



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by N.L.
AICAC File No.: AC-02-73

PANEL: Mr. Mel Myers, Q.C., Chairman
Dr. Patrick Doyle
Mr. Wilson MacLennan

APPEARANCES: The Appellant, N.L., was represented by R.C.T.;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Mark O'Neill.

HEARING DATE: January 6, 2003, March 17, 2003 and May 21, 2003

ISSUE(S):

1. Entitlement to further permanent impairment benefits for scarring of the right thigh;
2. Entitlement to permanent impairment benefits for hip and thigh problem;
3. Entitlement to permanent impairment benefits for vision problems;
4. Entitlement to Income Replacement Indemnity benefits beyond December 17, 1995

RELEVANT SECTIONS: Sections 83(1)(a), 84(1), 110(1)(a) and 127 of the Manitoba Public Insurance Corporation Act ("MPIC Act") and Schedule A of Manitoba Regulation 41/94

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

N.L. (hereinafter referred to as the 'Appellant') was a pedestrian who was involved in a motor vehicle accident on October 20, 1995. As a result of the accident she lost consciousness for a

short period of time following the accident and was admitted to the Emergency Department of the Health Sciences Centre where she was attended upon by Dr. Bendor-Samuel. In his Case Summary, dated October 20, 1995, Dr. Bendor-Samuel states that the Appellant was found to have a small right hemothorax. A CT scan revealed a non-displaced fracture of the frontal skull bone and a fracture of the orbital floor. The Appellant later complained of headaches, a painful nose, neck stiffness, right shoulder pain, pain in right buttock and had trouble with the right eye.

It is significant to note that, in his Case Summary, Dr. Bendor-Samuel indicates that the patient's hemoglobin was found to have dropped on the first day during a short period, from 86 to 64, following which it remained stable. Dr. Bendor-Samuel indicates that the Appellant had some degree of iron deficiency anemia to begin with.

It should be noted, however, that subsequent CT scans indicated that the Appellant had a massive developing hematoma respecting her right buttock and thigh, which was ultimately evacuated by Dr. Huebert on July 10, 1997. The Appellant also suffered from fractures of the 5th, 6th and 7th ribs, posteriorly, and extensive facial lacerations to the upper lip and forehead, as well as a broken denture, which were both treated shortly after the accident. The lip laceration was further treated by a plastic surgeon, Dr. Reid Waters, in order to correct a disfiguring upper lip scar while the broken denture was attended to by a dentist, Dr. Potter.

The Appellant, who has experience in the garment industry as a sewing machine operator, commenced employment with [text deleted] in August of 1995. When the firm found that they were without a payroll clerk they assigned the Appellant to work as a payroll clerk, which was the position the Appellant occupied at the time of the accident.

The Appellant was treated by her physician, Dr. Narvas, who provided a report to MPIC on January 9, 1996. In this report Dr. Narvas indicates that he examined the Appellant on January 9, 1996, and his diagnosis indicates mild residual low back pain and a scar to the upper lip and referred the Appellant to Dr. Reid Waters, a plastic surgeon. Dr. Narvas further indicates in his report that the Appellant was capable of returning to her work as a payroll clerk on October 17, 1995.

The case manager, in a note to file dated February 20, 1996, contacted Dr. Narvas who says he erred in respect of the date the Appellant could return to work and it should have read December 17, 1995. (Dr. Narvas, as a result of subsequent examinations of the Appellant, changed his position in respect of the capacity of the Appellant to return to work after the motor vehicle accident and concluded that the Appellant was incapable of returning to work due to the motor vehicle accident injuries.)

There is a further note to file from the case manager, dated January 19, 1996, which indicates that he was in contact with the Appellant's employer who indicated that there was work available for the Appellant as a sewing machine operator, but not as a payroll clerk. The case manager also indicates in a note to file, dated November 28, 1996, that the Appellant was contacted on that date and that the case manager reviewed the information that she had obtained from Dr. Narvas.

The Appellant informed the case manager that she was aware that she could return to work but there was no work available for her. The case manager advised her that he had been in contact with the employer, who indicated that there was work available for her as a sewing machine operator. The Appellant indicated that she has not applied for Unemployment Insurance and that

she has been looking for work. The case manager then advised the Appellant that the Income Replacement Indemnity ('IRI') benefits she has been receiving from MPIC would no longer be payable.

The Appellant was referred to Dr. Huebert, an orthopaedic surgeon, in respect of the hematoma in her right thigh. Dr. Huebert, in an Initial Health Care Report dated August 23, 1996, indicates that:

- (a) he first saw the Appellant on June 7, 1996 in respect of her right thigh and that she had developed an organized hematoma of the right thigh, lateral aspect.
- (b) in respect of work capacity, that the Appellant was able to work modified duties and also indicated that the Appellant may work but has some pain in the right thigh.

Dr. Huebert's clinical note, dated June 7, 1996, indicates that the Appellant complained about pain in the right upper thigh and buttock and notes that there is swelling in this area. The Appellant informed him at that time that she was able to walk quite well, but at other times she had considerable pain. These notes further indicate Dr. Huebert intended to obtain x-rays of the spine and a CT scan of the right upper thigh.

Dr. Huebert's clinical notes further indicate that he next saw the Appellant on August 23, 1996 where the Appellant further reports "*some aches and pains continue in her right thigh*". In a CT scan, which was done on August 15, 1996, Dr. Huebert indicates that he believed that the Appellant had a large hematoma in the thigh, which was now still somewhat enlarged but organized.

Dr. Narvas provided a narrative report to MPIC dated November 13, 1996. In this report he indicates that:

- (a) The patient was supposed to return to work on December 18, 1995 but she was unable to do so because of continuing pain in the right thigh.
- (b) When he saw the Appellant on February 22, 1996 she was still experiencing pain in the right thigh and had remained off work and claimed that there was no work available at that time.
- (c) On a follow up visit on May 10, 1996 the Appellant had remained off work and had more pain in the right thigh area with persistent swelling of the lateral aspect with localized tenderness and had difficulty walking.
- (d) The Appellant was again seen on July 8, 1996 and she continued to complain of pain in the right thigh with difficulty walking and there was persistent pain and tenderness with localized swelling at the lateral aspect of the right thigh.
- (e) The Appellant's next visit to his office was on October 3, 1996 and he reports that the Appellant had remained off work with persistent pain in the right thigh and had difficulty walking with a visible limp. He notes residual swelling and tenderness at the lateral aspect of the right thigh.
- (f) The Appellant was last seen on November 5, 1996 with persistent soreness in the right thigh with difficulty walking and again was limping.

As a result of receiving this medical report, the case manager contacted Dr. Narvas and in a note to file dated November 28, 1996 Dr. Narvas confirmed to the case manager that the Appellant was not fit for work. However, Dr. Narvas was unable to explain his earlier comments of February 20, 1996 wherein he indicated that the Appellant was capable of returning to work on December 17, 1995.

It is clear that Dr. Narvas has changed his position in respect of the Appellant's ability to return to work due to the motor vehicle accident injuries since his initial report of January 9, 1996 but Dr. Narvas was unable to explain why he changed his medical opinion. It should further be noted that in every medical report by Dr. Narvas after his initial report dated February 20, 1996 he consistently asserts, based on his interviews with the Appellant and his examination of her, that she was suffering from significant pain to her thigh which rendered her incapable of returning to work.

It should also be noted that based on Dr. Narvas' initial mistaken assessment in respect of the Appellant's capacity to return to work, MPIC terminated the Appellant's IRI benefits on or about February 21, 1996 and did not reinstate these benefits despite Dr. Narvas' subsequent medical opinions.

Dr. Huebert's clinical notes indicate that he saw the Appellant in the month of November 1996, that the Appellant was reporting ". . . *continuing aches and pains and a lump in the right thigh*". Dr. Huebert further notes "*There is a good range of hip, knee and ankle movement. There is, however, still some soft enlargement of the lateral side of the right thigh. . .*" and that a CT scan of the upper thigh would be obtained.

The Appellant continued to complain to Dr. Narvas and to Dr. Huebert about pain to her right thigh and groin area.

Dr. Narvas, in a report to MPIC dated December 19, 1996, indicates that he saw the Appellant on December 2, 1996 and she reported "*persistent pain in the right thigh and right buttock which makes her uncomfortable to sit for a long period of time. She walks with a limp, because of the pain*".

In Dr. Huebert's clinical note dated February 25, 1997 he notes that the Appellant reports "*continuing severe pain in the right upper thigh and groin area*". On examination he indicates the area seems to be somewhat enlarged with tenderness in the region and further indicates that a CT scan has been asked for and will be done in early March, as well as a repeat x-ray of the right

hip and a bone scan. Dr. Huebert also notes that the x-rays of the right hip and pelvis were perfectly normal and he cannot see any soft tissue abnormalities.

On April 8, 1997 Dr. Huebert's clinical note reveals that he saw the Appellant and she ". . . *still has a lump on the lateral aspect of the right thigh*". The CT scan indicated an area which is lucent and quite large. Dr. Huebert indicates that arrangements are to be made for a biopsy of the right thigh.

In a November 7, 1997 report to MPIC, Dr. Huebert indicates an operation was conducted on July 10, 1997 and a "*Large cystic organized hematoma, right thigh, measuring 12x6x2 cm. I have seen her for follow-up since then, July 14th, dressings were removed and a drain was removed. July 29th sutures were removed. . . . August 29th, she was up walking, She says she felt better*". Dr. Huebert states:

This lady therefore has sustained an injury to her right thigh. As a result of the information from the surgical procedure of July 10th, I now recognize that this was a hematoma of the right thigh, which probably resulted from the accident of October 20th, 1995. (underlining added)

He further indicates that the "*Diagnosis is cystic hematoma, which may have been successfully excised, may still recur*".

The Commission notes that Dr. Huebert now concludes that a large cystic organized hematoma caused by the motor vehicle accident of October 20, 1995 was not removed from the thigh of the Appellant for a period of approximately twenty-one months. During this entire period of time the Appellant consistently complained to Dr. Narvas, Dr. Huebert and the case manager as to her consistent pain in her right thigh and groin area which prevented her from returning to work.

Dr. Huebert's clinical notes indicate that he next saw the Appellant on December 23, 1997. The Appellant was complaining "*. . . of pain in the right hip. She limps with walking. She also looks pale. Dr. Narvas has seen her and put her on iron. The patient continues to complain of pain in the right upper hip. Regardless of my question to her she only states that she has pain in the right upper hip. On examination there is full range of hip movement. . . . There is tenderness in the upper hip area*".

On April 3, 1998 Dr. Huebert notes that when he examined the patient on that date that she was complaining "*. . . of pain in the right thigh. She says it bothers her and is deep. It is staying roughly the same. This, she says, makes it impossible for her to work*". An examination indicated there is full range of hip, knee and ankle movement. However, the Appellant "*. . . complains of tenderness in the entire right upper thigh, and mid thigh*". Dr. Huebert notes that the patient has a cyst which he has tried to excise. He indicates there may still be some remnants of it present which would give her some discomfort but he thinks she is capable of employment, but perhaps not the heaviest work.

Dr. Huebert's next clinical note is dated May 11, 1998 where he notes that the Appellant was complaining of mid chest pain and also, that she indicated her right hip complaints were the same. On October 13, 1998 the Appellant complains of pain in the right upper thigh, also left thigh. The Appellant states when she walks and stands up there is pain.

Dr. Huebert's clinical notes further indicate that:

- (a) On December 11, 1998 the Appellant continues to complain of pain in the right buttock, right hip area, going down the right thigh. The x-rays of the right hip, done on November 2, 1998, are entirely normal.
- (b) On March 9, 1999 Dr. Huebert notes that the Appellant is complaining about

aches and pains in right groin, right buttock and right thigh. On examination there is good range of hip, knee and ankle movement.

- (c) On June 14, 1999 the Appellant reports some discomfort in the right hip, but Dr. Huebert gets the impression that she is somewhat improved.
- (d) On August 12, 1999 the Appellant complains about the whole right side. She is experiencing pain in the right groin, in the right back, in the right hip and in the right thigh. Dr. Huebert notes good range of hip movement, but there is a complaint of tenderness in the right buttock and the right mid thigh. Dr. Huebert indicates that the Appellant may have some cystic areas of the thigh area.

On November 12, 1999 MPIC wrote to Dr. Huebert advising him that they were assessing the Appellant's entitlement to IRI benefits and requested a report from Dr. Huebert outlining specifically what period, or periods, of time since the motor vehicle accident of October 20, 1995 that the Appellant had been unable to work as a direct result of the injuries she sustained. Dr. Huebert was informed that at the time of the accident the Appellant had been employed at [text deleted] with a responsibility for sewing and some office duties. As well, she had been involved in the garment industry since the early 1970's.

In reply, Dr. Huebert, in a letter dated December 6, 1999 to MPIC briefly indicates his involvement with the Appellant, as he first saw her on June 2, 1996, and states:

I have seen this lady periodically since that time, the last time being November 16. She still had some complaints of pain in the posterior aspect of the right thigh. She was up and around walking but took some pills for pain.

In assessing the disability this lady certainly would have been off work from July 10, 1997 for a period of about two months to allow recovery from the procedure. I am not certain, but it is my impression that in most of the time periods when I have seen her she has actually been working, though with some difficulty, and having to work a lighter job because she could not manage to do heavy work. In my notes, however, it should be realized that by and large I describe the specific state of the thigh and did not delve into her employment history. My feeling therefore is that she was definitely off for two months in 1997 and possibly was working the rest of the time when I saw her, though with some disability and some aches and pains. This may well have changed the type of employment that she could accept. (underlining added)

The same letter was written to Dr. Narvas by MPIC and in his reply, dated November 30, 1999, he states:

Thank you for your letter of November 12th, 1999. The patient has been off work from October 20th, 1995 to the present time because of persistent pain in the right buttock, right hip and right thigh. She is being followed on a regular basis by myself and Dr. H.T. Huebert (orthopedic surgeon) at the Winnipeg Clinic. She has been taking Tylenol Extra Strength, as necessary, for the pain. In the past, she was also tried on Celebrex, one capsule daily, as a nonsteroidal anti-inflammatory agent by Dr. Huebert. (underlining added)

When last seen in my office on October 19th, 1999 she was still complaining of persistent pain in the right hip, buttock and thigh. Since September of 1998 the patient has been experiencing occasional right sided headache, but more so since the 1st week of October, 1999. Because of this, the patient had a CT scan of the brain done on November 24th, 1999 which showed an area of gliosis at the right frontal lobe, probably related to the patient's previous head trauma.

Because of this finding, the patient will be referred to a neurologist for opinion. As mentioned above, the patient has been unable to return to work since October 20th, 1995 following the motor vehicle accident. (underlining added)

Dr. Michael J. MacKay, Medical Consultant, MPIC's Health Care Services Team, was requested by MPIC to provide his opinion on several matters including whether or not, as a result of the motor vehicle accident, the Appellant had received injuries which prevented her from carrying out her occupational duties. In that memorandum Dr. MacKay points out the following from his review of the file, namely:

The information obtained from the documents reviewed indicates that N.L. was disabled from her occupational duties until December 18, 1995. Dr. Narvas documented that N.L. did not return to work on this date as a result of her pain and perceived limitation of function. Dr. Huebert was of the opinion that N.L. was able to perform her occupational duties and was doing so except for two months following the July 10, 1997 surgical procedure.

Dr. Shelton was of the opinion that N.L.'s CT scan findings as well as her neurological examination would not result in any restrictions or difficulties.

In the reports provided by Dr. Narvas, it is noted that N.L. reported to him that she did not return to work as a result of her pain. I was unable to extract any information from the information obtained from Dr. Narvas that would indicate he advised N.L. to remain off subsequent to December 18, 1995.

Based on the medical evidence presently contained in N.L.'s file, it is my opinion that the evidence does not identify N.L. as being physically impaired, as a result of the conditions arising from the incident in question, to the extent that she was unable to perform her occupational duties subsequent to December 18, 1995 except for a two month period of time following the July 10, 1997 surgical procedure.

Upon receipt of this memorandum, the case manager wrote to the Appellant on October 3, 2001 and confirmed the decision of the case manager on March 4, 1996 that IRI benefits were paid for the period October 8, 1995 to January 10, 1996. In addition, the case manager indicates that the medical information received by MPIC does not identify that the Appellant was physically impaired as a result of the accident, to the extent that she was unable to perform her occupational duties subsequent to December 18, 1995, except for a two month period of time following the July 10, 1997 surgical procedure.

The case manager further indicates that the initial entitlement to IRI benefits was properly terminated once the Appellant had regained the ability to hold the employment which she held at the time of the accident. Following the surgery on July 10, 1997 the Appellant was entitled to IRI benefits for a period of two months. Thereafter, the Appellant was capable of returning to her employment and, therefore, was no longer entitled to IRI benefits.

Application for Review

The Appellant made Application for Review of that decision on February 4, 2002. The Internal Review Hearing involved three separate meetings, the last of which occurred on March 4, 2002. The Internal Review Officer, after a review of the entire medical file, relying on Dr. MacKay's medical opinion as set out in his Inter-Departmental Memorandum of August 22, 2001, and having regard to Dr. Huebert's report which fails to establish any impairment of physical function preventing the Appellant to return to her previous employment except for the period

following the surgery, confirmed the decision of the case manager dated October 3, 2001 and dismissed the Appellant's Application for Review with respect to IRI benefits.

Appeal

The Appellant filed a Notice of Appeal on September 16, 2002 and appeared before the Commission on January 6, 2003, March 17, 2003 and May 21, 2003. R.C.T. represented the Appellant and MPIC was represented by legal counsel.

Entitlement to IRI benefits beyond December 17, 1995

The relevant legislative provisions are:

Entitlement to I.R.I. for first 180 days

83(1) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

(a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;

Entitlement to I.R.I. after first 180 days

84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

At the commencement of the initial hearing on January 6, 2003 the Commission, upon a review of the entire file and prior to hearing any evidence, indicated to both the Appellant and MPIC's legal counsel that the Commission wishes to obtain clarification from Dr. Shelton and Dr.

Huebert, as well as information with respect to the medication the Appellant was taking, and whether or not the ankle fracture referred to in the medical material, was caused by the accident. The Appellant, in consultation with her advisor, indicated she did not wish to consent to this information being provided to the Commission.

At the second hearing on May 21, 2003 the Appellant testified as to the nature of the injuries that she sustained in the accident and the effect it had on her ability to return to work. Having regard to the Commission's concern about the ability of the Appellant to understand English, an interpreter, N.J., attended this hearing and was present when the Appellant testified. It should be noted that on several occasions the Appellant did not understand the question that was put to her by either legal counsel for MPIC or by the Commission and on several occasions during the course of her testimony she required the assistance of either her representative or N.J. in understanding the questions.

The Appellant testified that:

- (a) she had extensive experience as a sewing machine operator and worked for [text deleted] as a sewing machine operator for several months prior to the motor vehicle accident;
- (b) she was assigned to work in the office as a payroll clerk and that it was while she was carrying out these duties that the motor vehicle accident occurred; and
- (c) some period of time after the accident occurred, she attempted to return to work as a sewing machine operator at [text deleted] but was unable to do so and, therefore, did not continue employment with that firm.

The documentation on file also indicated to the Commission that the employer was not happy with the Appellant's work as a payroll clerk and would not have permitted her to continue to work in that position but was prepared to have the Appellant work as a sewing machine operator. The Appellant testified that, having regard to the pain in her hip, thigh and chest, which at times

was excruciating and severe, she was unable to continue employment after the motor vehicle accident.

The Appellant in her testimony:

1. denied informing the case manager that she did not return to work at [text deleted] because there was no work available for her and reiterated she had attempted to go back to work at [text deleted] as a sewing machine operator but was unable to continue that employment due to the severe pain in her thigh;
2. challenged Dr. Huebert's opinion, as set out in his report dated August 23, 1996, that she was able to continue employment with modified duties and further testified that she consistently told Dr. Huebert that she was unable to work due to the extreme pain in her thigh;
3. denied the comments of Dr. Huebert, set out in his letter of December 6, 1999, that during the period of time that Dr. Huebert saw the Appellant, it was his impression that she had actually been working, though with some difficulty, at a lighter job because she could not manage to do heavy work.

Dr. MacKay states in his Inter-Departmental Memorandum to MPIC dated August 22, 2001 that:

- (a) he agrees with Dr. Huebert's opinion that the Appellant was capable of returning to work after the motor vehicle accident except for the two month period following the July 10, 1997 surgical procedure;
- (b) Dr. Narvas disagreed with Dr. Huebert in respect to this issue but Dr. MacKay indicates that there is nothing in Dr. Narvas' medical reports which would indicate that he had ever advised the Appellant to remain off work subsequent to December 18, 1995;
- (c) in his view the Appellant was capable of returning to work following the motor vehicle accident and that MPIC was justified in terminating the IRI payments to the Appellant when they did.

DISCUSSION

The subsequent medical reports of Dr. Narvas, and the clinic reports of Dr. Huebert, corroborate

the Appellant's testimony that she constantly complained to both doctors about the consistent excruciating pain to her thigh and hip.

Dr. Huebert in his report to MPIC dated December 6, 1999 indicates that although he is not certain, it was his impression that in most of the time periods when he saw the Appellant she had actually been working, although with some difficulty, and having to work a lighter job because she could not manage to do heavy work. However, in this report Dr. Huebert acknowledges that an examination of his clinical notes indicates that by and large he described the specific state of the Appellant's thigh but he did not delve into her employment history. Dr. Huebert therefore believes that she was definitely off for two months in 1997 but possibly was working the rest of the time he saw her.

There is also reference to her employment status in Dr. Huebert's clinical note dated January 17, 2000 where he reports that the Appellant advised him that since her accident she has never worked. Dr. Huebert states:

. . . I think I recall asking her to return to work. Whether or not she did I guess I cannot be certain of. (underlining added)

It is clear from Dr. Huebert's clinical notes and from the testimony of the Appellant that at no time during the period when Dr. Huebert commenced treating the Appellant on June 7, 1996 until January 17, 2000 did he ever have a conversation with her about whether or not she had worked after the motor vehicle accident. It is also clear from Dr. Huebert's clinical notes that he did not conduct any investigation into her employment status and was merely speculating when he informed MPIC that the Appellant had returned to work after the motor vehicle accident

doing lighter duties and continued to work until her surgery in July 1997, when she was off work for two months.

The Commission concludes that MPIC terminated the Appellant's IRI benefits on or about February 21, 1996 because of Dr. Narvas' initial mistaken assessment in respect of the Appellant's capacity to return to work. Notwithstanding medical reports from Dr. Narvas indicating that he had erred in his opinion about the capacity of the Appellant to return to work, MPIC did not change their position. It is apparent to the Commission that MPIC also relied on or was influenced by Dr. Huebert's comments in respect of the Appellant's employment status in maintaining their position not to reinstate IRI benefits to the Appellant. It should be noted that MPIC only reinstated IRI benefits to the Appellant for a period of two months following the thigh surgery on July 10, 1997 based on Dr. Huebert's medical opinion.

The Commission also finds that Dr. MacKay, in arriving at his medical opinion in respect of the reinstatement of IRI to the Appellant, was clearly influenced by the comments of Dr. Huebert as to the Appellant's employment history subsequent to the motor vehicle accident. Dr. MacKay conducted a paper review and at no time had the opportunity to meet with and interview the Appellant to determine whether she was credible in respect of her capacity to return to work. However, Dr. Narvas, her treating physician, did have the opportunity on many occasions to see the Appellant, to interview her and to assess her credibility in respect of her assertion that she was incapable of returning to work because of the pain to her right thigh.

The Commission notes that there is a conflict between the Appellant's testimony and the discussion with the case manager on November 12, 1996 about the Appellant's reasons for not returning to work. The Commission had the opportunity, on three separate occasions during the

appeal hearings, to assess the Appellant's ability to communicate in the English language. The Commission is satisfied the Appellant has some language difficulties which may have caused miscommunication between the Appellant and her case manager, as well as between the Appellant, Dr. Narvas and Dr. Huebert in respect to the capacity of the Appellant to return to work. As a result of such miscommunications, misinformation in respect of the Appellant's capacity to return to work may have been unintentionally provided by the Appellant to her doctors, who in turn may have unintentionally provided the same information to the case manager in respect to the Appellant's capacity to work. The Commission therefore concludes that having regard to the Appellant's language difficulties, her inability to return to work was due to the physical pain she was suffering not because there was no work available to her.

The Commission finds the Appellant testified in a direct and straightforward manner, attempted to the best of her ability to answer the questions put to her by MPIC's legal counsel and the Commission, finds that her testimony was consistent throughout and that she was therefore a credible witness. The Commission determines that in respect of any conflict in the testimony between the Appellant and the case manager, and between the Appellant and Dr. Huebert, the Commission gives greater weight to the testimony of the Appellant.

The Appellant suffered a significant series of injuries in the accident that had a devastating effect on her life. The large hematoma, which Dr. Huebert confirms was as a result of the motor vehicle accident, was not removed until July 10, 1997, a period of twenty-one months after the motor vehicle accident. During that entire period of time the Appellant suffered enormously from the existence of a large hematoma in her right thigh. The medical reports of Dr. Narvas and the clinical notes of Dr. Huebert consistently indicate the complaints made by the Appellant as to the excruciating pain she was suffering as a result of this large hematoma and corroborate

her testimony as to the existence of a medical condition which would have prevented the Appellant from working.

As well, the testimony of the Appellant is confirmed by the testimony of her sister who described the pain and suffering that the Appellant endured as a result of the presence of the hematoma in the Appellant's thigh.

It is unfortunate that Dr. Narvas initially concluded that the Appellant was capable of returning to work within a few weeks of the motor vehicle accident. It is clear from his subsequent medical reports that Dr. Narvas recognized his error, changed his position and thereafter consistently reported the constant pain the Appellant had in respect of her right thigh and her incapacity to return to work.

It is also unfortunate that a period of twenty-one months elapsed from the time of the motor vehicle accident until the time the Appellant's hematoma was removed from her right thigh. It is apparent to the Commission that Dr. Huebert was speculating when he advised MPIC that he believed the Appellant was working during the entire time he was treating her and these comments adversely affected the Appellant's entitlement to IRI benefits. Dr. Huebert did acknowledge in his clinical note of January 17, 2000 "*I think I recall asking her to return to work. Whether or not she did I guess I cannot be certain of.*" (underlining added)

The Commission is satisfied that Dr. Narvas, who treated the Appellant in respect of the motor vehicle injuries arising from the accident, had observed her and interviewed her on many occasions, and was in the best position to determine whether or not the Appellant was suffering from pain to her right thigh which prevented her from working. In these circumstances the

Commission notes that Dr. MacKay did not have an opportunity over a period of time of meeting with the Appellant, discussing her medical problems and making an assessment as to her credibility. However, Dr. Narvas did have this opportunity of determining the credibility of the Appellant in respect of her capacity to work and therefore the Commission, in these circumstances, gives greater weight to the latter medical opinions of Dr. Narvas than it does to the medical opinions of Dr. MacKay.

Having regard to the nature of the surgery, the consistent complaints the Appellant made to both Dr. Narvas and Dr. Huebert about the constant pain to her right thigh, and the candid testimony of the Appellant, the Commission determines that the Appellant has established on the balance of probabilities that MPIC improperly terminated the IRI payments to the Appellant on January 10, 1996 and that the Appellant was entitled to continue to receive IRI payments after this date.

The Commission notes that following the Appellant's surgery on July 10, 1997 the Appellant received IRI benefits for a period of two months based on Dr. Huebert's opinion that the Appellant would be unable to work for a period of two months following her surgery. The Commission disagrees with Dr. Huebert's opinion that the Appellant was capable of returning to work two months after her surgery in the month of July 1997.

Dr. Huebert's last clinical note on file dated January 17, 2000 states:

Patient continues to complain of pain in the right thigh. She says when she actively moves the right ankle there is some discomfort in the thigh. On examination there is full range of hip, knee and ankle movements. There is an area of tenderness on the lateral aspect of the right thigh. There is no other disfiguration as far as I can tell. The patient claims that since her car accident she has never worked. I think I recall asking her to return to work. Whether or not she did I guess I cannot be certain of. See in 2 months. At that time she will have thought about whether she would like an injection of Depo-Medrol into the right thigh.

It should be noted that the Appellant, six months after the surgery, continued to complain of the pain in her right thigh, a complaint the Appellant had since the date of the accident, five years prior to her visit to Dr. Huebert on January 17, 2000. It should further be noted that in this clinical note Dr. Huebert indicated he wished to treat the right thigh pain with an injection of Depo-Medrol into the right thigh. The purpose of this drug is to help reduce the pain in the Appellant's right thigh.

The Appellant testified at the hearing that since the date of the accident she continued to have pain to her right thigh and that this pain was not alleviated as a result of the surgery. She further testified that subsequent to the surgery she was incapable of returning to work because of the right thigh pain. Dr. Huebert's clinical note dated January 17, 2000, six months after the surgery, corroborates the Appellant's testimony in this regard. The Commission determines that as of January 17, 1997 the Appellant, due to the injuries sustained in the motor vehicle accident, was unable to continue her employment as a sewing machine operator.

The Commission therefore determines that MPIC, contrary to Section 110(1)(a) of the Act, improperly terminated the Appellant's IRI payments and directs that MPIC reinstate the IRI payments except for the two month period following the surgery when IRI payments were made.

Entitlement to further permanent impairment benefits for scarring of the right thigh

The relevant section of the MPIC Act and Regulations in respect of the above-mentioned appeals are as follows:

Lump sum indemnity for permanent impairment

127 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.

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The Internal Review decision dated August 21, 2002 rejected the Appellant's Application for Review in respect of permanent impairment benefits for scarring of the right thigh, including changes in form and symmetry. The Internal Review Officer, arriving at his decision, notes that Dr. MacKay, Medical Consultant, MPIC's Health Care Services Team, requested Ms. Heather Howdle, a physiotherapist, to further assess permanent impairment entitlements in respect of scarring of the right hip. Ms. Howdle did make an assessment, which is contained in her report to the case manager dated October 18, 2001. In respect of this report, the Internal Review Officer states:

According to Ms. Howdle, you had scarring on your right hip, measuring 6.12 square centimetres. It is also determined that you have a 4 centimetre difference in girth of the thigh related to the sequela of the cystic hematoma. Ms. Howdle indicated that according to Table 17 of the Permanent Impairment Schedule, that would fit into the mild, moderate range (1%-4%) for a change in form and symmetry.

Having received Ms. Howdle's report, Dr. MacKay addressed your Permanent Impairment entitlement in his memorandum of November 14, 2001. Specifically, he stated:

“According to the impairment manual, an individual that sustains an injury to any part of the body except the fact that results in a change in form and symmetry as well as scarring is entitled to the higher of the two percentages obtained under either heading without exceeding the maximum impairment percentage prescribed for that body.

With this in mind, it is my opinion that N.L. is entitled to an additional 6.12% permanent impairment benefit as a result of the injuries she sustained secondary to the incident in question.”

The Internal Review Officer determined:

Having had the opportunity to review your file, it is my decision that the Permanent Impairment award of 6.12% for scarring of the right thigh, including changes in form and symmetry, was calculated correctly in accordance with the provisions of the *Act* and Regulations. Therefore, I am upholding that decision and dismissing your Application for Review.

The Commission has reviewed the report of Ms. Howdle and Dr. MacKay and is satisfied that the Appellant has not established, on the balance of probabilities, that she is entitled to an increase beyond the 6.12% that has been awarded to her in respect of this impairment and, as a result, dismisses the Appellant's appeal in this regard.

Entitlement to permanent impairment benefits for hip and thigh problem

In respect to the entitlement to permanent impairment benefits for hip and thigh problems, Dr. MacKay, Medical Consultant, MPIC's Health Care Services Team, in a report to the case manager dated August 22, 2001 found that, after reviewing the entire medical file, the medical evidence does not indicate that the Appellant's physical impairment might have caused her to limp at times, was a result of her pain and not the result of a condition adversely affecting musculotendinous structures and/or joint.

However, the Commission is satisfied, upon a review of the medical evidence, assessing the testimony of the Appellant and having regard to their own observations of the Appellant's movements at the appeal hearing on three separate occasions, that the Appellant suffers from a permanent impairment to her right thigh as a result of the motor vehicle accident. Pursuant to Subdivision 2, Section 2.3 of Schedule A, Regulation R.M. 41/94 the Commission directs that MPIC compensate the Appellant for the permanent impairment in respect of her hip and thigh problems in the amount of 2%.

Entitlement to permanent impairment benefits for vision problems

Dr. Adrian Long, ophthalmologist, provided a report to MPIC dated August 9, 1996. In this report Dr. Long indicates that the Appellant was complaining of an uncomfortable eye, which dated subsequent to the motor vehicle accident. Dr. Long, in his report, states there was no sign of injury but the Appellant's history was suggestive of recurrent corneal erosion, which is quite a common condition. He further states that he provided the Appellant with the appropriate treatment and when he subsequently saw her, she advised him that she had improved. Dr. Long concludes his report by saying that the Appellant will not be left with any impairment of ocular function or health as a result of the accident.

The Commission therefore determines that the Appellant has not established, on the balance of probabilities, that she is entitled to a permanent impairment benefit for a vision problem and, therefore, dismisses her appeal in this respect.

Dated at Winnipeg this 15th day of July, 2003.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

WILSON MACLENNAN