

# **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an appeal by [the Appellant]  
AICAC File No.: AC-98-60**

**PANEL:** Mr. J. F. Reeh Taylor, Q.C., Chairman  
Mrs. Lila Goodspeed  
Mr. Colon Settle, Q.C.

**APPEARANCES:** Manitoba Public Insurance Corporation ('MPIC')  
represented by Mr. Keith Addison;  
the Appellant, [text deleted], was represented by  
[Appellant's representative]

**HEARING DATE:** September 28<sup>th</sup>, 1999

**ISSUE(S):** Whether arthritic condition of Appellant's thumbs caused  
by MVA and therefore compensable.

**RELEVANT SECTIONS:** Sections 81(1)(a), 110(1)(a) and 136(1)(a) and (d) of the  
MPIC Act, Section 8 of Manitoba Regulation No. 37/94 and  
Section 5 of Manitoba Regulation No. 40/94.

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY  
AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S  
PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION  
HAVE BEEN REMOVED.**

## **REASONS FOR DECISION**

The only issue before this Commission is whether the arthritic changes in the joints of [the Appellant's] thumbs were caused by the trauma of her motor vehicle accident or were the result of natural degeneration.

[The Appellant], at the time of her accident, was the sole owner of [text deleted], the owner and operator of the [text deleted], in [text deleted], Manitoba. On the 17<sup>th</sup> of July, 1996, [the Appellant] was driving her [text deleted] van at night when, being confronted with two cows on the highway ahead of her, she was unable to stop her vehicle in time to avoid collision with one of the cows. As [the Appellant] testified "I was doing about 80 to 90 kilometers per hour. All I could do was grab the steering wheel and hit the brakes. I felt the airbag hit me. I checked to see if my passenger was all right. I lost consciousness, but then we got out of the car".

It should be emphasized that [the Appellant] received a number of injuries in that accident. She first consulted [text deleted], general practitioner, on July 26<sup>th</sup>, 1996, when he made the following diagnoses:

- (i) head and neck injury (*no further explanation is offered*);
- (ii) bruised left knee with laxity of the lateral collateral ligament;
- (iii) bruising on both breasts caused by steering wheel;
- (iv) haematomas of right knee;
- (v) bruised chin.

[Appellant's doctor] notes that [the Appellant] temporarily lost consciousness but was awake when the rescue vehicles came; she was taken to [hospital], investigated and released. He diagnosed a Grade 2 Whiplash Associated Disorder (WAD 2), advised that [the Appellant] was capable of performing less than her full functions due to symptoms or functional deficits, had hired someone to do her usual job but would remain on the premises of [text deleted] in a supervisory role. He felt that this situation was likely to prevail for about three weeks.

While the injuries to her head, neck, knees and chest all seem to have been resolved within a reasonable time, the blow to [the Appellant's] chin caused more serious problems with respect to her left temporomandibular joint, for which she continued to receive treatments from [Appellant's dentist #1] and [Appellant's dentist #2].

When making her initial application to MPIC for benefits under the Personal Injury Protection Plan, on July 24<sup>th</sup>, 1996, [the Appellant] mentioned only a cut to the underside of her chin, a sore chest, a right knee injury, headaches and, simply, "head and neck". In an adjuster's note on the file bearing date September 3<sup>rd</sup>, 1996, it is apparent that [the Appellant] had been obliged to have [text deleted] hire someone else to work an extra six or seven hours each day, at a wage of \$6.00 per hour, to cover the work that [the Appellant] became unable to do herself. [The Appellant] claimed, and the adjuster accepted, that this situation had prevailed from the date of the accident until August 9<sup>th</sup>, when [the Appellant] returned to her normal duties. The adjuster therefore wrote to her on December 4<sup>th</sup>, 1996, indicating [the Appellant's] entitlement to income replacement indemnity of \$347.99 bi-weekly from July 25<sup>th</sup> (seven days after her accident) to August 9<sup>th</sup>, 1996. As well, she was awarded \$521.00 for the permanent impairment consisting of a small scar on her chin measuring 3 centimeters by 0.1 centimeter.

It is the contention of [the Appellant] that, in addition to the injuries briefly described above, the trauma of her accident either caused, or seriously aggravated, an osteo-arthritic condition in the joints of both her thumbs, rendering her unable to continue with her previous occupation. If she is correct in this assertion, then she is entitled to an order from this Commission requiring MPIC to reinstate her income replacement from the time when she again felt unable to continue her

work until at least May 22<sup>nd</sup>, 1997, when [the Appellant] fell and broke her wrist in an unrelated accident. She sold [text deleted] in October of 1997.

The relevant evidence includes several reports from [Appellant's doctor], a report from [physiotherapy clinic #1], three reports from [text deleted] (an orthopaedic specialist to whom [Appellant's doctor] referred [the Appellant]), [text deleted], Director of Physiotherapy at the [physiotherapy clinic #2], a memorandum prepared by [Appellant's MPIC case manager #1] on July 16<sup>th</sup>, 1999, and the oral testimony of [the Appellant] herself, and of [text deleted], a former employee of [the Appellant].

### **The Evidence of [Appellant's doctor]**

We have already noted that [Appellant's doctor's] initial health care report speaks of unexplained injuries to the head and neck, a bruised left knee, bruising on both breasts caused by impact with a steering wheel, bruising to the right knee and a bruised chin. He makes no mention of the Appellant's wrists, hands or thumbs.

The next report on file from [Appellant's doctor] is in narrative form and dated October 21<sup>st</sup>, 1997. In that letter, [Appellant's doctor] reports, in part, that he had first attended [the Appellant] on July 18<sup>th</sup>, 1996, when she was wearing a soft cervical collar and complaining of a sore chin, neck and headache. He prescribed Tylenol No. 3. He saw her again July 26<sup>th</sup>, August 29<sup>th</sup>, October 3<sup>rd</sup> and October 18<sup>th</sup>, again complaining of neck pain. He referred her to [physiotherapy clinic #1] on October 3<sup>rd</sup> and she obtained treatment there twice weekly until the end of 1996. [Appellant's doctor] goes on to say:

On February 18<sup>th</sup>, 1997, she complained that since her motor vehicle accident she had been unable to use her hands because of pain in the first M.P. joints. The joints were indeed subluxated and swollen. She was prescribed non-steroid anti-inflammatory drugs. She returned on April 14<sup>th</sup> complaining that the **wrists** were getting worse. X-rays were done which showed deformity at the trapezio-metacarpal joints. She was referred to [Appellant's orthopaedic surgeon].....The **wrist** injury could have occurred by holding onto the steering wheel at the time of the accident.

A further, handwritten report from [Appellant's doctor], dated March 16<sup>th</sup>, 1998, contains the following statements:

She was holding onto the steering wheel and suffered dislocations of both carpo-metacarpal joints. Because of other more serious injuries, which required urgent treatment, she first brought her wrists to my attention February 15<sup>th</sup>, 1997. X-rays were done which confirmed injuries to the first M.P. joints. She was referred to [Appellant's orthopaedic surgeon].....

Finally, we have a letter from [Appellant's doctor] dated May 1<sup>st</sup>, 1998, which says, simply:

Following injuries sustained in a motor vehicle accident June 17<sup>th</sup>, 1996, this lady has developed advanced arthritis of both first carpo-metacarpal joints. Due to this injury she cannot grasp with either hand.

She therefore cannot work at her original job as a [text deleted] or any other job that requires full use of her hands.

There was no previous history of arthritis.

### **Evidence of [physiotherapy clinic #1]**

This evidence is in the form of a single letter, addressed to this Commission in response to an inquiry immediately after the hearing of [the Appellant's] appeal. We specifically asked whether there had been any documentation of bilateral thumb complaints. There was none. [Appellant's doctor's] referral of [the Appellant] to the [physiotherapy clinic #1] for physiotherapy made reference to a cervical strain only. "Any reports of complaints not noted during the initial history

or assessment session and not specified on the physiotherapy referral would have been referred back to the referring physician". [The Appellant] had attended for an assessment and three additional sessions of physiotherapy, informing her therapist that she would then attempt a short duration of home exercises by herself. Her last appointment there was on October 17<sup>th</sup>, 1996.

### **Evidence of [Director of Physiotherapy] ([physiotherapy clinic #2])**

We have numerous reports available to us from [Director of Physiotherapy], from which it is quite clear that, from the date of [the Appellant's] initial attendance at the [physiotherapy clinic #2] on February 26<sup>th</sup>, 1997, [the Appellant] was complaining of a reduced ability to grasp items with her hands and to oppose or bend her thumbs. [Director of Physiotherapy] recommended a referral back to the Appellant's attending physician with respect to these complaints. As a result of further recommendations from [Director of Physiotherapy], [Appellant's doctor] arranged for X-rays to be taken of both [the Appellant's] hands - more specifically, "bilateral first carpo-metacarpal joints", by reason of increasing pain and deformity. The X-ray report speaks of

Moderate degenerative changes involve both trapezial-metacarpal joints, worse on the left. In addition, there is mild lateral subluxation of the left first metacarpal. The trapezial-metacarpal joint no longer aligns normally. Less pronounced lateral movement of the right first metacarpal is also present with respect to the adjacent trapezium.

Again, on April 18<sup>th</sup>, 1997, [Director of Physiotherapy] writes to MPIC's adjuster to say, in part:

This lady demonstrates need for intervention medically. I have a referral to treat TMJ but she needs treatments to hands and knees. Could we please discuss re: signs of potential chronicity.

(Subsequent notations and correspondence indicate that the reference to "potential chronicity" relates to the temporomandibular problem rather than to hands and knees.

On May 20<sup>th</sup>, 1997, [Director of Physiotherapy] became more insistent, reiterating that [the Appellant] required treatment to both hands (thumbs) as well as her jaw and back. She requested that [the Appellant] be sent to an independent physician. It seems to have been primarily as a result of [Director of Physiotherapy's] insistence that [the Appellant] was referred by [Appellant's doctor] to [Appellant's orthopaedic surgeon].

### **Evidence of [Appellant's orthopaedic surgeon]**

[Text deleted], orthopaedic specialist, examined and assessed [the Appellant] on three occasions.

On June 4<sup>th</sup>, 1997, shortly after she had sustained a fractured left wrist in a fall. [Appellant's orthopaedic surgeon's] report of that date may be summarized this way: [the Appellant] gave a history of some aches and pains in her thumbs, particularly since her accident of July, 1996. She now had some pain with movement of the thumbs, particularly at the base, left worse than right. Examination showed some prominence at the base of the thumbs, though worse on the left. There was fair movement but some limitation of abduction. Motor, power and sensation in the hands was otherwise normal. The X-rays from April 16<sup>th</sup>, 1997 showed some injury to the right trapezium bone which could have been either arthritic or traumatic. On the left side there was definite osteo-arthritic change at the carpal-metacarpal joint. The trapezium on the left side looked fairly good but there was "a hint of subluxation of the left first carpal-metacarpal joint. This is of course typical for osteo-arthritic change". [The Appellant] appeared to have mild osteo-arthritis of the right first carpal-metacarpal joint and moderate arthritis of the left first carpal-metacarpal joint. [Appellant's orthopaedic surgeon] could not say whether the abnormality of the trapezium was from a fracture or injury, nor could he say whether the arthritic

changes were aggravated or accelerated by an injury. He had given [the Appellant] the options of taking occasional, enteric-coated Aspirin for her aches and pains and for her arthritis; she could also take oral anti-inflammatory medicines or, thirdly, she could have osteotomies of the base of the metacarpals, particularly on the left side. [The Appellant] had elected to wait and see.

On September 10<sup>th</sup>, 1998, [the Appellant] had attended, seeking confirmation that her thumbs bother her from the accident and not from arthritic changes. She had aches and pains of her thumbs, for which she had received physiotherapy and laser treatment. "The patient by and large at this time is symptomless, though when she works hard there is some discomfort in her thumbs." There was no obvious external deformity of her hands except some prominence at the base of the left first metacarpal. There was scarring over the hypothernar eminence of the left side, with some contracture, but this was from an injury [the Appellant] had sustained in a fall at the age of [text deleted]. There was full range of elbow, wrist and finger movements. Motor power and sensation in the hands was normal bilaterally. "Basically this lady has come in to prove to me that her aches and pains are the result of a MVA." At that point, clinically, said [Appellant's orthopaedic surgeon], [the Appellant] did have some osteo-arthritic changes at the bases of both thumbs, at the carpo-metacarpal joints, somewhat worse on the left. This is a common site of osteo-arthritis. It was impossible for [Appellant's orthopaedic surgeon] to tell whether that pathology was aggravated by a motor vehicle accident.

On December 9<sup>th</sup>, 1998, [Appellant's orthopaedic surgeon] reviewed X-rays of September 10<sup>th</sup>, 1998. There were arthritic changes between the first metacarpal and the carpus on both sides; there were also arthritic changes of the distal interphalangeal joints of a number of fingers.

[Appellant's orthopaedic surgeon] described these as "typically osteo-arthritic changes". He concluded "I cannot prove or disprove that this was initiated by an accident".

### **Evidence of [Appellant's MPIC case manager #1]**

Because [the Appellant] insisted that she had spoken to [text deleted], her adjuster at MPIC, to complain about the problem with her thumbs as early as the fall of 1996, MPIC's counsel apparently asked him for his recollection. His intra-office memorandum of July 16<sup>th</sup>, 1999, says, in part:

I cannot recall all the circumstances as it has been a while but do remember that the claimant did complain about them (i.e. her thumbs) and advised that it came from the steering wheel as she gripped same. I do recall setting up an appointment for physio and was to get a report from a female therapist and at that time the file was sent away or our jobs changed as I did not handle it anymore. This lady has even attended my present office to seek my help in trying to remember the incident to look after her treatment for the thumbs. I can recall allowing a certain amount of treatment for the thumbs per a discussion with the physiotherapist. It is my opinion in talking to the claimant who I feel is honest and that this injury is related as I do not feel she'd fight this long if it was not.

### **Evidence of [Appellant's former employee]**

[Appellant's former employee] was the passenger in [the Appellant's] vehicle at the time of her accident. She worked as cook and assistant manager of [text deleted] and had close daily contact with [the Appellant]. She testified that, prior to her accident, the Appellant would rise at about 10 o'clock every morning, clean up the bar, load beer into the cooler and help out in the kitchen and the restaurant. As [Appellant's former employee] puts it, "She was very fit and active; she had no complaints of pain or disability."

[Appellant's former employee] testified that she did not remember much about the accident, other than her belief that she called out "A cow!" and then covered her face with her hands and arms. Despite that, she testified that she remembers seeing [the Appellant] jam on the brakes and gripping the wheel tightly. While a passenger would readily appreciate that the brakes were being applied suddenly and hard, it is questionable whether [Appellant's former employee] would have found the time or the inclination to observe [the Appellant's] grip of her steering wheel while she, [Appellant's former employee], was concurrently protecting her face with her hands and arms.

[Appellant's former employee] also testified that, from about a month after the accident, [the Appellant] started to complain about her hands, could not open beer bottles nor carry glasses - "She kept dropping things". ([The Appellant] did testify that she had dropped one glass.) [The Appellant] kept driving herself and [Appellant's former employee] into the city regularly, even post-accident, since they were both having physiotherapy. After the accident, the nature of [the Appellant's] activities changed, since she had difficulty completing such chores as cleaning up the bar. She had to hire others to do that work for her, so that one of her part-time workers started working full-time and others started putting in longer hours to compensate for [the Appellant's] apparent disability.

[Appellant's former employee] recalls hearing [the Appellant] speak to [Appellant's MPIC case manager #1] and complaining about her knees, her back and thumbs. She believes this was in the fall of 1996 since, as she said, "She ([the Appellant]) seemed to get worse between then and the end of the year when I left due to pregnancy".

[Appellant's former employee] further testified that it was she who had made the call to [Appellant's MPIC case manager #1], because [the Appellant] could not see to read the phone book. Having made contact, she turned the phone over to [the Appellant] who spoke with [Appellant's MPIC case manager #1] for some ten to fifteen minutes. [The Appellant] reportively [Appellant's former employee] that [Appellant's MPIC case manager #1] had said he was no longer her adjuster.

[Appellant's former employee] also recalled that it was in or about October of 1996 that [the Appellant] started wearing a splint on one hand and had said that this was because she was getting shooting pains from her thumb.

While we do not question [Appellant's former employee's] desire to tell the truth, it is quite apparent that her memory fails her in several aspects of her testimony. We know, from the detailed notes and regular reports of [Director of Physiotherapy], that the application of a splint for [the Appellant's] thumb problems was first mooted in a report of April 29<sup>th</sup>, 1997; [the Appellant] was not wearing a splint in the fall of 1996. Similarly, if [Appellant's MPIC case manager #1] remembers approving physiotherapy for [the Appellant's] thumbs, that question did not arise until February of 1997, either, and [the Appellant] herself says that she received the splint for one of her thumbs at the outset of her treatments from [Director of Physiotherapy], in February of 1997. [the Appellant's] memory is also in error by a couple of months, but this is not surprising since the testimony of both these ladies was given some three years after the accident.

It should also be noted that by some time in late July of 1996, [Appellant's MPIC case manager #1] had relinquished the management of [the Appellant's] claim and [Appellant's MPIC case manager #2] had become her case manager. Knowing that, it is hard to understand why she would call [Appellant's MPIC case manager #1] in October of 1996 to complain about the pain in her thumbs; he had no authority to deal with the matter at all in October, and did not re-enter the picture until the latter half of April and all of May, 1997. It seems quite clear that any discussion [the Appellant] may have had with [Appellant's MPIC case manager #1] about her thumbs did not take place until April, 1997, at the earliest.

### **Evidence of [the Appellant]**

Most of [the Appellant's] evidence is reflected in the early portion of these Reasons. Of the remainder of her testimony, that which was relevant to her present claim may be summarized this way: after she returned to [text deleted] work in August 1996 she was sore, although her TMJ problem emerged later; initially, it was her knees that were giving her the most problem. She had first complained to [Appellant's doctor] about her thumbs in October 1996. He had given her splints and had diagnosed arthritis. Her brother had come up from [text deleted], Ontario, to help with the heavier work around the [text deleted] in July or August, since [the Appellant] found she could not work well in the [text deleted], having dropped a glass. At the time of the accident, the vehicle's airbag was located in the middle of the steering wheel and had engaged on impact. [Director of Physiotherapy] started treating her thumbs in about February 1997; by April/May of 1998 she had largely regained the functional capability in her hands.

## Discussion

There are a number of other aspects of the evidence adduced on behalf of [the Appellant] that trouble us. In no particular order of importance, they are these:

- (a) [the Appellant] testified that, although she had started working again about three weeks after her accident, she consulted [Appellant's doctor] in October 1996, about her thumbs. He had told her that her pain was due to arthritis and prescribed splints. In none of [Appellant's doctor's] reports does he make mention of splints. His narrative report of October 21<sup>st</sup>, 1997, which appears to have been prepared following a review of his clinical notes, indicates that [the Appellant's] first mention of problems with her hands occurred on February 18<sup>th</sup>, 1997 and splints do not appear until late April of 1997;
- (b) the foregoing absence of any mention of the problem with [the Appellant's] wrists or thumbs is borne out by the report from [physiotherapy clinic #1], to the effect that that Clinic's file reveals no documentation of bilateral thumb complaints, and this was four months post-accident;
- (c) [Appellant's doctor's] further report of March 16<sup>th</sup>, 1998 goes further, to say that [the Appellant] "suffered dislocations of both carpo-metacarpal joints" in the course of her accident. We have to say that, if this were the case, it is astonishing that no mention of problem with those joints appears to have been made by anyone - not [the Appellant], not [Appellant's doctor], not [physiotherapy clinic #1], not her adjusters - until February of the following year, some seven or eight months after the incident. We realize that [the Appellant] sustained other injuries for which she was being treated, her position being

that those other injuries were more severe and she did not get around to mentioning the thumbs until the Fall of 1996. It is unfortunate that no one to whom she claims to have spoken that Fall seems to have made a note of the fact. In addition, the dislocation of both thumbs at the carpo-metacarpal joint would have been sufficiently painful that even someone with a high pain threshold would have found it difficult, if not impossible, to carry out even those duties to which, [the Appellant] testified, she returned. Therefore, with deference, we find that [Appellant's doctor] must have been mistaken in the retroactive diagnosis that he made on March 16<sup>th</sup>, 1998 or, if his diagnosis was correct, it is sufficiently distant from the date of the motor vehicle accident to cast doubt upon the causal relationship. We find it hard to believe that [the Appellant] carried on her activities at [text deleted], from July 17<sup>th</sup>, 1996, until February 15<sup>th</sup>, 1997, with two dislocated thumbs, without seeking treatment and without apparently mentioning the pain of those two dislocations to the physician who saw her at least six times in the interim nor to the physiotherapist who saw her at least five times in October of 1996;

- (d) [the Appellant] was apparently able to return to her work at [text deleted] about six weeks after her accident. From the evidence on file, she does not appear to have found it necessary to hire additional staff, nor to engage existing staff for longer hours, until mid-May of 1997. We are prepared to accept that it was purely a matter of coincidence that, on May 15<sup>th</sup>, 1997, [the Appellant] fell and fractured her wrist.
- (e) [Text deleted], the orthopaedic consultant to whom [Appellant's doctor] referred [the Appellant], is unable to tell us whether, even on a reasonable balance of probabilities, the arthritic changes in the Appellant's carpo-metacarpal joint and distal interphalangeal joints were initiated or aggravated by her motor vehicle accident.

Upon a careful review of all of the evidence and, in particular but by no means exclusively, having regard to the time that elapsed between the date of her accident and her first recorded complaint about her thumbs, as well as the nature and extent of the arthritic changes in both of her hands, we feel obliged to find that the causal relationship between the accident and those osteo-arthritic changes has not been established on a balance of probabilities. It follows, therefore, that the appeal of [the Appellant] must fail.

Dated at Winnipeg this 7th day of February, 2000.

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**J. F. REEH TAYLOR, Q.C.**

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**LILA GOODSPEED**

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**COLON SETTLE, Q.C.**