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Indexed as:
L.M.W. (Re)

IN THE MATTER OF an appeal by L.M.W.
AICAC File No. AC-96-51

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[1997] M.A.I.C.A.C.D. No. 1

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.
and L. Goodspeed
Heard: January 6, 1997
Decision: January 13, 1997
(5 pp.)

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Issue:

Whether 'sensory loss' includes loss of function, or
whether the two are separate bases of claim; unlisted,
permanent impairment - schedule as guideline.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, secs. 127, 129(1) and (2) and 130.
Regulation 41/94, subs. 2, s. 9(d)(iii) and (e).

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')

represented by Joan McKelvey.

L.M.W., the appellant, appeared in person.

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MAIC 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 FACTS

[para1] The Appellant was injured in a motor vehicle
accident on July 18, 1994, when the vehicle she was driving
collided with a moose that appeared over a hill on the
roadway. She sustained several injuries including facial
lacerations, cuts to her arms, left index finger and general
soreness which required medication, plastic surgery, lengthy

physiotherapy and other rehabilitation programs to bring her to her present stage of recovery.

[para2] The accident resulted. amongst other things, in the severance of a facial nerve which, despite plastic surgery that appears to have been otherwise successful, has not been regenerated. This has left L.M.W. with a large area of numbness on the right side of her face , which she likens to permanent dental anaesthesia.

[para3] However, over and above the sensory loss the nerve severance has given rise to certain forms of functional loss as well. More specifically, because of the numbness of a large area of the inner surface of her mouth, L.M.W. has difficulty brushing her teeth effectively; she loses food inside her mouth because, not having any sensory awareness on the inner surface of her mouth, she is unaware of the presence of small portions of food and, therefore, loses the functional ability to move those food particles around properly. She has difficulty eating on the right side of her mouth with any degree of comfort because, when doing so, she frequently bites her cheek. This necessitates restricting her chewing to the left side, almost exclusively. It is both difficult to eat particular foods and embarrassing, because she now chews in an awkward manner, which affects her appearance. She also has difficulty with drinking, having had to use a straw for about a year following the accident and, later, positioning any drinking vessel at the left side of her mouth in order to avoid having the liquid dribble down her chin. She now finds the best solution is to drink and eat from the left side of her mouth at all times. Articulation is a problem as well: her words lose clarity and become garbled, especially when she is excited or required to give quick instruction or guidance to her children. Even kissing, with the full vigour sometimes required of an active participant, presents problems.

[para4] An assessment of the Appellant's condition was conducted by Dr. K. Murray on November 24, 1995, some 16 months after the accident and his report of December 11, 1995, reads, in part, as follows:

"The patient has an area of numbness on the upper lip below the central scar with a 5 mm. two point area of sensation. She has an area on the lower lip covering approximately the lower third below the scar of the lateral commissure with an area of two point sensation measuring 10 mm. This includes approximately the lateral third of the lip.

It is anticipated that the numbness this patient feels is permanent at this point in time and I would anticipate very little difference from that she has now attained. This patient's area of numbness in the upper lip would fall under Subdivision 2 No. 9 (d)(iii) area affecting

the lip 0.5%, and (e) sensory loss of the inferior maxillary branch affecting dental arch and lip 3%, ..."

[para5] Dr. Murray's report of December 11th, 1995, concurs with all of L.M.W.'s statements regarding the difficulties she is experiencing and his subsequent report of September 10, 1996 acknowledges that there is a substantial area of numbness in her face. He states that her facial numbness covers "approximately 9 square centimetres internally and probably another nine centimetres of mucosal surface." Dr. Murray makes it clear that L.M.W.'s facial numbness is permanent and there is no anticipated change.

[para6] M.P.I.C., basing its decision largely upon Dr. Murray's reports, decided that L.M.W. was entitled to compensation for sensory loss and, applying the provisions of Section 127 of the Act and of subsections 9(d) (iii) and (e) of Subdivision 2 of Regulation 41/94, found L.M.W. to be entitled to 3.5 % of the maximum impairment benefit of \$100,000, for a payment of \$3,500.00. That decision was affirmed by the Internal Review Officer, from whose decision L.M.W. now appeals. (Copies of the relevant portions of the Act or of the Regulations referred to in these Reasons will be attached hereto.)

[para7] L.M.W. is not disputing the amount of compensation that she has received for her facial scarring, but only the portion of the impairment benefit related to sensory loss and loss of function.

THE ISSUES:

[para8] The issues are: (i) whether or not the appellant's apparent, functional loss is part and parcel of the sensory loss for which she has already been compensated; and (ii) if her functional loss forms the basis for a separate claim, distinct from sensory loss, in what manner she should be compensated for it since the applicable Regulation is silent on the point.

THE LAW:

[para9] We have no difficulty in distinguishing between loss of sensory perception and loss of function. True, the two are often intertwined but, in our respectful view, can and usually should be viewed as separate and distinct bases of claim. One can sustain a numbness without any loss of function, and functional impairment without loss of feeling. In L.M.W.'s case, for example, had sensory loss been limited to the exterior surface of her face, there would presumably have been no functional deficiency and we would not have interfered with the decision of the Internal Review Officer. The evidence of Dr. Murray and that of the appellant herself persuade us that she has, indeed, sustained a functional

impairment. Simply put, she can no longer do, to- day, some of the things (not including feeling) that she used to be able to do with the right side of her face before the accident.

[para10] Regulation No. 41/94 contains a Schedule that lists many forms of permanent impairment, along with the compensation formula that must be applied to each such impairment. There does not appear to be any category listed in that Schedule into which L.M.W.'s functional loss may properly be fitted, and we are therefore obliged to find her remedy in Section 129(2) of the Act, which reads as follows:

"Impairment not listed on schedule

129(2) The corporation shall determine a percentage for any permanent impairment that is not listed in the prescribed schedule, using the schedule as a guideline."

[para11] Since L.M.W.'s functional loss effectively flows from her sensory loss, and since neither party appears to have taken issue with the assessment of 3.5% compensation for the latter, we find that the closest parallel that we can achieve is to apply that same percentage to the former.

DISPOSITION:

[para12] We therefore find that the appellant, L.M.W., is entitled to a further payment of \$3,500.00 as compensation for the permanently impaired functions of parts of the interior surface of her mouth that she has sustained by reason of her motor vehicle accident.

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