

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-036**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Paul Johnston
Mr. Wilf De Graves

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: October 26, 2011

ISSUE(S): Assessment of Permanent Impairment Benefits

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Schedule A of Manitoba Regulation 41/94 (as of February 10, 1994, subsequently amended)

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], was involved in a motor vehicle accident on June 7, 1997. As a result of the injuries which she suffered in that accident, the Appellant sustained permanent impairments which, pursuant to Section 127 of the MPIC Act, entitle her to a lump sum indemnity in accordance with the Regulations to the MPIC Act. The Appellant is appealing the Internal Review Decision dated January 26, 2011 with respect to the permanent impairment benefit as determined by MPIC.

Section 127 of the MPIC Act provides that:

Lump sum indemnity for permanent impairment

[127\(1\)](#) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

Lump sum indemnity for catastrophic injury

[127\(2\)](#) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of a catastrophic injury resulting from an accident is entitled to a lump sum indemnity of \$215,000. for the permanent impairment.

The Regulations set out the amount available for each type of permanent impairment as a percentage of the total amount available. Part 1, Division 9, Subdivision 3 of the Schedule of Permanent Impairments provides as follows:

DIVISION 9
MENTAL FUNCTION SYSTEM
SUBDIVISION 3
NON-PSYCHOTIC MENTAL DISORDER

- | | | |
|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| 9. | The neurotic syndrome is invasive and leads to complete deterioration of social and personal achievement. It is accompanied by serious and constant changes in interpersonal relations, disrupting ordinary activities and requiring continuous supervision or confinement, including any side effects of medication: | 100% |
| 10. | The symptomatic intensity of the neurotic syndrome, although ordinarily variable, requires the victim to have constant recourse to therapeutic measures and to change his ordinary activities leading to a marked reduction in his social and personal achievement, such a syndrome being accompanied by functional psychophysiological disorders requiring symptomatic treatment and causing a constant interruption of regular activities, including any side effects of medication: | 50 to 80% |
| 11. | The symptomatic intensity of the neurotic syndrome, although ordinarily variable, requires the victim to have occasional recourse to therapeutic measures and to change his ordinary activities leading to a moderate reduction in his social and personal achievement, including any side effects of medication: | 20 to 45% |

Facts & Background:

In order to assess the Appellant's entitlement to a permanent impairment benefit, the Appellant was referred to [Appellant's Psychologist], for a psychological assessment. The purpose of the evaluation was to assess her current psychological status, level of impairment, DSM-IV diagnosis and whether or not she required further psychological treatment as a result of the accident on June 7, 1997. In a report dated May 17, 2010, [Appellant's Psychologist] concluded as follows:

Conclusions and Recommendations:

[The Appellant] was referred for assessment to evaluate her current status and level of impairment in relation to her diagnosis. The findings of this evaluation indicate that [the Appellant] is suffering clinically significant levels of emotional distress over preoccupation of her bodily complaints, experience of pain as well as anxiety and depressive symptoms. These symptoms are aggravated by her perception that she is not likely to make any significant changes in her condition and her anger because the insurance company has denied her treatment sessions last year, and that her condition has deteriorated. Furthermore, she feels guilty as she is irritable with her husband and is worried that he might leave the relationship. Meanwhile, she seems to have difficulty monitoring her behaviour. The diagnostic impression is that her current psychological symptoms likely meet criteria for the DSM-IV diagnosis of Pain Disorder Associated with Both Psychological Factors and a General Medical Condition as well as Adjustment Disorder with Mixed Depressive Mood and Anxiety.

[MPIC's Psychologist], [text deleted], reviewed the Appellant's file in order to assess the Appellant's entitlement to a permanent impairment benefit. In his inter-departmental memorandum dated July 9, 2010, [MPIC's Psychologist] concluded as follows:

PERMANENT IMPAIRMENT

Based upon [Appellant's Psychologist's] most recent assessment and a complete review of the medical package, it would appear that the claimant's psychiatric/psychological condition has not changed significantly since she began seeing [Appellant's Psychologist] for treatment approximately 3½ years ago. Therefore, it is the writer's opinion that it would be appropriate to consider the claimant's current psychiatric symptoms to be permanent and that the claimant has reached maximum medical improvement. The writer would therefore suggest a permanent impairment entitlement for her condition.

The applicable impairment schedule would be what is referred to as the “old schedule” since the motor vehicle accident occurred in 1997. The applicable division would be Division 9 (Mental Function System), Subdivision 3 (Non-Psychotic Mental Disorder). The applicable section would be Section 11 which describes a neurotic syndrome which, although ordinarily variable, requires the victim to have occasional recourse to therapeutic measures and to change his ordinary activities leading to a moderate reduction in his social and personal achievement, including any side effects of medication. The writer would note that there is a range of permanent impairment ratings from 20% to 45%. This writer would recommend a permanent impairment entitlement in the middle of this range: 32.5%.

The above recommendation is based on the premise that further improvement in the claimant’s psychological condition is unlikely to occur with further psychological treatment.

In a decision dated July 13, 2010, MPIC’s case manager advised the Appellant that she qualified for a permanent impairment benefit of 32.5% for non-psychotic mental disorder pursuant to Division 9, Subdivision 3, Section 11 of Manitoba Regulation 41/94. The amount of 32.5% when applied against the indexed maximum for the date of the accident of \$106,429.00 resulted in an impairment benefit in the total amount of \$34,589.43.

The Appellant disagreed with the case manager’s decision and sought an Internal Review of the decision. The Internal Review Officer requested a further opinion from [MPIC’s Psychologist], in order to respond to questions raised by the Appellant’s solicitor regarding the Appellant’s permanent impairment benefit. In an inter-departmental memorandum dated January 14, 2011, [MPIC’s Psychologist] noted the following:

The claimant’s solicitor has raised the following questions:

1. How/why the claimant was placed “*arbitrarily*” in the “*middle range*” of Section 11;
2. Why the claimant was not placed in the “*middle range*” of Section 10?

It was the writer’s opinion, based upon the medical information that was available at the time of the previous review, that the claimant clearly fell within Section 11 to reflect that

she has been required to change her ordinary activities leading to a moderate reduction in her social and personal achievement, and to reflect that she requires occasional recourse to therapeutic measures, as reflected in the medical file. It was the writer's opinion that the medical information did not support that the claimant required constant recourse to therapeutic measures, nor that her syndrome was accompanied by functional psychophysiological disorders requiring symptomatic treatment, nor that it resulted in a constant interruption of regular activities. Hence, the appropriate permanent impairment section in the writer's opinion was Section 11.

With regard to recommending that the claimant receive a permanent impairment award in the middle of the range, the writer was not able to find any information in the claimant's file to suggest that she should be at the top of the range nor at the bottom of the range. For the bottom of the range, the writer would look for medical information which would indicate that the claimant just minimally meets the requirements for the applicable permanent impairment section. For the claimant to be at the top of the range, the writer would look for information which would suggest that the claimant nearly exceeds the requirements for the applicable section or, that the claimant meets some of the criteria for a higher permanent impairment section but not sufficient to meet the definition of the higher requirement. These conditions, in the writer's opinion, were not met. Therefore, the writer recommended a permanent impairment award in the middle of the suggested range of 20 to 45%.

In a decision dated January 26, 2011, the Internal Review Officer concluded that there was no error made in the determination of the Appellant's permanent impairment entitlement. The Internal Review Officer relied upon [MPIC's Psychologist's] opinion and found that "*Based on the medical information on [the Appellant's] file, I am unable to conclude that an error was made in the determination of her Permanent Impairment entitlement. Accordingly there is no basis for interfering with the decision letter dated July 13, 2010*". As a result, the Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review.

The Appellant has now appealed that Internal Review Decision to this Commission. The issue which requires determination on this appeal is whether the Appellant's permanent impairment benefit was properly assessed and calculated.

Appellant's Submission:

Counsel for the Appellant submits that [the Appellant] meets the criteria for an impairment benefit pursuant to Division 9, Subdivision 3, Section 10, rather than Section 11. He maintains that the Appellant's condition has not improved and has only gotten worse with the passage of time. As a result, he argues that the Appellant should be entitled to an impairment benefit of more than 32.5%.

In support of his position, counsel for the Appellant contends that the Appellant is required to have constant recourse to therapeutic measures. He notes that the Appellant is currently on seven different medications every day for motor vehicle accident-related injuries. Counsel for the Appellant also maintains that the Appellant has had a marked reduction in her social and personal achievements and her regular activities have been constantly interrupted by her disorder and her treatment. She has migraines on a regular basis as well as constant pain in her neck, shoulders and middle back. She's also had a complete reduction in her social life. She has no social life as a result of the pain which she experiences. She no longer does any volunteer work, she is a very religious person and can no longer attend church services, and she has no intimate relations with her husband. Counsel for the Appellant argues that the Appellant does not do anything, but rather her day is devoted to her disorder.

Counsel for the Appellant submits that the accident has completely changed the Appellant's life. Her headaches and pain have reduced her social and personal activities to virtually nothing. She is depressed and she sleeps and cries a lot. Although the Appellant has learned pain management skills, she has been unable to effectively apply them when her pain worsens. She had been attending psychotherapy counselling for about 10 years to learn skills for coping with her pain,

anxiety and depressive symptoms. However, she is unable to apply the pain management techniques when her pain worsens. Further pain management treatments have been denied because they are unlikely to be of any further benefit to her.

Counsel for the Appellant submits that more consideration should be given to [Appellant's Psychologist's] report of May 17, 2010, as [Appellant's Psychologist] saw the Appellant for counselling sessions for some time and therefore she has a better understanding of the Appellant's situation than [MPIC's Psychologist]. Counsel for the Appellant specifically refers to [Appellant's Psychologist's] report of May 17, 2010 wherein [Appellant's Psychologist] notes that:

She reported that her condition has become worse since our last treatment session. She reported that she used to have pain two or three times a week, but now she has pain daily. She reported that she has had migraines, pain in the neck, shoulders, and middle back constantly. She stressed that if she does not "catch" the spasm in her neck in time, she develops a migraine. She graded her level of pain as falling at "10", where "0" represents the absence of pain and "10", the maximum. She also reported having a tingling sensation in her hands and pain in her legs. She has coped with her pain by taking medication, doing relaxation exercises, praying, and listening to CDs. She said that none of the intervention helps. She estimated that when she takes medication, her level of pain reduces from "10" to "7". She pointed out that her husband used to massage her neck and reduced her intensity of pain. However, he now suffers from arthritis and is unable to massage her any more.

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She reported that, in general, she gets up with her pain, either at 6:45 a.m. or 7:00 a.m., takes medication, paces in her apartment, and prays. (She reported that she cannot sit or lie down with her pain and it often takes 30 minutes for the pain medication to work). She then has breakfast, watches TV, and often falls asleep while watching it (when she falls asleep, she usually sleeps for about an hour). When her husband comes home at noon, they have lunch and go out for a cup of coffee, after which she returns to her apartment and falls asleep again in the afternoon. She said that she tries to get up and prepare dinner before her husband comes home at 4:00 p.m. She reported that she often tells her husband to go out and she stays home and tries to read; however, she cannot read for too long. She said that she used to write poetry, but she cannot write currently because she cannot hold a pen. She tries to write a book but can only write one page at a time. She cannot sit in front of a computer for more than 10 minutes; otherwise, she experiences "pressure" in her neck. In general, she is on Facebook about 10 minutes a day to maintain contact with her children and grandchildren.

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She cried as she talked about her pain. She feels that she is suffering because of someone else's mistakes. She reported feeling very angry and irritable because of persistent pain. She stated that she cannot walk very far because she feels pain in her neck. She cannot arrange to spend time with friends because of the unpredictable pain. She stressed that she still has an "active" mind, but she is unable to cope with her functional limitations. She recalled that prior to the accident, when she was working with mentally challenged clients, she was able to dance and participate in sports with them. She said she has also become impatient with her husband and has yelled at him on a number of occasions. Afterward, she feels sorry for him.

...

She reported that she has felt depressed since October 2009. She spoke of sleeping and crying a lot. She has become very angry and irritable and has withdrawn from others. She recalled telling her best girlfriend off and not wanting to answer the phone. She did not even go to church. She spoke of losing her sexual desire although she feels sorry for her husband and is afraid that he might leave their marriage.

[The Appellant] reported that she does not want to be with people because people "get on her nerves". She reported that she is very much bothered by the fact that she is not a nice person. She said she has become "cross" and "sarcastic", and "wants to tell everyone off". She dislikes this part of herself.

Relying on [Appellant's Psychologist's] report and the testimony of the Appellant at the hearing, counsel for the Appellant submits that the Appellant is entitled to a higher permanent impairment benefit pursuant to Division 9, Subdivision 3, Section 10 in a range of 50 to 80 percent. He maintains that the motor vehicle accident has completely changed the Appellant's life and in fact she has no life apart from her attempts to cope with her impairments. As a result, counsel for the Appellant maintains that her appeal should be allowed.

MPIC's Submission:

Counsel for MPIC submits that the permanent impairment benefit paid to the Appellant in the amount of 32.5 % was appropriate and there is no basis for interfering with that decision. Counsel for MPIC submits that the Appellant's permanent impairment entitlement was assessed by [MPIC's Psychologist], psychological consultant to MPIC Health Care Services. [MPIC's

Psychologist] is fully experienced with the permanent impairment schedules and he made his recommendation taking into account [Appellant's Psychologist's] report of May 17, 2010 and all the categories set out in the permanent impairment schedules. [MPIC's Psychologist] is also best qualified to determine the appropriate ratings to be applied to the impairments set out in Division 9, Subdivision 3. Counsel for MPIC submits that [MPIC's Psychologist's] opinion was based upon the objective medical evidence presented in the Appellant's medical file and is supported by the medical evidence found in the file. As a result, counsel for MPIC submits that the Internal Review Decision is supportable as it relied upon the objective medical evidence contained in the Appellant's file. Accordingly, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated January 26, 2011 should be upheld.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that the Appellant is entitled to a permanent impairment benefit of 50% for non-psychotic mental disorder pursuant to Division 9, Subdivision 3, Section 10 of Manitoba Regulation 41/94.

Reasons for Decision:

At the hearing of the appeal, the Appellant testified that:

- She has bad spasms in her neck and shoulders.
- She has migraines every day. Although she takes medications for her migraines, it doesn't completely help. She has to go to the hospital when her migraines are really bad.

- She spends most of her day either on the couch or in her bedroom lying down.
- Although she is very religious, she no longer attends church as regularly as she would like, she may attend church once per month, if she is able. She no longer does any volunteer work in her church.
- She is concerned that her husband will leave her because of her illness and her inability to do anything. She no longer has intimate relations with her husband.
- Apart from her few attendances at church, she has no social life. If she was well, she would have an active social life.
- She tries to do stretching exercises, but she's not able to do them.
- Before the motor vehicle accident she was very outgoing, now she just wants to be left alone and is depressed.
- She can't go for walks with her husband;
- She feels that her life has been reduced 99% by her problems.

The Commission also notes a medical report form [text deleted], the Appellant's current treating practitioner. In his letter dated July 7, 2011, [Appellant's Doctor] notes:

[The Appellant] is getting no better from her pain due to the car accident. She has neck spasms, shoulder spasms and migraine headaches every day. These pains are and have taken up her life.

Her quality of life is very low. Her pain has increased in frequency now.

I have had to put her on another pain pill: Gabapentin 300mg per day. This medication is in addition to the other medications she is already taking.

The Commission finds that, based upon the Appellant's testimony at the appeal hearing and the various medical reports filed in this matter, the symptomatic intensity of the neurotic syndrome

requires the Appellant to have constant recourse to therapeutic measures and to change her ordinary activities of daily living leading to a marked reduction in her social and personal achievement. As a result, we find that an appropriate award for the Appellant's permanent impairment benefit pursuant to Division 9, Subdivision 3, Section 10 is 50%.

The Commission had the benefit of the Appellant's testimony and [Appellant's Doctor's] report. Based upon that evidence we would place her in Division 9, Subdivision 3, Section 10 in the Schedule of Permanent Impairments and assess a rating of 50%. We find that [MPIC's Psychologist] did not have the benefit of the *vive voce* testimony of the Appellant upon which to base a higher award. However, upon hearing her testimony, and the evidence from her caregivers, we are satisfied that the Appellant does require constant recourse to therapeutic measures, including medication and hospital visits and her ordinary activities have been reduced to such an extent that she has minimal social and personal achievement. Our review of the categories contained within Subdivision 3 and the voluminous evidence which we have received in respect of this matter, convinces us that Section 10 is the appropriate classification for this Appellant's impairment, and that 50% is an appropriate impairment rating. We find that this rating accurately reflects the Appellant's markedly altered functional status since the motor vehicle accident and the psychological factors which account for her lifestyle changes, her reduced responsibilities, her disrupted relations with her family and friends, her demoralization and her significant stress and anxiety. As a result we find that the Appellant has established an entitlement to the permanent impairment benefit of 50%.

Accordingly, the Appellant's appeal is allowed and the Internal Review Decision dated January 26, 2011 is hereby rescinded.

Dated at Winnipeg this 22nd day of December, 2011.

YVONNE TAVARES

PAUL JOHNSTON

WILF DE GRAVES