

AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

IN THE MATTER OF an Appeal by D.T.
AICAC File No.: AC-99-125

PANEL: Mr. J. Guy Joubert, Chairperson
The Honourable Mr. Wilfred De Graves
Dr. F. Patrick Doyle

APPEARANCES: The Appellant, D.T., appeared on her own behalf;
Manitoba Public Insurance Corporation was represented by Messrs. Robert Buisson and Dean Scaletta

HEARING DATE: June 2, 2008

- ISSUE(S)**
1. Whether the Appellant had a reasonable excuse for the late filing of an Application for Review of Injury Claim Decision with respect to the First Case Manager Decision Letter pertaining to the Permanent Impairment Benefit?
 2. If the Appellant had a reasonable excuse for the late filing of an Application for Review of Injury Claim Decision, whether the amounts awarded for the Permanent Impairment Indemnity were adequate on their merits with respect to:
 - a) Tooth #11 and Tooth #21?
 - b) Tooth #12?
 - c) Neck injury, whistling in right ear, stress and possible fracture or broken rib?
 3. Whether the Appellant is entitled to coverage or reimbursement with respect to:

- a) Re-capping (Lengthening) Tooth #11 and Tooth #21?
 - b) Extracting Tooth #27?
4. Whether the Appellant was properly classified as a non-earner at the time of the accident?
 5. Whether the Appellant is entitled to an Income Replacement Indemnity for the 180 day period following the accident and after 181st day following the accident?
 6. Whether the Appellant is entitled to compensation for general pain and suffering resulting from the accident?

RELEVANT SECTIONS

Sections 70(1), 72, 83(1), 83(2), 84(1), 84(3), 85(1), 86(1), 86(2), 127, 135, 172(1), 172(2), 174 and 184(1) of *The Manitoba Public Insurance Corporation Act*, R.S.M. 1987, c. P215 (the "Act") and Regulation P215 – R.M. 39/94 and 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

A. BACKGROUND

The Appellant is a sixty-eight (68) year old woman who was involved in a highway motor vehicle accident on July 3, 1997. At the time of the accident, the Appellant was fifty seven (57) years old. She was a front seat passenger in a 1994 Ford Aerostar van that was driven by her husband. Another vehicle was traveling in the opposite direction in their lane and in order to avoid a head-on collision, the Appellant's husband took evasive action and swerved onto the

shoulder of the highway. The two vehicles collided and the other vehicle side-swiped the Appellant's van striking the driver's side door and side-view mirror. The Appellant and her husband were both injured.

The Appellant met with her physician, Dr. A. Van Wyk, on July 8, 1997, and the diagnosis was described in an Initial Health Care Report dated July 22, 1997, as "chipped tooth, sprain muscles in neck; bruise chest [Sic]". With respect to work capacity, Dr. Van Wyk recommended modified work duties given that the Appellant complained of a difficulty concentrating on work when helping her husband repair suites. The management plan was to maintain usual activities with a prescription of acetaminophen and stretching exercises.

A referral was made for physiotherapy and the Appellant saw Mr. Ron Gall for a series of treatments which were paid by MPIC.

In a Subsequent Physiotherapy Report dated February 9, 1999, Mr. Gall notes that the Appellant complained of pain over the left and right side of the neck. He also mentions a decreased left rotation that improved with treatments. Spasms and tenderness in many regions of the neck and shoulder were also identified. Ultimately, Mr. Gall was of the view that the Appellant had reached a plateau with physiotherapy treatment because she received only temporary relief from the same.

Dr. Van Wyk also suggested a dental assessment and in that regard, the Appellant saw Dr. J. W. Rink.

Dr. Rink describes the nature of the damage to the Appellant's teeth in a reporting letter dated February 24, 2000, as follows:

[D.T.] was first seen on July 10, 1997 for damage to three of her front teeth (nos. 12, 11, 21) which essentially amounted to enamel edge fractures. Radiographic examination also indicated a large pre-existent, apparently non-symptomatic abscess apical to tooth #12, and several deficient fillings of long standing duration.

In accordance with MPIC's position, as outlined in a letter dated May 1, 1998, these teeth were conservatively repaired by Dr. Rink. He used a composite resin filling and the cost was covered by MPIC. In addition, MPIC agreed to pay for subsequent replacement of these resin fillings in accordance with a recommendation by its Dental Consultant, Dr. R. Mazurat, who states in an Inter-Departmental Memorandum dated August 16, 2000 (the "Mazurat Memo"):

[r]egarding further treatment of #11, #21, #12 – we advised we would cover replacement if restorations failed ... I would advise agreeing to cover resin restorations if warranted.

An issue arose with respect to two (2) of the three (3) teeth (Tooth #11 and Tooth #21) in that the Appellant claims they are now shorter in length than prior to the accident. In the Notice of Appeal dated November 3, 1999, the Appellant states:

2 front teeth got chip at Accident Which the Dentist tried to Repair
But are Not the Same than Before the Accident. I've Brought Him a
Picture Before the Accident - & He Sees My 2 front teeth Were
Longer – Which He Sent to M.P.I. Dentist for Approval – Ref: I just

can't Pay - & also I Would Like them the Same Length than Before the Accident – [Sic]

This is confirmed by Dr. Rink who mentions in an earlier reporting letter dated October 8, 1999, that:

[r]egarding her previous resin restorations done on June 15, 1999, she has remained convinced that her front teeth were longer in past years prior to her accident. I succeeded in obtaining one radiograph of one of her front teeth (dated 1987) from a previous dentist, and a photograph taken many (35?) years ago, which, after considerable enlargement, indicates longer centrals at that time.

In addition, the Appellant argues that her upper left second molar was damaged as a result of the accident when she knocked her lower jaw against her upper teeth. With respect to this tooth, Dr. Rink indicates in a reporting letter dated October 8, 1999, that:

[r]adiographic examination was inconclusive, but clinical examinations indicated a complete mesio-distal fracture of tooth number 27 which could very well have been of long standing duration from such trauma. Intra-oral photography verified the fracture which was beyond treatment and required surgical removal in two places. *Emphasis added.*

The Appellant's glasses were broken as a result of the accident and it appears that she did not suffer an eye injury. In this regard, an eye specialist, Dr. Macrodimitris, states in a letter dated July 6, 1998, that:

[o]n examination I found that she has an anisometropic astigmatism mostly in the right eye and this eye is also slightly amblyopic. She is also a presbyope. Apart from this finding her eye examination was normal. Therefore this accident had no effect on her eyes and I will check her again one more time in approximately 10 days where I will prescribe the necessary spectacles.

Although not clear from the written record, it appears that MPIC covered the expenses for the eyeglasses.

Apart from the physical trauma, the Appellant experienced some emotional issues. On January 13, 1999, she was seen by a psychiatrist, Dr. H. Fast, who diagnosed the Appellant as suffering from depression and chronic pain syndrome. In addition to the psychiatrist, the Appellant was seen by a physiatrist, Dr. Dubo, who made the following comments in a reporting letter dated March 20, 2000:

[h]er symptoms and signs are characteristic of multiple muscle myofascial pain syndrome.

Previous treatment failed to eradicate her myofascial trigger points leading to chronic persistent pain complaints, restricted range of motion of cervical spine and to a lesser degree lumbar spine. This also caused sleep disorder and secondary mood disorder. It is very common for people with prolonged pain symptoms following soft tissue injury especially after motor vehicle accidents to develop secondary disorders including anxiety or depression. Psychologic or psychiatric conditions do not cause myofascial pain syndrome although mood disorders perpetuate symptoms once myofascial pain has been established post trauma. It is important to treat any mood disorder simultaneous with management of the myofascial trigger points. Sleep disorder secondary to myofascial pain also requires treatment if severe since this also perpetuates myofascial trigger point activity and mood changes.

At the time of the accident, the Appellant states that she had been assisting her husband in a carpentry and repair business since 1962, except for a period between 1979 and 1989. The nature of the Appellant's help included buying, repairing and re-selling homes for profit. She indicates that, in part, she assisted

him with painting, wall-papering and dry-walling. In addition, she installed plumbing and wiring. The Appellant states in a Declaration dated May 6, 1999, that her husband:

ne m'a jamais rémunéré pour le travail que j'ai fait pour lui. Les profits que nous avons réalisés sont enregistrés dans nos déclarations de revenu. Notre comptable, Monsieur Lucien Guénette, prépare nos déclarations de revenu et Émile et moi partageons également les profits.

[Translation]

Never paid me for the work I did for him. The profit we made was declared in our income tax return. Our accountant, Mr. Lucien Guénette, prepares our income tax returns and [E.T.] and I share the profits equally.

On July 16, 1997, the Appellant completed an Application for Compensation wherein she responded:

1. "N/A" meaning "not applicable" to the section of the Application for Compensation relating to whether the accident prevented the Appellant from carrying out domestic, occupational, educational and leisure activities.
2. "No" to the section relating to whether the Appellant was working at the time of the accident.
3. "No" to the section relating to whether the Appellant was ordinarily unable to work for a reason other than age.
4. "No" to the section relating to whether at the time of the accident, that an employer had promised the Appellant a job.
5. "N/A" meaning "not applicable" to the section relating to current jobs and the names of the principals and other employers.

Throughout the written record, the Appellant indirectly makes references to the general pain and suffering that she (and her husband) have experienced. Perhaps the most concise reference to this is found in the Notice of Appeal dated November 3, 1999, wherein the Appellant states that:

I wish to Appeal Ref: since July 3/97 Accident Which my Husband [E.T.] & I were Victim & Both Suffered Injury & ... [part of the statement is obliterated and initialed by the Appellant] Stress [Sic].

...

its enough to Have a Nervous Break Down or a Heart Attack – Since the Accident [E.T.] Had to go for treatments & I also Had to Go for Neck Therapy – which I Must continue [Sic]

Case Manager Decision Letters

On January 30, 1998, the Case Manager, Mr. R. Walker, issued a case manager decision letter (the “First Case Manager Decision Letter”), relating to the Permanent Impairment Benefit contemplated by the Act with respect to the Appellant’s teeth. In that letter, the Case Manager states that:

[w]e have completed our assessment of your claim for permanent impairment as it relates to the damage sustained to Tooth #11 and #21. In accordance with Section 127 of the Manitoba Public Insurance Corporation Act, which reads:

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 entitle to a lump sum indemnity of not less than \$521. and not more than \$104,138. for the permanent impairment. *Emphasis added. Actual amounts in the Act are \$500.00 and \$100,000.00 respectively.*

We have awarded the following impairment as follows:

Tooth #11	Central Incisor	1%
Tooth #21	Central Incisor	1%

You are eligible for an impairment benefit of 2% of the indexed amount of \$106,429.00 or \$2,128.58 with respect to the alteration of your teeth.

With respect to Tooth #12, some pre-existing dental work was conducted to that tooth, however, we are prepared to pay for the cost of restoring the crown. As there appears to be no damage to Tooth #12 there is no impairment benefit payable relating too [Sic] it.

The Appellant was reminded about the timeline for filing an appeal in the penultimate and concluding paragraphs of the letter which read as follows:

[w]e trust you will find the above satisfactory, however, should you have any questions, you may contact me at 985-7426. Alternatively, you have the option to apply for a review of this decision.

Any requests must be made in writing **within sixty (60) days** of receiving this letter. Applications for an Internal Review can be obtained from any of our claims locations or by contacting the writer.

As an aside, we note that MPIC subsequently re-assessed the Appellant with respect to a Permanent Impairment Benefit for Tooth #12. In a letter from Senior Solicitor, Mrs. Joan G. McKelvey, dated September 14, 2000, (the "McKelvey Letter"), MPIC indicated that they were requisitioning a cheque payable to the Appellant representing a further Permanent Impairment Benefit of .75%.

On May 20, 1999, Case Manager, Ms L. Nixon, issued a case manager decision letter (the "Second Case Manager Decision Letter"), with respect to an Income Replacement Indemnity contemplated by the Act. In that letter, the Case Manager states that:

[a]t the time of the above-noted accident, you completed an Application for Compensation (long form) with your previous Case

Manager, Mr. Richard Walker indicating that you were not gainfully employed outside the home. During our meeting of May 6, 1999, you stated that you assisted your husband, [E.T.] [Sic] with his carpentry/repair business and have been doing so since you were married in 1962. [E.T.'s] business consists of him purchasing rundown homes, renovating them and selling them for a profit. You further stated that since you left your previous employer, [Text deleted] [Sic] in 1989, you worked approximately five days per week, eight hours per day, helping [E.T.] with painting, installation of siding, drywalling, wallpapering, installation of tiles, flooring and carpeting and you would also help [Sic] [E.T.] with the wiring and plumbing.

At our request, you provided us with your income tax returns for the years 1996, 1995, and 1994, three years prior to the accident. You have advised that [E.T.] paid you for the work you did and your accountant would split the total income earned on both your income tax returns.

Contrary to the information you provided, your tax returns for the years 1996, 1995, and 1994, shows no earned income. As you are unable to substantiate employment income prior to and at the time of your accident, for the purpose of Income Replacement Indemnity benefits, you would be classified as a non-earner. As you have not advised or supported any promised employment that you would have held during the initial 180-day period following your accident, there is no entitlement to Income Replacement Indemnity during this period. As such, for the first 180 days following the accident, you were not entitled to Income Replacement Indemnity benefits. For your information and reference, we quote Section 85(1)(a), which reads:

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

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

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

In regards to entitlement to Income Replacement Indemnity after the first 180 days following the accident, we refer you to Section 86(1) and 86(2) of the Manitoba Public Insurance Corporation Act, which read as follows:

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

86(1) For the purpose of compensation for the 181st day after the accident, the corporation shall determine an employment for a non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity, if he or she is not able because of the accident, to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident.

Determination of I.R.I.

86(2) The Corporation shall determine the Income Replacement Indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment considering

- (a) whether the victim could have held the employment on a full-time or part-time basis;
- (b) the work experience and earnings of the victim in the five years before the accident; and
- (c) the regulations.

In light of the tax information provided, which fails to support any paid employment from 1994 to 1996 and your degree of education and training prior to your accident, we have determined you in an entry-level employment/occupation, which consists of, but not limited to the following:

Cashier, service station attendant, grocery store/clerk, beauty salon attendant, cloakroom attendant, door attendant, elevator operator, funeral attendant, storage attendant, hotel valet, gas jockey, laundry room attendant, ticket taker, toll booth attendant, usher, other trade helpers/labours [Sic].

As the 180-day determination takes into consideration your employment history during the five-year period preceding your accident, we would request that you provide our office with certified copies of your 1992 and 1993 tax returns. In addition, you are required to provide written confirmation of all employment held

during the five-year reference period of 1992 to 1996 inclusive. This information must document all employers, duties or job classification, period of employment and wages/salary paid.

Notwithstanding the above, based on the medical information provided by Dr. Van Wyk's medical report on July 22, 1997, and Dr. Kent Ferrari's report of May 25, 1998, there were no objective findings sufficient in nature to preclude you from maintaining any of the aforementioned occupations. In light of same, there is no entitlement to Income Replacement Indemnity.

As a result of the findings in the First Case Manager Decision Letter and the Second Case Manager Decision Letter, the Appellant filed on July 23, 1999, an Application for Review of Injury Claim Decision(s) pursuant to Section 172(1).

Internal Review of the Decision Letters

On September 7, 1999, the Internal Review Officer, Mr. T.R. Strutt, issued an internal review decision letter (the "Internal Review Decision Letter") wherein he dealt with the following issues:

1. Whether the Appellant is out of time with respect to filing an Application for Review of Injury Claim Decision relating to of the First Case Manager Decision Letter?
2. Whether the Appellant is entitled to a further Permanent Impairment Benefit with respect to the damaged front teeth, and for other injuries associated with the accident?
3. Whether the Appellant is entitled to a further Permanent Impairment Benefit for re-capping the front teeth?
4. Whether the Appellant is entitled to an Income Replacement Indemnity?

The Internal Review Officer rejected all of the Appellant's claims. Details of the Internal Review Officer's decision are as follows:

[y]our Application for Review requests compensation for various physical deficits that you say resulted from your motor vehicle accident. Rick Walker's decision letter of January 30, 1998 did award you a Permanent Impairment benefit. That letter contains the standard paragraph putting you on notice that an Application for Review of the Permanent Impairment award had to be made within 60 days. Your Application for Review is, therefore, more than a year late. Section 172(2) of *The Manitoba Public Insurance Corporation Act* ("the Act") allows the Corporation to extend the time for applying for a review if it is satisfied that the claimant has a reasonable excuse for a late Application. Nothing in your Application for Review, or on your claim file, provides such a reasonable excuse, I therefore, decline to extend the time for an Application for Review of your entitlement to a Permanent Impairment benefit.

I have also reviewed your entitlement to a Permanent Impairment benefit on its merits. You received the correct award for the damage to your two middle teeth (#11 and #21). Your file contains no medical justification for a further Permanent Impairment benefit for the other injuries complained of in your Application for Review, namely: your neck injury; the whistling you experience in your right ear; your heart attack; and the ribs you say were broken in the accident. If such medical justification becomes available in the future, your adjuster will reassess your entitlement to a Permanent Impairment benefit.

Your Application for Review also complains that we have not paid to have your two front teeth recapped. There is no specific claims decision on your file regarding your entitlement to reimbursement for such an expense. Nevertheless, I deal with it now. Your adjuster wrote to your dentist on May 1, 1998. She pointed out to him that our dental consultant had reviewed the evidence and concluded that the major esthetic and structural defect at the gingival level of your 11th and 21st teeth existed before the car accident. Our dental consultant had also indicated that any decision to crown those teeth would likewise be based on dental problems that existed before your car accident. I conclude that you are not entitled to reimbursement for such an expense.

Although your Application for Review talks only about Permanent Impairment benefits and medical expenses, I note that you do refer to the decision of May 27, 1999. In fact, there is not such decision. There is a decision dated May 20, 1999 having to do with your entitlement to Income Replacement Indemnity ("IRI") benefits. Perhaps you intended to request a review of this decision.

Accordingly, I have reviewed it as well. This decision was also forwarded to you in both French and English. The reasons Ms. Nixon gives for concluding that you were a “non-earner” before the motor vehicle accident are sound. She is also correct in concluding that, since you have not provided any evidence you would have held employment during the first 180 days following your accident, you are not entitled IRI for those 180 days. This follows from the provisions of Section 85(1) of the Act. Her determination of employment for you as of the 181st day appears to have been a reasonable one based on what we know of your working history. Ms. Nixon is correct in saying that the available medical evidence reports no objective findings that would have prevented you from working at the determined employment as of the 181st day. She is correct in concluding, therefore, that you did not have entitlement to Income Replacement Indemnity benefits as of the 181st day.

As a result of the findings of the Internal Review Officer, the Appellant filed a Notice of Appeal on November 3, 1999, pursuant to Section 174.

B. THE POSITION OF THE PARTIES

The Appellant

The Appellant’s position is that the accident, together with the physical and emotional injuries, had a negative cascading effect upon her. Ultimately, she says the injuries affected the family business because she could no longer help her husband. In this regard, she mentions in the Notice of Appeal dated November 3, 1999, that:

... Right Now – Everything is Very Critical Situation Ref: St Bon Credit union is Foreclosing – we Will Be Loosing everything we Have Worked for – (Since we Got married in 1962.) Before the Accident Payments Have always Been on time since the Accident Payments are All Behind Including Van – which they will also Repossess ... [Sic]

The Appellant is seeking the following remedies:

1. Re-capping of her front teeth so that they can be the same length as they were before the accident.
2. Coverage/reimbursement for the extraction of Tooth #27.
3. Permanent Impairment Indemnity for the loss of Tooth #27.
4. Income replacement Indemnity.
5. Compensation for emotional and physical pain and suffering.

MPIC

MPIC's arguments center on the following issues:

1. Whether the Appellant is out of time with respect to appealing the First Case Manager Decision Letter?
2. Whether the Appellant is entitled to an additional Permanent Impairment Benefit?
3. Whether the Appellant is entitled to have her front teeth crowned?
4. Whether the Appellant has been appropriately classified as a non-earner?
5. Whether the Appellant is entitled to an Income Replacement Indemnity for the 180 days following the accident?
6. Whether the Appellant is entitled to an Income Replacement Indemnity after the 181st day following the accident?

A written submission (the "Written Submission") answering the above-noted questions was filed with the Commission at the end of the Hearing.

MPIC's position is that the Appellant is out of time with respect to the late filing of an Application for Review of Injury Claim Decision relating to the First Case Manager Decision Letter. In the Written Submission, MPIC cited the following five factors that the Commission should consider in rejecting the extension of time:

1. la durée réelle du délai, comparativement à la période de temps prescrite ;

2. les motifs du délai de réponse;
3. la création ou non d'un préjudice pour la Société d'assurance publique en raison du délai;
4. l'existence d'une exonération relative au délai; et
5. la présence d'autres facteurs qui auraient eu des incidences sur la justice des procédures.

[Translation]

1. The actual length of the delay compared with the time period in question.
2. The reasons given for the delay.
3. Whether there has been any prejudice to MPI resulting from the delay.
4. Whether there was any waiver respecting the delay.
5. Any other factors impacting on the justice of the proceeding.

We note that these factors were previously enumerated by the Commission in *V.R. (AC-02-103, April 22, 2004)* with respect to extensions of time for appealing a review decision pursuant to Section 174 (although in the case at hand, it would be Section 172(2)).

With respect to the Appellant's teeth, MPIC argues that the Appellant is not entitled to a further Permanent Impairment Benefit in that she has already received all benefits as contemplated by the Act. MPIC is of the view the resin filling restorations were reasonable, and that no other work is justified given that the Appellant had some pre-existing issues with her teeth. In this regard, MPIC argues:

... [D.T.] a subi des fractures du bord incisif (ébrèchement) sur deux dents (incisives centrales n^{os} 11 et 21) qui ont exigé une restauration en résine. L'annexe des déficiences permanentes de la Société d'assurance publique (l'« Annexe ») prévoyait pour chaque dent un pourcentage d'incapacité de 1 %, qu'on a utilisé pour calculer la prestation.

[D.T.] semble se plaindre principalement du fait que ses dents ne semblent pas aussi longues qu'auparavant. Son propre dentiste a indiqué que les éléments de preuve qui soutiennent une telle affirmation « n'étaient pas concluants »...

Par contre, même si l'affirmation est correcte, la cote d'incapacité permanente accordée aux dents ne sera pas modifiée, car le pourcentage de 1 % établi dans l'Annexe pour les dents fait clairement référence à l'« altération [...] de dents ». ...

En août 2000, la Société d'assurance publique a reçu d'autres éléments de preuve ... qui ont établi une altération de l'incisive latérale droite de [D.T.] (dent n° 12), ce qui a ajouté un pourcentage d'incapacité de 0,75 %.

[Translation]

. . . [D.T.] sustained enamel edge fractures (chips) to her two front teeth (central incisors #'s 11 & 21), which each required resin restorations. The MPI Permanent Impairment Schedule ("the Schedule") then in effect provided for a 1% award for each tooth.

[D.T.'s] main complaint seems to be that her front teeth are not as long as they used to be. The evidence supporting this assertion has been characterized as "inconclusive" by her own dentist.

But even if the assertion is correct, the Permanent Impairment rating for these two teeth does not change, because the 1% award which the Schedule establishes for each tooth clearly refers to "Alteration . . . of teeth". . .

In August, 2000, further evidence was received which established that an alteration to [D.T.'s] right lateral incisor (#12) had also occurred, entitling to her an additional 0.75%.

As for tooth # 27, MPIC simply states:

[e]n se fiant aux probabilités, aucun élément de preuve ne peut établir que la fracture de la deuxième molaire supérieure gauche (dent n° 27) est le résultat de l'accident survenu plus de deux ans avant la découverte de la fracture.

[Translation]

The weight of the evidence does not, on a balance of probabilities, establish that the fracture to the upper left second molar (#27) is causally related to the accident more than two years prior to its discovery.

With respect to the issue of crowning tooth #11 and tooth #21, MPIC's position is that appropriate restorations were completed as reasonably required. There are no other obligations on its part concerning these teeth.

As for the issues surrounding the Income Replacement Indemnity and "non-earner" status, MPIC argues that the Appellant was properly classified as a non-earner and that based on the written record, she was not entitled to a benefit for the 180 days following the accident, including the 181st day thereafter.

MPIC also raises the possibility that the Appellant could have been entitled to a benefit under Section 135, but states that this Section is not applicable given that a replacement worker was not hired by her husband.

C. DECISION – ISSUES UNDER APPEAL

1. Whether the Appellant had a reasonable excuse for the late filing of an Application for Review of Injury Claim Decision with respect to the First Case Manager Decision Letter pertaining to the Permanent Impairment Benefit?

On a balance of probabilities, this Commission finds that the Appellant had a reasonable excuse for the late filing on July 23, 1999, of an Application for

Review of Injury Claim Decision with respect to the First Case Manager Decision Letter and pertaining to the Permanent Impairment Benefit.

In her testimony, the Appellant indicated that a lawyer she earlier consulted had not provided her with any letters or information regarding the request for a hearing. It also appeared to this Commission that the Appellant seemed somewhat confused as to the steps she was required to follow in order to comply with the Act.

Apart from accident-related insurance and medical issues, during the relevant time period, the Appellant was also suffering from a depression illness and chronic pain syndrome.

It is clear from the written record that the Appellant was cooperative with MPIC, and on a number of occasions, she had provided MPIC with handwritten letters and a declaration detailing her plight. The issues surrounding the Appellant's teeth (Permanent Impairment Benefit, re-capping with resin filling and lengthening to the pre-accident state), were routinely being considered by MPIC and the last entry in the written record being the McKelvey Letter.

It is not difficult to see why the Appellant may have been confused with respect to the timing of a review when the issues relating to her teeth were before a Case Manager and MPIC's Dental Consultant. The Appellant was under a mistaken

apprehension with respect to the process as she was also waiting for a determination on her Income Replacement Indemnity, and she did not fully appreciate the timing involved for the appeal in question.

In light of the above, and on a balance of probabilities, we find that the reasons for the delay are compelling and unavoidable. While we are cognizant that some 18 months have passed between the First Case Manager Decision Letter and the Application for Review of Injury Claim Decision, there was no real prejudice to MPIC on the issue of a Permanent Impairment Benefit in this case given that there is often a longer delay in MPIC reaching a decision regarding these benefits generally.

Pursuant to the authority vested in this Commission under Section 184(1)(a), we rescind the Internal Review Decision Letter with respect to this issue. In addition, pursuant to Section 184(1)(b), we make the following decision that MPIC could have made as contemplated by Section 172(2), and we hereby extend the time to July 23, 1999, for the filing of the Application for Review of Injury Claim Decision with respect to the First Case Manager Decision Letter.

2. If the Appellant had a reasonable excuse for the late filing of an Application for Review of Injury Claim Decision, whether the amounts awarded for Permanent Impairment Benefit were adequate on their merits with respect to:

a) Tooth # 11 and Tooth # 21?

This Commission finds that MPIC did not err with respect to the amounts awarded for Permanent Impairment Benefit for Tooth # 11 and Tooth #21, and its agreement to cover restorative work in the future for these teeth, if needed. The medical evidence on the record adequately supports the position taken by MPIC in that regard.

MPIC's Dental Consultant, mentions in the Mazaurat Memo that:

2) The #11 + #21 + #12 had very minimal damage and crowning was not justified. We had offered the option of partial coverage (for crowns) but the teeth were restored conservatively. There would be an impairment for those teeth:

11	1.00%
21	1.00%
12	.75%
Total	2.75%

We accept Dr. Mazurat's assessment with respect to the Permanent Impairment Benefit for Tooth #11 and Tooth #21.

Pursuant to the authority vested in this Commission under Section 184(1)(a), we confirm the Internal Review Decision Letter with respect to this issue.

b) Tooth # 12?

We note the Appellant has raised the issue pertaining to the Permanent Impairment Benefit with respect to Tooth # 12, and that this issue was not considered by the Internal Review Officer in the Internal Review Decision Letter. This issue is technically out of order from a timing perspective. However, given

that MPIC has dealt with the same in its Written Submission, and in the interests of providing the parties with a comprehensive decision in this matter, we find that we have sufficient jurisdiction to deal with this question.

Therefore, on a balance of probabilities, this Commission finds that MPIC did not err with respect to the amount awarded for Permanent Impairment Benefit for this tooth. We find that the medical evidence on the record adequately supports the position taken by MPIC relating to the Permanent Impairment Benefit, and as noted in the McKelvey Letter.

3. Whether the Appellant is entitled to coverage or reimbursement with respect to:

a) Re-capping (Lengthening) Tooth #11 and Tooth #21?

We note that there is no Case Manager Decision Letter in the written record with respect to this issue. However, the Appellant has raised it in the Notice of Appeal and the issue is considered by the Internal Review Officer in the Internal Review Decision Letter. In light of this, the Commission is of the view that it has sufficient jurisdiction to rule on the question.

On a balance of probabilities, the Commission finds that MPIC erred in denying coverage or reimbursement to the Appellant for re-capping (lengthening) the Appellant's front teeth so as to restore the same to their original length prior to the accident. The evidence suggests that prior to the accident the Appellant's

front teeth were longer than they were subsequent to the application of the resin fillings.

Dr. Rink's letter dated October 8, 1999, clearly indicates that the teeth in question were longer based upon a review of a pre-accident radiograph and a picture dating back some 35 years. Although MPIC's Dental Consultant stated in the Mazurat Memo that "[s]ince only minimal tooth structure was involved, I do not see a change in length of these teeth being due to the motor vehicle accident", we nonetheless prefer the Appellant's evidence as supported by Dr. Rink's comments referred to above.

Pursuant to the authority vested in this Commission under Section 184(1)(a), we rescind the Internal Review Decision Letter with respect to this issue. In addition, pursuant to Section 184(1)(b), we make the following decision that MPIC could have made and order that should the Appellant decide to have her teeth lengthened, MPIC pay for the same by using a resin bonding as contemplated by Dr. Rink in his letter dated October 8, 1999.

Given the significant passage of time, and in light of possible advancements in dentistry, and related fields, with respect to alternative methods for lengthening teeth by means other than resin bonding, we further order MPIC, in consultation with the Appellant and her dental consultant(s), all parties acting reasonably, consider and if required, pay for the lengthening of the teeth using such

alternative method. The Commission shall retain jurisdiction with respect to this issue and either party may upon reasonable notice refer this matter back to the Commission for final determination.

As an aside, we note the Written Submission refers to the issue of “crowning” Tooth #11 and Tooth #21. Likewise, the Internal Review Officer suggests this is what the Appellant is seeking. Perhaps it is a question of semantics, however, our reading of both the Application for Review of Injury Claim Decision and the Notice of Appeal suggest that the Appellant is seeking to have her teeth lengthened and not crowned. At the date of the Internal Review Decision Letter, namely, September 7, 1999, “crowning” the teeth was no longer an issue as the resin fillings had already been completed by then (June 15, 1998). Case Manager, Ms. Nixon, was apprised of this in a letter from Dr. Rink dated June 29, 1998.

b) Extracting of Tooth # 27

The matter relating to the extraction of Tooth # 27 was not before the Internal Review Officer and as a consequence, he did not deal with it in the Internal Review Decision Letter. We note the Appellant raised the issue in the Notice of Appeal, and that MPIC dealt with the same in its Written Submission. In light of this, and for the sake of comprehensiveness, we find that we have sufficient jurisdiction to deal with this question.

We accept Dr. Rink's assessment that the fracture "could very well have been of long standing duration from such trauma". In a reporting letter dated October 8, 1999, Dr. Rink indicates:

[r]adiographic examination was inconclusive, but clinical examinations indicated a complete mesio-distal fracture of tooth number 27 which could very well have been of long standing duration from such trauma. Intra-oral photography verified the fracture which was beyond treatment and required surgical removal in two places. *Emphasis added.*

Conversely, MPIC's Dental Consultant states in the Mazurat Memo that:

1) Tooth # 27 – I had not seen any report prior to this concerning tooth. It is very difficult to ascertain or attribute a cause to the fracture of this tooth. Given the time frame of 2+ years, it is very possible that the fracture is not motor vehicle accident related.

Dr. Mazurat mentions that it is difficult to attribute a cause, but concludes that the fracture was not related to the accident. And yet, the written record shows that the Appellant suffered other fractures to her teeth as a result of the accident. The Commission finds it difficult to accept Dr. Mazurat's evidence in this regard and prefers that of Dr. Rink. The only concern we have with Dr. Rink's findings is that he did not initially note a fracture of this tooth in his preliminary assessment.

On a balance of probabilities, we find that MPIC erred in denying the Appellant's claim for coverage or reimbursement with respect to the extraction of Tooth # 27 and a Permanent Impairment Benefit. Pursuant to Section 184(1)(a), we rescind the decision of MPIC and we refer this matter back to MPIC for a determination of the Appellant's claim for Permanent Impairment Benefit as contemplated by

Section 127, Schedule "A", Division 3, Subdivision 1, Section 4 (a)(vii) of Regulation 41/94, which would entitle the Appellant to a benefit of 1.00%. In addition, pursuant to Section 184(1)(b), we make the following decision that MPIC could have made and we order MPIC to reimburse the Appellant for all costs associated with the extraction of Tooth # 27. The Commission shall retain jurisdiction on this issue, and either party may upon reasonable notice refer this issue back to the Commission for final determination.

c) Neck injury, whistling in right ear, stress and possible fracture or broken rib?

On a balance of probabilities, this Commission finds that MPIC did not err with respect to denying compensation for Permanent Impairment Benefit for the Neck injury, whistling in right ear, stress and possible fracture or broken rib. We agree with the Internal Review Officer that the Appellant's file does not contain any medical justification for such compensation.

Pursuant to Section 184(1)(a), we confirm the Internal Review Decision Letter with respect to this issue.

4. Whether the Appellant was properly classified as a non-earner at the time of the accident?

This Commission finds that MPIC erred in classifying the Appellant as a non-earner at the time of the accident.

According to Section 70(1), a non-earner is defined as:

"non-earner" means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student; (« non-soutien de famille »)

In its Written Submission, MPIC argues that although the term “regular employment” is not specifically defined in the legislation, the definition of “employment” in Section 70(1) clearly contemplates a remunerative occupation. MPIC appears to suggest this would mean “employment” in the classic sense where there is remuneration and source deductions.

MPIC also indicates that the Appellant’s Income Tax Returns do not show a claim for “employment income” or even “business income”, but rather investment income or income from property. And as a result, MPIC would say that the Appellant is a non-earner.

What MPIC fails to appreciate is that the Act and accompanying regulations broadly use the term “employment” in both the classic sense and in the context of revenue generated from a proprietorship or partnership ... that is a business income.

Examples of this type of usage can be found in Section 83(2)(a)(i) which refers to “employment as a salaried worker” that would presumably mean “employment” in the classic sense, and Section 83(2)(a)(ii) which speaks to a part-time earner

who is self-employed and “the gross income that he or she earned or would have earned from the employment...”

In addition, Section 3 of Regulation P215 - R.M. 39/94 relating to the determination of income and employment, contemplates proprietorship and partnership employment income from self-employment. It is also interesting to note that “business income” is defined in part as “... income derived from self-employment, by way of a proprietorship or partnership interest ...”.

Without a doubt, the Act and the accompanying regulations contemplate employment in its broadest sense.

As further support for its position, MPIC points out that when completing the Application for Compensation, the Appellant indicated she was not working at the time of the accident. In this regard, this Commission questions whether the Appellant understood the import of what was being asked of her? Perhaps had the question had been framed to ask the Appellant whether she was employed or self-employed, then perhaps this would have elicited a different response. In any event, we note Dr. Van Wyk’s comments in the Initial Health Care Report dated July 22, 1997, wherein he mentions that the Appellant had “difficulty concentrating on work (when helping husband repair suites)”. This suggests to us that at least when she met her physician, she had discussed her work arrangements with him. We accept the Appellant’s evidence that she worked

with her husband buying, repairing and re-selling dilapidated houses, and that she earned a business income from that activity. She was a co-owner or partner with her husband and this is clearly set out in her Income Tax Returns for 1994, 1995 and 1996, where she lists her husband as a co-owner or partner. See for example Schedule T776E (96) of her 1996 Income Tax return.

We find that the Appellant should have been classified as a part-time earner who held a regular employment and received a "business income" notwithstanding the fact that for tax purposes, she treated her income as income from property.

The written record supports a finding that the Appellant was a part-time earner. Her occupation consisted of a mixture of being a laborer, property manager and landlord with remuneration in the form of rent and proceeds from the sale of real property.

Section 70(1) defines a part-time earner as:

"part-time earner" means a victim who, at the time of the accident, holds a regular employment on a part-time basis, but does not include a minor or a student; (« soutien de famille à temps partiel »)

While we find the Appellant was a part-time earner, we do not accept her evidence that she worked with her husband five days per week, eight hours per day. The evidence suggests that she and her husband sold two or perhaps three houses.

We accept MPIC's arguments on this point as set out in the Written Submission:

[e]n ce qui concerne la demande d'une IRR de [D.T.], cette dernière a indiqué qu'elle travaillait environ 40 heures par semaine (8 heures par jour et 5 jours par semaine) à exécuter des travaux de rénovation dans les maisons qu'elle-même et son conjoint achetaient à des fins de revente (**onglet 5, page 3; onglet 6, page 3**).

Cela semble improbable. Ses déclarations de revenus (**onglets 23 à 27**) indiquent deux (ou possiblement trois) ventes de propriété qui ont produit des gains en capital au cours des cinq ans qui ont précédé la date de l'accident. Au cours de la même période, selon les éléments de preuve qu'elle a soumis, [D.T.] aurait accumulé plus de 10 000 heures de travail. (Nota. Ce nombre ne tient pas compte du nombre d'heures travaillées par son conjoint au cours de la même période.)

En supposant qu'elle a acquis certaines compétences raisonnables au cours de ses 35 années de travail à temps plein à titre de rénovatrice, il semble improbable que de si nombreuses heures de travail n'aient produit que deux ou trois propriétés vendables en cinq ans.

[Translation]

With respect to her IRI claim generally, [D.T.] indicates that she worked about 40 hours per week (8 hours/day, 5 days/week) doing various aspects of the renovation work on homes that she and her husband purchased for resale (**Tab 5, Page 3; Tab 6, Page 3**).

This seems unlikely. Her income tax records [**Tabs 23-27**] indicate two (or possibly three) sales of properties which generated capital gains during the five-year period preceding the accident. During that same time period, [D.T.] would – according to her evidence – have put in over 10,000 hours of work. (Note: This number does not even take into account the hours which [E.T.] would have worked during the same time period.)

Assuming she had acquired some reasonable competence over her 35 years of reported full-time work as a renovator, it seems unlikely that so many hours of work would have produced only two or three saleable properties over a five-year period.

In light of the above, and on a balance of probabilities, we find that MPIC erred with respect to classifying the Appellant as a non-earner at the time of the accident and therefore, pursuant to the authority vested in this Commission under Section 184(1)(a) of the Act, we rescind the Internal Review Decision Letter with respect to this issue. Pursuant to Section 184(1)(b), we make the following decision that MPIC could have made and we find that the Appellant is properly classified as a part-time earner pursuant to Section 70(1).

5. Whether the Appellant is entitled to an Income Replacement Indemnity for the 180 days following the accident and after the 181st day following the accident?

180 Days Following the Accident

Having determined that the Appellant is a part-time earner, this Commission finds that MPIC erred in denying the Appellant an Income Replacement Indemnity for the 180 days following the accident pursuant to Section 85. In light of our finding regarding the Appellant's status as a part-time earner, the appropriate provision of the Act with respect to the Income Replacement Indemnity is Section 83.

Turning to Section 83(1), we note that this Section provides in part that a part-time earner is entitled to an Income Replacement Indemnity for any time, during the first 180 days after an accident where she was unable to continue the employment during that period if the accident had not occurred.

The Initial Health Care Reports dated July 22, 1997 and May 25, 1998, both indicate with respect to “Work Capacity”, that the Appellant could only work modified work duties. Furthermore, the latter Initial Health Care Report, which was dated some 10 months after the accident, shows that the Appellant should not do any heavy lifting greater than 30 pounds. Given the nature of the Appellant’s work duties with her husband, this is a significant restriction.

Overall, the medical evidence shows that as a result of the accident, The Appellant was unable to continue employment. We accept the evidence of Dr. van Velden in this regard where he states in a letter dated December 18, 1998:

[a]t present her main complaint is a pain in her neck and shoulders. She states that she had no pain before the accident but that it got steadily worse since the accident. She attends physiotherapy (Ron Gull [Sic] at pan Am Sports Clinic) since [and] that does give her some relief but she is still in pain all the time. She states that she actively helped her husband before the accident in his repair job but that she can’t help him at all since. She can hardly do her work own housework now.

...

Her second problem is emotional. She has never driven a vehicle since the accident. She has developed a phobia for oncoming traffic and just can’t get the accident out of her mind.

I referred her to our local mental health worker for this problem.

I do feel that her symptoms started or were triggered by the accident on July 3, 1997. I also feel that there is a big emotional and psychological problem involved and that she [Sic] would benefit from psychotherapy.

Dr. van Velden, as well as Dr. Van Wyk, had the benefit of conducting medical examinations of the Appellant. We accept Dr. van Velden’s assessment that

there is a causal connection between the accident and her injuries resulting in the Appellant not being able to continue her employment on a part-time basis.

Pursuant to Section 184(1)(a), we rescind the decision of the Internal Review Officer with respect to denying the Appellant an Income Replacement Indemnity under Section 85, and we refer this matter back to MPIC for a determination of the Appellant's claim for an Income Replacement Indemnity for the first 180 days following the accident. The Commission shall retain jurisdiction on this issue, and either party may upon reasonable notice refer this issue back to the Commission for final determination.

After the 180th Day Following the Accident

This Commission finds that on a balance of probabilities, MPIC erred in denying the Appellant an Income Replacement Indemnity after the 180th day following the accident pursuant to Section 86. In light of our finding regarding the Appellant being a part-time earner, the appropriate provision of the Act with respect to this Income Replacement Indemnity is Section 84.

The evidence of Dr. van Velden, Dr. Dubo and Dr. Fast, support the Appellant's claim that she was unable to work during the relevant time periods. Apart from suffering from the physical injuries caused by the accident, she was also suffering from depression, chronic pain syndrome and multiple myofascial pain syndrome.

MPIC's Psychological Consultant, Dr. A. Moore, in an Inter-departmental Memorandum dated September 18, 2000, states, after cautioning MPIC he had an extremely limited pre-accident history that "[a]s you are aware, depression and/or driving phobia can be barriers to work". Further details with respect to Dr. Moore's above-noted statement in this regard are instructive:

Allow me to attempt to respond to your initial referral questions. Unfortunately, based on the available information, it is difficult to be conclusive with respect to your questions. With respect to an impairment award, it would be premature to provide a rating regarding depressogenic and/or driving phobia without any background information, specifically a premorbid mental health history. This speaks directly to causation. As well, it does not appear that [E.T.'s] potential depression/driving phobia have been addressed in a comprehensive manner based on the information I have available to review. Additionally, I do not have information detailing the extent of her symptomatology or the degree to which this may be disabling at the present time. Without this information, I fear I am unable to provide you with an impairment rating with respect to her psychological status.

Similarly, the relative lack of information with respect to the etiology, development, treatment or severity of her symptoms prevent me from providing you with an opinion with respect to whether her psychological symptoms would prevent work activities at this time. As you are aware, depression and/or driving phobia can produce barriers to work. Without additional information with respect to causation, treatment, or the severity of her symptoms, I am unable at this time, to provide you with an opinion regarding how whether or how great a barrier these issues might represent vocationally. Additional information and/or assessment is required to respond to your referral questions.

On a paper review of the medical file, MPIC's Psychological Consultant is unable to arrive at any conclusion and he states that he would need additional information in order to "respond to the referral questions".

In addition, MPIC requested that its Medical Consultant, Dr. Brad Baydock, review the Appellant's medical file and provide his opinion. In that regard, Dr.

Baydock concluded that:

In my review of the submitted material, it is clear that the claimant developed a neck injury as a result of the motor vehicle collision. This condition was diagnosed as a WAD (Whiplash Associated Disorder) injury. Consistently throughout the file, the only objectively documented physical finding due to the collision is decreased range of motion in the claimant's neck. In my opinion, the presence of the decreased neck motion would constitute a partial temporary impairment. However, on the balance of medical probabilities, this impairment would likely not prevent the claimant from working in a sedentary classification work (an entry-level position). With respect to how her partial physical impairment affects her ability to perform duties of her pre-collision occupation, there is insufficient information in the file pertaining to the specifics of her job duties upon which for me to comment. *Emphasis added*

The file identifies the presence of significant psychological problems that have developed subsequent to the collision. These conditions may also be associated with a degree of partial impairment. I would recommend that Dr. Moore, the psychological consultant, review the file to provide an opinion on any impairment associated with the claimant's psychological condition.

In our view, what is important to note from Dr. Baydock's concluding remarks is that he mentions there is insufficient information on the file to permit him to determine whether the physical impairment affects her abilities to perform her pre-collision duties.

Overall, we prefer the medical evidence submitted on behalf of the Appellant's physicians, who had the opportunity to examine her in person on numerous

occasions, over the medical opinions rendered by MPIC's Consultants who only conducted paper reviews of the Appellant's medical file.

Pursuant to Section 184(1)(a), and based in part on our finding that the Appellant's occupation consisted of a mixture of being a laborer, property manager and landlord with remuneration in the form of rent and the proceeds from the sale of real property, we rescind the decision of the Internal Review Officer with respect to denying the Appellant an Income Replacement Indemnity under Section 86, and we refer this matter back to MPIC for a determination of the Appellant's employment and claim for an Income Replacement Indemnity after the 180th day following the accident, as contemplated by Section 84.. The Commission shall retain jurisdiction on this issue, and either party may upon reasonable notice refer this issue back to the Commission for final determination.

6. Whether the Appellant is entitled to compensation for general pain and suffering resulting from the accident?

On reading the Application for Review of Injury Claim Decision and Notice of Appeal, and although not precisely articulated by the Appellant, we find that the Appellant also requested compensation for what would be characterized as general pain and suffering. In the Application for Review of Injury Claim Decision, the Appellant states that:

... My Nerves are Very Bad - & Going through a Lot of Stress Ref:
Arrears on All Payments, its enough to Have a Heart Attack ... [Sic]

The Appellant also makes a similar statement in the Notice of Appeal.

We find that the Appellant is not entitled to compensation for general pain and suffering because such compensation is not contemplated by the legislation. According to Section 72, the heads of compensation under the Act stand in lieu of any other rights and remedies arising from bodily injuries. Section 72 provides as follows:

72. Notwithstanding the provisions of any other Act, compensation under this Part stands in lieu of all rights and remedies arising out of bodily injuries to which this Part applies and no action in that respect may be admitted before any court.

The Act only provides coverage to qualified individuals for medical and personal expenses, income replacement, caregiver expenses, personal assistance, impairment, and rehabilitation.

Therefore, the Internal Review Decision Letter is varied accordingly.

Dated at Winnipeg this 8th day of October, 2008.

Mr. J. Guy Joubert

The Honourable Mr. Wilfred De Graves

Dr. F. Patrick Doyle

