



## Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by D.A.L.  
AICAC File No.: AC-03-18-LG

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Ms. Wendy Sol  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, D.A.L., was represented by Mr. Allan Ludkiewicz;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

**HEARING DATE:** May 25, 2004, December 30, 2004 and January 25, 2005

**ISSUE(S):**

1. Entitlement to Income Replacement Indemnity benefits from and after September 14, 2003;
2. Should a Functional Capacity Assessment be arranged and funded by MPIC;
3. Should MPIC fund some form of retraining.

**RELEVANT SECTIONS:** Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

**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

D.A.L. (hereinafter referred to as the "Appellant") was involved in a motor vehicle accident on March 12, 1999. The Appellant was walking across Osborne Street when a vehicle making a left turn struck her in the area of her left knee. The Appellant, in her Application for Compensation to MPIC, dated March 18, 1999, indicated that she had sustained bruising and swelling to her left knee, bruised right elbow, bruised right shoulder and left wrist. At the time of the motor vehicle accident she had been employed as a floral designer at [text deleted] for several years.

The Appellant was referred to Dr. Engel, an Orthopedic Surgeon, by MPIC. Dr. Engel saw the Appellant on September 3, 1999 and again on September 20, 1999 and provided reports to MPIC dated September 20, 1999 and to MPIC's Occupational Therapist/Consultant, dated August 23, 2000. In his report dated September 20, 1999 Dr. Engel stated:

1. the Appellant's ligament in her left knee was stable but she complained of patellofemoral pain.
2. she did not require knee surgery but needed an aggressive physiotherapy program.
3. there had been improvement in her knee as a result of physiotherapy but there would be no further improvement in the future.
4. in respect of her knee, he diagnosed arthrofibrosis.

Dr. Engel, in a written report to MPIC dated August 24, 1999, made reference to a possible presence of reflex sympathetic dystrophy in respect to the Appellant's left knee.

The Commission notes that the Occupational Therapist who had been treating the Appellant, in a report dated January 19, 2000, states that Dr. Engel approved a return to work program for the Appellant which would commence on February 14, 2000.

The Commission further notes that the Appellant saw her personal physician, Dr. Elkin, on several occasions who reported as follows:

1. in a report dated May 2, 2001 he documented that the Appellant should not increase the number of hours of work to eleven (11) hours until May 14, 2001.
2. in his June 11, 2001 report he stated:
  - (a) the Appellant was still having severe pain to her left knee which was worse near the end of her work shift.

(b) he was of the opinion that the Appellant was not capable of returning to her full-time regular duties.

Dr. Stitz, in a report to MPIC dated May 8, 2001, stated:

1. his examination of the Appellant identified a limitation of knee extension and a slight decrease in flexion.
2. in his opinion the Appellant's clinical presentation was in keeping with chronic left knee pain.

On March 26, 2001, D.B., the manager of [text deleted], wrote to MPIC advising MPIC that [text deleted] would not be providing a position of employment to the Appellant. D.B. informed MPIC that although the Appellant had improved her work performance, she was unable to meet the demands of her work duties and she was not employable in the flower shop industry in Winnipeg.

The Appellant's Occupational Therapist, in a report dated October 1, 2001, stated that the Appellant had been working thirty (30) hours per week and had reported an increase in knee pain when working.

Dr. Elkin, in a report dated October 7, 2001, stated that in his opinion the Appellant's knee condition had not changed, the condition was permanent and she would not be able to resume her regular duties at work, and that the Appellant would likely require retraining.

On November 7, 2001 the case manager requested an assessment from Dr. Michael J. MacKay, Medical Consultant to MPIC's Health Care Services Team. In a report to MPIC dated January

24, 2002 Dr. MacKay, after reviewing all of the medical reports on MPIC's file, concluded that the medical evidence did not identify a physical or psychological impairment of function which would prevent the Appellant's return to her pre-accident employment as a floral designer or necessitate retraining for a less physically demanding position. Dr. MacKay determined that the Appellant's work related duties did not expose her knee to movements beyond her physical capabilities even though he noted that the Appellant had a loss of range of motion.

The case manager accepted the medical opinion of Dr. MacKay and wrote to the Appellant on August 28, 2002 and advised her that a review of the Appellant's medical file had been conducted by MPIC's Medical Consultants and they concluded that she was physically and psychologically capable of returning to her full time occupational duties. As a result, the Appellant was not entitled to receive any further Income Replacement Indemnity ('IRI') benefits and they would cease as of September 15, 2002.

**Internal Review Officer's Decision terminating the Appellant's IRI benefits**

The Appellant made an Application for Review dated October 16, 2002 seeking a review of the case manager's decision.

The Internal Review hearing took place on November 14, 2002 and the Appellant was represented at the hearing by Mr. Allan Ludkiewicz. On December 11, 2002 the Internal Review Officer wrote to the Appellant confirming the case manager's decision and dismissing the Application for Review. In his decision, the Internal Review Officer stated that the case manager had adopted the medical opinion of Dr. MacKay in terminating the IRI benefits and stated:

19. The substantive opinions expressed by Dr. MacKay in his memo dated January 24, 2002 were incorporated at length into the decision letter from the case manager dated August 28, 2002. In essence, Dr. MacKay concluded that the medical evidence did not identify a physical or psychological impairment of function which would prevent a return to the pre-accident employment or necessitate retraining for a less physically demanding occupation.

20. In his July 7, 2002 memo, Dr. MacKay addressed the recommendation for a functional capacity assessment. He noted that these types of assessments can be beneficial where there is objective evidence of an impairment of physical function, but they tend not to provide a true indication of functional abilities when performed on individuals with chronic pain conditions (because the testing tends to be limited by their subjective pain complaints). At the hearing, [D.A.L.] said she firmly believed that a functional capacity assessment would show that she is unable to return to full-time employment.

21. In the same memo, Dr. MacKay acknowledges that [D.A.L.] has a residual permanent loss of range of motion in her left knee. But after reviewing [D.A.L.'s] job description, Dr. MacKay concluded that her work-related duties would not expose the knee to movements that are beyond her physical capabilities.

The Internal Review Officer further stated:

#### DISCUSSION & RATIONALE FOR DECISION

I accept that [D.A.L.'s] subjective complaints of left knee pain are genuine and sincere, and I accept that she considers the pain disabling.

From an objective standpoint, however, I am simply unable to conclude that there is anything structurally wrong with her left knee. At least three specialists - two orthopedic surgeons and a physical medicine specialist - have reviewed the extensive test results. They have all come to the conclusion that the knee is structurally sound. There is no contrary medical evidence. Even the clinical notes kept by Dr. Elkin (who supported her decision to stop working) make numerous references to the fact that the knee is stable.

Dr. Kayler made it quite clear in November 2000 that he felt a return to work was appropriate, and that full-time hours were achievable by March 2001. Notwithstanding that very clear opinion, IRI payments continued unabated for almost two more years.

It is clear from the material that [D.A.L.] requires some assistance with some of her work-related tasks. It is also clear that the layout of the shop (especially the stairs), and its small staff, present some unique challenges for her. Not all of these challenges could be overcome by implementing the various suggestions of the occupational therapist, but there were some functional improvements realized.

Nevertheless, the test under Section 110(1)(a) is an objective one and, in spite of her undoubtedly sincere protestations to the contrary, the objective medical evidence supports the conclusion that she is, to use the words of the statute, "able to hold the employment that ... she held at the time of the accident".

I am therefore confirming the decision of the case manager dated August 28, 2002.

In the circumstances, I cannot justify directing that MPI fund a functional capacity assessment (which, as noted above, is unlikely in any event to provide a true picture of [D.A.L.'s] functional abilities) or that retraining be funded.

### Appeal

The Appellant filed a Notice of Appeal dated January 27, 2003. The relevant provision of the MPIC Act in respect of this appeal is Section 110(1)(a) which states as follows:

**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;

The appeal hearing took place on May 25, 2004, December 30, 2004 and January 25, 2005. The Appellant was represented by Mr. Allan Ludkiewicz and Mr. Terry Kumka represented MPIC.

The Appellant in a written statement dated July 5, 2004 supplied to the Commission by her legal counsel, stated:

My duties include a lot of walking, standing almost all the time, heavy lifting, bending, reaching for items, sometimes couching/squatting (sic) for item on low shelves, occasionally climbing a ladder. I had to be able to work at a very fast pace to be able to wait on customers, answer phones and fill orders. Being in the shop by myself for part of my shifts would make working at a fast pace a must. There are stairs in the shop and some things were (sic) keep downstairs. For example boxes for arrangements, some silk flowers, seasonal containers or seasonal product (ribbon, pine cones etc.) and the washrooms were downstairs.

The Appellant testified at the appeal hearing and confirmed the contents of this statement.

A Physical Demands Analysis of the Appellant's work duties as set out in a report from NRCS Inc to MPIC's case manager dated July 14, 1999 was filed in evidence at the appeal hearing and sets out the Appellant's work duties and responsibilities as follows:

1. Wrapping and boxing orders for deliveries. Prioritizing and filling orders throughout the day. Arranging for deliveries by courier service.
2. Servicing customers in store or over phone. Responsible for handling cash sales, credit transactions, adding invoices, making change.
3. As flowers (product) arrive by delivery, buckets (5 gallon pails) are filled with fresh water and filled with product and placed in coolers/displays.
4. Telephones are answered throughout the shift, of which there are 3 incoming lines (often at one time) as well as a fax which needs to be checked periodically. Checking computer order system for orders to be filled.
5. Opening the store front, placing signs on street on special occasions, climbing ladder to hang balloon arches over store front.
6. Changing water in "Oasis" buckets (green foam blocks flowers are inserted into for arrangements).
7. Cleaning pails/buckets, cleaning out coolers, washing down glass doors. See below for further details on cooler cleaning.
8. Completing "pre-greening" or breaking off leaves on ferns, greenery, cutting stems, cleaning product (cutting stems, leaves, rinsing).
9. Filling and re-filling coolers with arrangements as needed during day.
10. Making extra corsages; servicing balloons (filling balloons with helium using tank, attaching ribbons),tying bows, wiring silks.
11. Completing various store cleaning i.e. sweeping and washing floors, dusting, taking out garbage (1-2 bags per shift).
12. Watering plants, trimming leaves etc.
13. When closed flowers arrive, performing "tenting", involves draping a cover over arrangements of flowers placed in warm water to promote opening of petals.
14. Transporting boxes of flowers from delivery vehicle to store when assistance needed. Opening boxes of product when delivery arrives (every 2nd day), large boxes are 4 x 2 ft. in dimension and therefore awkward to manage, may weight between 25- 50 lbs., and when able, are lifted using two people.
15. The Designer arranges and designs floral bouquets, arrangements and completes packaging/wrapping of the orders. Includes obtaining flowers from coolers at front of store and carrying to back work area on frequent basis.

NRCS Inc., in this report, after reviewing the duties of the Appellant's employment and physical demands of her job, stated:

It is my opinion that [D.A.L.] should not commence a GRTW (*Gradual Return to Work Program*) program at this time. Her job duties consist mainly of standing and walking activities. These activities need to be completed at a fairly rapid pace due to the demand for efficient customer service, and the general business of the store. The floor surfaces present a slipping and tripping hazard, especially to someone using crutches and with balance deficits. She also would be unable to carry various items due to using crutches, not to mention that her activity tolerance is low at this time. In discussing activities which could be performed in a seated position, few were identified (i.e. tying bows, ribbons, wiring silks) and therefore do not allow an

appropriate type of program to be developed. It is my recommendation that a GRTW program be addressed at a later date, optimally when further medical information and recommendations can be obtained regarding the status of the claimant's left knee and/or the claimant's mobility status improves. (underlining added)

Dr. Engel in his medical report to the Occupational Therapist dated August 23, 2000 outlined the problems the Appellant would have in returning to work and stated:

6. Main problem: The problems I would have are returning to work; i.e., barriers that will be difficult to overcome, including some of the following activities that this lady has to perform.
  - a) This would be lifting large boxes of flowers weighing between 25 and 50 lbs, cleaning of the coolers, moving of 5 gallon pail product, weighing 10-20 kg per pail, and then carrying these 50 feet.
  - b) Also, the employer indicated that the shop is not designed to be run by only one person. Therefore, a lot of time is spent running from one area to another, necessitating a person to be highly mobile. I have never seen that with [D.A.L.] on any of her visits, including the very last visit. I would question whether this lady could run from one area to another for a day's shift.
  - c) Another thing is going to the washroom will be difficult. If the john is downstairs 20 steps, this would be exceedingly difficult for [D.A.L.]. She has difficulty walking on a level.
  - d) Other physical demands that will be difficult: climbing to access high shelves would be difficult; kneeling and squatting, again, due to her limited range of motion of 115°. This would make it difficult to do unless she squatted with one leg, but that requires a relatively strong opposite leg, especially when you have to balance yourself, pick up something, and return to the standing position. This can be done in someone who is young, fit, not overweight, and coordinated, but I do not think [D.A.L.] would be able to do this.

I think this is most of the concern with her job description that I would have. I have noted that there were some recommendations for a trial of return to work, and these all sound very good. The bottom line is to not sit around in a Committee and banter forth ideas of whether someone can or cannot go back to work. The best thing is to try a trial of return to work and see whether she can do it. My gut reaction is that she would probably fail on return to work. (underlining added)

The Appellant testified at the appeal hearing that:

1. she attempted to return to work on a gradual basis but was unable to carry out the responsibilities of her duties.

2. she required a cane when walking, and was unable to move at a fast pace on wet floors when waiting on customers, answering phones and filling orders when she was left alone in the shop.
3. she was physically unable to carry the buckets, lift and handle heavy floral arrangements and required a co-worker to undertake these activities.
4. she had difficulty in standing, walking, bending, and squatting in carrying out her work activities.
5. the chronic pain in her left knee increased during the course of the work day.

In his submission to the Commission the Appellant's legal counsel submitted that she had established, on the balance of probabilities, that she was unable to continue her employment as a result of the injuries she sustained in the motor vehicle accident and MPIC erred when terminating her IRI benefits. He referred to the testimony of the Appellant in respect of her physical condition and her inability to carry out the physical demands of the job, the written statements of the Appellant's employer in respect of her inability to work, and the medical opinions of Dr. Engel and Dr. Elkin which corroborated the Appellant's testimony that she was physically incapable of returning to her full time employment.

The Appellant's legal counsel therefore submitted that MPIC erred in terminating the Appellant's IRI benefits and requested that they be reinstated retroactive to September 14, 2003. The Appellant's legal counsel further requested that MPIC be required to obtain a Functional Capacity Assessment and there should be retraining of the Appellant for a sedentary position.

MPIC's legal counsel submitted that:

1. the Internal Review Officer had properly considered and applied Section 110(1)(a) of the MPIC Act in determining that the Appellant was able to hold the employment that she held at the time of the accident and was justified in terminating the IRI benefits.
2. the Internal Review Officer had relied on the assessment of Dr. MacKay who, having reviewed all of the medical reports, concluded that the medical evidence did not identify physical or psychological impairment of function which would have prevented the Appellant's return to her pre-accident employment or to necessitate retraining for a less physically demanding occupation.
3. Dr. MacKay had recognized that the Appellant had suffered a residual permanent loss of range of motion in her left knee.
4. Dr. MacKay, after reviewing the Appellant's job description, had concluded that the work related duties did not expose the knee to movements that are beyond her physical capabilities.
5. three specialists – two orthopedic surgeons and a physical medicine specialist – reviewed all of the reports and concluded there is nothing structurally wrong with the Appellant's left knee, and that they had all come to the conclusion that the left knee was structurally sound.
6. Dr. Kayler had made it quite clear in November 2000 that a return of the Appellant to her pre-employment occupation was appropriate and that full time hours were achievable by March 2001.

MPIC's legal counsel therefore concluded, having regard to all of the medical evidence, that the Appellant had failed to establish, on a balance of probabilities, that she was unable to hold the employment that she held at the time of the accident and that the medical evidence did not justify funding a Functional Capacity Assessment nor that retraining be funded.

At the conclusion of the hearing, and prior to considering the evidence and argument, the Commission determined that it wished to obtain an independent medical report from an orthopedic surgeon as to whether or not the Appellant was capable, either entirely or substantially, to perform the essential duties of her pre-accident employment as a floral designer in a floral shop, and whether a Functional Capacity Assessment would demonstrate whether she was unable to return to her pre-accident employment as a floral designer. The Commission requested Dr. Peter MacDonald, an Orthopedic Surgeon, to provide his medical opinion in respect of these issues and provided Dr. MacDonald with all relevant information and all medical reports in respect of these issues.

On June 24, 2004 Dr. MacDonald provided a medical report to the Commission. Dr. MacDonald indicated he saw the Appellant on June 22, 2004, and after referring to the medical reports of Dr. Engel, physiotherapy treatments, and the report of Dr. MacKay, and stated:

Her past medical history is significant. She has had a previous deep venous thrombosis of the left lower extremity and was on Coumadin for six months. She also has a history of ulcerative colitis treated with 5-ASA and is currently in remission. She has a known hypercoagulable state and has been investigated by hematology. Her sister had a previous pulmonary embolism as a similar state.

Clinical exam today reveals that she is in no distress at rest. She walks with an antalgic gait on the left side. She uses a cane but is able to get around without it and does not use the cane in the house. She has no visible swelling or deformity. There is slight scarring on the outer aspect of the knee consistent with previous abrasions from the accident. She has no obvious effusion today. She has mild left quadriceps wasting. Her range of motion is 3° to 95° compared to 0 to 120 on the opposite site. She has tenderness along the medial joint line which is diffuse and not pinpoint. There is tenderness along the patellar tendon and tibial tuberosity as well as medial and lateral facet of the patella. She has less tenderness in the lateral joint line. There is no patellofemoral crepitus noted today. Lachman, drawer and pivot shift are negative. McMurray's test is negative. There is no excessive laxity in any other direction including rotational laxity. Her neurovascular status is normal.

My conclusion with this lady is:

1. She has posttraumatic arthrofibrosis and anterior knee related syndrome and anterior knee pain as a result. This has caused likely a mild sympathetic dystrophy in the left knee with continued anterior knee complaints and infrapatellar scarring.
2. She has continued deep soft tissue inflammation around the anterior knee.

I think she is currently disabled for a heavy job or any job where there is prolonged standing on hard surfaces, kneeling, climbing stairs or steps, squatting or crouching. She is therefore capable of only a sedentary type job. (underlining added)

In respect of future treatment Dr. MacDonald stated:

With regard to the knee I think it may be reasonable to consider further active treatment although I am not at liberty to do so as an independent medical consultant. I suggested to her that she be referred to Dr. Warren Froese who may consider a manipulation arthroscopy and medial and lateral patellar releases to attempt to regain a full range of motion in the knee although it is recognized at this date, some five years later, that this would be not guaranteed to improve her knee status. There is also a recognized risk of DVT or pulmonary embolism and she would have to be under prophylaxis perioperatively at the time of this procedure.

A copy of this report was provided to legal counsel for both parties. MPIC's legal counsel, referred Dr. MacDonald's report to Dr. MacKay for his comment. Dr. MacKay provided MPIC with his Inter-Departmental Memorandum dated July 19, 2004 wherein he stated that from an objective standpoint the information filed does not support Dr. MacDonald's medical opinion that there exists a sympathetic dystrophy. Dr. MacKay stated:

. . . Dr. MacDonald's examination findings are not in keeping with an individual with sympathetic dystrophy, in my opinion.

Dr. MacKay further stated:

From a functional standpoint, [D.A.L.] is capable of doing some activities with her left leg. Dr. MacDonald concluded that [D.A.L.] should avoid work duties that require prolonged standing on hard surfaces. As noted earlier in the file [D.A.L.] was provided an anti-fatigue mat in order to reduce stress and strain through her lower extremities when standing. Dr. MacDonald was of the opinion that [D.A.L.] should avoid kneeling, squatting and crouching. It is assumed that [D.A.L.] is able to kneel to some extent on her right knee and is able to squat within her functional range. Crouching would be difficult to perform based on the limitation of knee flexion. Based on my review of [D.A.L.'s] job demands, it is my opinion that she would not be required to perform these activities on a repetitive basis. Dr. MacDonald was of the opinion that [D.A.L.] was disabled from climbing stairs or steps. It is assumed that Dr. MacDonald did not imply all stairs and steps since [D.A.L.] would be required to climb stairs and steps

during her day-to-day activities. It is assumed that Dr. MacDonald was of the opinion that [D.A.L.] should not perform this type of activity on a repetitive basis.

The Appellant's legal counsel was provided with a copy of Dr. MacKay's Inter-Departmental Memorandum dated July 19, 2004. On July 15, 2004 the Appellant's legal counsel wrote to the Commission and submitted that in an independent medical assessment Dr. MacDonald has concluded, as a result of her accident, the Appellant was capable of only a sedentary type job. The Appellant's legal counsel further provided the Commission with an outline of the Appellant's duties that she was expected to perform on a full time basis as a floral designer at [text deleted]. A copy of this report was provided to MPIC's legal counsel.

At the request of MPIC's legal counsel the appeal hearing reconvened in order to permit MPIC's legal counsel to cross-examine Dr. Peter MacDonald in respect of the contents of his medical report dated June 24, 2004. The appeal hearing took place on December 30, 2004 and at the conclusion of Dr. MacDonald's examination, the Commission adjourned the proceedings in order to consider the evidence and argument that had been submitted at the appeal hearing.

### **Discussion**

The Commission notes there is no dispute between the Appellant and MPIC in respect of the issue of causation. MPIC acknowledges that the Appellant sustained injury to her left knee as a result of the accident but determined this injury did not prevent the Appellant from returning to her previous employment as a floral designer at [text deleted]. The Appellant, however, has asserted that as a result of the motor vehicle accident injury to her left knee she was prevented from returning to this employment on a full time basis. The Commission, in order to determine this appeal, is required to examine the nature of the Appellant's work as a

floral designer, and whether or not as a result of the motor vehicle accident injury she was able to carry out the essential duties of this employment.

In respect of the nature of the Appellant's work she testified that:

1. she was required to work in a small shop where there was limited staff and often she had to work by herself.
2. as a result of the injury the Appellant, who was unable to walk without the use of a cane across floors that were often wet, was required to carry out her duties in a quick and efficient manner and from time to time lift and carry heavy objects.
3. her duties involved a great deal of walking quickly, standing, squatting and at the same time providing courteous and prompt service to customers.
4. having regard to the totality of her duties, her work as a floral designer was extremely physically demanding.

The Commission finds that the testimony of the Appellant in respect of the nature of her work, is corroborated by:

1. the Physical Demands Analysis Report of NRCS Inc. dated July 14, 1999 which outlines in some detail the Appellant's job duties and is referred to earlier in this decision;
2. the medical report of Dr. Engel dated August 23, 2000 which outlines in some detail the job duties of the Appellant.

The Appellant testified at the appeal hearing that as a result of the injury she sustained in the motor vehicle accident she was unable to carry out the essential duties of the position of a floral designer on a full time basis.

Dr. MacKay, MPIC's Medical Consultant, in his Inter-Departmental Memorandum dated January 24, 2002, and his further report dated July 19, 2004, concluded that the Appellant was physically capable of returning to her pre-accident employment, notwithstanding the injury she sustained to her left knee as a result of the motor vehicle accident.

The Commission notes that the manager of [text deleted] stated that the Appellant was a valued employee and hoped she would return to full time employment. The Internal Review Officer in his decision dated December 11, 2002 found that the Appellant was a credible person and stated:

I accept that [D.A.L.'s] subjective complaints of left knee pain are genuine and sincere, and I accept that she considers the pain disabling.

The Appellant's testimony about her inability to carry out her duties was corroborated by:

1. the letter of D.B., Manager of [text deleted], dated March 26, 2001.
2. report of NRCS Inc., dated July 14, 1999.
3. the comments of Dr. Engel in his report dated August 23, 2000, the medical opinion of Dr. Elkin, her personal physician, in his letter dated June 11, 2001 and the medical report of Dr. MacDonald dated June 24, 2004.

D.B., Manager of [text deleted], advised MPIC in his letter dated March 26, 2001, stated that not only was the Appellant unable to physically perform the duties of a floral designer at [text deleted], but she was not employable in the floral shop industry:

[D.A.L.] (Claim No. 066312) has requested that [text deleted] inform you as you requested to whether she has an employment position with the company and if no why. [text deleted] will not be providing a position of employment for [D.A.L.]. We are a small company with only a few employees and each employee has to be able to manage many different duties of our shop; to make their position cost efficient. Our staff must also be able to manage the shop alone for a number of hours. [D.A.L.] is not able to manage the shop for a number of hours. We have one phone with two lines and another

phone with one line plus walk in customers. [D.A.L.] is unable to handle all the phone lines and walk in customers efficiently, which would affect our customer business and our potential profit for our company. Our staff must be physically able to handle the fast pace, heavy and strenuous work load (sic). [D.A.L.] is unable to handle the fast pace and heavy strenuous work load (sic) efficiently. [D.A.L.] tires quickly with the strenuous work load (sic) and can not keep up with fast pace. The environment of the shop, of wet floors and debris of stems and leaves makes work more difficult for [D.A.L.]. For this reason [D.A.L.] uses her cane at all times. These conditions make it easy to slip for any one. For [D.A.L.] the uneven and slippery floors are more difficult which slows her production down.

I am also sending you a three-page copy of an outline that was given to Melody Horvrisko (Occupational Therapist/Rehabilitation Consultant) of [D.A.L.'s] duties that she performed prior to the accident and difficulties after accident. [D.A.L.] has made improvement but is still unable to meet the demands of her work duties.

Basically [D.A.L.] is not employable in this industry in Winnipeg. Predominately the Flower Shops in Winnipeg are manned with only 1-2 people. Each person needs to be proficient in many areas. (underlining added)

NRCS Inc., in its report dated July 14, 1999, after reviewing the Appellant's employment and physical demands of her job, stated:

It is my opinion that [D.A.L.] should not commence a GRTW (*Gradual Return to Work Program*) program at this time. Her job duties consist mainly of standing and walking activities. These activities need to be completed at a fairly rapid pace due to the demand for efficient customer service, and the general business of the store. The floor surfaces present a slipping and tripping hazard, especially to someone using crutches and with balance deficits. She also would be unable to carry various items due to using crutches, not to mention that her activity tolerance is low at this time. In discussing activities which could be performed in a seated position, few were identified (i.e. tying bows, ribbons, wiring silks) and therefore do not allow an appropriate type of program to be developed. It is my recommendation that a GRTW program be addressed at a later date, optimally when further medical information and recommendations can be obtained regarding the status of the claimant's left knee and/or the claimant's mobility status improves. (underlining added)

Dr. Engel examined the Appellant on September 3, 1999, September 20, 1999 and June 7, 2000. In his report dated August 23, 2000 Dr. Engel, after examining the job duties and physical demands of the Appellant's employment as a floral designed, stated:

I think this is most of the concern with her job description that I would have. I have noted that there were some recommendations for a trial of return to work, and these

all sound very good. The bottom line is to not sit around in a Committee and banter forth ideas of whether someone can or cannot go back to work. The best thing is to try a trial of return to work and see whether she can do it. My gut reaction is that she would probably fail on return to work. (underlining added)

The Appellant did attempt to return to work commencing on or about February 14, 2000.

Dr. Elkin, the Appellant's personal physician, in his report dated June 11, 2001, noted that the Appellant was still having severe pain in her left knee which was worse at the end of the shift. It was his opinion that the Appellant was not capable of returning to her full time regular duties.

Dr. MacDonald, an Orthopedic Surgeon, examined the Appellant and disagreed with Dr. MacKay's medical opinion. In his report to the Commission dated June 24, 2004, Dr. MacDonald determined that the Appellant is suffering from a mild sympathetic dystrophy in her left knee. He states:

1. She has posttraumatic arthrofibrosis and anterior knee related syndrome and anterior knee pain as a result. This has caused likely a mild sympathetic dystrophy in the left knee with continued anterior knee complaints and infrapatellar scarring.
2. She has continued deep soft tissue inflammation around the anterior knee.

I think she is currently disabled for a heavy job or any job where there is prolonged standing on hard surfaces, kneeling, climbing stairs or steps, squatting or crouching. She is therefore capable of only a sedentary type job.

Notwithstanding the Appellant's testimony that she was unable to return to her job as a floral designer, and notwithstanding the opinions of Dr. Engel, Dr. Elkin and D.B., Manager of [text deleted], supporting the Appellant's position in this respect, the Internal Review Officer determined that the Appellant was capable of returning to her full-time employment as a floral designer. The Internal Review Officer, relying primarily on the medical opinion of Dr.

MacKay, concluded that there was no physical or psychological impediment preventing the Appellant from returning to her work full time and, as a result, the Appellant's IRI was terminated.

The Commission also notes that Dr. Kayler, an Orthopedic Surgeon, indicated in his medical opinion that the Appellant was capable of returning to her pre-accident employment status. However, an examination of the Internal Review Officer's decision indicates that the Internal Review Officer relied primarily on the medical opinion of Dr. MacKay in terminating the Appellant's IRI and in the Commission's view failed to give adequate consideration to the comments of Dr. Engel, the medical opinion of Dr. Elkin, and the comments of D.B., the Manager of [text deleted], all of whom had personal knowledge of the Appellant's work and her physical capacity to do this work.

The Commission further notes that Dr. Engel's diagnosis of arthrofibrosis to the Appellant's left knee is corroborated by Dr. MacDonald. Dr. MacDonald concluded that this arthrofibrosis resulted in the chronic pain that the Appellant suffered to her left knee.

The Commission also notes that Dr. MacKay agreed with Dr. MacDonald that the Appellant did sustain a permanent injury to her left knee in respect of the motor vehicle accident but they disagreed as to whether or not this injury prevented the Appellant from returning to her pre-accident employment. The significant conflict in medical opinions between these two doctors relates essentially to Dr. MacDonald's opinion as to the existence of a mild sympathetic dystrophy in the Appellant's left knee and Dr. MacKay's medical opinion that there does not exist a mild sympathetic dystrophy in the Appellant's left knee.

## **DECISION**

### **1. IRI Payment**

Unlike Dr. Engel, Dr. Elkin and Dr. MacDonald, Dr. MacKay did not have the opportunity to physically examine the Appellant and his opinion is based primarily on a paper review of the relevant medical reports. As a result, Dr. MacKay did not have an opportunity of meeting with the Appellant and assessing her credibility as to her physical capacity to carry out the work as a floral designer. Dr. Engel, Dr. Elkin and Dr. MacDonald did personally meet with the Appellant and therefore were in a better position to assess the Appellant's credibility in respect of her claim that she was physically unable to carry out the essential duties of her work as a floral designer. The Commission in these circumstances gives greater weight to the medical opinions of Dr. Elkin and Dr. MacDonald in respect to the issue of the Appellant's inability to return to her full time work as a floral designer than it does to Dr. MacKay.

The Appellant testified in a straightforward manner, without equivocation, and the Commission finds she was a candid witness. The Commission accepts her testimony that as a result of the motor vehicle accident she suffered an injury to her left knee which has prevented her from returning to work full time as a floral designer. The Appellant's testimony in respect of her physical incapacity to return to work as a floral designer is corroborated by the medical opinions of Dr. Engel, Dr. Elkin, and Dr. MacDonald, and by the comments of the Manager of [text deleted].

For these reasons the Commission is satisfied that the Appellant has established, on the balance of probabilities, that due to the motor vehicle accident injuries she sustained she was unable to return to her pre-accident employment as of September 15, 2002. The

Commission therefore allows the Appellant's appeal and directs MPIC to reinstate the Appellant's IRI at the date of its termination, together with interest from that date to the date of the IRI payments.

## **2. Functional Capacity Assessment**

Dr. MacDonald was requested to advise whether a Functional Capacity Assessment would demonstrate whether the Appellant was capable of returning to her pre-accident employment as a floral designer. Dr. MacDonald did not specifically respond to this request and in the view of the Commission it was not necessary for him to do so in light of his medical opinion. Dr. MacDonald determined that having regard to the condition of the Appellant's left knee, she was currently disabled from heavy duty or any job where there was prolonged standing on hard surfaces, kneeling, climbing stairs or steps, squatting or crouching and that she was only capable of a sedentary type job. The Commission therefore infers from these comments that in Dr. MacDonald's view a Functional Capacity Assessment was not necessary to demonstrate whether or not the Appellant was unable to return to her pre-accident employment.

Dr. MacKay in his report dated July 19, 2004 for different reasons agrees with Dr. MacDonald that there is no medical need for a Functional Capacity Evaluation. Since both doctors conclude that a Functional Capacity Assessment was not necessary, the Commission dismisses the Appellant's appeal in respect of the requirement of MPIC to arrange and fund a Functional Capacity Assessment.

**3. Retraining**

In respect of requiring some form of retraining for the Appellant in respect of sedentary employment, the Commission refers this issue back to MPIC for their assessment and determination.

The decision of the Manitoba Public Insurance Corporation's Internal Review Officer bearing date December 11, 2002 is therefore varied accordingly.

Dated at Winnipeg this 30<sup>th</sup> day of March, 2005.

---

**MEL MYERS**

---

**WENDY SOL**

---

**PAUL JOHNSTON**