

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by D.R.
AICAC File No.: AC-05-201

PANEL: **Ms Laura Diamond, Chairperson**
Ms Jean Moor
Dr. Patrick Doyle

APPEARANCES: **The Appellant, D.R., was represented by Mr. Victor Bargen;**
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Dean Scaletta.

HEARING DATE: **April 1, 2009 and May 5, 2009**

ISSUE(S): **Entitlement to Permanent Impairment Benefits for whatever**
condition is causing the Appellant's lower body
symptoms/complaints.

RELEVANT SECTIONS: **Sections 127 and 129 of The Manitoba Public Insurance**
Corporation Act ('MPIC Act') and Manitoba Regulation
41/94.

MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER
IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on September 13, 2000. At the time of the motor vehicle accident the Appellant was employed as a secretary by the [text deleted]. Following the motor vehicle accident the Appellant sought treatment for her injuries and was in receipt of Income Replacement Indemnity ("IRI") benefits.

The Appellant also sought a Permanent Impairment benefit under the Act. It was the position of the Appellant that the injuries she suffered in the motor vehicle accident caused the development of or materially contributed to the acceleration of a condition of spinal stenosis.

The Appellant's case manager wrote to her on January 21, 2003 indicating that, after reviewing the medical reports on file, it was determined that her spinal stenosis was not as a result of the motor vehicle accident but rather was due to degenerative causes. Therefore, she was not entitled to a Permanent Impairment benefit.

The Appellant sought an Internal Review of this decision. On August 31, 2005, an Internal Review Officer for MPIC found that the Appellant did not have a permanent anatomicophysiological deficit capable of causing the symptoms complained of. Her symptoms were not caused by the car accident, but were the outcome of a long process of degeneration which had been going on for some time and which was underway prior to the car accident. Permanent Impairment benefits were not available for her symptoms in any event. For all of these reasons, the Appellant was not entitled to a Permanent Impairment benefit.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

At the appeal hearing, the parties agreed that the issue before the Commission was whether the enhancement of the Appellant's symptoms from advanced spinal stenosis entitled her to Permanent Impairment benefits under the MPIC Act.

Evidence and Submission for the Appellant

The Appellant testified at the hearing into her appeal. She described her educational and employment background. She also described her personal circumstances prior to the motor vehicle accident, raising two adult children and residing with her 11 year old grandson, for whom she had been the legal guardian since 1998, since he was an infant. At the time of the motor vehicle accident he was 2½ years old and she was fully responsible for his care. She had no medical difficulties, was healthy and able to care for him, as well as working and enjoying activities such as theatre, symphony, dancing, gardening, painting, and spending recreational time with her grandson.

The Appellant described her medical status prior to the motor vehicle accident, which included some minor medical issues with a bladder repair, right knee scope and bunion surgery. She had no problems with her back or further problems with her knees and was able to fully participate in all activities.

The Appellant also described the motor vehicle accident and aftermath, when she went to hospital by ambulance. She described pain in her chest with difficulty breathing as well as sore legs, arms, neck and back. The Appellant was discharged from hospital with prescriptions for Demerol, Vioxx, Extra Strength Tylenol and Stemetil for nausea. However, she returned back to the hospital a few days later with her chest hurting and suffering from difficulty breathing and moving. More x-rays were performed and eventually, broken ribs were found.

The Appellant was in the hospital for a few days while her caregivers attempted to get her pain under control with medical injections, such as Demerol. She was then discharged from hospital and cared for by her family physician, Dr. Luk, who continued to prescribe the medications referred to above. The Appellant testified that following her discharge, she stayed in bed

recovering and with her daughter helping her. She wanted to go back to work and began physiotherapy treatment. She also undertook a gradual return to work program working part-time. She continued with physiotherapy and eventually returned to work at her job.

However, as the Appellant got stronger, and her arms and balance improved, she found that her back was not getting better. In addition to her physiotherapy treatment, she tried acupuncture, which provided relief that only lasted a few days.

Further investigation with her family doctor and Dr. Adduri, an orthopaedic surgeon, followed. She also saw Dr. Fewer, a neurologist, and Dr. Stitz, a physiatrist. The Appellant described her back pain, leg problems and the bowel and incontinence issues which went with this. She also described the medications which she is still taking and the side effects.

The Appellant testified that she continued to work and to take her grandson to school and daycare. Any other activities were too difficult for her. She can no longer do sports or physical activities and cannot attend movies or concerts because she cannot sit still that long. She cannot take car trips, travel, and walk very far, go to church or take her grandson to Sunday school.

She emphasized that prior to the motor vehicle accident, she was able to do anything she wished, while also caring for an infant and working. She now has to use supports to walk (first a cane, now a walker), cannot do anything besides work and provide basic care for her grandson, and suffers from bladder and bowel dysfunction, in addition to pain.

Counsel for the Appellant also referred to medical reports on the indexed file from the Appellant's family doctor, from Dr. Adduri, and Dr. Goytan, Assistant Professor of Orthopaedics

and Neurosurgery. The physicians reviewed the radiographic findings and their examinations and assessments of the Appellant.

Dr. Adduri provided a diagnosis of spinal canal stenosis at L5-S1 with S1 nerve root compression bilaterally. He noted that spinal canal stenosis is usually degenerative in nature and is usually a very gradual onset. While indicating that sometimes an accident could aggravate the condition by prolapsing a disc, he did not think the CT scan findings indicated any acute disc prolapse. According to Dr. Adduri, the back symptomatology, being caused by the degenerative changes in arthritis of the apophyseal joints is likely to continue permanently and might even get worse with time.

Dr. Goytan provided a letter dated October 7, 2003. He described the Appellant's injuries and responded to questions set out by the Appellant's previous counsel. He described the Appellant's distress and the x-rays which revealed degenerative scoliosis. A CT scan performed December 5, 2001 revealed moderate to severe spinal stenosis seen at the L5-S1 level and to a lesser degree at the L4-5 level. Degenerative changes were seen in the facet joints throughout the lumbar spine. He noted that based on the likelihood of probabilities, the Appellant had pre-existent spinal stenosis. The findings seen radiographically could not be attributed to one single episode of trauma, overuse or heavy lifting. The changes were cumulative in nature and multifactorial and he believed that these radiographic findings were pre-existent to the time of the motor vehicle accident on September 13, 2000.

Dr. Goytan was also asked whether, if the Appellant had spinal canal stenosis which was latent, it was enhanced or materially aggravated by the accident. He indicated that the radiographic findings outlined were unlikely to have been enhanced by the motor vehicle accident. The

Appellant, however, did not complain of back pain and leg pain with associated leg weakness and numbness prior to her accident and began to complain of these symptoms in October or November of 2000. This led to a diagnosis of neurogenic claudication secondary to lumbar spinal stenosis. He noted:

“Therefore the radiographic findings were not exacerbated or created by the motor vehicle accident however the clinical situation resultant from these radiographic findings by history was exacerbated or aggravated by the motor vehicle accident dated the 13th of September 2000.”

In a letter dated September 1, 2004, Dr. Goytan noted that although he was unable to state that there was a change in the Appellant’s spine in terms of degeneration as a result of the motor vehicle accident, he could suggest with a high degree of certainty that the motor vehicle accident contributed to her diminution in function. Natural history studies show that there are a significant number of patients in the Appellant’s age group who do have evidence of degenerative changes which result in spinal stenosis and would have no symptoms of back pain, leg pain or numbness. Therefore, given that the Appellant had no symptoms prior to her motor vehicle accident and now has marked diminution in her mobility, it can be said that the motor vehicle accident materially contributed to her decreased function.

Counsel for the Appellant compared this evidence with evidence provided by MPIC from Dr. Baydock of MPIC’s Health care Services team. He noted that although Dr. Baydock was of the view that the Appellant’s symptoms were not caused by the motor vehicle accident and that there was no entitlement to Permanent Impairment benefits as a result of her symptoms, Dr. Baydock had conducted a purely medical review. He had never examined the Appellant and he also lacked experience regarding the prescription medications which the Appellant was taking, as well as the multiplicity of her injuries.

Counsel submitted that through the evidence of the Appellant and her care givers, the Appellant had satisfied the onus upon her of establishing her entitlement to benefits, and that all of this evidence should be given greater weight than the evidence of Dr. Baydock.

Counsel for the Appellant urged the Commission to “connect the dots” in this case between the picture of the Appellant prior to the motor vehicle accident, the significant event of the accident and the pictures of the Appellant during her initial recovery and through her continuing physical difficulties with her back and other problems, over the last several years. The Appellant who was an active participant in life prior to the motor vehicle accident, fully engaged at work, recreationally, and in raising her grandchild had, as Dr. Goytan recognized in his letter dated September 1, 2004, “no symptoms prior to her motor vehicle accident”. Immediately following the motor vehicle accident, she had a great deal of difficulty with pain and breathing, which explains any delays which may have occurred in her ability to focus on and articulate her back pain. Now, years after the motor vehicle accident, her lifestyle has been significantly altered. She is unable to participate in her previous recreational activities and suffers with mobility issues, pain, and bladder and bowel problems. Prior to the motor vehicle accident the Appellant was an individual with some common minor medical complications, but there was no significant effect on her lifestyle. Subsequent to the motor vehicle accident, she had done everything one would expect a reasonable motivated individual to do in returning to work and trying to get back to her life, yet she still suffered from significant physical issues.

Counsel submitted that the Appellant was entitled to Permanent Impairment benefits under Division 1 of Regulation 41/94, Subdivision 1, Section 1.2(a), for a fractured sternum with abnormal healing. He submitted that although the medical evidence in the reports did not specifically address this difficulty, the Appellant had provided testimony regarding the

difficulties which she had sitting at her desk in the workplace and problems at her home with her pain.

Counsel also submitted that the Appellant should be entitled to a Permanent Impairment benefit under Division 1, Subdivision 2, Section 3.4(a)(i) for ligament and other soft tissue disruptions to the cruciate or collateral ligament associated with occasional instability.

Counsel also pointed to Division 5, Section 1.3 dealing with bladder impairment, and in particular 1.3(b)(ii) for incontinence or urinary retention: partial loss of sphincter control. He submitted that the Appellant should be entitled to Permanent Impairment benefits under this provision as well.

Counsel noted that although there was no medical evidence of urinary tract tissue disruption or ligament injury to the knee, the Appellant's testimony clearly established these injuries.

Counsel also referred to previous decisions of the Commission in *AC-05-147 (L.Y.)* and *AC-05-30 (P.S.W.)*. These cases noted the Appellants' accounts of their symptoms, recognizing the value of the Appellants' testimony even where there were distinctions between the Appellants' symptoms and the clinical findings available. Counsel suggested that in those cases, as in the current appeal, the Commission should be deferential to the evidence of the Appellant, who is able to give a true picture of the injuries and their impact.

Evidence and Submission for MPIC:

Dr. Bradley Baydock, a medical consultant with MPIC's Health Care Services team, gave oral testimony at the hearing, which supplemented reports on the indexed file, including his own reports dated October 21, 2002 and April 29, 2004.

Following a description of his medical training and experience as well as his experience as a consultant to MPIC, Dr. Baydock reviewed the Appellant's medical history. He then described the condition of spinal stenosis. He reviewed the Appellant's hospital records and described his review of the radiological tests performed in the Appellant's case.

He stated that although there was such a thing as traumatic spinal stenosis, where the application of a traumatic force could immediately lead to a narrowing of openings in the spine or acute disc herniation, he noted that there was no evidence of this in the Appellant's case. There was no evidence of a "blow-out fracture" or a catastrophic collapse of vertebrae with associated ligament disruption, nor were there reports by the Appellant of back pain while she was in hospital. He indicated that there was nothing in the reports on the Appellant's file to indicate that there had likely been a trauma induced spinal stenosis, fracture, dislocation or trauma induced bony abnormality of the lumbar spine.

In Dr. Baydock's view, the Appellant's spinal stenosis was caused by degenerative changes. He reviewed the results of the CT scan. It showed an incompletely fused congenital vertebrae as well as diffusely prominent disc space. He noted the presence of osteophyte formations (bony outgrowths which occur from wear and tear in the spine) which he described as resulting from the aging process. He also noted ligament flavum thickening, a process which takes years to develop and lumbosacral advanced facet arthropathy, which is more of end stage alteration of

that joint. He also noted spinal canal diameter narrowing due to degenerative spondylolisthesis. In Dr. Baydock's view such changes take a long time to develop. They develop over time, due to force placed on the spine from the joints not working properly. They are not acute changes.

These are some of the findings which caused him to conclude that the Appellant's spinal stenosis was due to pre-existing, degenerative changes, and not related to the motor vehicle accident. In his view, the Appellant's symptoms were due to degenerative causes and were not traumatic in nature. Her symptoms developed some time after the motor vehicle accident and so there was not even a strong temporal relationship to the motor vehicle accident.

While the motor vehicle accident may have resulted in a temporary exacerbation, in the sense that the Appellant experienced symptoms of pain and stiffness, it was not likely that the motor vehicle accident altered the Appellant's lumbar spine. In the absence of an altered lumbar spine, the Appellant would not be entitled to Permanent Impairment benefits under the schedules found at Regulation 41/94 of the MPIC Act.

Reports from Dr. Baydock dated October 21, 2002 and April 29, 2004 set out his view that:

“The spinal stenosis was caused by degenerative changes as identified in the CT scan. The presence of marked degenerative changes likely preceded the motor vehicle collision in question as the advanced state of degeneration described would likely have occurred over many years. It is possible that the back pain developed as an exacerbation of the underlying spinal condition but would not likely have altered the lumbar spine so as to develop the degree of spinal stenosis documented. The documented progression of symptoms and physical impairments would also not be consistent with a single traumatic event but would be more in keeping with natural progression of the underlying condition, in my opinion.”

Dr. Baydock's evidence at the hearing confirmed and reiterated his view. In addition, he emphasized the view expressed in his memorandum of April 29, 2004 which stated that to be

compensable under the Permanent Impairment Schedule, a rateable impairment must relate to an anatomical alteration which occurred as a result of the motor vehicle accident and/or the presence of persistent measurable neurological dysfunction. This was not present in the Appellant's case and he noted that pain was not a rateable impairment. At the hearing, he reviewed various provisions of the Permanent Impairment Schedule, including a fracture to the sternum (he found no undisplaced fracture with abnormal healing), and injury to the knee or leg under Division 1 Subdivision 2 Section 3.4(a). He found no specific injury beyond bruising, such as ligamentous or post-traumatic patello-femoral or meniscal cartilage tears and as such no rateable impairment. He reviewed Division 1 Subdivision 3 for spinal impairments but found no post-traumatic alteration of a disc or disc abnormality related to the motor vehicle accident and Division 5 regarding urinary tract disruption (he found no tissue disruption or damage).

Accordingly, Dr. Baydock was of the view that the Appellant was not entitled to Permanent Impairment benefits for her back condition.

Counsel for MPIC reviewed the evidence of the Appellant. While he recognized the impact that both the motor vehicle accident and her back complaints had upon the Appellant's life, he submitted that the medical evidence did not support a Permanent Impairment benefit in this case.

Counsel reviewed the hospital reports, x-rays and scans, and reports from Dr. Luk, Dr. Adduri, Dr. Goytan, Dr. Fewer and Dr. Baydock. He noted that following the accident and her hospitalization, there were no complaints of severe, disabling low back pain, or pain radiating down the legs, or of incontinence of any kind. The Appellant's evidence confirmed that the leg symptoms and incontinence did not begin until more than a year post-accident. There is only

mention of mild back discomfort and even in hospital, her pain was well controlled and she was able to ambulate, dress and use facilities independently.

The first x-ray of the lumbosacral spine dated May 8, 2001, almost eight months post-accident, showed widespread degeneration described as quite marked.

Early reports from her family physician, Dr. Luk, did not make mention of any low back pain until December 20, 2000, more than three months after the accident. On December 6, 2000, there was no reference at all to leg pain, and her physiotherapist noted she was back at work possessed of full function with symptoms.

Dr. Adduri's diagnosis was one of degenerative lumbar disc disease with "degenerative apophyseal arthritis". Although he noted that an accident can result in a prolapsed disc, there was no evidence of that in this case. Such diffused right posterior-disc prominence is usually degenerative in nature, the symptoms caused by pre-existing degenerative changes in arthritis which were likely permanent and might worsen over time.

Dr. Goytan saw the Appellant almost three years post-accident. He noted an almost entirely normal neurological examination and noted that the CT findings could not be attributed to one single episode of trauma, overuse or heavy lifting. In his view the changes were cumulative and pre-existent to the accident.

Counsel for MPIC addressed Dr. Goytan's comments that the radiographic findings were unlikely to have been enhanced or exacerbated by the accident, but that the pain symptoms and

complaints probably were. He noted Dr. Goytan's second report which made it quite clear that the accident "did not accelerate the radiographic finding related to the spinal stenosis".

Counsel reviewed Dr. Baydock's evidence, both through his testimony at the hearing and his reports on the indexed file. These reports and evidence confirmed that the medical evidence did not establish either anatomical alterations of the spine or persistent measurable neurological dysfunction and therefore, did not establish rateable impairments.

Counsel submitted that to establish an entitlement to permanent impairment benefits, a claimant must provide objective medical evidence which brings her within one or more of the provisions of the MPI Permanent Impairment Schedule. He reviewed several possibilities for entitlement under the schedule. He reviewed Division 1, Subdivision 1, Section 1.2(a) regarding a possible fracture of the sternum and concluded that in the absence of abnormal healing, any fracture to the sternum (assuming there was one) was not compensable.

After reviewing Division 1, Subdivision 2, Section 3 regarding the knee and leg (ligamentous and other soft tissue disruptions) Counsel noted that there was no evidence in the material of an accident-related knee injury, with or without instability, eliminating that subsection.

After reviewing Division 1, Subdivision 3, Section 3 regarding the lumbar spine, Counsel noted that there was no evidence of vertebral body compression fractures, other post-traumatic bony alterations, or excessive active ranges of motion following a ligamentous injury with documented radiographic instability.

He reviewed Division 1, Subdivision 3, Section 4 regarding other spinal impairments, and noted that there was no evidence of post-traumatic alteration of an intervertebral disc, which is a threshold finding for this provision. There was also no evidence of myelopathy or radiculopathy, yet there was expert evidence pointing incontrovertibly to a pre-existing state of degeneration of the lumbosacral spine which had not in any way been altered, enhanced or advanced by the accident.

Counsel also reviewed Division 2, Subdivision 1, Section 4.3 and 4.4 regarding bladder and anal rectal function, noting that these are essentially neurogenic dysfunctions which must be eliminated on the basis of a complete absence of evidence of a brain injury.

He reviewed Division 2, Subdivision 2, Section 3.3(a) regarding bladder function and noted that to be compensable such neurogenic dysfunctions must arise from a spinal cord injury.

Finally, Counsel reviewed Division 5, Section 1.3(b)(ii) regarding bladder impairment and noted that there was no medical evidence documenting any tissue disruption of the urinary tract, which is a threshold finding for this provision.

Counsel for MPIC submitted that while one must have admiration for the Appellant's perseverance in the face of adversity, Permanent Impairment Benefits must be based on medical evidence tied in to specific provisions of the Permanent Impairment Schedule. Dr. Baydock looked at the schedule and the Appellant's file several times but could not identify any permanent impairment which would entitle the Appellant to PIPP benefits. With no evidence of a Permanent Impairment entitlement established by the evidence, he submitted that the appeal should be dismissed.

Discussion:**Lump sum indemnity for permanent impairment**

[127](#) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

Evaluation of permanent impairment under schedule

[129\(1\)](#) The corporation shall evaluate a permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

Impairment not listed on schedule

[129\(2\)](#) The corporation shall determine a percentage for any permanent impairment that is not listed in the prescribed schedule, using the schedule as a guideline.

Counsel touched upon the following Sections of the Permanent Impairment Schedule found under Regulation 41/94.

- Division 1, Subdivision 1, Section 1.2(a)
- Division 1, Subdivision 2, Section 3(a)(i)
- Division 1, Subdivision 3, Section 3
- Division 1, Subdivision 3, Section 4
- Division 2, Subdivision 1, Section 4.3 & 4.4
- Division 2, Subdivision 2, Section 3.3 (a)
- Division 5, Section 1.3(b)(ii)

The onus is on the Appellant to show, on a balance of probabilities that she has suffered a permanent impairment as a result of the motor vehicle accident which entitles her to benefits under the Permanent Impairment Schedule.

The panel has reviewed the evidence of the Appellant and Dr. Baydock, as well as the documentary evidence, including medical reports, on the indexed file.

The panel notes that the evidence does establish an acceleration of the Appellant's symptomatology which coincided with the motor vehicle accident. As a result of these difficulties, the Appellant was provided with some Income Replacement Indemnity benefits and reimbursement for various therapies under the Act. However, this does not mean that her symptomatology is compensable under the Permanent Impairment Schedule.

The panel finds that although the Appellant's symptoms may have been enhanced by the motor vehicle accident, there are no radiologic or neurologic findings, or measureable anatomical alterations which can support an award of benefits under the specific provisions of the Permanent Impairment Schedule.

The evidence has established that the Appellant suffers from a degenerative condition in her back which pre-dated the motor vehicle accident. Both Dr. Adduri and Dr. Goytan identified that the presence of degenerative changes, and recognized the likelihood of her pre-existent spinal stenosis. They could not attribute the radiographic findings to the trauma of the motor vehicle accident.

While MPIC provided benefits to the Appellant under Section 136 of the Act for medical and paramedical care, and Income Replacement Indemnity benefit regarding her inability to work due to her various injuries following the motor vehicle accident, no Permanent Impairment benefits are available for her symptoms, without objective medical evidence of specific alterations causing a permanent physical impairment. Without specific objective medical findings resulting from the motor vehicle accident, the symptoms of the Appellant are not compensable under the Permanent Impairment scheme.

As a result, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated August 31, 2005 is hereby confirmed.

Dated at Winnipeg this 11th day of June, 2009.

LAURA DIAMOND

JEAN MOOR

DR. PATRICK DOYLE