Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-82

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **The Honourable Mr. Wilfred De Graves** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**May 25, 2005 and October 25, 2006**
ISSUE(S):	**1. Whether Appellant incapable of returning to full-time employment as of December 17th, 2001, and therefore entitled to ongoing Income Replacement Indemnity benefits.** **2. Adequacy of permanent impairment award (10%) for organic brain syndrome.** **3. Entitlement to permanent impairment benefits for loss of lumbar spine range of motion.**
RELEVANT SECTIONS:	**Section 81(1)(a) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Manitoba Regulation 41/94, Subdivision 1, Category 4.**

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 October 23, 1996 and sustained the following injuries:

- Comminuted fracture of C7 with mild retropulsion of fragments.
- Fractured right radius and ulna.
- Compound fracture of left index finger.
- Open skull fracture with small subdural hematoma and mild cerebral edema.
- Punctured lung.
- Multiple lacerations requiring skin grafting.

As a result of these injuries the Appellant's fractured C7 required spinal fusion and discectomy and his fractured radius and ulna required open reduction/internal fixation. [The Appellant's surgeon] documented that the Appellant made full functional recovery from this injury. The initial assessment indicated that, in respect of the Appellant's head injury, there was no documentation of any complication arising from this injury.

Medical treatment was also required in respect of the Appellant's compound fracture involving his left index finger and the puncture to his lung. There is no documentation to indicate that the Appellant suffered any complications arising out of these injuries. As well, the Appellant had multiple lacerations arising out of the motor vehicle accident, some which required skin grafting. Aside from the various surgeries the Appellant underwent, he also received an extensive course of physiotherapy between February 1997 and February 1999. MPIC assisted in the Appellant returning to work in June of 1998 at [text deleted].

In August of 1999 the Appellant was involved in a second motor vehicle accident and, as a result, he received a further course of physiotherapy treatment and was able to return to work.

In June of 2000 [Appellant's physiatrist #1] assessed the Appellant and concluded that the Appellant's symptoms were ligamentous in origin. As a result, [Appellant's physiatrist #1]

performed prolotherapy (i.e., injection of 6 ml of P-25-G mixed with Xylocaine without epinephrine) on various occasions. The Appellant's complaints related to his low back and resulted in a reduction in the pain he was suffering. [Appellant's physiatrist #1], in a report dated July 4, 2000, stated that the Appellant had sustained an injury while at work, which resulted in exacerbation of his back symptoms. In August of 2000 the Appellant was unable to return to work and MPIC reinstated the Appellant's Income Replacement Indemnity ('IRI') benefits.

On October 25, 2001 MPIC's case manager requested [text delted], MPIC's Medical Consultant, to review the Appellant's medical file and advise MPIC of the following:

- Is prolotherapy a medical requirement in the management of the medical conditions arising from the incident in question?
- Are further therapeutic interventions a medical requirement in the management of the medical conditions arising from the incidents in question?
- Does the medical evidence indicate that [the Appellant] is able to return to his occupational duties with [text deleted]?

[MPIC's doctor] provided an Inter-departmental Memorandum to MPIC dated October 25, 2001 and stated:

> There is no documentation of a specific injury occurring to [the Appellant's] lower back as a result of the incident on October 23, 1996 MVC. [text deleted] identified symptoms involving the lower back in May 1997 and examination findings that suggested sacroiliac joint dysfunction. [Appellant's doctor] was of the opinion that [the Appellant's] back symptoms were mechanical in origin. [Appellant's physiatrist #1] documented that [the Appellant's] low back pain was a result of a ligamentous injury.

[MPIC's doctor] further stated:

> **Conclusion**

> Based on the objective medical evidence presently contained in [the Appellant's] file, in conjunction with the information indicating [the Appellant] has been educated with regard to an independent exercise program, it is my opinion that further therapeutic interventions are not required in the management of the medical conditions arising from the incidents in question. (underlining added)

In respect of the Appellant's work capabilities, [MPIC's doctor] indicated that [Appellant's physiatrist #1's] examination did not identify any objective evidence of impairment of physical function. [MPIC's doctor] concluded that, based on the objective medical evidence presently contained in the Appellant's file, there was insufficient medical evidence to support a total occupational disability and, as a result, [MPIC's doctor] stated in his Inter-departmental Memorandum:

> **Conclusion**
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> . . .
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> It is my opinion that medical evidence does not identify [the Appellant] as being unable to perform his regular full time occupational duties as a result of the medical conditions arising from the incidents in question. (underlining added)

The Appellant notified [text deleted] that he had received a report from MPIC indicating that he was capable of returning to work and on November 20, 2001 [text deleted] advised him that due to an overall work shortage the Appellant's employment terminated on November 6, 2001.

Case Manager's Decision

On December 12, 2001 the case manager wrote to the Appellant and advised him, based on the medical opinion of [MPIC's doctor], there was insufficient medical evidence in respect of the Appellant to support a total occupational disability at that time. As a result, the case manager advised the Appellant that he was no longer entitled to IRI benefits. The case manager further advised the Appellant that because his employment was terminated due to the time the Appellant

missed from work due to recuperation from his motor vehicle accident injuries, MPIC was providing him with a temporary continuation of IRI benefits for a period of one hundred eighty (180) days from December 12, 2001.

On January 7, 2002 the Appellant sought an Application for Review of the case manager's decision. The Appellant's personal physician referred the Appellant for a second opinion from [Appellant's physiatrist #2]. [Appellant's physiatrist #2] was provided with all of the relevant medical reports in respect of the Appellant, examined the Appellant on March 25, 2002 and provided a report dated April 2, 2002. A succinct summary of [Appellant's physiatrist #2's] report is contained in the Internal Review Officer's decision dated June 17, 2002, which states:

> After [Appellant's physiatrist #2] examined you March 25, 2002 he provided a report dated April 2nd. [Appellant's physiatrist #2] advised that the Prolotherapy being performed by [Appellant's physiatrist #1] was not supported. After [Appellant's physiatrist #2] completed his diagnoses, he advised that you have some residual neck stiffness and diminished range of motion but it does not interfere with function. He also noted some weakness in both the upper and lower limbs but said it does not fit in a spinal nerve pattern and does not appear to be associated with pain or disuse atrophy. [Appellant's physiatrist #2] supposes that it may be from a traumatic brain injury but he states that the deficits appear to be mild and do not appear to be interfering significantly with neuromuscular function. The only impairment of function noted in [Appellant's physiatrist #2's] report is to your left index finger.
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> [Appellant's physiatrist #2] concludes by stating that he agrees in general with the findings of those of [MPIC's doctor]. He agrees that Prolotherapy is not indicated as a treatment for your low back condition. He also notes that there may be some subtle neurologic motor findings and possibly cognitive findings that may be a permanent sequelae of your injury. The only treatment that he recommends is home exercise. (underlining added)

MPIC's case manager, upon receipt of [Appellant's physiatrist #2's] report, requested [Appellant's neuropsychologist] to examine the Appellant. The case manager advised [Appellant's neuropsychologist] that [Appellant's physiatrist #2] had recently examined the

Appellant and that [Appellant's physiatrist #2] had suggested that further investigation was required for neurologic and cognitive status.

On June 8, 2006 the case manager, in a Memo to File, indicates that the Appellant saw [Appellant's neuropsychologist] on June 5, 2002. The case manager spoke to [Appellant's neuropsychologist] by telephone on June 6, 2002. In this discussion the case manager informed [Appellant's neuropsychologist] that the Internal Review Officer needed to know if the Appellant had functional deficits that would preclude him from returning to his pre-accident employment at [text deleted]. The case manager, in his Memo, stated:

> . . . [Appellant's neuropsychologist] advised that [the Appellant] did have some mild memory deficits but these would only be a problem if [the Appellant] wanted to work in a position requiring facial recognition (such as a bartender or waitress) wherein he would need quick memory to remember faces or an order for a specific person. [Appellant's neuropsychologist] noted that [the Appellant] told him that he wanted to get employment as a tractor-trailer operator. [Appellant's neuropsychologist] said that he had no reason to think (sic) could not do that type of work. I asked about [the Appellant's] work at [text deleted] and [Appellant's neuropsychologist] could see no reason that [the Appellant] could not do this from a cognitive perspective.

Internal Review Officer's Decision

The Internal Review Officer met with the Appellant on May 15, 2002. In his report dated June 17, 2002 the Internal Review Officer stated:

> . . . Although I have not seen a report from [Appellant's neuropsychologist] I did receive a note from the Case Manager dated June 6, 2002. In that note, I was informed that [Appellant's neuropsychologist] felt that there was no reason to prevent you from working. There was no cognitive reason that you could not do the work that you did at [text deleted] or even work with a tractor-trailer which you had suggested to [Appellant's neuropsychologist] that you would prefer to do.
>
> In my review of the medical information, I could see no functional deficits that would prevent you from doing your pre-accident occupation.

> As a result of all of this information, it is my decision that you were capable of working December 17, 2001 and I am therefore confirming your Case Manager's decision letter and dismissing your Application for Review.

Notice of Appeal

The Appellant filed a Notice of Appeal to this Commission dated July 3, 2002. On July 19, 2002 [Appellant's neuropsychologist's] report was forwarded to MPIC and a copy provided to both the Appellant and to the Commission.

On November 24, 2003 [Appellant's psychiatrist], provided a report to [Appellant's doctor]. [Appellant's psychiatrist], in his report to [Appellant's doctor], stated:

> Assessment
>
> Axis I: Major Depressive Disorder-mild severity

[Appellant's psychiatrist] also recommended that in order to obtain a second opinion in respect of [Appellant's neuropsychologist's] report, the Appellant should see [Appellant's psychologist].

Appeal – IRI benefits

The relevant provision in respect of this appeal issue is:

> **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;

The Commission commenced hearing the above noted appeal on May 25, 2005. The Appellant attended with his legal counsel, [text deleted], and [text deleted] represented MPIC. The Commission did not hear any evidence at that time because it decided that, in accordance with

[Appellant's psychiatrist's] recommendation, a report should be obtained by the Commission from [Appellant's psychologist].

On July 18, 2005 the Commission wrote to [Appellant's psychologist] requesting that he comment on two (2) issues. The first issue related to the adequacy of the permanent impairment benefit the Appellant has received for organic brain syndrome. This matter will be discussed later in this decision. The second issue the Commission requested assistance from [Appellant's psychologist] was whether the mental injury was caused by the Appellant's motor vehicle accident which rendered him entirely or substantially unable to perform the essential duties of full time employment on or after December 17, 2001.

[Appellant's psychologist], in his report dated September 29, 2005, in respect of this second issue, stated that he had diagnosed that the Appellant was suffering from a mild depressive disturbance. He further noted that [Appellant's neuropsychologist] had not reported that there were any symptoms related to post traumatic depression and neither the Appellant or his mother reported personality changes at that time. [Appellant's psychologist] further reported that [Appellant's psychiatrist], in 2003, had indicated the claimant was reporting chronic dysphoria and he provided a diagnosis of major depression, mild severity. [Appellant's psychologist] suggested, therefore, that it was possible for the Appellant to have had a mild depressive disorder secondary to symptoms resulting from the motor vehicle accident in question.

Upon receipt of that report MPIC requested [text deleted], a Psychological Consultant to MPIC, to review [Appellant's psychologist ']s report. In an Inter-Departmental Memorandum from [MPIC's psychologist] to MPIC's legal counsel, [MPIC's psychologist] reviewed reports of [Appellant's neuropsychologist] and [Appellant's psychologist] and stated:

4. During the approximately seven years from the time of the motor vehicle accident until the claimant presented to [Appellant's psychiatrist] complaining of depression, [Appellant's psychologist] noted that there was one early reference to depression (not noted in this writer's review), which raises the "possibility" of some continuity of the claimant's depressive symptoms.

   Reviewer's Comment

   [Appellant's psychologist] appears to be referring here to the word *"depression"* appearing on a physiotherapist's report dated February 18, 1998. This is the only reference to depression in the claimant's file from the date of the motor vehicle accident in 1996 to [Appellant's psychiatrist's] report in 2003. The writer has reviewed this physiotherapy report and notes that the word *"depression" is* written under "Other Symptoms" with no explanation as to the source of this information (e.g. patient's self report, mental status exam, etc.) or the significance of this notation. There was no followup to this, and no treatment noted for depressive symptoms.

   Notwithstanding the physiotherapist's notation of "depression" in 1998, in the remainder of his report, [Appellant's psychologist] comments several times about the lack of evidence for continuity of depression from 1996 until 2003. With regard to the physiotherapists report, [Appellant's psychologist] remarked, "I *did not see any subsequent follow up on this.* Later, [Appellant's psychologist] comments that there has been an *"absence of reports of depressive symptomatology and functional implications of depression,"* and that *"this has not been a major feature of his presentation over the course of time at least in the documentation I have reviewed".* In the next paragraph on page 28 of his report, [Appellant's psychologist] indicates that *"the continuity from accident onset through to [Appellant's psychiatrist]'s evaluation has not been established other than for [the Appellant's] self report".* Finally, again [Appellant's psychologist] on page 29 of his report comments that *"there is a lack of continuity in the medical documentation in regards to the depression".*

5. Based on his psychological and neuropsychological assessment of the claimant, [Appellant's psychologist] concluded that the claimant's depressive symptoms are not incompatible with employability, *"even full time employability".* In discussing this particular issue, [Appellant's psychologist] again refers to the lack of findings of significant depressive disturbance from the date of the motor vehicle accident until [Appellant's psychiatrist's] report. In the 4th paragraph on page 28 he indicates *"there is no report of mental health, psychological or neuropsychiatric issues that would interfere with his employment. There is no statement from his physician that he was suffering from a mental health disorder, nor from the rehabilitation physician, that mental health issues were relevant for him not working".*

[MPIC's psychologist] concluded:

> **CONCLUSIONS**
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> In this writer's opinion, [Appellant's neuropsychologist's] report of July 12, 2002 directly addressed the issue of whether the claimant developed a depressive condition or other psychological conditions as a result of the motor vehicle accident in question. [Appellant's neuropsychologist's] assessment some 4 years following the motor vehicle accident found no evidence of any sych (sic) symptoms, and this was based upon a psychological assessment, collateral information, and the claimant's self report. Based upon [Appellant's neuropsychologist's] report of July 19, 2002, the claimant was not exhibiting any symptoms of depression at that time, nor were he or his mother reporting that he was suffering from symptoms of depression or anxiety related to the motor vehicle accident for the approximately 6 years from the date of the accident until [Appellant's neuropsychologist's] assessment in July 2002.
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> Although [Appellant's psychologist] has suggested that there is a <u>possibility</u> that the claimant may have developed some depressive disturbance related to chronic pain following the motor vehicle accident, it is the writer's opinion that the medical evidence indicates that on balance of probabilities, this is unlikely. [Appellant's psychologist] in fact commented on the apparent lack of continuity in reports of the claimant's depressive symptoms following the motor vehicle accident, and that the current depressive disturbance, whether or not related to the MVA, is not of a sufficient severity to affect the claimant's day to day functioning.
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> <u>[Appellant's psychologist] suggests, and the writer concurs, that the claimant has not sustained any psychological injury or neuropsychological impairment that would affect his ability to be employed on a full time basis</u>. (underlining added)

<u>Appeal</u>

The appeal hearing reconvened on October 25, 2006. At this hearing the Appellant testified that as a result of the motor vehicle accident he developed low back problems resulting in chronic pain which prevented the Appellant from returning to work at [text deleted]. The Appellant further testified that as a result of the motor vehicle accident he suffered cognitive defects as well and he has been unable to return to work at [text deleted].

Discussion

The motor vehicle accident occurred on October 23, 1996 and the Appellant did not report to any caregiver at that time that he was suffering from any low back pain. The Appellant's first complaint in respect of low back pain was reported by a physiatrist to MPIC on May 27, 1997, approximately six (6) months after the motor vehicle accident. In this report the physiatrist indicated that the Appellant first complained about back pain on May 9, 1997. Notwithstanding his back problems, the Appellant commenced employment at [text deleted] on August 17, 1998 and he worked there until August 1999, when he was involved in a second minor motor vehicle accident, and returned to work full time on October 2, 1999.

In a report to MPIC [Appellant's doctor] indicates that he saw the Appellant in respect of a complaint with respect of muscle spasm to his neck. There was no complaint by the Appellant in respect of his back. On June 6, 2000, a period of approximately three (3) years and eight (8) months after the motor vehicle accident, the Appellant was seen by [Appellant's physiatrist #1]. [Appellant's physiatrist #1] wrote to [Appellant's doctor] on June 6, 2000 and indicated that the Appellant had indicated to him that he was well with no back problems until he had a motor vehicle accident. [Appellant's physiatrist #1] assessed that the Appellant's symptoms were ligamentous in origin and, as a result, he performed prolotherapy on several occasions.

[MPIC's doctor] was requested by MPIC to assess the treatments provided by [Appellant's physiatrist #1], determine if there is any further therapeutic interventions required and whether there was any medical evidence to determine whether the Appellant was unable to return to his occupational duties with [text deleted]. In a report dated October 25, 2001 [MPIC's doctor] concluded that no further therapeutic intervention was required and that the medical evidence

did not indicate that the Appellant was unable to return to his full time occupational duties as a result of any injuries he sustained in the motor vehicle accident.

[Appellant's physiatrist #2], who was requested by [Appellant's doctor] to provide his assessment, concurs with [MPIC's doctor] that prolotherapy was not indicated as a treatment for the Appellant's low back condition but suggested that the Appellant should be examined for any neurologic and cognitive impairment.

The Appellant was examined by [Appellant's neuropsychologist] and by [Appellant's psychologist], who both concluded that although the Appellant did suffer from some cognitive impairment of a mild nature, it would not impair the Appellant from returning to work at [text deleted]. [Appellant's neuropsychologist] found no evidence of any depression in respect of the Appellant. [Appellant's psychiatrist], on the other hand, found that there was depression suffered by the Appellant but made no comment as to whether it was connected to the motor vehicle accident. [Appellant's psychologist] thought it might be possible that the Appellant's depressive condition might be connected to the accident. However, [MPIC's psychologist], a psychologist who reviewed [Appellant's psychologist's] report, concluded that [Appellant's psychologist] did not find that there was a causal connection between the motor vehicle accident and the Appellant's depression. In any event, the Commission notes that [Appellant's psychologist] did not conclude that as a result of the motor vehicle accident the Appellant sustained any psychological injuries which prevented him from returning to work.

Decision

The Commission finds that the Appellant, who is a very pleasant person, honestly believes that, as a result of the motor vehicle accident, he suffers from chronic pain and from cognitive

defects which prevent him from returning to work. However, the Commission finds, having regard to the medical reports of [MPIC's doctor], [Appellant's neuropsychologist] and [Appellant's psychologist], the Appellant has not established, on a balance of probabilities, that his complaints in respect of back pain and depression:

1. (a) are connected to the motor vehicle accident in 1996.

   (b) prevent the Appellant from returning to work at [text deleted].

2. That the cognitive defects he suffers from as a result of the motor vehicle accident are of such a nature as to prevent the Appellant from returning to work at [text deleted].

The Commission therefore finds, for these reasons, that the Appellant's appeal in respect to the reinstatement of IRI is rejected and that the decision of the Internal Review Officer, dated June 17, 2002 is confirmed.

Appeal – Permanent Impairment Award

The Appellant also appealed the decision of the Internal Review Officer in respect of the following issues:

(a) Adequacy of Permanent Impairment Award (10%) for Organic Brain Syndrome

(b) Entitlement to Permanent Impairment Benefits for loss of lumbar spine range of motion

The relevant provision in respect of this appeal is set out in Manitoba Regulation 41/94, Subdivision 1, Category 4.

(a) Adequacy of Permanent Impairment Award (10%) for Organic Brain Syndrome

[Appellant's neuropsychologist], [text deleted], was requested by MPIC to conduct a neuropsychological assessment, as recommended by [Appellant's physiatrist #2] in his report to MPIC dated April 2, 2002. [Appellant's neuropsychologist] met with the Appellant on June 5, 2002 and provided a report to MPIC dated July 19, 2002 wherein he stated:

> **Conclusions**
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> 1) Cognitive limitations: [the Appellant] has been found to have a few impairments in our testing. This includes very specific limitations in his nonverbal memory, which would be consistent with the right-sided locus of his subdural hematoma. We have also found a slight reduction in one type of concentration; and subtle to mild reductions in his right hand speed, strength and coordination, which would be consistent with [Appellant's physiatrist #2's] April 2, 2002 report. (We also found mildly reduced word-finding and general knowledge, which is likely more related to his academic proficiency rather than the head injury, based upon his description of schooling).
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> 2) Functional Abilities: In contrast, the majority of [the Appellant's] neuropsychological assessment was within normal limits. This includes most types of attention/concentration; auditory perception; verbal memory; a few types of nonverbal or visual memory (particularly for geometric figures or drawings); visual spatial functions; and problem solving. Intellectually, [the Appellant] was felt to be primarily back at baseline, with the primary exception of slower hand speed.
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> 3) Practical Implications: The primary difficulty that [the Appellant] will likely have will be in recognizing or remembering other individual's faces, or recalling information from social situations. Fortunately, his problem solving skills are strong, and he is also normal in visual spatial functions. These were likely utilized in his position at [text deleted], where he was assisting in the fabrication of entertainment units.
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> 4) Permanence: [the Appellant's] difficulties with memory and psychomotor skills are felt to be permanent at almost six years post-injury.
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> 5) Etiology: The difficulties in memory, and hand function, are felt to be secondary to his MVA. The limitations in word finding, and general knowledge are felt to be premorbid, relating to his description of his academic history.

[Appellant's neuropsychologist] made the following suggestions in respect of the Appellant's permanent impairment award related to his brain injury:

a) The head injury itself would be rated under Subdivision 1, in the Skull, Brain and Carotids section of Division 2. The section that refers to his subdural hematoma would be Subcategory 5. There are two ratings of either minor or severe. [The Appellant's] rating would be severe, based upon the length of retrograde amnesia that he reports; and his post-traumatic amnesia (of several days). I would suggest a 4% rating.

b) [The Appellant's] cognitive changes would be rated under Subdivision 1, of the Organic Brain Syndromes, in Division 9. The first three subcategories of this refer to individuals who require supervision, which would not apply to [the Appellant]. However category 4 would be appropriate for his cognitive changes (e.g. in memory and psychomotor skills), with a range of 7% to 15%. I would suggest the rating of 10%, which recognizes that there has been cognitive change in regards to his memory, but with the majority of other neuropsychological functions falling within normal limits.

c) Thus a total for [the Appellant] would be 4% + 10% = 14%.

Case Manager's Decision

MPIC's case manager wrote to the Appellant on October 31, 2002 and, adopting [Appellant's neuropsychologist's] recommendations, advised the Appellant, in respect of the organic brain syndrome the award would be 10%, and the award relating to the subdural hematoma to be 4%.

Internal Review Officer's Decision

The Appellant made application to have the case manager's decision reviewed by an Internal Review Officer.

The Internal Review Officer issued her decision on April 13, 2004 confirming the case manager's decision and dismissing the Appellant's Application for Review. As a result, the Appellant filed a Notice of Appeal dated June 17, 2004 in respect of the impairment award in respect of the organic brain syndrome.

Discussion

As indicated earlier in this decision, [Appellant's psychologist] was requested to provide his opinion as to the adequacy of the permanent impairment benefit of 10% the Appellant received from MPIC for organic brain syndrome. [Appellant's psychologist] was provided with [Appellant's neuropsychologist's] report of July 19, 2002 and a copy of Subdivision 1 of Division 9 of the Impairment Schedule in effect when the Appellant had his accident.

[Appellant's psychologist], in his report to the Commission dated January 12, 2006 confirms [Appellant's neuropsychologist's] assessment and states:

> In my view, and with all respect to his subjective experience of feeling very different than he did on a pre-accident basis, this level of functioning does not move into the range of higher rating, the 20-45% range, as he does not require occasional supervision for the tasks necessary for every day life, which are very elementary tasks. Given his employment, with responsibility, this rating could not be in that range. Hence, the correct range is 7-15%. He has meaningful impairments here. The rating of 10% is a reasonable rating. There is no clarification in the rating scales on how to make the gradation between a 7% and 15%, but my inclination would not be to give him the upper or top range, as he does not approach the level where he requires supervision, given his employment that is ongoing, and that he had on a post injury basis.

The Commission notes that [Appellant's psychologist] endorsed [Appellant's neuropsychologist's] assessment that 10% is a reasonable award in respect of the Appellant's permanent impairment for organic brain syndrome.

Decision

The Appellant testified about the difficulties he had in respect of his cognitive limitation and this testimony is consistent with the opinions of both [Appellant's neuropsychologist] and [Appellant's psychologist] as it relates to the Appellant's cognitive condition. The Commission therefore finds that the Appellant has failed to establish, on a balance of

probabilities, that MPIC has incorrectly determined the 10% assessment either inadequate or unreasonable or incorrect. As a result, the Commission confirms the Internal Review Officer's decision dated April 13, 2004 and dismisses the Appellant's appeal in this respect.

(b) Entitlement to Permanent Impairment Benefits for Loss of Lumbar Spine Range of Motion

The Appellant, at the request of MPIC, was assessed by [rehab clinic] on August 1, 2003. MPIC received the assessment from [rehab clinic] on August 21, 2003 and reported that the Appellant made the following complaints:

> [The Appellant] complained of aching in his lumbar spine. He states that when he sits or lies down, it is difficult to get up again. Riding in a vehicle causes his lumbar pain to radiate into his right buttock and up his back. He stated his cortisone injection on June 20, 2003 made his back pain worse. He also complained of impairment of his short term memory and sleep dysfunction.
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> . . .
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> **Range of Motion:**
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> Lumbar: Flexion: 6" fingertips to floor – burning and aching pain at L4 to S1 area with extension.
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> Extension: 50% of full – sharp pain at L4 to S1.

The Appellant made application for review claiming he had not been fully compensated for the damage that has happened.

The Internal Review Officer, in an Inter-Departmental Memorandum dated December 19, 2003, requested the MPIC Health Care Services Team to review the PAR report in respect of

the Appellant's range of motion and advise if any further impairment awards were warranted by this report with respect to the Appellant's range of motion.

[MPIC's doctor], in an Inter-Departmental Memorandum to the Internal Review Officer dated January 19, 2004 stated:

> In a recent report submitted to the file by [text deleted], it is noted that [the Appellant] had a limitation of lumbar flexion and extension.
>
> According to the Manitoba Public Insurance Schedule of Permanent Impairments, a claimant is not entitled to an impairment benefit as it relates to loss of lumbar spine range of motion.

The Appellant filed an Application for Review in respect of the permanent impairment relating to range of motion.

Internal Review Officer's Decision

The Internal Review Officer, in her decision dated April 13, 2004 to the Appellant stated:

> You received an assessment from [rehab clinic] and a report was sent to Manitoba Public Insurance dated July 13, 2003. This information was reviewed by [MPIC's doctor] looking specifically at a limitation of lumbar flexion and extension. [MPIC's doctor] advises that the Manitoba Public Insurance Schedule of Permanent Impairments does not include an impairment benefit with respect to this injury. . .

Appeal

At the appeal hearing MPIC's legal counsel submitted that, upon an examination of the Schedule of Permanent Impairments under the Act, there is no provision to provide an impairment award in respect of a limitation of lumbar flexion and extension. In response, the Appellant's legal counsel could not rebut this submission.

Decision

The Commission agrees with MPIC's submission and finds that the Appellant has failed to establish, on a balance of probabilities, that he was entitled to a permanent impairment award in respect to a limitation of lumbar flexion and extension. For this reason, the Commission rejects the Appellant's appeal in this respect and confirms the decision of the Internal Review Officer dated April 13, 2004.

Dated at Winnipeg this 28th day of December, 2006.

MEL MYERS, Q.C.

THE HONOURABLE MR. WILFRED DE GRAVES

PAUL JOHNSTON