to Section 79(1) of the Act, the Appellant's bodily injuries was a result of an accident that was wilfully caused by the Appellant. Accordingly, under Section 79(1), no compensation was payable by MPIC to the Appellant.

Legal counsel for MPIC further submitted that the Appellant, as a result of picketing in such a manner as to block the entrance of [text deleted] automobile into the parking lot, and by inserting her right hand into the automobile and grabbing the driver's throat, suffered bodily injuries which were the direct result of an accident wilfully caused by the Appellant.

In respect of the meaning of accident in Section 70(1) of the Act, the Appellant's legal counsel urged the Commission to adopt the decision of the British Columbia Court of Appeal in *Martin v. American International Assurance Life Co*. (2001) 196 D.L.R. (4th) 427. (leave to appeal has been granted to the Supreme Court of Canada)

The head note of this case states:

> "Insured doctor was addicted to demerol after orthopaedic injury -- Insured died from overdose of demerol and phenobarbital -- Wife of insured brought action under policy of insurance -- Trial judge dismissed action on basis that insured's death was not accidental -- Trial judge found that insured intentionally consumed dose of demerol that was within lethal range in combination with phenobarbital -- Trial judge held that insured courted risk of death and that his death could not be described as unlooked for mishap or untoward event that was not expected or designed -- Insured's wife appealed -- Appeal

allowed --..."

Central in *Martin* was the decision of the Court of Appeal in defining the meaning of accident in the doctor's life insurance policy. The Court of Appeal in its unanimous decision at page 3 stated:

> 1 "The issue on this appeal is whether a death caused by an overdose of self-injected Demerol comes within the "Accidental Death Benefit Provision" of a policy of life insurance. The Provision reads in the relevant parts:
>
> BENEFIT
>
> Subject to this provision's terms, the Company will pay the amount of the Accidental Death Benefit..., upon receipt of proof that the Life Insured's death resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means,
> .....
> RISKS EXCLUDED
>
> No benefit shall be payable under this provision if death occurs;
> ....
>
> (b) as a result of self-destruction, whether sane or insane, or any attempt thereat or injuries intentionally inflicted, or
>
> (f) as a result of any poison, or gas or fumes voluntarily or involuntarily, accidentally or otherwise taken, administered, absorbed or inhaled....."

The Court, in arriving at it's decision, followed the decision of the Supreme Court of Canada in *Stats v. Mutual of Omaha Insurance Corporation* 1972 SCR 1153 in respect of the definition of accident. Having regard to the meaning of the term accident in the life insurance policy being considered in the *Stats* decision, the court at page 6 stated:

> 11 "In *Stats, supra*, the Supreme Court settled the meaning of the word accident as: "an unlooked-for mishap or an untoward event which is not expected or designed" or "any unlooked for mishap or occurrence." The nature of the insurance policy is not decisive, as was made clear by the reasoning in ***Walkem*** [*Straits Towing Ltd. v. Washington Iron Works*, [1976] 1 S.C.R. 309 (S.C.C.) -- hereinafter "***Walkem***", infra at 315-6 and in ***Stats***, *supra*, at 181-2. In all policies providing accident benefits, the insured seeks cushioning against the results of the risk of an accident. In all policies the

word accident carries the same meaning..."

The Court also noted that negligence can be a part of an accident. At paragraph 17 of its decision, the Court stated:

> 17 "It is well established in Canada that negligence and accident can co-exist (See especially: *Walkem*, *supra* and *Stats*, *supra*). In *Walkem*, at 314-315 [cited to S.C.R.], Justice Pigeon cited with approval a passage from the dissenting reasons of Freedman J.A. in *Marshall Wells of Canada Ltd. v. Winnipeg Supply & Fuel Co.* (1964), 49 W.W.R. 664 (Man. C.A.), at 665. Justice Freedman's words are instructive:
>
> > With respect, I am of the view that what occurred here was an accident. One must avoid the danger of construing that term as if it were equivalent to "inevitable accident." That a mishap might have been avoided by the exercise of greater care and diligence does not automatically take it out of the range of accident. Expressed in another way, "negligence" and "accident" as here used are not mutually exclusive terms. They may co-exist."
> >
> > [emphasis added]
>
> 18 In *Walkem*, *supra*, Justice Pigeon continued, after criticizing the majority of the Manitoba Court of Appeal's attempt to distinguish an accident from a calculated risk on the basis of the dangerousness of the action in question (leaving a hot-water tank unsupported), at 315-316:
>
> > With respect, this is a wholly erroneous view of the meaning of the word "accident" in a comprehensive business liability insurance policy. On that basis, the insured would be denied recovery if the occurrence is the result of a calculated risk or of a dangerous operation. Such a construction of the word "accident" is contrary to the very principle of insurance which is to protect against mishaps, risks and dangers. While it is true that the word "accident" is sometimes used to describe unanticipated or unavoidable occurrences, the word is applied as Halsbury says in the passage above quoted, to any *unlooked for mishap or occurrence*. That is the proper test...."
>
> At 316-317, Justice Pigeon concluded his discussion of the construction of the word "accident" by saying "[I]f calculated risks and dangerous operations are excluded, what is left but some exceptional causes of liability?" And, as Justice Labrosse noted in *Johnson v. Mutual of Omaha Insurance Co.* (1982), 139 D.L.R. (3d) 358 (Ont. H.C.) at 370 an actor can court intoxication without courting death."

The Court further stated in *Martin* at page 10:

> 30 "Vital to the inquiry, under the approach I am suggesting as appropriate, is the recognition that rarely is an accident purely fortuitous. In most cases, a deliberate human act, usually of the insured, initiates the chain of circumstances from which the mishap results. Insurers regularly deny coverage because damage resulted from a deliberate act of the insured or because the damage was the "foreseeable result" of an act of the insured. This argument could be used to deny coverage for almost any loss since almost any accident occurs as a result of some deliberate act. As Lord Robertson rightly opined in Fenton v. J. Thorley & Co., [1903] A.C. 443 (U.K. H.L.) at 452: "[t]he fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence to

> them, which is the element of mischance, mishap or misadventure." In my respectful view, this recognition that an accident may be predicated upon a miscalculation or misapprehension of forces by the insured is the key to the holistic approach...."

The British Columbia Court of Appeal in *Martin* clearly indicates that there is a distinction between a willful act on the one hand and a negligent and/or deliberate act on the other hand. The Appellant's legal counsel in his written submission to the Commission noted this distinction and stated:

> "...Even if one accepts that [the Appellant] was negligent in placing her arm inside a car, or that doing so was a dangerous action or operation, this does not remove her from the protection afforded to the victim of an "accident", nor should such actions qualify as willful causation...
>
> It is our submission that this two-step concept applies directly to the case before the Commission. In *Martin* the taking of drugs was a deliberate act, but the cause of death, the overdose, was accidental and insurance was payable. Similarly, in *Oldfied v. Transamerica Life Insurance Company of Canada* (2002) 210 D.L.R. (4th) 1 the Supreme Court of Canada upheld the lower court decision to grant insurance benefits to the widow of a cocaine smuggler who died after a condom filled with cocaine ruptured in his stomach. In that instance, the deliberate and illegal act of smuggling was seen as separate from the accidental cause of death.
>
> In this case, the deliberate actions of the appellant have to be separated from the actions which caused the accident. While [the Appellant] deliberately stood in front of the car, and deliberately placed her arm inside the window of the stationary car, she did not "wilfully cause" the accident. There is no evidence that [the Appellant] shifted the car into drive, or forced down the accelerator, or prevented the driver from braking the car earlier than he did. To apply the concept dating to the English Court of Appeal in 1903 discussed above, [the Appellant] miscalculated the forces involved, or was inadvertent to them, and as a result she was injured in an accident...."

It should be noted that MPIC's legal counsel in his submission that the Appellant wilfully caused an accident which disentitled her to any compensation under Section 79(1) of the Act, noted the distinction between the wilful act on the one hand and an intentional or negligent act on the other hand. MPIC's legal counsel referred to a number of dictionary definitions including the following definition from Black's Law Dictionary (6th ed.):

> "Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; <u>not</u>

> accidental or involuntary."
>
> [underling added]

Legal counsel for MPIC also referred to the decision in *Peterson v. Bannon* [1993] B.C.J. no. 23567 (B.C.C.A.) as follows:

> "A wilful act is one done intentionally, knowingly, and purposely, without justifiable excuse. A wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A wilful act differs essentially from one done negligently."
>
> [underling added]

The Commission finds that the principles of negligence or contributory negligence are not to be applied in determining the meaning of wilfully under Section 79(1) of the Act. If the Appellant intended to commit suicide by running across the path of an automobile on a city street, was not successful and only injured herself when coming into contact with the automobile, she would not be entitled to claim any benefits under Section 79(1) of the Act.

If the Appellant's sole purpose in running across a city street was for the normal purpose of arriving at a certain destination and in the process of running across the street, negligently failed to look in either direction and as a result thereof, was struck by an automobile which caused her bodily injury, she would be entitled to claim benefits under the Act and would not be disentitled by Section 79(1) of the Act.

In determining whether Section 79(1) of the Act applied in this case, the Commission is required to determine the motive of the Appellant when she suffered bodily injuries arising out of the motor vehicle accident.

The Commission finds that when the Appellant was exercising her right to picket, the purpose was to persuade members of the public not to enter the premises of the [text deleted]. The Appellant while participating in the picket line was not intending to cause harm to herself.

The Appellant was acting lawfully when she exercised her right to picket at the [text deleted] on the night in question. It should be noted that the strike by the union members at the [text deleted] was a lawful strike and the right to picket is recognized by the Labour Relations Act of Manitoba and the Queen's Bench Act of Manitoba. The right to picket a struck employer has also been recognized by the Supreme Court of Canada as a constitutionally protected form of freedom of expression under Section 2(b) of the Charter of Rights and Freedoms - *K Mart Canada v. UFCW Local 1518*, in 1999 Carswel/BC 1909.

The Commission also finds that when the Appellant inserted her arm into [text deleted] automobile, it was not for the purpose of harming herself, but for the purpose of making a citizen's arrest. The Appellant's intention in grabbing hold of [text deleted] was to restrain him from leaving the area until the [text deleted] Police arrived to investigate the incident and her intention was not to cause injury to herself. The Appellant may have been negligent in her actions, but she was not acting wilfully within the meaning of Section 79(1) of the Act.

The Commission, therefore, rejects the submission by MPIC's legal counsel that pursuant to Section 79(1) of the Act, the Appellant is not entitled to be compensated for any bodily injuries she may have suffered as a result of the automobile accident.

Entitlement to Income Replacement Indemnity Benefits and Reimbursement for Therapeutic Treatments

MPIC's legal counsel has submitted that the bodily injury suffered by the Appellant on February 2, 2001, was not serious enough to warrant the Appellant receiving income replacement indemnity benefits (IRI) and reimbursement for chiropractic treatments.

The relevant Sections of the Act and Manitoba Regulations are as follows:

> **Entitlement to I.R.I.**
> **81(1)** 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;

> **Reimbursement of victim for various expenses**
> **136(1)** 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:
>
> (b) medical and paramedical care, including transportation and lodging for the purpose of receiving the care.

> **Medical or paramedical care**
> **5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:
>
> (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

The Internal Review Officer in dismissing the application for review relies on the medical opinions of two chiropractors, [MPIC's chiropractor] and [Independent chiropractor]. In respect of [MPIC's chiropractor's] medical opinion the Internal Review Officer states:

> "After reviewing the medical information on file and the videotape, [text deleted], a Chiropractic Consultant with the Manitoba Public Insurance Corporation was of the opinion that your client possibly suffered from a slight sprain/strain type injury to her shoulder girdle complex. With respect to the low back pain, he could find no indication of a significant trauma to the low back beyond perhaps a mild sprain/strain type injury. As a result of these observations [MPIC's chiropractor] is of the opinion that the mechanism of injury is not consistent with significant time loss nor is it consistent with intensive treatment of long duration as outlined by [Appellant's chiropractor #1]."

In respect of [Independent chiropractor's] medical opinion, the Internal Review Officer states:

> "[Independent chiropractor] was able to review the videotape and he examined your client on April 25, 2001. He has supplied a report dated May 3, 2001, which I believe you have a copy. [Independent chiropractor] concludes:
>
> > "The video tape in my opinion clearly indicates a very mild form of trauma. At the worst, the claimant probably sustained bruising to her left thigh and possibly some myofascial strain to the right side of her shoulder and perhaps neck. None of these injuries should have taken any more than one to two weeks to resolve and certainly would not have precluded her from returning to the picket line or subsequently to work.
> >
> > Based on all available evidence, I cannot justify the need for any treatment being necessary as an aftermath of this trauma. Quite clearly this claimant required reassurance and motivation to return to normal activities very quickly to avoid the onset of chronic pain."

The Internal Review Officer having regard to the medical opinions of [MPIC's chiropractor] and [Independent chiropractor] concluded that the injuries sustained in the motor vehicle accident were minimal and likely consisted of some bruising and strain that would have been resolved in one or two weeks without any treatment. The Internal Review Officer, therefore, determined that the Appellant was not entitled to:

(a) be reimbursed in respect of any therapeutic treatments relating to the automobile injuries; and

(b) any IRI benefits with respect to the loss of pay due to the automobile injuries because these injuries would not have required the Appellant to miss any work or her strike duties.

In reply, legal counsel for the Appellant submits that the Internal Review Officer erred in

minimizing the significance of the automobile accident. In her decision dated July 31, 2001, the Internal Review Officer rejects the Appellant's assertion that she was being dragged rather than running along side of the motor vehicle during most of the duration of the incident. The Internal Review Officer found that from her review of the videotape, the Appellant was sliding with her feet and not being dragged. However, [text deleted], a chiropractor, was requested by MPIC to perform an independent chiropractic examination on the Appellant and after examining the videotape in his report to MPIC dated May 3, 2001, stated, "the car then proceeded forward and she was dragged several meters."

The Commission also had an opportunity of viewing the videotape of the incident on several occasions during the Appeal Hearings and agrees with [Independent chiropractor] and the Appellant that while her right arm was inside the automobile, she was dragged along side the automobile for a short distance.

The Commission, therefore, finds that the Internal Review Officer erred in concluding that:

a) the Appellant was not dragged along side the automobile for a short distance.

b) the automobile accident was not a violent incident that would cause the Appellant significant injury.

The Commission agrees that the initial contact between the Appellant and the front of the automobile was minor. However, following the verbal confrontation, the Appellant reached into the driver's side window and the car accelerated forward some distance, dragging the Appellant along side the vehicle. The Commission notes that the incident was not violent in the sense that the Appellant was not physically attacked. However, the Commission finds that the incident was not insignificant or minimal, but was of such a nature that it could cause the Appellant significant injury.

The Appellant's testimony in respect of the causal connection between the automobile accident and her neck and back injuries is corroborated by the medical opinions of [Appellant's chiropractor #2] and [Appellant's physical medicine specialist].

[Text deleted], a chiropractor who assessed the Appellant at her office on September 12, 2001, states in her report dated September 13, 2001:

> "The strain on [the Appellant's] right arm as she described could have jarred her right arm and neck sufficiently to have caused her injuries..."

[Text deleted], a Consultant of Physical Medicine Rehabilitation who has treated the Appellant on several occasions in 2001 and 2002, stated in his report dated June 12, 2002:

> "I reviewed the video tape. Unfortunately, I can not see clearly the position of the patient's hand in the car window. From her description to me it is possible that the right upper limb may have been stressed by the driver driving away and dragging her for about ten seconds or so. The event would explain the reason why there is an injury at the right wrist, the right elbow, the right shoulder, the extending into the attachments of the right upper limb to the dorsal spine and neck."

The Appellant has testified that prior to the accident she had no problems with her neck and upper back and, as a result of the accident, she had suffered significant pain to her neck and upper back which required her to receive therapeutic treatments and this pain prevented her from returning to work. The Appellant was a credible witness and gave her evidence in a direct and candid manner. She has been consistent in her complaints that since the date of the accident on February 2, 2001, to the time she attended [Appellant's physical medicine specialist] on November 16, 2001, and thereafter, her injuries were caused by the motor vehicle accident on February 2, 2001, caused her a great deal of pain and suffering, prevented her from carrying on a normal life and from obtaining employment.

The Commission notes that the Appellant, within one hour of the incident, attended at the Emergency Department of the [hospital] and complained about pain to her mid posterior thighs, lower back and posterior neck, shoulder and right hand.

The Appellant's testimony in respect of her pain and disabilities arising out of the motor vehicle accident have been corroborated by [Appellant's chiropractor #1], [Appellant's doctor #1], [Appellant's doctor #2], [Appellant's chiropractor #2] and [Appellant's physical medicine specialist].

The day following the motor vehicle accident, the Appellant attended at the office of [text deleted], a chiropractor, who noted in his Initial Healthcare Report dated February 3, 2001, that the Appellant complained about her low back pain, right leg pain , right arm pain, and his diagnosis was spinal concussion and spinal whiplash.

[Appellant's chiropractor #1's] report further indicates that in his view, the Appellant could not work for a period of one to three months, and that she required chiropractic treatments following the accident for three times per week with an anticipated duration of in-clinic care of 1 1/2 years. He also indicated the limitation for work for a period of one to three months.

[Appellant's doctor #1] medically examined the Appellant on March 6, 2001, and in his report to MPIC indicated, as a result of the accident on February 2, 2001, the Appellant suffered low back, shoulder and neck pain. [Appellant's doctor #1] noted tenderness to the paraspinal muscles to the lumber spine; reduced lumbar range of motion; tenderness to cervical paraspinals; and slow painful gait. [Appellant's doctor #1] assessed the Appellant's disability, and her employability, as being unable to do any work and states that the Appellant reports that: "She cannot even do

housework at home. Sitting also bothers her." [Appellant's doctor #1's] opinion was that the duration of this condition would continue for three to four months. His recommendation for rehabilitation was ongoing chiropractic treatment, avoidance of lifting and that prolonged sitting would be of benefit.

[Appellant's doctor #2] provided a medical report to MPIC dated August 2, 2001, and stated that the Appellant, who had been involved in a motor vehicle accident on February 2, 2001, has been in a lot of pain since that time with neck, right shoulder, and right pain with weakness in her lower back. [Appellant's doctor #2] further reported that the Appellant was unable to go to work since the incident of February 2, 2001, because of the pain. He recommended the Appellant for physiotherapy and for assessment by [Appellant's physical medicine specialist], [text deleted].

[Text deleted], a chiropractor, provided a report to legal counsel for the Appellant dated September 13, 2001. [Appellant's chiropractor #2] stated that she assessed the Appellant at her office on September 12, 2001. The Appellant reported to [Appellant's chiropractor #2]:

> "She is experiencing paraspinal muscular pain, right shoulder blade, right neck and right forearm pain. She claims she has occasional 2nd, 3rd, 4th digit numbness. She also complains of nervousness, inner tension and fatigue....
>
> [The Appellant's] diagnosis is right C5, 6 facet irritation with multiple muscular hypertonicitics. As a chiropractor, my treatment plan would be to adjust [the Appellant] three times per week to begin with. The adjustments would correct the C5, 6, facet irritation and relieve some of the referred pain into the right arm and right shoulder blade. Trigger points, soft tissue massage and stretching would be used to relieve the muscular hypertonicities. The majority of patients with this type of complaint recover in approximately six weeks. The only modifying factors [the Appellant] has that would predispose her to a longer healing period is that she is female and her symptoms have remained for over three months."

[Text deleted], a Consultant in Physical Medicine and Rehabilitation, saw the Appellant on November 16, 2001, and subsequently saw her on January 17, 2002, March 14, 2002, and April

18, 2002. In a report to legal counsel for the Appellant dated June 12, 2002, [Appellant's physical medicine specialist] stated:

> "My physical findings suggest that she had ligamentous injuries at the right wrist as she was tender over the ulnar and radial side of the wrist and a little bit over the dorsum of the hand on the ulnar side. There may have been a mild injury of the right elbow area as she was tender over the right lateral epicondylar area. She was tender over the distal mid right humerus. There was probably an injury of the right shoulder as well as she was tender over the coracoid process, A/C joint, the insertion of the infraspinatus and supraspinous tendons, and she was tender over the right anterior and posterior shoulder capsules.
>
> There was injury as well to the neck and dorsal spine as she was tender over the right C3 and C4 lamina, the right T3 to T8 facets, the left T4 to T6 facets, the right ribs at T4 to T5, and the left ribs from T3 to T8."

[Appellant's physical medicine specialist] commenced treating the Appellant and in his report dated June 12, 2002, could not forecast how many treatments the patient would require to recover from her injuries.

Decision

Having regard to the opinions of three medical physicians, [Appellant's doctor #1], [Appellant's doctor #2], and [Appellant's physical medicine specialist], together with the opinions of two chiropractors, [Appellant's chiropractor #1] and [Appellant's chiropractor #2], the Commission finds, on the balance of probabilities, that these medical opinions corroborate the testimony of the Appellant:

(a) as to the nature of the injuries she sustained in the motor vehicle accident and to the pain and disabilities that these injuries have caused the Appellant,

(b) the need for the Appellant to have chiropractic and physiotherapy treatments, as well as the treatments provided by [Appellant's physical medicine specialist].

(c) the motor vehicle accident injuries prevented the Appellant from returning to work.

In view of the above-mentioned medical opinions of [Appellant's doctor #1], [Appellant's

chiropractor #1], [Appellant's doctor #2], [Appellant's chiropractor #2] and [Appellant's physical medicine specialist], which corroborates the testimony of the Appellant, the Commission gives greater weight to these medical opinions than it does to the medical opinions of [MPIC's chiropractor] and [Independent chiropractor].

The Commission is satisfied, on the balance of probabilities, that the Appellant has established that MPIC erred in refusing to reimburse the Appellant for the costs of therapeutic treatments she received in respect of the automobile injuries and in refusing to provide IRI benefits to the Appellant from the date of the automobile accident.

The Commission therefore directs MPIC:

> a) to reimburse the Appellant in respect of the costs of the therapeutic treatments in respect of the chiropractic, physiotherapy treatments which are medically required and the treatments provided by [Appellant's physical medicine specialist] in respect to the injuries the Appellant sustained in the motor vehicle accident on February 2, 2001, if these treatments are not covered by The Health Services Insurance Act, together with interest to the date of payment;
>
> b) to pay IRI benefits to the Appellant 7 days from the date of the motor vehicle accident together with interest to the date of payment;
>
> c) the Commission shall retain jurisdiction in this matter and, if the parties are unable to agree on the amount of compensation, either party may refer this issue back to this Commission for final determination; and
>
> d) the decision of MPIC's Internal Review Officer bearing date, July 31, 2001, be rescinded and the foregoing substituted for it.

Dated at Winnipeg this 13th day of January, 2003.

MEL MYERS, Q.C.

ANTOINE FRECHETTE

WILSON MACLENNAN