

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]

AICAC File Nos.: AC-15-113, AC-15-114, AC-15-115, AC-15-116, AC-15-117

PANEL: Ms Jacqueline Freedman, Chair
Mr. Brian Hunt
Dr. Arnold Kapitz

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Matthew Maslanka.

HEARING DATE: November 4, 2019

ISSUE(S): Whether the Appellant is entitled to Personal Injury Protection Plan benefits for her knee osteoarthritis, right wrist radiological findings or dental injuries.
Whether the Appellant is entitled to further personal care assistance benefits.
Whether the Appellant is entitled to further physiotherapy benefits.
Whether the Appellant is entitled to further permanent impairment benefits.

RELEVANT SECTIONS: Subsections 70(1), 127(1), 131(1) and 136(1) of The Manitoba Public Insurance Corporation Act (“MPIC Act”), sections 2 and 5 of Manitoba Regulation 40/94 and section 1 of Manitoba Regulation 41/94.

Reasons for Decision

Background:

[Text deleted] (the “Appellant”) was riding her moped while in [country] when she lost control and crashed on December 14, 2013 (the “MVA”). The Appellant suffered various injuries as a result of the MVA and received certain benefits pursuant to the Personal Injury Protection Plan

(“PIPP”) provisions of the MPIC Act, including personal care assistance, physiotherapy treatment and permanent impairment benefits.

MPIC reviewed the Appellant’s entitlement to benefits, and the case manager issued five decisions, as follows:

1. January 7, 2015: there is no further entitlement to personal care assistance benefits;
2. January 23, 2015: there is no medical requirement for physiotherapy treatment beyond 24 visits (Category 1 primary care treatment);
3. January 30, 2015: there is no entitlement to PIPP benefits for the Appellant’s knee osteoarthritis, right wrist radiological findings, dental injuries or deviated nasal septum;
4. February 17, 2015: permanent impairment benefits are payable in respect of only concussion (1%) and facial scarring (7%); and
5. March 9, 2015: there is no entitlement to funding for Botox treatments for pain relief.

The Appellant disagreed with the decisions of the case manager and filed Applications for Review in respect of all of them. The Internal Review Officer (“IRO”) considered the decisions of the case manager. On April 9, 2015, the IRO issued a decision regarding the Botox treatment, overturning the decision of the case manager, and approving a trial of Botox treatment. On April 29, 2015, the IRO issued four further decisions, which upheld the four other decisions of the case manager.

The Internal Review Decision (“IRD”) regarding personal care assistance provides, in part, as follows:

[Text deleted] re-assessment of your personal care needs on December 17, 2014 indicated you no longer required assistance with the essential activities of self-care or

daily living. She documented that she had reviewed a Healthcare Services report prior to her assessment. The report outlined your pre-existing medical conditions.

[...]

In order for you to succeed on this Review, I have to be satisfied, on a balance of probabilities, that the evidence supports a change in the PCA assessment of December 17, 2014 or there is an indication you require further assistance than what was outlined. In my opinion, that has not been demonstrated.

The IRD regarding physiotherapy provides, in part, as follows:

Based on the totality of the medical information on file, there is no objective medical information supporting that further physiotherapy treatment would be deemed “medically required” within the meaning of PIPP legislation and directly related to the accident of December 14, 2013.

[...]

Giving consideration to all information on your file, I agree with the case manager’s decision and conclude MPI does not have an obligation to consider funding for additional physiotherapy treatment.

The IRD regarding PIPP benefits provides, in part, as follows:

In order for you to succeed on this review, I have to be satisfied, on a balance of probabilities, that the medical evidence supports your medical conditions of knee osteoarthritis, deviated nasal septum, dental injuries, and right wrist radiological findings were “*caused by an automobile or the use of an automobile*” as defined by Section 70(1) of the *Act*. In my opinion, that has not been demonstrated.

Giving consideration to all the information on file, I agree with the case manager’s decision of January 30, 2015. The decision is supported by the opinion of MPI’s medical consultant. The decision is based on the grounds that the medical evidence does not support your medical conditions of knee osteoarthritis, deviated nasal septum, dental injuries, and right wrist radiological findings were “*caused by an automobile or the use of an automobile*” as defined by the *Act*.

The IRD regarding permanent impairment provides, in part, as follows:

In order for you to succeed on this review, I have to be satisfied, on a balance of probabilities, that the medical evidence on file supports you sustained an additional injury as a direct result of the MVA that in turn would result in a ratable permanent impairment.

[...]

On the basis of the medical evidence available, in my opinion, your Permanent Impairment award as outlined in the case manager's decision of February 17, 2015 was properly assessed and calculated.

The Appellant disagreed with all five of the decisions of the IRO and filed five Notices of Appeal with the Commission, all dated June 17, 2015.

Issues:

The issues which require determination on this appeal are as follows:

1. Whether the Appellant is entitled to PIPP benefits for her knee osteoarthritis, right wrist radiological findings or dental injuries;
2. Whether the Appellant is entitled to further personal care assistance benefits;
3. Whether the Appellant is entitled to further physiotherapy benefits; and
4. Whether the Appellant is entitled to further permanent impairment benefits.

Decision:

For the reasons set out below, the panel finds as follows:

1. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits for her knee osteoarthritis, right wrist radiological findings or dental injuries;
2. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further personal care assistance benefits;
3. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further physiotherapy benefits; and
4. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further permanent impairment benefits.

Preliminary and Procedural Matters:

The hearing of this appeal was originally scheduled for August 24, 2017. On that day, the panel originally scheduled to hear the appeal advised the parties that rather than proceed with the appeal, it had determined that additional medical information was required. Accordingly, a case conference was held to discuss the matter. The parties agreed that the Commission would write to three of the Appellant's treating physicians to obtain additional medical information. As a result, on September 22, 2017, the Commission wrote to the Appellant's dentist, [text deleted], her orthopedic surgeon, [text deleted], and her otolaryngologist, [text deleted]. The Commission received reports from each of those physicians, copies of which were provided to the parties and included in the indexed file.

In addition, subsequent to the issuance of the IRDs noted above, case management decisions were issued by MPIC regarding three issues dealt with in those IRDs, as follows:

Botox Treatments

As noted above, the Appellant filed a Notice of Appeal with the Commission regarding the IRD dealing with Botox treatments. However, that IRD had overturned the case manager's decision, and approved funding for Botox treatments. A subsequent case manager's decision, dated August 24, 2017, approved additional Botox treatments as follows:

- Botox injections for your chronic facial pain are approved from **August 10, 2015** to **August 21, 2018** at the frequency of once every 2 to 4 months as required.
- No additional Botox injections will be approved beyond August 21, 2018 without updated medical information from the prescribing physician for review. [emphasis in original]

At the appeal hearing, the Appellant said that she does not want to have any further Botox treatments, and she withdrew her appeal regarding the April 9, 2015, IRD dealing with Botox treatments.

Permanent Impairment Benefits

Based on a report dated December 31, 2015, from a neurologist who assessed the Appellant in connection with her facial fracture and consequent facial numbness, MPIC determined that the Appellant was entitled to an additional permanent impairment benefit. The case manager issued a decision dated August 14, 2017, which provided that the Appellant was entitled to a further 1% permanent impairment benefit, in respect of facial sensory loss.

Deviated Nasal Septum

In response to the Commission's letter of September 22, 2017, [Appellant's otolaryngologist], who performed the surgery on the Appellant's deviated septum, provided a report dated November 2, 2017. Based on this report, MPIC accepted that the Appellant's deviated nasal septum was caused by the MVA. This was confirmed at the appeal hearing by counsel for MPIC. Further reports were sought and received from [Appellant's otolaryngologist], in an effort to determine whether the Appellant was entitled to permanent impairment benefits as a result of her deviated nasal septum. The case manager issued a decision dated March 29, 2019, which provided, in part, as follows:

Further to our decision letter dated August 14, 2017, this will confirm our decision regarding additional permanent impairment entitlement in relation to your deviated septum.

[...]

The medical information on file has been reviewed. As a result of the review, there is no entitlement for a further permanent impairment payment under the Personal Injury Protection Plan (PIPP):

- In order to consider a further permanent impairment payment there must be medical information in support of your injuries for review.
- Information was requested from [Appellant's otolaryngologist] on June 7 and July 30, 2018.
- The report received from [Appellant's otolaryngologist] did not confirm that there is an obstructed airway and 1% for facial sensory loss has already been paid.

Accordingly, the Appellant did not receive any further permanent impairment benefit arising from her deviated nasal septum. It does not appear that MPIC awarded to the Appellant any other PIPP benefits as a result of accepting that the Appellant's deviated nasal septum was caused by the MVA, and it is not clear whether, in fact, the Appellant sought any PIPP benefits in that regard other than permanent impairment benefits. However, she is not precluded from doing so in the future.

Legislation:

The relevant provisions of the MPIC Act are as follows:

Definitions

70(1) In this Part,

"accident" means any event in which bodily injury is caused by an automobile;

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile [...]

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.

Reimbursement of personal assistance expenses

131(1) Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. per month relating to personal home assistance

where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
- [...]

Manitoba Regulation 40/94 (the “Expense Regulation”) provides, in part, as follows:

Reimbursement for personal care assistance under Schedules C and D

2(3) Subject to the maximum amount set under section 131 of the Act, the corporation shall reimburse a victim for the actual and proven expenses of personal care assistance in accordance with Schedules C and D if

- (a) the personal care assistance meets the minimum score prescribed in Schedule D;
- (b) the personal care assistance expenses are the direct result of the victim's bodily injury caused by an automobile for which compensation is provided under Part 2 of the Act; and
- (c) the personal care assistance expenses are not covered under *The Health Services Insurance Act* or any other Act.

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant;
- [...]

Manitoba Regulation 41/94 (the “PI Regulation”) provides, in part, as follows:

Compensation for permanent impairment based on Schedule

- 1 Compensation for permanent impairments shall be determined on the basis of Schedule A.

Evidence and Submission for the Appellant:

Evidence:

The Appellant testified at the appeal hearing. She described the circumstances of the MVA, and how she crashed her moped into a line of mailboxes and hit her head. She was taken by ambulance to the hospital. She suffered a fracture in her face which led to nerve and muscle damage in her face, as well as damage to a tooth. She also had other injuries.

In response to questions from the panel, the Appellant said she couldn’t recall all of her other injuries, but she said that she had fractures in her right wrist and forearm and an ankle fracture. She recalled that she couldn’t walk and had difficulty seeing. She lay in bed for two weeks in her motor home. She had, at that time, a large dog as well as a cat, and had difficulty caring for them during those two weeks. She also had difficulty keeping the motor home clean. Her next-door neighbour would come by occasionally to check on her. As well, someone from the mobile home park office came to check on her once a day. If she needed something from the store, she would have to pay an acquaintance \$10 to drive her there.

The Appellant described needing to use her left hand, due to the fracture in her right wrist. She also described a previous fracture in her right upper arm, due to a fall in a hole made by her dog. The Appellant said that her left hand got sore because of overuse, due to her right hand pain. She had to have carpal tunnel surgery at the [clinic].

She said that her MPIC case manager kept encouraging her to return home to [city] from [country], but she wasn't feeling well enough to make the trip, and cost was also a factor. The Appellant finally left [country] for [city] on March 25, 2014, and arrived in [city] on April 25, 2014. She said she is not sure how she made it home, because she couldn't see very well. She could only drive between 50-100 miles per day. She would find a [text deleted] parking lot in the evenings and park her motor home there to sleep overnight. She did not return to [country] until the winter of 2017.

In response to further questions from the panel, the Appellant further described her injuries. She said that after the accident, her knees were very sore. She had difficulty breathing, for which she eventually had surgery with [Appellant's otolaryngologist]. She did not see any doctors in [country]. No one would see her or talk to her because she did not have any money. She did see a doctor as soon as she arrived back in [city], [Appellant's physician], on May 5, 2014. The Appellant said she had to wait a long time to get her knees fixed and to get her nose fixed. Her ankle healed. MPIC supplied an ankle brace and a knee brace. She tried to return them, but the provider would not accept the return.

Submission:

The Appellant acknowledged that she had pre-existing arthritis in her knees prior to the MVA. However, she argued that the MVA caused further osteoarthritis damage to both of her knees, the left greater than the right. Because the damage to the left knee was greater than the right, she relied on her right knee more, and it ultimately deteriorated to the same level as the left knee.

In support of her position, she referred to a report from [Appellant's gastroenterologist] dated November 20, 2012. He had examined her prior to the MVA with respect to abdominal issues. In his report, he notes: "Her past medical history is relatively unremarkable. She has some arthritis

and chronic swelling in her left leg due to varicose veins.” The Appellant argued that if she had severe osteoarthritis in her knees at the time of this examination by [Appellant's gastroenterologist], he would have noted it in his report. She also relied upon a report to MPIC from her treating physician [Appellant's physician #2] of the [clinic], dated July 15, 2014, which states, in part, as follows:

With respect to your specific questions, I believe I have provided you with a diagnosis of the injuries sustained. Those would include an exacerbation of existing knee arthritis on the left. [...]

The Appellant pointed out that she wouldn't have been able to ride her moped prior to the MVA unless her knee arthritis had not been bothering her. After the MVA, it took a couple of weeks before she could even walk. The mobile home park let her use their handicap scooter to get around.

The Appellant also argued that her wrist was injured in the MVA. She said that her wrist was not cut in the accident (there was no skin break); however, it was terribly sore after the MVA. She sought physiotherapy treatment for her wrist. She noted that her physiotherapist asked MPIC for an exercise bar for her wrist, and MPIC supplied it.

The Appellant noted that the MVA caused a lot of damage. She had stitches in her face, and she had a lot of pain. She had neck problems and facial pain and lost a tooth. She felt that she had difficulty getting care and did not always receive the service she expected from MPIC and this was very distressing for her.

Evidence and Submission for MPIC:**Evidence:**

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination. He asked her about her right wrist, and she confirmed that it was painful after the MVA. The Appellant did not recall that an x-ray was taken of her right wrist on the date of the MVA, because she was hurt all over and her head injury was the most important thing. Counsel referred to the x-ray report from December 14, 2013, which notes that “there is a dressing surrounding the wrist compressing the soft tissues”. The Appellant said that she was not sure what that notation would be referring to. She did not recall a dressing on her wrist at all. She said that she has bought braces for her wrist, three or four in total, replacing them when they get dirty. She did not have them prior to the MVA.

The Appellant was referred to a personal care assessment tool prepared by an occupational therapist on December 17, 2014, which notes, under the heading of “orthotic/prosthetic devices” that the Appellant has a wrist brace and reportedly wears it occasionally. Counsel pointed out that the report states that the Appellant had the wrist brace prior to the MVA. The Appellant disagreed with the comment made by the occupational therapist in the report and stated that she disagreed with many of the comments made by the occupational therapist. She said she did not have the wrist brace prior to the MVA. Counsel put to the Appellant that she had wrist problems prior to the MVA. She said that would be wrong, and in any event a wrist brace wouldn’t have helped her pre-MVA fracture, which was higher on her arm.

Counsel questioned the Appellant regarding where she obtained the wrist braces. She responded that she purchased one at a local business and others at garage sales. When asked why she didn’t ask MPIC to pay for them, she responded that she didn’t ask because she did not know that MPIC

would pay for them, and she is very independent. Counsel pointed out that the Appellant did ask MPIC for a knee and ankle brace, and the Appellant acknowledged that she did.

The Appellant was a patient of [Appellant's physician #3] prior to the MVA. Counsel questioned her regarding her complaint to the College of Physicians and Surgeons of Manitoba relating to his chart notes. Counsel referred to [Appellant's physician #3]'s letter to the College dated June 26, 2015, transcribing those chart notes, and pointed out to the Appellant an entry from August 19, 2013, stating "the patient's issue is chronic right hand pain, previous injuries". The Appellant replied "that's not for real". She said that [Appellant's physician #3]'s chart notes were not accurate, and that he deliberately entered fabrications because she left his practice to see a different general practitioner. She felt that [Appellant's physician #3] had something against her. She also described other physicians who had something against her.

Counsel questioned the Appellant regarding the osteoarthritis in her knees. She acknowledged that it pre-existed the MVA, but she said her knees were not bothering her before the MVA, and that she was in excellent condition. Counsel referred again to the letter of [Appellant's physician #3] dated June 26, 2015, and referred to a chart note entry from April 11, 2013, which stated "a concern in [sic] the diverticulosis, chronic back pain, osteoarthritis feet, and osteoarthritis knees". Counsel suggested that this note means that the Appellant was reporting her osteoarthritis to [Appellant's physician #3] at that point in time, but the Appellant denied this. She said that [Appellant's physician #3] was making things up, and that the College also made things up.

The Appellant was referred to a letter from her surgeon, [Appellant's orthopedic surgeon], dated October 17, 2014, which states "Today I saw [the Appellant] regarding left knee pain that has been present for years". The Appellant responded that she did not know why [Appellant's orthopedic

surgeon] said her pain had been present for years, because she was in excellent health and she had no pain. She pointed to the report from [Appellant's gastroenterologist] dated November 20, 2012 (referred to above) as support for her statement. She said she didn't even meet [Appellant's orthopedic surgeon] until he was actually operating on her. Counsel questioned why [Appellant's orthopedic surgeon]'s report does not mention the MVA, because if her knee pain was caused by the MVA he would have assumed she would have said so. The Appellant responded that she did not know why it was necessary for the report to mention the MVA. She also said she thought she must have mentioned it.

Submission:

Counsel for MPIC submitted that at issue is a determination of the Appellant's MVA-related injuries. In order to identify those injuries, it is important to look at the documentation from the time of the MVA. Counsel pointed to the Emergency Provider Report from [medical center] dated December 14, 2013, which describes the Appellant's complaint as "fall, face injury" and also states "no other injuries". The report describes the location of pain/injury as "face (cheek right)". The report notes that a physical examination was done, and a musculoskeletal examination revealed no sensory deficit. Counsel pointed out that this report, as well as the Discharge Summary dated the same day, indicates that the Appellant suffered a crash on her moped and suffered a fractured facial bone and a laceration to her face, for which MPIC has provided coverage. The Appellant received twelve sutures for the laceration to her face, she received antibiotics and antihistamines, and was released after a few hours. Counsel submitted that the reports do not show any injury to the Appellant's knees or to her right wrist. Her only diagnosis on discharge was "fractured facial bone/wound care - laceration". One week following discharge, the Appellant had a follow-up appointment at the [medical center], on December 21, 2013. The only thing mentioned in the Discharge Summary report from that appointment is "wound suture check - normal".

The Appellant did not see any medical providers from December 21, 2013, until May 5, 2014, when she saw [Appellant's physician], on her return to [city]. [Appellant's physician] provided a brief report to MPIC, which stated that the Appellant suffered multiple injuries on her right side in the MVA, to her "face, eye, ankles, arm, shoulder". Counsel pointed out that [Appellant's physician]'s report does not include any reference to the Appellant's knees or wrist.

Counsel noted that MPIC's Health Care Services ("HCS") medical consultant provided a report dated October 29, 2014, which reviewed the Appellant's medical conditions secondary to the MVA. The report stated that there was no causal connection between the MVA and the Appellant's knee osteoarthritis, deviated nasal septum, dental injuries and right wrist radiological findings. The HCS consultant explained that the [medical center] reports do not identify that the Appellant was diagnosed as having any problems with her lower extremities, nor do they identify any physical findings consistent with problems in the other three areas.

The HCS medical consultant provided a further report, dated November 10, 2014, subsequent to the receipt of chart notes from the Appellant's treating physician [Appellant's physician #3]. The report identified that the Appellant had numerous pre-existing medical conditions prior to the MVA, including osteoarthritis affecting the back, neck and knees. The report concluded that "it is medically probable [the Appellant's] reported knee problems stem from the pre-existing osteoarthritis".

Counsel submitted that it is MPIC's position that the Appellant had pre-existing osteoarthritis in her knees prior to the MVA, and that there was no exacerbation of this osteoarthritis by the MVA. The Appellant did not report any injury to her knees at the time of the MVA or even several months thereafter. Counsel acknowledged that the Appellant's physician, [Appellant's physician #2],

stated in his report dated July 15, 2014, that the Appellant experienced an “exacerbation of her existing knee arthritis on the left” due to the MVA. He argued that [Appellant’s physician #2] was providing this opinion based solely on the Appellant’s self-report, and was not privy to the reports from [medical center] from the time of the MVA or to the Appellant’s pre-MVA chart notes; therefore, more weight should be given to the opinion of the MPIC’s HCS medical consultant, who had the benefit of all of that information. As well, her other treating physician, [Appellant’s orthopedic surgeon], stated in his report dated October 17, 2014, that her left knee pain “has been present for years”. [Appellant’s orthopedic surgeon]’s report of September 26, 2017, states “I have no knowledge of the etiology of her knee arthritis”. It is MPIC’s position that her knee replacement surgery may have been required regardless of the MVA and was not caused by the MVA. Counsel noted that the Appellant did not agree with several questions that he posed to her on cross-examination, alleging that [Appellant’s physician #3] lied and altered his chart notes. Counsel submitted that the reports and chart notes should stand for themselves and the Appellant’s explanations should be given little weight. Counsel submitted that the opinion of the HCS medical consultant, which says that the Appellant’s knee osteoarthritis was not caused by the MVA, should bear the most weight.

Another issue in this appeal is the Appellant’s right wrist radiological findings. Counsel pointed to a report from the HCS medical consultant dated September 8, 2015, which states, in part, as follows:

1. The medical evidence does not confirm a causal relationship between the incident in question and the December 14, 2013 radiological findings with respect to the right wrist (the claim file does not contain objective physical findings one would expect to see after an acute fracture of the radius and ulna).

[...]

Counsel noted that there was an x-ray done of the Appellant's right wrist at the [medical center] on December 14, 2013. He reviewed the x-ray report, and pointed out that it states that the wrist fractures were of "uncertain chronicity", and as well that they were "acute or subacute in nature". There is nothing in the other documents from [medical center] which supports an acute injury to the Appellant's wrist at the time of the MVA. Therefore, it is MPIC's position that, based on the x-ray report, her wrist injury must have been subacute in nature. As well, the x-ray report notes that the Appellant had a dressing on her wrist at the time of the x-ray, and there is nothing to suggest that this dressing was applied as a result of the MVA at the [medical center]. It is MPIC's position that it is possible that the Appellant was suffering from chronic right hand pain, as identified in [Appellant's physician #3]'s chart notes on August 19, 2013: "The patient's issue is chronic right hand pain, previous injuries". Counsel submitted that the x-ray report does not confirm that the Appellant injured her wrist in the MVA, and the HCS medical consultant provided an opinion that it does not.

With respect to the Appellant's claim for PIPP benefits relating to dental injuries, counsel noted that she did not address this at the hearing. Counsel referred to a report from [Appellant's dentist], her treating dentist, dated September 28, 2017, which says that the MVA did not play a role in the management of the Appellant's dentures.

Counsel addressed the issue of the Appellant's claim to further personal care assistance ("PCA") benefits. Initially, pursuant to the legislation, the Appellant received those benefits based on an assessment by an occupational therapist. The last assessment done by the occupational therapist was on December 17, 2014, subsequent to the HCS report of November 10, 2014. That report, as noted above, had indicated that the Appellant had pre-existing osteoarthritis affecting her back, neck and knees, and had found that there was no causal connection between the MVA and the

Appellant's knee osteoarthritis and her right wrist radiological findings. It is MPIC's position that the Appellant has not established that her knee and wrist problems were caused by the MVA, and so she is not entitled to further PCA benefits.

It is also MPIC's position that the Appellant is not entitled to further physiotherapy benefits. In order to be entitled to physiotherapy treatment, the Appellant must establish that the treatment is medically required. Counsel acknowledged that MPIC did initially authorize physiotherapy treatment pursuant to a recommendation from [Appellant's physician #2], prior to the determination that the Appellant's injuries were not caused by the MVA. Subsequently, on January 14, 2015, the Appellant's physiotherapist requested additional physiotherapy treatments to address pain in the Appellant's right wrist. Counsel submitted, as indicated above, that the Appellant has not established that the MVA caused an injury to her right wrist, and so she is not entitled to further physiotherapy treatments. The Appellant has not submitted any other recommendation for physiotherapy from any other medical professional. In any event, as indicated above, it is MPIC's position that the Appellant has not established that her injuries were caused by the MVA, and physiotherapy would not be medically required.

Finally, with respect to permanent impairment, it is MPIC's position that the Appellant's permanent impairment ("PI") benefits were properly assessed and calculated. She has received a total of 9% PI benefits. Counsel submitted that there are no other PI benefits to which the Appellant is entitled.

To conclude, MPIC submits that the Appellant's appeal should therefore be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to PIPP benefits arising from the MVA. In particular, the onus is on the Appellant to establish the following:

1. That she is entitled to PIPP benefits for her knee osteoarthritis, right wrist radiological findings and dental injuries;
2. That she is entitled to further personal care assistance benefits;
3. That she is entitled to further physiotherapy benefits; and
4. That she is entitled to further permanent impairment benefits.

In making our decision, as set out below, we have thoroughly reviewed all of the reports and documentary evidence filed in connection with this appeal and we have given careful consideration to the testimony of the Appellant and to the submissions of the Appellant and of counsel for MPIC. We have also taken into account the provisions of the relevant legislation.

1. Entitlement to Further PIPP Benefits

The Appellant is seeking PIPP benefits under the MPIC Act in respect of her knee osteoarthritis, right wrist radiological findings and dental injuries. In order to be entitled to those benefits, she must establish, on a balance of probabilities, that she suffered a “bodily injury caused by an automobile”, within the meaning of subsection 70(1) of the MPIC Act, with respect to each of those areas.

(a) Knee Osteoarthritis

It is the Appellant’s position that her pre-existing knee osteoarthritis was exacerbated by the MVA. MPIC disputes this.

The Appellant testified that the MVA caused further osteoarthritis damage to both of her knees, the left greater than the right. She said that she had difficulty walking, and she lay in bed for two weeks after the MVA. A review of the records from [medical center] from the day of the MVA shows no evidence of any injury to the Appellant's knees.

The first post-MVA medical record regarding the Appellant's knees is the report of [Appellant's physician #2] dated July 15, 2014, regarding his examination of the Appellant on May 12, 2014.

As noted above, that report provides, in part, as follows:

With respect to your specific questions, I believe I have provided you with a diagnosis of the injuries sustained. Those would include an exacerbation of existing knee arthritis on the left. [...]

[Appellant's physician #2] also states, later in the same paragraph, as follows:

[...] I do believe that the motor vehicle accident was responsible based on probabilities from the patient's history only since I had no contact with her from the time of the accident in December until May of 2014. [...]

[Appellant's orthopedic surgeon] provided a report dated October 17, 2014, regarding an examination the same day, which states, in part, as follows:

Today I saw [the Appellant] regarding left knee pain that has been present for years. The pain is troublesome with activity. Past treatment has included analgesics, oral antiinflammatories, and physiotherapy.

[...]

X-rays done at [clinic] on May 12, 2014 showed tricompartmental degeneration with medial bone on bone.

When questioned regarding [Appellant's orthopedic surgeon]'s statement that her left knee pain had been "present for years", the Appellant's testimony was somewhat inconsistent. On the one hand, she denied that her pain had been present for years, saying that she was in excellent health and she had no pain, and thus she did not know why [Appellant's orthopedic surgeon] would say

that. On the other hand, she also stated that she didn't meet [Appellant's orthopedic surgeon] until he was actually operating on her. Similarly, when questioned regarding why [Appellant's orthopedic surgeon]'s report does not reference the MVA, the Appellant's response was also somewhat inconsistent. On the one hand, she said that she did not know why it was necessary for the report to mention the MVA; on the other hand, she said she thought she must have mentioned it.

The Commission wrote to [Appellant's orthopedic surgeon] on September 22, 2017, to seek his opinion. The letter stated, in part, as follows:

[The Appellant] advises that she was referred to you for treatment of her bilateral knee problems and that she discussed with you the impact of the MVA on her pre-existing knee osteoarthritis. The Commission asks that you review the enclosed documents and provide a detailed narrative report outlining your opinion on whether, on a balance of probabilities, [the Appellant]'s pre-existing bilateral knee problems were exacerbated or enhanced by the MVA of December 14, 2013. We also ask that you outline what treatment [the Appellant] underwent for her bilateral knee problems and whether, in your opinion, these treatments were medically required due to the impact of the MVA. Please include any other information you feel would be helpful in determining the issue on appeal.

[Appellant's orthopedic surgeon] provided a report in response to the request from the Commission, dated September 26, 2017, which states as follows:

This letter is in response to your letter to me dated September 22, 2017.

Included with this letter are copies of all of my chart notes relating to [the Appellant], whom I saw in referral for and subsequently treated for arthritis of both knees. I do not have any knowledge of [the Appellant] and her knees other than what is recorded in these notes. In particular, I have no knowledge of the etiology of her knee arthritis.

MPIC's HCS medical consultant, [text deleted], provided a report dated October 29, 2014, reviewing the Appellant's medical conditions secondary to the MVA. The report states, in part, as follows:

Presently the BI3 claim file does not contain sufficient medical evidence supporting a causal connection between the incident in question and the following medical conditions:

- Knee osteoarthritis;
- Deviated nasal septum;
- Dental injury (will need to be confirmed by Dental consultant in Health Care Services);
- Right wrist radiological findings.

These opinions are based on information obtained from the [medical center] outlining the medical conditions [the Appellant] was diagnosed as having and received treatment for. In the reports submitted by this facility there is documentation indicating assessment of the neck and lower back was unremarkable. The reports do not outline any problems with the lower extremities, physical findings in keeping with an acute fracture involving the right radius and ulna, evidence of a traumatic loss of tooth or physical findings in keeping with a traumatic nose injury that would result in deviation of the septum.

Subsequent to the receipt of chart notes from the Appellant's treating physician, [text deleted], [MPIC's HCS medical consultant] provided a further report, dated November 10, 2014, which states, in part, as follows:

The information obtained from the clinic notes submitted by [Appellant's physician #3], outlining assessments [the Appellant] underwent from June 27, 2012 to October 9, 2013, indicates [the Appellant] had the following medical conditions prior to the incident in question:

- Osteoarthritis affecting the back, neck and knees;
- Scoliosis;
- Colon cancer;
- Diverticulitis;
- Obesity;
- Hysterectomy and cholecystectomy;
- DISH (i.e., Diffuse Idiopathic Skeletal Hyperostosis);
- Abdominal wall hernia.

The clinic notes do not contain medical evidence that would lead me to change the opinions previously rendered. It is medically probable [the Appellant]'s reported knee problems stem from the pre-existing osteoarthritis.

The panel finds that [MPIC's HCS medical consultant], in the preparation of his reports dated October 29, 2014, and November 10, 2014, had the opportunity to review all of the medical reports,

assessments and reports of interventions on the Appellant's file and was thorough and comprehensive in his analysis. The panel preferred the evidence provided by [MPIC's HCS medical consultant] to that of the Appellant, whose evidence was inconsistent, and to that of [Appellant's physician #2], who did not have an opportunity to conduct a review of all of the file material.

Based on the evidence of [MPIC's HCS medical consultant], we find that the Appellant has not established a causal connection between her knee osteoarthritis and the MVA. As a result, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits as a result of her knee osteoarthritis.

(b) Right Wrist Radiological Findings

It is the Appellant's position that her right wrist was injured in the MVA. MPIC disputes this. It is MPIC's position that the x-ray taken at [medical center] on December 14, 2013, does not establish that the Appellant suffered a wrist injury on that day; rather, the x-ray identifies a previous (subacute) injury, and the Appellant was possibly suffering from chronic right hand pain.

The December 14, 2013, x-ray report provides, in part, as follows:

AP, lateral and oblique views were performed. There is a foreshortening of the distal radius and buckling of the cortex without significant dorsal angulation consistent with a distal radius fracture of uncertain chronicity. Ulnar styloid process fracture of uncertain chronicity. There is generalized soft tissue prominence. There is a dressing surrounding the wrist compressing the soft tissues. [...]

IMPRESSION:

Distal radius and ulnar styloid process fractures, acute or subacute in nature.
Suggestion of prior trauma to the fifth digit.
Diffuse osteopenia.
Osteoarthritis changes.

As pointed out by counsel for MPIC, the report indicates that the radius and ulnar styloid fractures are of “uncertain chronicity”, and are either “acute or subacute” in nature. The report also notes that the Appellant had a “dressing surrounding the wrist”. A review of the other records from [medical center] from the day of the MVA does not reveal anything which would indicate that that dressing was applied at that [medical center] as a consequence of the MVA.

There was a second x-ray that was done of the Appellant’s right wrist. When she went to see [Appellant’s physician #2], on May 12, 2014, it appears that he ordered an x-ray of her right wrist, because there is an x-ray report of her right wrist in the documentary evidence from that date, which provides as follows:

RIGHT WRIST

There is an old healed fracture of the distal radius with mild dorsal tilting of the radiocarpal angle. Arthritic changes are scattered throughout the intercarpal joints as well as the first CMC joint.

The x-ray report does not identify when the “old healed fracture” occurred. [Appellant’s physician #2]’s report of July 15, 2014, relating to the Appellant’s examination of May 12, 2014, states that she was seen “for an assessment of the issues stated stemmed [sic] from the accident of December 14, 2013”. There is no reference in his report to any issues involving the Appellant’s right wrist. Similarly, on May 12, 2014, [Appellant’s physician #2] signed a requisition for a knee brace and an ankle brace for the Appellant, and as well requested physiotherapy and athletic therapy for her, with both such forms indicating left knee osteoarthritis and right ankle fracture as the underlying issues. No brace was ordered for the Appellant’s wrist, nor was her wrist mentioned on the physiotherapy form.

The Appellant testified that she fractured her wrist in the MVA. She acknowledged that she had previously fractured her arm, but said that the break was higher up on her arm. She denied that she

had any pre-MVA wrist problems. She was questioned regarding some evidence that conflicts with her testimony on this point.

As indicated above, [Appellant's physician #3] provided a letter dated June 26, 2015, to the College of Physicians and Surgeons of Manitoba, which transcribes his chart notes. Included in a chart note from August 19, 2013, is the following: "The patient's issue is chronic right hand pain, previous injuries". When questioned regarding this chart note, the Appellant responded that [Appellant's physician #3]'s chart notes were not accurate, and that he deliberately entered fabrications. She felt that [Appellant's physician #3] had something against her. In fact, the Appellant made a complaint to the College relating to the chart notes that [Appellant's physician #3] provided to MPIC, and it was in response to this complaint that [Appellant's physician #3] wrote the June 26, 2015, letter. The College's Investigation Committee reviewed those chart notes, and provided a report, dated December 17, 2015, which was subsequently upheld by the College's Appeal Committee. The Appeals Committee issued a decision regarding the Appellant's complaint dated July 27, 2016, which states in part as follows:

She alleges that [Appellant's physician #3]'s information is fabricated and not accurate. There is no evidence to support an allegation of deliberate fabrication. The Investigation Committee did note that certain information provided by [Appellant's physician #3] in the medical record was wrong but notes that it was not clear the degree to which this impacted the MPI claim, if any. Some of the acknowledged inaccurate information such as whether she has a past cholecystectomy versus cholelithiasis was noted to be unlikely to impact her MPI claim for knee damage. Other information was available through other medical consultants that MPI could have requested information from. [...]

As noted, the Investigation Committee report found that there were some minor errors contained in [Appellant's physician #3]'s chart notes in connection with the Appellant's past medical history (such as a reference to cholecystectomy that should have been to cholelithiasis); however, none of

these minor discrepancies relate to the Appellant's wrist. Accordingly, we accept [Appellant's physician #3]'s chart notes on the issue of the Appellant's wrist.

A personal care assessment report dated December 17, 2014, prepared by an occupational therapist, contains a note that the Appellant has a wrist brace and reportedly wears it occasionally. When questioned about this, the Appellant denied that she had a wrist brace prior to the MVA. She said that she purchased wrist braces subsequent to the MVA, three or four in total, replacing them when they get dirty. The Appellant said that she disagreed with many of the comments made by the occupational therapist. As indicated, the Appellant did acknowledge that she had an injury to her right arm prior to the MVA, but said that the fracture was higher up on her arm.

The Appellant's testimony regarding the issue of a wrist brace was slightly inconsistent. On the one hand, she said that she purchased the wrist braces on her own, because she is very independent and she did not know that MPIC would pay for them. On the other hand, she acknowledged that she did ask MPIC for a knee brace and ankle brace.

MPIC's HCS medical consultant, [MPIC's HCS medical consultant], provided a report dated September 8, 2015, reviewing the Appellant's right wrist radiological findings. As noted above, the report states, in part, as follows:

1. The medical evidence does not confirm a causal relationship between the incident in question and the December 14, 2013 radiological findings with respect to the right wrist (the claim file does not contain objective physical findings one would expect to see after an acute fracture of the radius and ulna).

[...]

The panel has carefully considered the issue of whether the evidence establishes a causal connection between the Appellant's right wrist radiological findings and the MVA. While there

were two x-ray investigations done of the Appellant's right wrist, one on the day of the MVA and one on May 12, 2014, both of those investigations led to equivocal results, the first finding fractures of "uncertain chronicity", which were either "acute or subacute in nature", and the second finding "an old healed fracture". Coupled with these equivocal results is an absence of any clinical findings or other reporting regarding the Appellant's right wrist, either from the [medical center], where the first x-ray was performed, or from [Appellant's physician #2], who ordered the second x-ray. In addition, [Appellant's physician #3]'s chart note indicates "chronic right hand pain, previous injuries", and the occupational therapist's report indicates a wrist brace worn prior to the MVA, although the Appellant disputes both of these last two. Finally, there is [MPIC's HCS medical consultant]'s report of September 8, 2015, as noted above. We find that [MPIC's HCS medical consultant], in the preparation of his report, had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant's file and was thorough in his analysis. The panel preferred the evidence provided by [MPIC's HCS medical consultant] to that of the Appellant, whose evidence was inconsistent.

Based on all of the above, we find that the Appellant has not established a causal connection between her right wrist radiological findings and the MVA. As a result, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits as a result of her right wrist radiological findings.

(c) Dental Injuries

The Appellant did not address her claim for PIPP benefits relating to dental injuries in her testimony or in her submission. In the documentary evidence, it is noted that the Appellant claimed that injuries to her teeth suffered in the MVA caused her dentures not to fit properly. As noted above, the Commission wrote to [Appellant's dentist], her treating dentist, on September 22, 2017,

and provided him with documentary evidence to review. The Commission's letter states, in part, as follows:

[The Appellant] advises that her dentures do not fit properly as result of the MVA and she may require an adjustment to her dentures or new dentures. The Commission asks that you review the enclosed documents and provide a narrative report outlining your opinion on whether, given the injuries as outlined on the CT scan from the time of the MVA [...], it is more likely than not that problems associated with [the Appellant]'s dentures were caused by the MVA of December 14, 2013.

[Appellant's dentist] replied, providing a report dated September 28, 2017, which states, in part, as follows:

My assessment is that the injury that this patient has suffered did not play a significant role in management of her complete upper and lower dentures, since there was no apparent fracture to the maxilla or mandible. I do not believe that an undisplaced fracture of the zygoma would alter her ability to wear her upper and lower denture.

The Appellant did not provide any testimony which contradicts the evidence of [Appellant's dentist], nor is there any contradictory documentary medical evidence.

Based on the report from [Appellant's dentist], we find that the Appellant has not established a causal connection between her dental injuries and/or her difficulty with her dentures and the MVA. As a result, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits as a result of her dental injuries.

2. Entitlement to Further Personal Care Assistance Benefits

The Appellant did not address her claim for PCA benefits in her testimony or in her submission. In her Notice of Appeal dated June 17, 2015, she stated that she disagreed with the Internal Review Decision ending her entitlement to PCA benefits. It is MPIC's position that the Appellant is not entitled to further PCA benefits.

PCA benefits are governed under subsection 131(1) of the MPIC Act, which provides for reimbursement “where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance”. Subsection 2(3) of the Expense Regulation provides for the use of a Personal Care Assessment Tool to assess entitlement to PCA benefits. The assessment tool is used to evaluate a claimant’s personal care needs and the level of care that a claimant requires on a daily basis. A score is applied based on personal care requirements, if they are “the direct result of the victim’s bodily injury caused by an automobile”. A minimum score of 9 is required to qualify for entitlement to PCA benefits. In order to be entitled to further PCA benefits, the Appellant must establish, on a balance of probabilities, that she suffered a bodily injury caused by an automobile which resulted in an inability to perform activities of daily living such that her score would be 9 or above.

As indicated above, the latest personal care assessment performed by MPIC was done by an occupational therapist on December 17, 2014. The Appellant received a score of zero on that assessment, because the occupational therapist relied on the November 10, 2014, report from the HCS consultant, which had identified numerous pre-existing conditions and had also found that there was no causal connection between the MVA and the Appellant’s knee osteoarthritis and her right wrist radiological findings. As a result, the occupational therapist, when assessing the Appellant’s personal care needs, ignored her knee and wrist problems, because they were not caused by the MVA.

As indicated above, we have found that the Appellant has not established, on a balance of probabilities, a causal connection between either her knee osteoarthritis or her right wrist radiological findings and the MVA. As a consequence, any personal care needs of the Appellant were not the direct result of any bodily injury caused by an automobile. Accordingly, we find that

the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further PCA benefits.

3. Entitlement to Further Physiotherapy Benefits

The Appellant did not specifically address her claim for physiotherapy benefits in her testimony or in her submission, although she did refer to her physiotherapist. In her Notice of Appeal dated June 17, 2015, she stated that she disagreed with the Internal Review Decision denying her claim to further physiotherapy benefits. It is MPIC's position that the Appellant is not entitled to those benefits.

Physiotherapy benefits are governed under paragraph 136(1)(a) of the MPIC Act, which provides for "the reimbursement of expenses incurred by the victim because of the accident". Subsection 5(a) of the Expense Regulation provides that MPIC shall reimburse physiotherapy expenses "when care is medically required". In order to be entitled to further physiotherapy benefits, the Appellant must establish, on a balance of probabilities, that physiotherapy treatment is medically required treatment directed towards an injury sustained in the accident.

[Appellant's physician #2], in his report of July 15, 2014, had recommended that the Appellant receive physiotherapy treatment "to help her with her back and nerve irritability pain as well as rehabilitate some of her irritated arthritic pain." As noted above, MPIC did authorize physiotherapy treatment initially, prior to their determination that the Appellant's injuries were not caused by the MVA. Subsequently, by letter dated January 14, 2015, the Appellant's physiotherapist requested additional physiotherapy treatments to address pain in the Appellant's right wrist, as follows:

Please see attached X-ray document re: wrist fracture which [the Appellant] sustained during her accident December 14, 2013. This should be considered when determining

that the injuries sustained in the accident place her in a category II for her bodily injury claim.

The x-ray attached was imaging ordered by [Appellant's physician #2] on May 12, 2014, referred to above.

As indicated above, we have found that the Appellant has not established, on a balance of probabilities, a causal connection between her right wrist radiological findings and the MVA. As the right wrist x-ray was the sole item relied upon by the physiotherapist to support the request for further physiotherapy treatment, we therefore find that further physiotherapy treatment would not be considered to be medically required.

As noted by counsel for MPIC, there is no evidence that any other healthcare provider treating the Appellant made any other recommendation for physiotherapy treatment for her. Therefore, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further physiotherapy benefits.

4. Entitlement to Further Permanent Impairment Benefits

The Appellant did not address her claim for PI benefits in her testimony or in her submission. In her Notice of Appeal dated June 17, 2015, she stated that she disagreed with the Internal Review Decision regarding her PI benefits. It is MPIC's position that the Appellant is not entitled to further PI benefits.

PI benefits are governed under subsection 127(1) of the MPIC Act, which provides that "a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity" for the permanent impairment. Section 1 of the PI Regulation provides that

“[c]ompensation for permanent impairments shall be determined on the basis of Schedule A”. Schedule A lists permanent, measurable deficits of physical or mental function, as well as observable disfigurements that may have been caused by an accident. It expresses the amount available for each type of permanent impairment as a percentage of the maximum indemnity. In order to be entitled to further PI benefits, the Appellant must establish, on a balance of probabilities, that there are additional PI benefits to be found in Schedule A of the PI Regulation to which she is entitled, as a result of the MVA.

The Appellant has already received a total of 9% PI benefits, as follows:

- 1% PI benefit for concussion;
- 7% PI benefit for facial scarring (the maximum); and
- 1% PI benefit for facial sensory loss.

She has not expressly identified what additional PI benefits she is seeking. While it is possible that she may be seeking PI benefits with respect to her knee osteoarthritis, right wrist radiological findings or dental injuries, as indicated above, we have found that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits with respect to those injuries.

The Appellant did not provide any testimony which would identify any further PI benefits to which she would be entitled, nor is there any documentary medical evidence which establishes that the Appellant is entitled to any further PI benefits.

Accordingly, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further PI benefits.

Conclusion

As indicated above, the panel finds as follows:

1. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits for her knee osteoarthritis, right wrist radiological findings or dental injuries;
2. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further personal care assistance benefits;
3. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further physiotherapy benefits; and
4. That the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further permanent impairment benefits.

Disposition:

Accordingly, the Appellant's appeal is dismissed.

The Internal Review decision dated April 29, 2015, dealing with the Appellant's PIPP benefits for her knee osteoarthritis, right wrist radiological findings, dental injuries and deviated nasal septum is varied to take into account the case manager's decision dated March 29, 2019, which acknowledged that the Appellant's deviated nasal septum was caused by the MVA; in all other respects it is upheld.

The Internal Review decision dated April 29, 2015, dealing with the Appellant's permanent impairment benefits is varied to take into account the case manager's decision dated August 14, 2017, which awarded the Appellant a permanent impairment benefit of 1% for facial sensory loss; in all other respects it is upheld.

The remaining two Internal Review Decisions dated April 29, 2015, dealing with the Appellant's personal care assistance benefits and physiotherapy benefits, respectively, are upheld.

Dated at Winnipeg this 9th day of December, 2019.

JACQUELINE FREEDMAN

BRIAN HUNT

DR. ARNOLD KAPITZ