

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-06-185**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Dr. Patrick Doyle  
Ms Linda Newton

**APPEARANCES:** The Appellant, [text deleted], was represented by Mr. Craig Henderson;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

**HEARING DATE:** August 21, 2008

**ISSUE(S):** Entitlement to Permanent Impairment Benefits

**RELEVANT SECTIONS:** Sections 127 and 129 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 1 and Schedule A of Manitoba Regulation 41/94

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

**Reasons For Decision**

The Appellant, [text deleted], suffers from Multiple Sclerosis, a disease which she has had for some thirty (30) years. On December 29, 2001, the Appellant went out for a two (2) hour car ride with some friends to view Christmas lights. As a result of her Multiple Sclerosis, the Appellant's heat perception is ostensibly diminished. Due to her impaired heat perception, the Appellant sustained serious burns to her left buttock and right thigh from the car seat warmers.

The Appellant was hospitalized on January 1, 2002 for treatment of her burns. She underwent three (3) weeks of intensive therapy for her burns and the subsequent infection which occurred. On January 24, 2002, she was transferred to the Rehabilitation Centre for ongoing physiotherapy and rehabilitation in relation to the Multiple Sclerosis attack which she suffered after the burn injury.

In an Internal Review decision dated May 25, 2005, the Internal Review Officer determined that the left buttock and right thigh burns which the Appellant sustained on December 29, 2001 came within the statutory definition of “bodily injury caused by an automobile” set out in Section 70(1) of the MPIC Act. As a result, the file was returned to MPIC’s case manager for a determination of the Appellant’s entitlement to Personal Injury Protection Plan (‘PIPP’) benefits.

In a decision dated March 14, 2006, MPIC’s case manager rendered a decision in which she concluded that the burns (and subsequent infection) likely did not alter the natural course of the Appellant’s already progressive Multiple Sclerosis, and that the Appellant’s current state of physical dysfunction would likely have come about whether or not the incident had occurred. As a result, MPIC’s case manager concluded that the Appellant was not entitled to further benefits under PIPP.

The Appellant sought an Internal Review of that decision. In a decision dated November 10, 2006, the Internal Review Officer dismissed the Appellant’s Application for Review and confirmed the case manager’s decision. In his decision, the Internal Review Officer noted the following:

### **REVIEW DECISIONS**

As I explained at both of the recent hearings, the entitlement to, and the amount of, a Permanent Impairment benefit under PIPP are essentially medical (as opposed to legal) issues.

For an entitlement to arise, the specific medical condition in question must be:

1. causally-related to a “bodily injury caused by an automobile” (as defined in the *Act*); and,
2. specifically listed in the MPI Permanent Impairment Schedule; or,
3. one which can be assessed by analogy to a condition listed in the Schedule, pursuant to Section 129 of the *Act*.

I put these issues to our medical consultant in my June 16, 2006 memorandum. I asked him to make the assumption that the first criterion above had been met.

While there is some question whether [MPIC’s Doctor] was actually prepared to make that assumption, his response – insofar as it relates to the second and third criteria – was unequivocal. He was firmly of the view that the functional difficulties you described in your correspondence did not bring you within any of the provisions of the MPI Permanent Impairment Schedule. He described the manner in which Section 129 is applied and ultimately concluded that the impairment benefits for residual scarring were all you were entitled to.

My function as an Internal Review Officer is to determine whether the decisions of the case manager can be supported by the available evidence. While you clearly disagree with some of the conclusions reached by [MPIC’s Doctor], I am satisfied that he gave due consideration to all of the medical and other written evidence available to him and that it was, therefore, reasonable for the case manager to have relied upon the opinions received.

The Appellant has now appealed from that Internal Review decision to this Commission. The issue which arises on this appeal is whether the Appellant is entitled to a permanent impairment benefit for the deterioration in her medical condition and, in particular, for the general reduction in her mobility since late 2001.

### **Appellant’s Submission**

The Appellant’s representative submits that the Appellant sustained a severe exacerbation of her Multiple Sclerosis as a result of the incident in question. He maintains that prior to sustaining

the burns from the car seat warmer, the Appellant was managing her Multiple Sclerosis well and had been stable for a long period of time. However, he argues that due to the infection which the Appellant developed as a result of the burns to her left buttock and right thigh, she suffered a severe attack of Multiple Sclerosis. The Appellant's representative submits that the trauma to the Appellant's immune system caused by the infection resulted in a sudden deterioration of her Multiple Sclerosis.

The Appellant's representative maintains that the Appellant's life has changed dramatically subsequent to the accident. He notes that prior to the accident, she was able to walk independently with a walker, stand and transfer unassisted. He points out that since the accident, the Appellant is no longer capable of managing these tasks - she now experiences the following functional limitations:

- ◆ unable to walk unattended;
- ◆ unable to walk around the house or into a restaurant;
- ◆ only able to transfer from bed to scooter;
- ◆ unable to use handicap washrooms;
- ◆ unable to stand to dress.

The Appellant's representative argues that the Appellant cannot function to the same extent as before the motor vehicle accident-related injury. He claims that this constitutes a permanent impairment which was directly attributable to the accident.

The Appellant's representative also submits that MPIC's Health Care Services Team failed to consider the extent to which the burns affected the Appellant's Multiple Sclerosis. He maintains

that the Health Care Services Team and MPIC's case manager should not have concluded that the Appellant would have been in the same position as a result of her pre-existing Multiple Sclerosis, but should have considered the impairment as directly flowing from the accident. Additionally, the Appellant's representative relies upon the report dated May 31, 2007 of the Appellant's treating neurologist, [Appellant's Neurologist #1], wherein [Appellant's Neurologist #1] concluded that:

In summary, it is my opinion that this woman sustained a specific injury to her central nervous system in the form of an attack in the form of an attack (sic) or flare-up of her Multiple Sclerosis as a result of her burn injury and subsequent infection. This situation is permanent in view of the fact that there has not been any improvement in the last to five and five and (sic) a half years.

As a result, the Appellant's representative submits that the Appellant sustained a specific injury to her central nervous system in the form of a flare-up of her Multiple Sclerosis as a result of her burn injury and subsequent infection. Accordingly, he maintains that the Appellant is entitled to a permanent impairment award in accordance with Section 129 of the MPIC Act.

### **MPIC's Submission**

Counsel for MPIC submits that a permanent impairment award does not arise in the Appellant's circumstances because there has not been a loss of function attributable to the motor vehicle accident-related injuries. Rather, he maintains that the Appellant's loss of function was more likely a byproduct of the progressive nature of her Multiple Sclerosis, rather than the motor vehicle accident-related injuries.

In support of his position, counsel for MPIC argues that the Appellant's condition was not stable prior to the December 2001 incident. Counsel for MPIC relies upon the opinion of [MPIC's Doctor] of MPIC's Health Care Services Team. In his report dated July 7, 2006, [MPIC's

Doctor] concluded the following with respect to the Appellant's entitlement to a permanent impairment award:

### **COMMENTS**

The information indicates [the Appellant] had significant functional limitations and physical impairments arising from her longstanding, slightly progressive Multiple Sclerosis prior to the incident in question (i.e., essentially paraplegic; use of a walker and orthosis; significant lower leg weakness, spasticity and clonus; intermittent catheterization). Even though the evidence indicates [the Appellant] did not experience any further attacks after being prescribed Copaxone in 2001, the longstanding MS had resulted in severe and irreversible damage to her nervous system.

The information indicates [the Appellant] sustained effectively with I.V. and oral antibiotics. The file does not contain information indicating [the Appellant's] immune symptom was compromised as a result the burns to her buttock and leg and subsequent infection to the extent that she was more vulnerable to further illnesses and/or diseases.

It is reasonable to assume that based on her period of immobilization while in hospital she experienced some degree of deconditioning beyond that she had prior to the incident in question. The information obtained from the treating physiotherapist and [text deleted] indicates [the Appellant] was able to attain her previous level of function as relates to ambulation, transferring and day-to-day function. The information obtained from these healthcare professionals does not paint a picture similar to that [the Appellant] reported (i.e., severe exacerbation, sudden deterioration of Multiple Sclerosis).

I was unable to extract information from the file indicating a healthcare professional diagnosed [the Appellant] experienced a relapse in her Multiple Sclerosis and/or a further attack. According to information obtained from [the Appellant], it is her belief that the severe infection resulted in the worse attack (sic) of MS in her life. The medical evidence obtained from the healthcare professionals involved in her care would not support this statement. The evidence does indicate [the Appellant] was able to regain her previous level of function aside from having an assistant present when ambulating with the walker and foot orthosis.

The functional and homecare assessments performed on [the Appellant] subsequent to the incident in question indicate her condition improved. The information obtained from [the Appellant] indicates she experienced progressive worsening following the incident in question and a dramatic change in her life. I was unable to extract information from the documents provided by the healthcare professionals involved in her care that would reflect a dramatic change in [the Appellant's] lifestyle from a medical/functional standpoint.

Based on assessments performed on [the Appellant] following the incident in question, the only difference that can be extracted from the reports on file is standby assistance when walking with a walker and her left foot orthosis. Standby assistance indicates to me that an individual is beside [the Appellant] to assist her if required when ambulating with

a walker. In other words, the assistance is not required in order for [the Appellant] to actually ambulate with a walker and orthosis. It is documented that [the Appellant] was able to regain her ability to perform various tasks in her home without assistance.

The natural history of Multiple Sclerosis exhibiting a slightly progressive decline in function is further decline with the passage of time. In other words, had [the Appellant] had not been involved in the motor vehicle incident, it is reasonable to conclude that she would have encountered further functional difficulties and an increased level of physical impairment. It is also reasonable to conclude that increasing physical impairment would have resulted in an increasing degree of disability as relates to her ability to perform various tasks in her home.

According to the American Association Guides to Evaluation of Permanent Impairment, impairment is defined as the loss of use or derangement of any body part (sic), system, or function. A permanent impairment is defined as an impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment. Disability is defined as a decrease in or the loss or absence of, the capacity of an individual to meet personal, social, or occupational demands or to meet statutory or regular requirements. A permanent disability occurs when the degree of capacity becomes status or well stabilized and is not likely to increase despite continued use of medical or rehabilitative measures.

A medical impairment is an alteration of an individual's health status that is assessed by medical means. It should be noted that an individual who is impaired is not necessarily disabled. Impairment gives rise to disability only when the medical condition limits the individual's capacity to meet the demands that pertain to non-medical fields and activities.

The information on file indicates [the Appellant] had a physical impairment associated with her Multiple Sclerosis that contributed to some degree of disability as relates to performing various day-to-day and household activities prior to the incident in question. The information on file does not indicate, in my opinion, that [the Appellant's] physical impairment changed dramatically following the incident in question. The information on file leads me to conclude that [the Appellant's] physical impairments associated with the Multiple Sclerosis did not change from an objective standpoint following the incident.

The information does indicate [the Appellant] reported functional limitations and dramatic changes in her mobility and lifestyle following the incident in question. In my opinion, the information on file does not support [the Appellant's] most recent statements as relates to functional limitations.

According to the revised Schedule of Permanent Impairments, a claimant is entitled to impairment benefit if an injury occurs to the central and/or peripheral nervous system that in turn results in permanent dysfunction and/or there is evidence of injury occurring to the system. The file does not indicate [the Appellant] sustained a specific injury to the central and/or peripheral nervous system that in turn would entitle her to a permanent impairment benefit under Division 2. The file does not contain documentation indicating [the Appellant] developed a medical condition that in turn resulted in functional alterations of the brain that in turn would adversely affect her ability to move her upper

and lower extremities, lead to an alteration of bladder, bowel or sexual dysfunction as well as cause problems with communications and/or level of consciousness.

Under Section 129 of the Manitoba Public Insurance Corporation Act, the claimant can be awarded a permanent impairment benefit for a condition that is not listed in the Regulations by using the Regulations as a guideline. An example of such a situation would be a claimant that has sustained an injury to a nerve that has resulted in permanent nerve dysfunction but the Schedule does not specifically assign an impairment benefit for the nerve that is injured. In this situation, an impairment benefit is awarded in accordance to the percentage awarded for injury to a similar nerve in the region of the body.

The information on file indicates [the Appellant] developed scarring as a result of the burns she sustained to her buttock and leg secondary to the incident in question. It is my opinion the residual scarring does not factor into her present level of dysfunction associated with the Multiple Sclerosis.

## **CONCLUSION**

Based on my review of [the Appellant's] file, it is my opinion the evidence does not indicate she developed a condition as a result of the incident in question that in turn entitles her to a permanent impairment benefit other than that relating to the scarring she has been left with as a result of the burns.

It is my opinion [the Appellant] reported level of dysfunction in 2005 is not a byproduct of the incident in question, in all probability. It is my opinion the physical impairments she presently exhibits are a byproduct of the Multiple Sclerosis.

It is my opinion the incident in question did not result in an enhancement of her underlying Multiple Sclerosis, based on the balance of probabilities.

As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision of November 10, 2006 confirmed.

## **Discussion**

Upon a careful review of all the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of the Appellant's representative, and of counsel for MPIC, the Commission finds that the Appellant had not established, on a balance of probabilities, that any deterioration in her overall medical



condition and particularly, the general reduction in her mobility, is attributable to the motor vehicle accident-related injury of December 29, 2001.

With respect to the Appellant's entitlement to a permanent impairment benefit for the loss of mobility, we accept the opinion of [MPIC's Doctor], expressed in his report of July 7, 2006, that:

According to the revised Schedule of Permanent Impairments, a claimant is entitled to impairment benefit if an injury occurs to the central and/or peripheral nervous system that in turn results in permanent dysfunction and/or there is evidence of injury occurring to the system. The file does not indicate [the Appellant] sustained a specific injury to the central and/or peripheral nervous system that in turn would entitle her to a permanent impairment benefit under Division 2. The file does not contain documentation indicating [the Appellant] developed a medical condition that in turn resulted in functional alterations of the brain that in turn would adversely affect her ability to move her upper and lower extremities, lead to an alteration of bladder, bowel or sexual dysfunction as well as cause problems with communications and/or level of consciousness.

Due to the progressive nature of Multiple Sclerosis, we are unable to conclude, on a balance of probabilities, that the decline in the Appellant's mobility subsequent to December 2001, was attributable to the burn injury and subsequent infection sustained as a result of the motor vehicle accident-related injury, rather than a progression of the Appellant's pre-existing Multiple Sclerosis.

While we find that the Appellant is not entitled to a permanent impairment award for the loss of mobility, we note that her bladder dysfunction became evident immediately following the event of December 29, 2001 and appears to be definitive and lasting. According to the evidence presented at the appeal hearing, the burns sustained by the Appellant from the car seat warmer and the subsequent infection required the hospitalization of the Appellant and the use of an indwelling catheter. Although her bladder function may have been inhibited because of the indwelling catheter, once the catheter was removed, such function should have returned shortly

to its previous state, which was noted to be normal. However, we note that in the Appellant's case, the return of normal bladder function did not occur. Rather, as a result of the prolonged use of the indwelling catheter during her hospitalization and her pre-existing Multiple Sclerosis, she appears to have sustained permanent bladder dysfunction.

The evidence presented at the appeal hearing regarding the Appellant's bladder dysfunction included the following:

- ◆ The Appellant testified that she continues to have loss of bladder control, requiring catheterization for retention and pads for incontinence;
- ◆ [The Appellant's Neurologist #2] who treated the Appellant before her move to [Text deleted], stated that he didn't recall her ever requiring catheterizations while in [Text deleted]; and
- ◆ [The Appellant's Neurologist #1] stated that "her bladder condition also got worse, in that she had to start catheterizing herself, which she has to do to this day."

While the foregoing evidence is significant, we find that there was insufficient evidence presented at the hearing to permit the Commission to make a determination respecting the Appellant's entitlement to a permanent impairment benefit for bladder dysfunction. Additionally this specific impairment award does not appear to have been assessed by MPIC's case manager. As a result, the Commission finds that this matter shall be referred back to MPIC's case manager for a determination of the Appellant's entitlement to a permanent impairment benefit for bladder dysfunction, and a determination of the Appellant's entitlement to any attendant expenses of ongoing care, including reimbursement for the cost of her special bedside commode and incontinence pads.

As a result, the Appellant's appeal of the Internal Review decision dated November 10, 2006 with respect to her entitlement to a permanent impairment award for the loss of mobility is dismissed and the Internal Review decision dated November 10, 2006 is hereby confirmed.

Dated at Winnipeg this 26<sup>th</sup> day of November, 2008.

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**YVONNE TAVARES**

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**DR. PATRICK DOYLE**

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**LINDA NEWTON**