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## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]**  
**AICAC File No.: AC-04-97**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Mr. Neil Cohen  
Dr. Patrick Doyle

**APPEARANCES:** The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

**HEARING DATE:** September 20, 2005

**ISSUE(S):** Adequacy of permanent impairment award for Temporomandibular disorder.

**RELEVANT SECTIONS:** Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and P215 Manitoba Regulation 41/94, Division 3, Subdivision 1, Sections 1(c)(ii), 1(d)(i) and 1(d)(iii)

**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 involved in a motor vehicle accident on June 5, 1998 and suffered injuries to the left side of her face, teeth, gum and jaw. The Appellant was referred to [Appellant's dentist] for dental treatment required as a result of the accident. [Appellant's dentist] treated the Appellant for a number of matters including a Temporomandibular Joint (TMJ) problem, which is the subject of this appeal, and other matters which are not the subject of this appeal. As part

of her treatment, in July 1998, [Appellant's dentist] provided the Appellant with a jaw splint, referred to below as an "intra-oral device", to be worn at night for relief from the symptoms of the TMJ.

In a letter dated March 10, 2003, [Appellant's dentist] provided the Appellant's case manager with a report on the status of her recovery. [Appellant's dentist] stated:

It is my opinion that [the Appellant's] progress has plateaued. She has not fully recovered from injuries sustained in the motor vehicle accident. She continues to present signs and symptoms of a temporomandibular disorder. She needs to continue to wear the nighttime appliance [the splint or intra-oral device] indefinitely. Provision should be made for ongoing and continuous appliance care and maintenance. In addition, because she continues to present ongoing chronic muscle pain/dysfunction provision should be made for her to receive treatment for these soft tissues injuries on a regular basis. I am of the opinion that surgical intervention or other treatment would be of no significant benefit.

On April 25, 2003, the Appellant's case manager sought an opinion of [text deleted], Dental Consultant with MPIC's Health Care Services, for advice as to whether the claimant was entitled to an impairment award for TMJ. On May 5, 2003, [MPIC's dentist] responded with the following recommendation:

Craniofacial muscle disorder  
(i) myofascial pain - 1%

The range of benefit available under the legislation in place at the time of the accident for this impairment is governed by the *Permanent Impairments (Universal Bodily Injury Compensation) Regulation*, M.R. 41/94, Division 3, Maxillofacial System and Vision, Subdivision 1, Temporomandibular Articulations. It provides:

1(d) Craniofacial muscle disorder:  
(i) myofascial pain: 1 to 2%

### **Case Manager's Decision**

On May 13, 2003, the case manager wrote to the Appellant informing her that she was entitled to a permanent impairment award of 1% for Temporomandibular disorder as outlined in the Regulation, Division 3, Subdivision 1, Section 1(d)(i).

On May 20, 2003, the Appellant wrote to the case manager informing her that she was reviewing the matter with her dentist, [text deleted].

### **Application for Review**

On June 27, 2003, the Appellant applied for a review of the case manager's decision. She stated:

The decision that I receive \$1,086.64 regarding the permanent impairment of my tmj is inappropriate. I did not have temporomandibular disorder prior to my accident on June 5, 1998. I continue to have significant muscle pain and joint dysfunction. I believe several categories of impairment and compensation under Division 3, subdivision 1 apply to my present condition.

On July 2, 2003, [Appellant's dentist] wrote to the case manager stating:

[The Appellant] continues to present signs and symptoms of a chronic temporomandibular disorder. Specifically; masticatory myofascial pain/dysfunction, episodes of masticatory muscle spasm and a disc displacement with reduction (ie. clicking in her jaw joints). It is my opinion that her injuries will not resolve over time. ... Based upon a copy of the Appendix 2 [of the Case Manager's decision] provided, with her current impairment, she should therefore be entitled to claim within 3 categories of the appendix. Namely 1.(c) subset ii) [disc displacement with reduction] and 1.(d) subset i) [myofascial pain] and 1.(d) subset iii) [spasm]. These injuries are additive and unfortunately the whole is greater than the sum of the parts.

[Appellant's dentist] did not express an opinion as to where the Appellant's impairment might be placed within the ranges set out in the legislation.

The ranges of benefit available under the Regulation for each of these impairments are set as follows:

- 1(c)(ii) – disc displacement with reduction (range 1 – 4%)
- 1(d)(i) – myofascial pain (range 1 – 2%)
- 1(d)(iii) – spasm (range 1 – 2%)

An Internal Review hearing, originally scheduled for November 19, 2003 and rescheduled at the request of the Appellant, was held April 13, 2004. At the hearing the Appellant argued that she was entitled to impairment benefits under the categories recommended by [Appellant's dentist] and that the awards should be in the high end of the permitted range given the impact of the injuries on her professional and personal life.

Following the hearing, on April 13, 2004, the Internal Review Officer requested [text deleted], Dental Consultant with MPIC's Health Care Services, to review [Appellant's dentist's] July 2, 2003 letter. On May 10, 2004, [MPIC's dentist] replied accepting [Appellant's dentist's] interpretation of the impairment and suggested a total award of 3% based on an award of 1% in each of the three categories suggested by [Appellant's dentist]. In the handwritten note, [MPIC's dentist] commented:

- 1.c(ii) - 1%
- 1.d(i) - 1%
- d(ii) - 1%
- 3%

Severity 1-4% - based on report I would assess all at the low end – Problem is essentially muscular in nature and directly related to stress not primarily the trauma from the MVA.

### **Internal Review Decision**

On May 14, 2004, the Internal Review Officer issued his decision granting the Appellant a 3% permanent impairment award. He referred to the note above and stated:

Following the hearing, I asked [MPIC's dentist] to review [Appellant's dentist's] July 2, 2003 report and he advised by handwritten note dated May 10, 2004 that he now believed you would be entitled to an impairment for the three areas [Appellant's dentist] identified. However, [MPIC's dentist] recommended the lowest end of the range for each impairment, namely 1%, because your problem is essentially muscular in nature and directly related to stress not primarily from the trauma of the accident. ...

Based on the new information from [Appellant's dentist] dated July 2, 2003, [MPIC's dentist] has recommended a permanent impairment award totaling 3% for the following impairments:

- 1) Disc displacement (1%);
- 2) Myofascial pain dysfunction (1%);
- 3) Spasm (1%).

... I have no medical evidence on which to base my decision on what end of the range of the various impairments you should be awarded, other than [MPIC's dentist's] comments. Thus for the reasons noted by [MPIC's dentist], I have to agree that a total award of 3% is appropriate.

### **Notice of Appeal**

The Appellant filed a Notice of Appeal dated June 7, 2004 objecting to the award of 3% stating that it was too low. She commented in the Notice:

[MPIC's dentist] recommended the lowest award without examining me. I will therefore request that [Appellant's dentist] provide you with a further report prior to my appeal hearing date.

The Appellant attended upon [Appellant's dentist], July 23, 2004, for reassessment with regards to the injuries suffered in the motor vehicle accident. On March 6, 2005, [Appellant's dentist] issued his report by letter to the Internal Review Officer and enclosed all of his previous correspondence regarding the Appellant's case. [Appellant's dentist] noted that the Appellant reported:

- the intra-oral device worn at nights by the Appellant was wearing down [Appellant's dentist] noted in the letter that the device had been repaired with beneficial results];
- if she did not wear the appliance at night she would awaken with soreness and stiffness in her jaw joints, jaw muscles, and headaches localized behind her ears and in the back of her head;

- when she saw her family dentist she had trouble keeping her mouth open for the required extended periods of time, and, suffered soreness in her jaw joint and facial muscles for a number of days;
- her jaw muscles were sore towards the end of the day and she would have difficulties forming her words;
- if her stress level should rise during the day, tension in her facial muscles and pain would increase;
- eating tough or chewy foods was painful and so she avoided them;
- she was following a home self-care program, including the use of ice and heat, for the painful muscles and walked regularly for exercise.

[Appellant's dentist] reported that he had examined the Appellant and stated:

Examination revealed a mandibular opening of 44 mm with a deflection of 2mm to the left. Excursive movements were 9mm to the right and left respectively. Bilateral temporomandibular joint clicking was noted with opening clicks at approximately 25mm and closing clicks in the left joint and then the right at 22 mm. Extra-orally she presented taut palpable bands and myofascial trigger points in the right trapezius, right sternocleidomastoid, right masseter muscles and the posterior cervical musculature.

Intra-orally she presented taut palpable bands and myofascial trigger points in the masseter (R>L), and lateral pterygoid muscles.

[Appellant's dentist] gave this diagnosis:

[The Appellant] continues to present a complex chronic temporomandibular disorder. Specifically; a bilateral reducible disc interference disorder, chronic masticatory muscle myofascial pain/dysfunction, masticatory muscle spasm and significant parafunctional and bruxism behavior. She also continues to present a left sided mandibular deflection of 2mm which may represent a deviation in form and which would be best assessed with a tomogram of her temporomandibular joints. In addition, she continues to present ongoing upper shoulder girdle and neck muscle myofascial trigger points.

[Appellant's dentist] disputed [MPIC's dentist's] opinion that the Appellant's problem was essentially muscular and stress-related:

[MPIC's dentist's] interpretation that [the Appellant's] problem is essentially muscular and related to stress minimizes her situation. There is a complex interlay between the muscles in her upper shoulder girdle/neck and face. Tension in these muscles and/or stress (emotional or physical) can affect loading in the temporomandibular joints. None of these ongoing conditions pre-existed the accident in question. They continue to significantly impact [the Appellant], professionally and personally on a daily basis.

[Appellant's dentist] referred to the Internal Review Officer's decision and his comment that he, [Appellant's dentist], "did not provide his views on what end of the ranges he thought were appropriate." He stated:

[T]o my knowledge I did not receive a request to quantify the range of impairment that I thought would be appropriate in this situation.

In closing his letter, [Appellant's dentist] offered these thoughts on this point:

The quantification of impairment is certainly an interesting dilemma. At what degree of pain/dysfunction does [MPIC's dentist] recommend the higher end for each impairment award? Do guidelines exist which help in the determination of impairment?

On May 17, 2005, the Internal Review Officer asked [MPIC's dentist] to review [Appellant's dentist's] letter. He wrote:

I would appreciate your firstly indicating whether there is any information in [Appellant's dentist's] report which would result in a change in your opinion relating to the amount of the permanent impairment entitlement. I would also appreciate your elaborating somewhat on your decision to assess the benefit at the lower end of the range. In other words, would you kindly indicate what kind of symptoms and/or injuries would attract a larger entitlement with the range. (emphasis added)

June 6, 2003, [MPIC's dentist] submitted a handwritten note to the Internal Review Officer explaining the factors that went into his decision:

Given the circumstances of this particular case I would make the following observations as to how I determined the impairment rating.

There are 3 dimensions to impairment:

1. Symptom intensity
2. Disability
3. Progression

These dimensions are more important than the presence of individual symptoms.

Symptom intensity

The patient is coping adequately with the situation and for the most part the intensity of her symptoms are low. She has minor muscle pain that can be managed with non-invasive methods.

### Disability

The patient is able to carry on with her daily life without routine professional intervention. She has not had to see [Appellant's dentist] for over 2 years. The degree of disability is low.

### Progression

Her symptoms have not increased with time, they have decreased – which is a positive finding. The perpetuation of symptoms is due primarily to factors that are not MVA related.

While I accept that the condition has had an impact on her life and daily activities it is apparent from the report that in terms of possible disability that could have occurred, the impairment in this case is at the low end.

In addition there are significant additional contributing factors in her daily life that apparently are perpetuating her symptoms. Factors that are not MVA related. As mentioned in the report if her daily stress increases so does her muscle tension and symptoms. The MVA did not cause her stress, on a daily basis, and is not the cause of her muscle response. At this point in time progression of symptoms is related to factors separate from any possible MVA trauma.

We have accepted that the MVA contributed to symptoms after the accident and perhaps has pre-disposed her to be at some risk later on. Moreover/However from an impairment stand we have also taken into account the degree of severity and nature of her symptoms, in what I feel is a rational and fair manner.

Unfortunately, it would appear that, despite [Appellant's dentist's] comment in his March 6, 2005 letter asking if any guidelines exist to help in the interpretation of the degree of impairment, [MPIC's dentist's] note was not forwarded by MPIC to [Appellant's dentist]. Consequently, the panel did not have the benefit of [Appellant's dentist's] thoughts as to where he might have put the awards in the respective ranges.

### **Appeal Hearing**

The Appeal hearing took place on September 20, 2005. The Appellant represented herself and MPIC was represented by Mr. T.B. Kumka.

The Appellant explained that she appealed the Internal Review Officer's decision because she believed it was wrong. She told the panel that [MPIC's dentist's] opinion that the impairment was not MVA-related but was, rather, muscular related, was erroneous and pointed out that



[MPIC's dentist] had never examined her and didn't understand the full impact of the impairment the way that she and [Appellant's dentist] did.

The Appellant testified that:

- the movement in her jaw is affected;
- both discs are affected;
- she has the muscle spasm all the time;
- the clicking, while not all the time, happens frequently, especially on stressful days.

The Appellant explained that her symptoms were not minor and testified that:

- her symptoms had plateaued by 2003 and that there has been no change in the past couple of years;
- her mouth is never comfortable, it is always sore and the related muscles are always tight;
- her teeth always feel as if they are clenched;
- it hurts to eat hard or chewy food;
- she has constant dull pain every day, which increases through the day;
- the pain reaches a serious intensity late in the day, every day;
- late in the day, she has difficulty forming words, she slurs them and experiences pain when speaking;
- she has 3 to 5 headaches weekly whereas before she had them very rarely; and,
- she has migraines every month or so.

She explained also that it would be a mistake to assume that because she is "coping adequately", that the symptoms are not intense. She stated:

- coping adequately does not mean there is no pain or that it is not severe;
- the pain reaches a serious intensity late in every day;
- this has been constant since the condition plateaued a couple of years ago.

She is coping adequately, she explained, because she has decided that she has too. The condition has stabilized and, as [Appellant's dentist] reported in his March 10, 2003 report to the case manager, is unlikely to improve. There is an option of possible surgery but the outcome is uncertain and may not help.

The splint (the intra-oral device mentioned by [Appellant's dentist]) helps, she noted, and added that she follows a home, self-care regimen that includes stretching, the application of heat and ice, and pain-killers. She has to continue to live her life, she noted, and that means that she must cope. That she does cope, the Appellant argued, should not be interpreted to mean that she is having an easy time. Dealing with the pain and the headaches makes her tired, and the pain in her cheeks requires drugs. It is, she stated, a constant and serious condition.

Mr. Kumka, appearing on behalf of MPIC, argued that the Appellant had not demonstrated that the decision of the Internal Review Officer should be overturned. He argued:

- the legislation has a range for the impairment and that MPIC must fit the impairment within this range;
- the upper limits of the range should be for extreme cases where there is no relief;
- [MPIC's dentist] is familiar with the legislation and the regulation and with the categories and the ranges contained therein;
- [Appellant's dentist] is not as experienced as [MPIC's dentist] with those categories and ranges;
- [MPIC's dentist] reviewed the file 13 times through the history of the claim;
- [MPIC's dentist] explained the reasoning underlying his decision to place the Appellant's impairment, as he had, at the lower end of the ranges;
- the Appellant is functioning and enjoying a full life;
- the Appellant continues to ride her motorcycle and is raising two children, one of whom still lives at home;
- the Appellant is still working at her chosen profession, as she was before the accident;
- all of these are relevant to assessing the degree of impairment and where a particular claim should be placed in the permitted ranges;
- there is no opinion from [Appellant's dentist] contesting the ranges suggested by [MPIC's dentist].

[MPIC's dentist], Mr. Kumka submitted, understands the ranges, and his advice is reasonable.

He further submitted the Internal Review Officer's decision is reasonable, is based upon the evidence, and should be upheld.

### **Discussion**

The Internal Review Officer, in rejecting the Appellant's Application for Review and upholding the decision of the case manager, relied on the opinion of [MPIC's dentist] that the impairment

should be placed in the low end of the ranges because the Appellant was “coping adequately” and because, in the opinion of [MPIC’s dentist], the problem was “essentially muscular in nature, directly related to stress and not primarily to the motor vehicle accident”.

[Appellant’s dentist], in respect of several issues, disagreed with the assessment of MPIC’s dental consultant, [text deleted]. [Appellant’s dentist] was of the opinion that the impairment was causally related to the motor vehicle accident. He also felt that [MPIC’s dentist] minimized the Appellant’s impairment which [Appellant’s dentist] characterized as “significant”.

Specifically; a bilateral reducible disc interference disorder, chronic masticatory (sic) muscle myofascial pain/dysfunction, masticatory muscle spasm and significant parafunctional and bruxism behavior. She also continues to present a left sided mandibular deflection of 2mm which may represent a deviation in form and which would be best assessed with a tomogram of her temporomandibular joints. In addition, she continues to present ongoing upper shoulder girdle and neck muscle myofascial trigger points.

[Appellant’s dentist] also went on to disagree with [MPIC’s dentist’s] opinion as to the degree of cause of the Appellant’s impairment. He stated:

[MPIC’s dentist’s] interpretation that [the Appellant’s] problem is essentially muscular and related to stress minimizes her situation. There is a complex interlay between the muscles in her upper shoulder girdle/neck and face. Tension in these muscles and/or stress (emotional or physical) can affect loading in the temporomandibular joints. None of these ongoing conditions pre-existed the accident in question. They continue to significantly impact [the Appellant] . . . on a daily basis. (underlining added)

The Commission accepts [Appellant’s dentist’s] opinion on the nature and cause of the Appellant’s condition in preference to the opinion of [MPIC’s dentist]. [MPIC’s dentist] never personally examined the Appellant and conducted a paper review of the documentation provided to him by MPIC in arriving at his assessment. On the other hand [Appellant’s dentist], who had personally examined the Appellant, was in a better position than [MPIC’s dentist] to gauge the

impairment suffered by the Appellant and its relation to the injuries sustained by the Appellant in the motor vehicle accident.

[Appellant's dentist] examined and treated the Appellant for injuries suffered in the motor vehicle accident over a period of almost seven (7) years. He first saw her in July 1998, approximately one (1) month after the accident and last assessed her condition in March 2005, the date of the last report in the file. [Appellant's dentist] first established that the Appellant's impairment came within three (3) different categories and this assessment was accepted by both [MPIC's dentist] and by the Internal Review Officer. [MPIC's dentist] had originally offered the opinion, accepted by the case manager and incorporated into her decision, that the Appellant's impairment was only myofascial pain within Section 1(d)(i) of the Regulation. [Appellant's dentist] responded to the case manager's decision explaining that he felt that the impairment was more complex in that it involved a combination of three conditions, disc displacement, myofascial pain dysfunction and spasm, meeting the requirements of three (3) sections of Division 3, Subdivision 1 of the Regulation, namely Sections 1(c)(ii), 1(d)(i) and 1(d)(ii). [MPIC's dentist] accepted the opinion of [Appellant's dentist] on this point. [Appellant's dentist's] opinion formed the basis of the Internal Review Officer's decision and this opinion is not in question in this appeal and has not been challenged by MPIC.

The Commission did have the opportunity to hear the Appellant and to assess her credibility. The Commission found the Appellant to be a convincing and compelling witness who testified in a clear and direct fashion and without equivocation. The Appellant testified before the Commission as to the severity of her symptoms, the fact that they were constant and increased in severity as the day progressed. The Appellant testified that these symptoms began after the

motor vehicle accident and that she had not experienced such symptoms before the motor vehicle accident. The Commission accepts her testimony in this regard.

The testimony of the Appellant supports the opinion of [Appellant's dentist] that the impairment is a significant one, that it is related to the motor vehicle accident and that the non-motor-vehicle-accident related stressors in the Appellant's daily life are not causative of the impairment she suffers.

### Decision

The Commission finds that the Appellant has established, on a balance of probabilities, that:

1. the impairment is related to the motor vehicle accident;
2. while other, non-motor-vehicle-accident-related stressors may exacerbate her symptoms, these additional stressors are not the cause of her impairment;
3. the impairment suffered by the Appellant is significant and the impairment awards should not be set at the lower ends of the possible ranges.

The Commission, for these reasons, sets the impairment awards at the following levels:

1(c)(ii) – disc displacement with reduction:	2%
1(d)(i) – myofascial pain:	2%
1(d)(iii) – spasm	<u>2%</u>
	<u>Total: 6%</u>

The Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated May 14, 2004.

Dated at Winnipeg this 18<sup>th</sup> day of October, 2005.

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**MEL MYERS, Q.C.**

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**NEIL COHEN**

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**DR. PATRICK DOYLE**