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## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by R.H.  
AICAC File No.: AC-98-47**

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

**APPEARANCES:** The Appellant, R.H., was represented by Mr. Lawrence McGonigal;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Dianne Pemkowski

**HEARING DATE:** December 12, 2002 and May 16, 2003

**ISSUE(S):** Assessment of Permanent Impairment Benefits

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

**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

R.H. (hereinafter referred to as the 'Appellant'), was involved in a motor vehicle accident on March 14, 1995 wherein he sustained a significant brain injury. As a result of this motor vehicle accident, the Appellant suffered the following problems: tinnitus, vertigo, hearing loss, erectile difficulty, unnatural mood swings, strained relationships with his wife and children and difficulty attending social functions. The Appellant has received Permanent Impairment awards as follows:

Tinnitus	3%
Loss of Hearing	3%
Vertigo	2%

MPIC has, in addition, having regard to the brain injury that the Appellant suffered arising from the motor vehicle accident, provided a further award to the Appellant of 15% in accordance with Division 9: Mental Function System, Subdivision 1: Organic Brain Syndromes, Paragraph 4.

### **Application for Review**

The Appellant made Application for Review of this decision. In an Internal Review decision dated July 2, 2002, the Internal Review Officer rejected the Application for Review and confirmed the decision of the case manager. In arriving at that decision the Internal Review Officer made reference to the submission of Mr. McGonigal, legal counsel for the Appellant, and stated:

According to comments contained in Mr. McGonigal's letter, the issue appears to be whether you should be placed in Category 3 or 4 of Subdivision 1 of Division 9 of the Impairment Schedule. Those categories are as follows:

3. Alteration of the higher cognitive or integrative mental functions which moderately impair the performance of the tasks necessary for every day life and require occasional supervision for performing such activities, including any side effects of medication. 20 to 45%
  
4. Alteration of the higher cognitive or integrative mental functions which slightly impair the performance of the tasks necessary for every day life, including any side effects of medication: 7 to 15%

It was Mr. McGonigal's position that you "...should be at least in the higher end of Category 3 of the noted schedule."

Mr. Loechner's decision to provide you with a permanent impairment benefit in accordance with Category 4 is supported by the psychiatrist Dr. Marilyn MacKay (see her report of December 14, 2000) and clinical psychologist Dr. Ted Gupton (see his report of September 20, 2001). Additionally, the medical, psychological and psychiatric reports were resubmitted to The MPI Psychological Consultant, Dr. Allan Moore, who provided an Inter-Departmental Memorandum of October 23, 2001. Specifically with respect to

the classification, Dr. Moore stated therein;

“Again, given your instruction to give R.H. the benefit of the doubt, I believe that an impairment award of 15%, the maximum recommended by Dr. Gupton in his conclusions, can be, discounting the above issues discussed, justified. As a result, I would recommend consideration of a 15% impairment award.”

As you can appreciate, the nature of the psychological and the psychiatric evidence in your file is extensive. To that extent I believe that the comments of Mr. McGonigal in his letter of May 6, 2002 have been adequately taken into account when the decision was made to award you the maximum amount under Category 4. It is therefore my view that the medical, psychological and psychiatric evidence establishes on a balance of probabilities that you are entitled to a permanent impairment benefit under Category 4. Therefore, I am upholding Mr. Loechner’s decision of January 29, 2002 and dismissing your Application for Review.

### Notice of Appeal

The Appellant filed a Notice of Appeal dated July 17, 2002 and asserted that the award of 15% for Permanent Impairment under Subdivision 1 of Division 9 (Category 4) is inadequate. The Notice of Appeal further stated:

2. The alteration of the higher cognitive or integrative mental functions moderately impair or significantly impair the performance (sic) of the tasks necessary for every day life and require occasional supervision for performing (sic) such activities, including any side effects of medication. The award should be in category 2 or 3 of Subdivision 1 of Division 9.
3. The medical evidence shews (sic) the alteration to the higher cognitive or integrative mental functions, however, the impact on R.H.’s day to day life has not been taking into account when awarding the permanent injury award.

### APPEAL

Section 127 of the MPIC Act provides that:

**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.

The hearing of this appeal took place December 12, 2002 and May 16, 2003.

Manitoba Regulation 41/94, Schedule A, sets out the amount available for each type of permanent impairment as a percentage of the total amount available, and are referred to in the Internal Review decision which is quoted above in these Reasons for Decision.

T.H., the Appellant's wife, testified at the hearing that, as a result of the motor vehicle accident, there has been a substantial adverse affect to the quality of the Appellant's life, his work and his relationship with his wife and children.

T.H. further testified that:

- (a) Prior to the motor vehicle accident the Appellant was employed as a truck driver and had no fear of driving. After the motor vehicle accident the Appellant had developed a fear of driving.
- (b) Prior to the motor vehicle accident the Appellant was able to perform home repair activities and to cook for the family without supervision. After the motor vehicle accident it was unsafe to the Appellant personally and to the members of her family to permit the Appellant to perform ordinary home repairs. After the motor vehicle accident it was too dangerous to permit the Appellant to cook without supervision.
- (c) Since the Appellant was unable to continue his previous employment as a truck driver due to the motor vehicle injuries, the Appellant undertook retraining as a bookkeeper but was unable to complete the two year course in the allotted time and completed his training within a three year period.
- (d) Prior to the motor vehicle accident the Appellant was a loving, supporting father to his children. However, as a result of the accident he has developed mood swings, became impatient, rigid, lacked the concentration needed to provide parental guidance for his children's homework, projects or day-to-day tasks and because he was less focused he was less able to deal with the stress in raising children. As a result, a very difficult and stressful relationship developed between the Appellant and his children.
- (e) Prior to the motor vehicle accident the Appellant was capable of exercising discipline in respect of his children but since the accident has suffered mood swings, became rigid and, therefore, was unable to discipline his children. As a result, the disciplinary responsibility has been taken undertaken solely by T.H. and the Appellant is no longer able to carry out his disciplinary responsibilities as

a father in respect of his children.

- (f) Her personal relationship with her husband has dramatically changed:
- i) He is no longer the loving, supportive husband she knew prior to the accident when they shared a very happy home life, a very healthy sexual life and participated together in many social activities.
  - ii) There has been a fundamental change in the personality of the Appellant due to the motor vehicle accident. As a result, T.H., with great effort, has had to learn to cope with the Appellant's irritability, his rigidity and mood swings.
  - iii) Due to the Appellant's erectile difficulties since the motor vehicle accident, their sexual life has suffered as well.
  - iv) Prior to the motor vehicle accident the Appellant and T.H. enjoyed attending a variety of social activities. However, since the motor vehicle accident, the Appellant is unable to cope with the noise when he attends social functions and, as a result, he is able to only stay at these functions for 15 minutes or half an hour and then is compelled to leave the social activity.
  - v) As a result of the motor vehicle injuries there has been a significant change in the Appellant's personality which nearly resulted in the destruction of the marriage of T.H. to the Appellant. T.H. testified that only with a supreme effort has she been able to keep the marriage together.

T.H. concluded her testimony by indicating that she had become the primary care giver in respect to her children and had assumed many of the activities which were formerly shared with her husband.

The Appellant's testimony corroborated T.H.'s evidence in respect of the change in the quality of his life, his work and his relationship with his wife and children. The Appellant testified:

- (a) In respect of his present employment he has had enormous difficulty in attempting to learn the tasks and routines of office work. He worked very hard to overcome these difficulties in order to secure employment on a permanent basis. He becomes easily fatigued and unable to focus and concentrate and this adversely affects his ability to carry out his employment tasks. The Appellant is extremely worried that he may not be able to succeed in learning the tasks of his job that he is presently employed in and, as a result, may not be able to keep his present

employment.

- (b) There has been a deterioration in his relationship with his wife and children and he is attempting to deal with his personality changes by modifying his behaviour.
- (c) That both he and his wife have made tremendous efforts to maintain their marriage and have been successful in this regard.

### Submissions

MPIC's legal counsel submitted to the Commission that the decision of the Internal Review Officer was correct and was supported by the medical opinions of Dr. Maralyn MacKay, in her report dated December 14, 2000, and the report of the clinical psychologist, Dr. Gupton, dated September 20, 2001. Legal counsel referred to Dr. Gupton's lengthy medical report, which concluded:

R.H.'s clinical presentation and performance on psychometric tests is consistent with a man whose general cognitive abilities remain intact, but who has mild problems with scanning for relevant cues, acquiring and maintaining set, benefitting from feedback, and these are all consistent with complaints present by both him and by his wife that he has problems with affective regulation.

Dr. Gupton further stated in his report:

He does suffer psychological distress, characterized by obsessive worry and anxiety about his health, and his social and occupational future. He is also prone to despondency and depressed mood, but this is reactive and he does not currently meet criteria for a diagnosis of Clinical Depression. I have considered the possible contributions of his psychological distress to his performance on psychometric tests, and it is my opinion that there is evidence for mild traumatic brain injury and that this evidence is not simply a reflection of any transitory emotional state or disorder.

MPIC's legal counsel also referred to the report of Dr. MacKay, dated December 14, 2000, who stated:

The assessment to date supports the assumption that at the time of the motor vehicle accident this man had a closed head injury and has been left with sequelae which are significant, although of a relatively mild degree.

He has difficulty with higher cognition and integrative mental functions which impair the performance of tasks necessary to his social and occupational functioning. The

emotional dyscontrol is typical of closed head injury with frontal lobe sequelae. In the schedule of impairment ratings provided, under Division 9, Mental Function System, Subdivision 1, Organic Brain Syndromes, the degree of impairment is rated under five categories. In my opinion this man falls into Category 4.

Legal counsel for MPIC therefore submitted that the assessment by MPIC placing the Appellant in Category 4 was correct and should not be disturbed.

Mr. Lawrence McGonigal, legal counsel for the Appellant, reviewed the testimony of both the Appellant and T.H., and submitted that:

- (a) Their testimony established that the brain injury suffered by the Appellant in the motor vehicle accident, significantly rather than slightly, impaired the Appellant's performance of the tasks necessary for everyday life.
- (b) The Appellant, subsequent to the motor vehicle accident, was unable to continue his employment as a truck driver, an occupation he held for many years and, as a result of which, he was able to support his family.
- (c) Since the motor vehicle accident he has been required to retrain for a new job and, having regard to his brain injuries, had extreme difficulties in passing the training course he took and in learning the tasks of the job he is presently occupying.
- (d) There has been a profound change in the personal life of the Appellant in respect of his relationship with his wife and his children. Due to the personality changes as a result of the motor vehicle accident injuries, the Appellant no longer has a satisfactory relationship with his children and the essential parental responsibilities of disciplining the children now lie solely with T.H..
- (e) The Appellant is no longer able to carry out the ordinary home activities and cooking meals which he did in the past without supervision.
- (f) The Appellant has difficulty attending social functions.
- (g) The Appellant is unable to enjoy a normal sexual life with his wife due to his erectile difficulties.

Legal counsel submitted that as a result of the organic brain syndrome suffered by the Appellant there was a significant impairment of the Appellant's performance necessary for everyday life and that this performance required occasional supervision. As a result, legal counsel submitted

that the Appellant should have been classified in Category 3 not Category 4.

### **Conclusion**

The Commission has determined that both the Appellant and T.H. were very credible witnesses, who both testified in a direct and consistent fashion, and that the Commission accepts their evidence on all material issues. The Commission finds that, notwithstanding the assessments of Dr. MacKay and Dr. Gupton, having regard to the testimony of the Appellant and T.H., the Commission is satisfied that on the balance of probabilities the Appellant has established that the motor vehicle accident adversely affected his cognitive functions, which significantly impaired the performance of the tasks necessary for his everyday life and that the Appellant requires occasional supervision performing these activities.

The Commission is satisfied, upon observing the manner in which the Appellant testified, his struggle in attempting to comprehend the questions put forth in examination-in-chief and in cross-examination, the difficulty he has in answering fairly simple questions clearly indicates that the Appellant is unable to focus, concentrate, comprehend and analyze abstract ideas and that there has been a significant alteration of the Appellant's cognitive functions due to the motor vehicle accident.

The Appellant presented himself as a very timid, fearful person who was struggling to cope with a profound change in his life due to the motor vehicle accident. The Appellant is unable to perform a number of ordinary tasks such as cooking, doing home repairs, disciplining his children or maintaining relationships with both his children and his wife. The Commission is satisfied, on the balance of probabilities, that the effect of the motor vehicle accident on the Appellant's cognitive functions has not resulted in a slight impairment in the performance of his

tasks for every day life, but is a significant impairment in the performance of these tasks.

The Commission therefore concludes that the Appellant has established, on the balance of probabilities, that he should be placed in Category 3 of Subdivision 1 of Division 9 of the Impairment Schedule and that the impairment award should be increased from 15% to 25%. The Commission therefore determines that the decision of MPIC's Internal Review Officer, bearing date July 2, 2002, be rescinded and the foregoing be substituted for it.

Dated at Winnipeg this 11<sup>th</sup> day of July, 2003.

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**MEL MYERS, Q.C.**

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**DR. PATRICK DOYLE**

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**WILSON MACLENNAN**