Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by M. R.
AICAC File No.: AC-02-82

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **The Honourable Mr. Wilfred De Graves** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, M.R., was represented by Mr. Michael Steinstra;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**May 25, 2005 and October 25, 2006**
ISSUE(S):	**1. Whether Appellant incapable of returning to full-time employment as of December 17th, 2001, and therefore entitled to ongoing Income Replacement Indemnity benefits.** **2. Adequacy of permanent impairment award (10%) for organic brain syndrome.** **3. Entitlement to permanent impairment benefits for loss of lumbar spine range of motion.**
RELEVANT SECTIONS:	**Section 81(1)(a) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Manitoba Regulation 41/94, Subdivision 1, Category 4.**

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

M.R. (hereinafter referred to as the 'Appellant') was involved in a motor vehicle accident on October 23, 1996 and sustained the following injuries:

- Comminuted fracture of C7 with mild retropulsion of fragments.
- Fractured right radius and ulna.
- Compound fracture of left index finger.
- Open skull fracture with small subdural hematoma and mild cerebral edema.
- Punctured lung.
- Multiple lacerations requiring skin grafting.

As a result of these injuries the Appellant's fractured C7 required spinal fusion and discectomy and his fractured radius and ulna required open reduction/internal fixation. Dr. Irving, the Appellant's surgeon, documented that the Appellant made full functional recovery from this injury. The initial assessment indicated that, in respect of the Appellant's head injury, there was no documentation of any complication arising from this injury.

Medical treatment was also required in respect of the Appellant's compound fracture involving his left index finger and the puncture to his lung. There is no documentation to indicate that the Appellant suffered any complications arising out of these injuries. As well, the Appellant had multiple lacerations arising out of the motor vehicle accident, some which required skin grafting. Aside from the various surgeries the Appellant underwent, he also received an extensive course of physiotherapy between February 1997 and February 1999. MPIC assisted in the Appellant returning to work in June of 1998 at [text deleted].

In August of 1999 the Appellant was involved in a second motor vehicle accident and, as a result, he received a further course of physiotherapy treatment and was able to return to work.

In June of 2000 Dr. Watson, a physiatrist, assessed the Appellant and concluded that the Appellant's symptoms were ligamentous in origin. As a result, Dr. Watson performed

prolotherapy (i.e., injection of 6 ml of P-25-G mixed with Xylocaine without epinephrine) on various occasions. The Appellant's complaints related to his low back and resulted in a reduction in the pain he was suffering. Dr. Watson, in a report dated July 4, 2000, stated that the Appellant had sustained an injury while at work, which resulted in exacerbation of his back symptoms. In August of 2000 the Appellant was unable to return to work and MPIC reinstated the Appellant's Income Replacement Indemnity ('IRI') benefits.

On October 25, 2001 MPIC's case manager requested Dr. M. J. MacKay, MPIC's Medical Consultant, to review the Appellant's medical file and advise MPIC of the following:

- Is prolotherapy a medical requirement in the management of the medical conditions arising from the incident in question?
- Are further therapeutic interventions a medical requirement in the management of the medical conditions arising from the incidents in question?
- Does the medical evidence indicate that [M.R.] is able to return to his occupational duties with Palliser Furniture?

Dr. MacKay provided an Inter-departmental Memorandum to MPIC dated October 25, 2001 and stated:

> There is no documentation of a specific injury occurring to [M.R.'s] lower back as a result of the incident on October 23, 1996 MVC. Mr. DeBrincat identified symptoms involving the lower back in May 1997 and examination findings that suggested sacroiliac joint dysfunction. Dr. Corder was of the opinion that [M.R.'s] back symptoms were mechanical in origin. Dr. Watson documented that [M.R.'s] low back pain was a result of a ligamentous injury.

Dr. MacKay further stated:

> **<u>Conclusion</u>**
> Based on the objective medical evidence presently contained in [M.R.'s] file, in conjunction with the information indicating [M.R.] has been educated with regard to an independent exercise program, <u>it is my opinion that further therapeutic interventions are</u>

> not required in the management of the medical conditions arising from the incidents in question. (underlining added)

In respect of the Appellant's work capabilities, Dr. MacKay indicated that Dr. Watson's examination did not identify any objective evidence of impairment of physical function. Dr. MacKay concluded that, based on the objective medical evidence presently contained in the Appellant's file, there was insufficient medical evidence to support a total occupational disability and, as a result, Dr. MacKay stated in his Inter-departmental Memorandum:

> **Conclusion**
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> . . .
>
> It is my opinion that medical evidence does not identify [M.R.] as being unable to perform his regular full time occupational duties as a result of the medical conditions arising from the incidents in question. (underlining added)

The Appellant notified [text deleted] that he had received a report from MPIC indicating that he was capable of returning to work and on November 20, 2001 [text deleted] advised him that due to an overall work shortage the Appellant's employment terminated on November 6, 2001.

Case Manager's Decision

On December 12, 2001 the case manager wrote to the Appellant and advised him, based on the medical opinion of Dr. MacKay, there was insufficient medical evidence in respect of the Appellant to support a total occupational disability at that time. As a result, the case manager advised the Appellant that he was no longer entitled to IRI benefits. The case manager further advised the Appellant that because his employment was terminated due to the time the Appellant missed from work due to recuperation from his motor vehicle accident injuries, MPIC was providing him with a temporary continuation of IRI benefits for a period of one hundred eighty (180) days from December 12, 2001.

On January 7, 2002 the Appellant sought an Application for Review of the case manager's decision. The Appellant's personal physician referred the Appellant for a second opinion from Dr. Hillel Sommer, a physiatrist. Dr. Sommer was provided with all of the relevant medical reports in respect of the Appellant, examined the Appellant on March 25, 2002 and provided a report dated April 2, 2002. A succinct summary of Dr. Sommer's report is contained in the Internal Review Officer's decision dated June 17, 2002, which states:

> After Dr. Sommer examined you March 25, 2002 he provided a report dated April 2nd. Dr. Sommer advised that the Prolotherapy being performed by Dr. Watson was not supported. After Dr. Sommer completed his diagnoses, he advised that you have some residual neck stiffness and diminished range of motion but it does not interfere with function. He also noted some weakness in both the upper and lower limbs but said it does not fit in a spinal nerve pattern and does not appear to be associated with pain or disuse atrophy. Dr. Sommer supposes that it may be from a traumatic brain injury but he states that the deficits appear to be mild and do not appear to be interfering significantly with neuromuscular function. The only impairment of function noted in Dr. Sommer's report is to your left index finger.
>
> <u>Dr. Sommer concludes by stating that he agrees in general with the findings of those of Dr. MacKay. He agrees that Prolotherapy is not indicated as a treatment for your low back condition. He also notes that there may be some subtle neurologic motor findings and possibly cognitive findings that may be a permanent sequelae of your injury. The only treatment that he recommends is home exercise</u>. (underlining added)

MPIC's case manager, upon receipt of Dr. Sommers' report, requested Dr. D. Gill, who is a clinical psychologist and a neuropsychologist, to examine the Appellant. The case manager advised Dr. Gill that Dr. Sommer had recently examined the Appellant and that Dr. Sommer had suggested that further investigation was required for neurologic and cognitive status.

On June 8, 2006 the case manager, in a Memo to File, indicates that the Appellant saw Dr. Gill on June 5, 2002. The case manager spoke to Dr. Gill by telephone on June 6, 2002. In this discussion the case manager informed Dr. Gill that the Internal Review Officer needed to know

if the Appellant had functional deficits that would preclude him from returning to his pre-accident employment at [text deleted]. The case manager, in his Memo, stated:

> . . . Dr. Gill advised that [M.R.] did have some mild memory deficits but these would only be a problem if [M.R.] wanted to work in a position requiring facial recognition (such as a bartender or waitress) wherein he would need quick memory to remember faces or an order for a specific person. Dr. Gill noted that [M.R.] told him that he wanted to get employment as a tractor-trailer operator. Dr. Gill said that he had no reason to think (sic) could not do that type of work. I asked about [M.R.'s] work at [text deleted] and Dr. Gill could see no reason that [M.R.] could not do this from a cognitive perspective.

Internal Review Officer's Decision

The Internal Review Officer met with the Appellant on May 15, 2002. In his report dated June 17, 2002 the Internal Review Officer stated:

> . . . Although I have not seen a report from Dr. Gill I did receive a note from the Case Manager dated June 6, 2002. In that note, I was informed that Dr. Gill felt that there was no reason to prevent you from working. There was no cognitive reason that you could not do the work that you did at [text deleted] or even work with a tractor-trailer which you had suggested to Dr. Gill that you would prefer to do.
>
> In my review of the medical information, I could see no functional deficits that would prevent you from doing your pre-accident occupation.
>
> As a result of all of this information, it is my decision that you were capable of working December 17, 2001 and I am therefore confirming your Case Manager's decision letter and dismissing your Application for Review.

Notice of Appeal

The Appellant filed a Notice of Appeal to this Commission dated July 3, 2002. On July 19, 2002 Dr. Gill's report was forwarded to MPIC and a copy provided to both the Appellant and to the Commission.

On November 24, 2003 Dr. Steven Kremer, who is a psychiatrist, provided a report to Dr. D. Corder, the Appellant's personal physician. Dr. Kremer, in his report to Dr. Corder, stated:

> Assessment
>
> Axis I: Major Depressive Disorder-mild severity

Dr. Kremer also recommended that in order to obtain a second opinion in respect of Dr. Gill's report, the Appellant should see Dr. M. Stambrook.

Appeal – IRI benefits

The relevant provision in respect of this appeal issue is:

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;

The Commission commenced hearing the above noted appeal on May 25, 2005. The Appellant attended with his legal counsel, Mr. M. J. Steinstra, and Mr. T. Strutt represented MPIC. The Commission did not hear any evidence at that time because it decided that, in accordance with Dr. Kremer's recommendation, a report should be obtained by the Commission from Dr. M. Stambrook.

On July 18, 2005 the Commission wrote to Dr. Stambrook requesting that he comment on two (2) issues. The first issue related to the adequacy of the permanent impairment benefit the Appellant has received for organic brain syndrome. This matter will be discussed later in this decision. The second issue the Commission requested assistance from Dr. Stambrook was whether the mental injury was caused by the Appellant's motor vehicle accident which rendered

him entirely or substantially unable to perform the essential duties of full time employment on or after December 17, 2001.

Dr. Stambrook, in his report dated September 29, 2005, in respect of this second issue, stated that he had diagnosed that the Appellant was suffering from a mild depressive disturbance. He further noted that Dr. Gill had not reported that there were any symptoms related to post traumatic depression and neither the Appellant or his mother reported personality changes at that time. Dr. Stambrook further reported that Dr. Kremer, in 2003, had indicated the claimant was reporting chronic dysphoria and he provided a diagnosis of major depression, mild severity. Dr. Stambrook suggested, therefore, that it was possible for the Appellant to have had a mild depressive disorder secondary to symptoms resulting from the motor vehicle accident in question.

Upon receipt of that report MPIC requested Dr. Joe Rallo, a Psychological Consultant to MPIC, to review Dr. Stambrook's report. In an Inter-Departmental Memorandum from Dr. Rallo to MPIC's legal counsel, Dr. Rallo reviewed reports of Dr. Gill and Dr. Stambrook and stated:

> 4. During the approximately seven years from the time of the motor vehicle accident until the claimant presented to Dr. Kremer complaining of depression, Dr. Stambrook noted that there was one early reference to depression (not noted in this writer's review), which raises the "possibility" of some continuity of the claimant's depressive symptoms.
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> **Reviewer's Comment**
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> Dr. Stambrook appears to be referring here to the word *"depression"* appearing on a physiotherapist's report dated February 18, 1998. This is the only reference to depression in the claimant's file from the date of the motor vehicle accident in 1996 to Dr. Kremer's report in 2003. The writer has reviewed this physiotherapy report and notes that the word *"depression" is* written under "Other Symptoms" with no explanation as to the source of this information (e.g. patient's self report, mental status exam, etc.) or the significance of this notation. There was no followup to this, and no treatment noted for depressive symptoms.

Notwithstanding the physiotherapist's notation of "depression" in 1998, in the remainder of his report, Dr. Stambrook comments several times about the lack of evidence for continuity of depression from 1996 until 2003. With regard to the physiotherapists report, Dr. Stambrook remarked, "I *did not see any subsequent follow up on this.* Later, Dr. Stambrook comments that there has been an *"absence of reports of depressive symptomatology and functional implications of depression,"* and that *"this has not been a major feature of his presentation over the course of time at least in the documentation I have reviewed".* In the next paragraph on page 28 of his report, Dr. Stambrook indicates that *"the continuity from accident onset through to Dr. Kremer's evaluation has not been established other than for [M.R.']s self report".* Finally, again Dr. Stambrook on page 29 of his report comments that *"there is a lack of continuity in the medical documentation in regards to the depression".*

5. Based on his psychological and neuropsychological assessment of the claimant, Dr. Stambrook concluded that the claimant's depressive symptoms are not incompatible with employability, *"even full time employability".* In discussing this particular issue, Dr. Stambrook again refers to the lack of findings of significant depressive disturbance from the date of the motor vehicle accident until Dr. Kremer s report. In the 4th paragraph on page 28 he indicates *"there is no report of mental health, psychological or neuropsychiatric issues that would interfere with his employment. There is no statement from his physician that he was suffering from a mental health disorder, nor from the rehabilitation physician, that mental health issues were relevant for him not working".*

Dr. Rallo concluded:

CONCLUSIONS

In this writer's opinion, Dr. Gill's report of July 12, 2002 directly addressed the issue of whether the claimant developed a depressive condition or other psychological conditions as a result of the motor vehicle accident in question. Dr. Gill's assessment some 4 years following the motor vehicle accident found no evidence of any sych symptoms, and this was based upon a psychological assessment, collateral information, and the claimant's self report. Based upon Dr. Gill's report of July 19, 2002, the claimant was not exhibiting any symptoms of depression at that time, nor were he or his mother reporting that he was suffering from symptoms of depression or anxiety related to the motor vehicle accident for the approximately 6 years from the date of the accident until Dr. Gill's assessment in July 2002.

Although Dr. Stambrook has suggested that there is a <u>possibility</u> that the claimant may have developed some depressive disturbance related to chronic pain following the motor vehicle accident, it is the writer's opinion that the medical evidence indicates that on balance of probabilities, this is unlikely. Dr. Stambrook in fact commented on the apparent lack of continuity in reports of the claimant's depressive symptoms following

> the motor vehicle accident, and that the current depressive disturbance, whether or not related to the MVA, is not of a sufficient severity to affect the claimant's day to day functioning.
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> Dr. Stambrook suggests, and the writer concurs, that the claimant has not sustained any psychological injury or neuropsychological impairment that would affect his ability to be employed on a full time basis. (underlining added)

Appeal

The appeal hearing reconvened on October 25, 2006. At this hearing the Appellant testified that as a result of the motor vehicle accident he developed low back problems resulting in chronic pain which prevented the Appellant from returning to work at [text deleted]. The Appellant further testified that as a result of the motor vehicle accident he suffered cognitive defects as well and he has been unable to return to work at [text deleted].

Discussion

The motor vehicle accident occurred on October 23, 1996 and the Appellant did not report to any caregiver at that time that he was suffering from any low back pain. The Appellant's first complaint in respect of low back pain was reported by a physiatrist to MPIC on May 27, 1997, approximately six (6) months after the motor vehicle accident. In this report the physiatrist indicated that the Appellant first complained about back pain on May 9, 1997. Notwithstanding his back problems, the Appellant commenced employment at [text deleted] on August 17, 1998 and he worked there until August 1999, when he was involved in a second minor motor vehicle accident, and returned to work full time on October 2, 1999.

In a report to MPIC Dr. Corder, the Appellant's personal physician, indicates that he saw the Appellant in respect of a complaint with respect of muscle spasm to his neck. There was no

complaint by the Appellant in respect of his back. On June 6, 2000, a period of approximately three (3) years and eight (8) months after the motor vehicle accident, the Appellant was seen by Dr. Watson, a physiatrist. Dr. Watson wrote to Dr. Corder on June 6, 2000 and indicated that the Appellant had indicated to him that he was well with no back problems until he had a motor vehicle accident. Dr. Watson assessed that the Appellant's symptoms were ligamentous in origin and, as a result, he performed prolotherapy on several occasions.

Dr. MacKay was requested by MPIC to assess the treatments provided by Dr. Watson, determine if there is any further therapeutic interventions required and whether there was any medical evidence to determine whether the Appellant was unable to return to his occupational duties with [text deleted]. In a report dated October 25, 2001 Dr. MacKay concluded that no further therapeutic intervention was required and that the medical evidence did not indicate that the Appellant was unable to return to his full time occupational duties as a result of any injuries he sustained in the motor vehicle accident.

Dr. Hillel Sommer, who was requested by Dr. Corder, the Appellant's personal physician, to provide his assessment, concurs with Dr. MacKay that prolotherapy was not indicated as a treatment for the Appellant's low back condition but suggested that the Appellant should be examined for any neurologic and cognitive impairment.

The Appellant was examined by Dr. Gill and by Dr. Stambrook, who both concluded that although the Appellant did suffer from some cognitive impairment of a mild nature, it would not impair the Appellant from returning to work at Palliser Furniture. Dr. Gill found no evidence of any depression in respect of the Appellant. Dr. Cramer, on the other hand, found that there was depression suffered by the Appellant but made no comment as to whether it was

connected to the motor vehicle accident. Dr. Stambrook thought it might be possible that the Appellant's depressive condition might be connected to the accident. However, Dr. Rallo, a psychologist who reviewed Dr. Stambrook's report, concluded that Dr. Stambrook did not find that there was a causal connection between the motor vehicle accident and the Appellant's depression. In any event, the Commission notes that Dr. Stambrook did not conclude that as a result of the motor vehicle accident the Appellant sustained any psychological injuries which prevented him from returning to work.

Decision

The Commission finds that the Appellant, who is a very pleasant person, honestly believes that, as a result of the motor vehicle accident, he suffers from chronic pain and from cognitive defects which prevent him from returning to work. However, the Commission finds, having regard to the medical reports of Dr. MacKay, Dr. Gill and Dr. Stambrook, the Appellant has not established, on a balance of probabilities, that his complaints in respect of back pain and depression:

1. (a) are connected to the motor vehicle accident in 1996.

   (b) prevent the Appellant from returning to work at [text deleted].

2. That the cognitive defects he suffers from as a result of the motor vehicle accident are of such a nature as to prevent the Appellant from returning to work at [text deleted].

The Commission therefore finds, for these reasons, that the Appellant's appeal in respect to the reinstatement of IRI is rejected and that the decision of the Internal Review Officer, dated June 17, 2002 is confirmed.

Appeal – Permanent Impairment Award

The Appellant also appealed the decision of the Internal Review Officer in respect of the following issues:

(a) Adequacy of Permanent Impairment Award (10%) for Organic Brain Syndrome

(b) Entitlement to Permanent Impairment Benefits for loss of lumbar spine range of motion

The relevant provision in respect of this appeal is set out in Manitoba Regulation 41/94, Subdivision 1, Category 4.

(a) Adequacy of Permanent Impairment Award (10%) for Organic Brain Syndrome

Dr. Daryl Gill, clinical psychologist and neuropsychologist, was requested by MPIC to conduct a neuropsychological assessment, as recommended by Dr. H. Sommer, a physiatrist, in his report to MPIC dated April 2, 2002. Dr. Gill met with the Appellant on June 5, 2002 and provided a report to MPIC dated July 19, 2002 wherein he stated:

> **Conclusions**
>
> 1) Cognitive limitations: [M.R.] has been found to have a few impairments in our testing. This includes very specific limitations in his nonverbal memory, which would be consistent with the right-sided locus of his subdural hematoma. We have also found a slight reduction in one type of concentration; and subtle to mild reductions in his right hand speed, strength and coordination, which would be consistent with Dr. Sommer's April 2, 2002 report. (We also found mildly reduced word-finding and general knowledge, which is likely more related to his academic proficiency rather than the head injury, based upon his description of schooling).
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> 2) Functional Abilities: In contrast, the majority of [M.R.'s] neuropsychological assessment was within normal limits. This includes most types of attention/concentration; auditory perception; verbal memory; a few types of nonverbal or visual memory (particularly for geometric figures or drawings); visual spatial functions; and problem solving. Intellectually, [M.R.] was felt to be primarily back at baseline, with the primary exception of slower hand speed.

3) Practical Implications: The primary difficulty that [M.R.] will likely have will be inrecognizing or remembering other individual's faces, or recalling information from social situations. Fortunately, his problem solving skills are strong, and he is also normal in visual spatial functions. These were likely utilized in his position at [text deleted], where he was assisting in the fabrication of entertainment units.

4) Permanence: [M.R.'s] difficulties with memory and psychomotor skills are felt to be permanent at almost six years post-injury.

5) Etiology: The difficulties in memory, and hand function, are felt to be secondary to his MVA. The limitations in word finding, and general knowledge are felt to be premorbid, relating to his description of his academic history.

Dr. Gill made the following suggestions in respect of the Appellant's permanent impairment award related to his brain injury:

a) The head injury itself would be rated under Subdivision 1, in the Skull, Brain and Carotids section of Division 2. The section that refers to his subdural hematoma would be Subcategory 5. There are two ratings of either minor or severe. [M.R.'s] rating would be severe, based upon the length of retrograde amnesia that he reports; and his post-traumatic amnesia (of several days). I would suggest a 4% rating.

b) [M.R.'s] cognitive changes would be rated under Subdivision 1, of the Organic Brain Syndromes, in Division 9. The first three subcategories of this refer to individuals who require supervision, which would not apply to [M.R.]. However category 4 would be appropriate for his cognitive changes (e.g. in memory and psychomotor skills), with a range of 7% to 15%. I would suggest the rating of 10%, which recognizes that there has been cognitive change in regards to his memory, but with the majority of other neuropsychological functions falling within normal limits.

c) Thus a total for [M.R.] would be 4% + 10% = 14%.

Case Manager's Decision

MPIC's case manager wrote to the Appellant on October 31, 2002 and, adopting Dr. Gill's recommendations, advised the Appellant, in respect of the organic brain syndrome the award would be 10%, and the award relating to the subdural hematoma to be 4%.

Internal Review Officer's Decision

The Appellant made application to have the case manager's decision reviewed by an Internal Review Officer.

The Internal Review Officer issued her decision on April 13, 2004 confirming the case manager's decision and dismissing the Appellant's Application for Review. As a result, the Appellant filed a Notice of Appeal dated June 17, 2004 in respect of the impairment award in respect of the organic brain syndrome.

Discussion

As indicated earlier in this decision, Dr. M. Stambrook was requested to provide his opinion as to the adequacy of the permanent impairment benefit of 10% the Appellant received from MPIC for organic brain syndrome. Dr. Stambrook was provided with Dr. Gill's report of July 19, 2002 and a copy of Subdivision 1 of Division 9 of the Impairment Schedule in effect when the Appellant had his accident.

Dr. Stambrook, in his report to the Commission dated January 12, 2006 confirms Dr. Gill's assessment and states:

> In my view, and with all respect to his subjective experience of feeling very different than he did on a pre-accident basis, this level of functioning does not move into the range of higher rating, the 20-45% range, as he does not require occasional supervision for the tasks necessary for every day life, which are very elementary tasks. Given his employment, with responsibility, this rating could not be in that range. Hence, the correct range is 7-15%. He has meaningful impairments here. The rating of 10% is a reasonable rating. There is no clarification in the rating scales on how to make the gradation between a 7% and 15%, but my inclination would not be to give him the upper or top range, as he does not approach the level where he requires supervision, given his employment that is ongoing, and that he had on a post injury basis.

The Commission notes that Dr. Stambrook endorsed Dr. Gill's assessment that 10% is a reasonable award in respect of the Appellant's permanent impairment for organic brain syndrome.

Decision

The Appellant testified about the difficulties he had in respect of his cognitive limitation and this testimony is consistent with the opinions of both Dr. Gill and Dr. Stambrook as it relates to the Appellant's cognitive condition. The Commission therefore finds that the Appellant has failed to establish, on a balance of probabilities, that MPIC has incorrectly determined the 10% assessment either inadequate or unreasonable or incorrect. As a result, the Commission confirms the Internal Review Officer's decision dated April 13, 2004 and dismisses the Appellant's appeal in this respect.

(b) Entitlement to Permanent Impairment Benefits for Loss of Lumbar Spine Range of Motion

The Appellant, at the request of MPIC, was assessed by PAR Health Services Physiotherapy department on August 1, 2003. MPIC received the assessment from PAR Health Services on August 21, 2003 and reported that the Appellant made the following complaints:

> [M.R.] complained of aching in his lumbar spine. He states that when he sits or lies down, it is difficult to get up again. Riding in a vehicle causes his lumbar pain to radiate into his right buttock and up his back. He stated his cortisone injection on June 20, 2003 made his back pain worse. He also complained of impairment of his short term memory and sleep dysfunction.
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> . . .
>
> **Range of Motion:**

<u>Lumbar:</u> Flexion: 6" fingertips to floor – burning and aching pain at L4 to S1 area with extension.

<u>Extension:</u> 50% of full – sharp pain at L4 to S1.

The Appellant made application for review claiming he had not been fully compensated for the damage that has happened.

The Internal Review Officer, in an Inter-Departmental Memorandum dated December 19, 2003, requested the MPIC Health Care Services Team to review the PAR report in respect of the Appellant's range of motion and advise if any further impairment awards were warranted by this report with respect to the Appellant's range of motion.

Dr. M. MacKay, in an Inter-Departmental Memorandum to the Internal Review Officer dated January 19, 2004 stated:

> In a recent report submitted to the file by Linda Trinder, it is noted that [M.R.] had a limitation of lumbar flexion and extension.
>
> According to the Manitoba Public Insurance Schedule of Permanent Impairments, a claimant is not entitled to an impairment benefit as it relates to loss of lumbar spine range of motion.

The Appellant filed an Application for Review in respect of the permanent impairment relating to range of motion.

<u>Internal Review Officer's Decision</u>

The Internal Review Officer, in her decision dated April 13, 2004 to the Appellant stated:

> You received an assessment from PAR Health Services and a report was sent to Manitoba Public Insurance dated July 13, 2003. This information was reviewed by Dr. MacKay looking specifically at a limitation of lumbar flexion and extension. Dr. MacKay advises that the Manitoba Public Insurance Schedule of Permanent Impairments does not include an impairment benefit with respect to this injury. . .

Appeal

At the appeal hearing MPIC's legal counsel submitted that, upon an examination of the Schedule of Permanent Impairments under the Act, there is no provision to provide an impairment award in respect of a limitation of lumbar flexion and extension. In response, the Appellant's legal counsel could not rebut this submission.

Decision

The Commission agrees with MPIC's submission and finds that the Appellant has failed to establish, on a balance of probabilities, that he was entitled to a permanent impairment award in respect to a limitation of lumbar flexion and extension. For this reason, the Commission rejects the Appellant's appeal in this respect and confirms the decision of the Internal Review Officer dated April 13, 2004.

Dated at Winnipeg this 28th day of December, 2006.

MEL MYERS, Q.C.

THE HONOURABLE MR. WILFRED DE GRAVES

PAUL JOHNSTON