Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-145

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Mr. Wilson MacLennan** **Dr. Patrick Doyle**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**November 7, 2002**
ISSUE(S):	**1. Whether the current problems with the Appellant's knees are as a result of the accident.** **2. Entitlement to Personal Injury Protection Plan coverage for ongoing treatment of knee condition.** **3. Whether the Appellant was properly classified as a "non-earner" for Income Replacement Indemnity (IRI) purposes.** **4. Whether the Appellant was incorrectly denied a 180-day determination and whether the Appellant was entitled to IRI at any time since the 181st day after the accident.**
RELEVANT SECTIONS:	**Sections 136(1), 70(1), 81(1) and 81(2) of the Manitoba Public Insurance Corporation Act ("MPIC Act") and Manitoba Regulations 40/94 Section 5(a), and 39/94 Sections 3(1) and 3(2)**

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

On May 7, 1998, [the Appellant] was a front seat passenger in a car which had collided at highway speed with a deer. [The Appellant] testified at the Appeal Hearing that she was forcefully thrust against the inside front of the car on the passenger side but she does not know

what part of the automobile in front of her that she struck. As a result of the accident, she sustained pain throughout her body and particularly to her knees. A day or two following the accident, while stepping out of a van, she felt a snap in her right knee. She further testified that subsequent to the accident she had pain and disability to her knees and had difficulty walking, particularly up and down stairs and is unable to kneel or squat. As a result thereof, the Appellant visited her family physician, [text deleted] on May 13, 1998.

[Appellant's doctor] testified at the Appeal Hearing and stated that:

> (a) On two routine pre-accident examinations of the Appellant performed on June 11, 1996, and August 12, 1997, respectively, she found the Appellant to be essentially normal except for being overweight.
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> (b) The Appellant had some crepitus (a crackling and grinding sensation) on palpitation of her left knee, but that the knee and her leg were essentially symptom fee.
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> (c) In view of the lack of problems and complaints expressed by the Appellant, no further investigation was initiated or indicated.

At the time of the accident the Appellant and her husband had been operating [text deleted] for approximately 24 years. This business involved the breeding and showing of purebred dogs and the boarding of cats and dogs. The Appellant carried out most of the activities of the business and received some assistance from her husband. The Appellant testified at the Appeal Hearing that these activities involved her 365 days each year and for 6 to 8 hours each day.

Prior to the motor vehicle accident, the Appellant was able to perform the majority of the activities in respect of the kennel operations. The Appellant further testified prior to the automobile accident, she experienced some mild swelling on the left knee, but this happened only after "she shopped until she dropped."

The Appellant further testified at the Appeal Hearing that with some help from her husband she was able to continue operating the boarding portion of the business to some extent until the fall of 1999. She was referred by her physician, [text deleted], to an orthopedic specialist, [text deleted], who scheduled her for an arthroscopic surgery on her right knee. Despite the surgery, the Appellant became unable to carry out any of the kennel operations because of the pain and disability to her knees.

The Appellant first saw [Appellant's doctor] in respect of the complaints to her knees on May 13, 1998. [Appellant's doctor] testified at the Appeal Hearing that upon examination of the Appellant:

1. She found an area of bruising on both sides of the Appellant's legs which was to the anterior tibial skin surface some 6 centimeters (about 2 or 3 inches) below the kneecap, but there was no external bruising to the patellar or kneecap area on either leg.

2. There was "bruising" to the back of the right knee. [Appellant's doctor] further testified that this bruising was not external bruising to the back of the right knee since there was none, but rather that she was describing an inflammatory reaction with some tenderness especially to the back of the body of the knee itself. She also noted crepitus and palpation of the knee but there was neither swelling nor effusion.

In her report to MPIC dated November 9, 1999, [Appellant's doctor] stated:

1. On November 26, 1998, the Appellant informed her of increasing pain in the right knee with problems walking long distances or descending stairs. The Appellant felt that the motor vehicle accident precipitated these problems. [Appellant's doctor] noted that the Appellant's knees had full range of motion but an x-ray taken on that day showed moderate osteoarthritis on the left knee with minimal changes to the right knee. The Appellant was advised to consider physiotherapy.

2. On September 3, 1999, she was seen for more severe right knee pain. She was now limping and unable to walk stairs at all. She found that her right knee locked. Examination only showed crepitations in both knees. A repeat x-ray of the knees showed progression of osteoarthritis in both joints with more severity on the left.

Since [Appellant's doctor] found that [the Appellant] had shown deterioration rather than improvement in [the Appellant's] knee function, she referred [the Appellant] to an orthopedic surgeon, [text deleted], who examined her on October 13, 1999 and slated her for arthroscopy of the right knee on November 15, 1999.

On November 9, 1999, [Appellant's doctor] re-examined [the Appellant] with the observation that, "There was no visible swelling. No locking or laxity of the knee was appreciated. She was walking with a small limp."

[Appellant's orthopedic specialist #1] performed an arthroscopy of [the Appellant's] right knee on November 15, 1999. In his operative report of that intervention dated November 19, 1999, [Appellant's orthopedic specialist #1] stated that, "*The medial meniscus showed a degenerative tear involving the posterior horn. This was arthroscopically excised."*

On March 3, 2000, in a further medical report, [Appellant's orthopedic specialist #1] stated the following:

> 2: "This lady I would think has degenerative arthrosis of either knee joint, however the tear through a degenerative meniscus could have happened at the time of the automobile accident in question and this seems to have given her more symptoms on the right side. It should also be noted that she has more degenerative arthrosis in the left knee joint which is basically asymptomatic.
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> 3: At the present time, she is still improving. I am not certain how capable she is to do her job yet. It is likely that it will take three to six months for her to regain the complete function. Even then, she may not regain complete function because of pre-existing degenerative arthrosis which incidentally was not aggravated or caused by the accident."

The Appellant had been receiving physiotherapy treatments from a physiotherapist, [text deleted]. In his report to MPIC dated January 24, 2000, he stated that the Appellant had

developed osteoarthritis in her knees since the motor vehicle accident and she denied any prior knee problems to him.

In his further report to MPIC dated February 18, 2000, [Appellant's physiotherapist] stated that he reassessed the Appellant's physical status on February 16, 2000 and in regard to her kennel duties, the Appellant stated she was unable to do the following:

1. "Be able to participate in breeding her dogs - requires being down on her knees for her [dogs].
2. Care for a litter of puppies - once again, lots of squatting, bending, and being on the ground to handle the pups.
3. Cleaning kennels - wastes, washing, etc.
4. Feeding/watering dogs - bending to pick up/put down food/water bowls, etc.
5. Be able to tolerate or avoid large dogs jumping on her legs (e.g., when playing).
6. Be able to be up on her feet (standing/walking) for periods of time while walking dogs.

> [The Appellant's] physical examination was essentially as per her initial examination, except she had mildly reduced tenderness to her knees on palpation. She had grade 4 extension to her right knee and 4+ to her left knee. Regarding functional tasks, she was only able to squat 1/3 down and favored her left knee while doing so. She was unable to go down onto the floor without the use of furniture to help lower herself buttocks first with her knees extended in front of her. She was able to rise from the floor by rotating her trunk and going into a push-up like position. She would then slowly move her arms back while bending her left leg slightly and right leg minimally. She was able to stand with moderate difficulty.
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> [The Appellant's] gait continues to be antalgic. She was able to ambulate with a cane approximately 500 ft in 6 minutes before she had to stop due to pain in knees and left lateral hip. During her ambulation, her limp began worsening after approximately 4 minutes and she had reduced knee flexion during swing phase of gait. This was compensated for by increased hip hiking causing fatigue/pain to her left hip abductors.
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> It is, therefore, evident from the above testing that [the Appellant] is not able to do the repetitive bending, squatting, kneeling, and prolonged standing/ambulation required to breed her dogs without significant assistance. I would not recommend that she attempt frequent squatting and lowering herself onto the ground given her current physical limitations....."

On February 23, 2000, MPIC referred the entire medical file to [MPIC's doctor], a member of the MPI Health Care Services Team for his review and medical opinion. The Internal Review Officer in his decision dated October 16, 2000, states:

> 12. "[MPIC's doctor] - a member of the MPI Health Care Services Team - has reviewed the medical package on your file on several occasions. It appears that his initial impression - based upon a review of [Appellant's doctor's] clinical notes and her narrative report dated November 9, 1999 - was that the problems with your right knee (which led [Appellant's orthopedic specialist #1] to perform the arthroscopy on November 15, 1999) were accident-related. There is, however, no memo from [MPIC's doctor] to this effect on the file - just a note prepared by the case manager dated November 17, 1999 indicating that she had met with [MPIC's doctor] and that he had stated that a causal relationship between the accident and your then "current injuries" did indeed exist.
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> 13. After [MPIC's doctor] next reviewed the file in February, 2000 (following the receipt of a report from your physiotherapist, [text deleted]), he prepared a detailed memo dated March 1, 2000 in which he reaches conclusions which appear to differ somewhat from what the case manager recorded as his initial impression.
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> 14. The memo dated March 1, 2000 states that the osteoarthritic changes in both of your knees likely pre-dated the accident, but that the accident itself might well have exacerbated the condition of both knees. In terms of the meniscal tear (which was detected and repaired during the November 15, 1999 surgery however, [MPIC's doctor] concluded that it was possible, but not probable, that the condition was caused by the accident. In arriving at this conclusion, [MPIC's doctor] noted that there was no documentation identifying the generally-recognized features of a traumatic meniscal tear."

The Commission also reviewed the following reports:

1. Report from [Appellant's orthopedic specialist #1] dated March 3, 2000, confirming the opinions he expressed in his operative report dated November 19, 1999.

2. Report from [MPIC's doctor] to MPIC dated March 31, 2000, acknowledges that it is possible that the meniscal tear was caused by the motor vehicle accident but concludes on the balance of probabilities that it was not. However, [MPIC's doctor] again confirmed that the degenerative arthrosis was pre-existing and was not caused by the motor vehicle accident.

Having regard to the medical opinion of [MPIC's doctor], the case manager in a letter dated April 25, 2000, approved physiotherapy treatments to the Appellant until May 8, 2000. The case manager further indicated in this letter that MPIC would not:

(a) reimburse the Appellant for any further physiotherapy treatments.
(b) reimburse the Appellant in respect of any treatment, medication or personal care expenses relating to either of the Appellant's knees; and
(c) that the Appellant would not be entitled to any income replacement indemnity benefits following the motor vehicle accident or any other benefits under the Personal Injury Protection Plan.

In response to the decision of MPIC to terminate the Appellant's benefits, [Appellant's doctor] wrote to MPIC on May 25, 2000, and disagreed with the medical opinions of [MPIC's doctor]. [Appellant's doctor] stated:

> "Despite the arthroscopic intervention, [the Appellant] still has significant pain in both knees, and especially in the right knee. She has been unable to continue breeding and showing her dogs and her husband has had to take over most of the duties of their dog boarding service at the kennel. She has lost substantial income after the accident.
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> It is my professional opinion, having cared for [the Appellant] before and after her accident, that the degenerative arthritis in her knees was greatly accelerated by the collision in May, 1998. The medial meniscal tear could have been initiated at the accident and then grown in size as time passed, therefore explaining her worsening symptoms. She has made efforts to lose weight and lower her cholesterol) by modifying her diet and she has lost 8 lbs since 1996.
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> [The Appellant] is only [text deleted] years old and otherwise healthy, but is unable to fully flex her right knee or squat. She is unable to walk distances or use stairs without significant pain. She may be getting bilateral total knee replacements in the near future. I predict that her arthritis would not have been so disabling for at least another decade if the accident had not occurred."

INTERNAL REVIEW OFFICER'S DECISION

As a result of MPIC's decision to terminate all benefits to the Appellant, the Appellant made application for an Internal Review dated June 9, 2000. The Internal Review Officer conducted a hearing on September 12, 2000, and in a letter to the Appellant dated October 16, 2000, informed the Appellant that her application for review was rejected and the decision of the case manager was confirmed. In arriving at his conclusion, the Internal Review Officer stated:

1. "While it remains a possibility that the meniscal tear in your right knee and the acceleration of your pre-existing arthritis in both knees is causally related to the accident, I am not convinced that the necessary connection has been established on a

balance of probabilities, and I am, therefore, confirming the decision of the case manager on this point.

2. I am satisfied that MPI has fulfilled its obligations in terms of funding medical treatment for your knee, and I am, therefore, confirming the decision of the case manager to terminate funding effective May 8, 2000. It follows that your entitlement to reimbursement for travel expenses, if any, would terminate as of that date as well.

3. I am satisfied that you have been correctly classified as a "non-earner" for IRI purposes, and I am, therefore, confirming the decision of the case manager on this point.

4. The available evidence does not, in my view, establish your entitlement to an IRI at any time since the 181st day after your accident, and I am, therefore, confirming the decision of the case manager regarding the refusal to do a 180-day determination in your case."

The Appellant filed a Notice of Appeal dated December 27, 2000.

Subsequent to the filing of the Appeal and prior to the Appeal Hearing on November 7, 2002, legal counsel for the Appellant requested a medical opinion from [text deleted], an orthopedic surgeon, [text deleted]. [Appellant's orthopedic specialist #2's] medical specialty is adult joint reconstruction, revision hip and knee arthroplasty. [Appellant's orthopedic specialist #2] provided two reports dated July 11, 2001, and December 17, 2001.

[Appellant's orthopedic specialist #2] testified at the Appeal Hearing on November 7, 2002, and clarified the medical opinions he expressed in his letter of July 11, 2001. In his testimony, [Appellant's orthopedic specialist #2] opined that the motor vehicle injuries caused the severe degenerative changes involving both of the Appellant's knees and that these degenerative changes probably would have developed within one year of the date of the accident. In the alternative, [Appellant's orthopedic specialist #2] testified that it was also probable that if there was a pre-existing condition of osteoarthritis, this condition would have been severely exacerbated by the automobile injuries which the Appellant had complained of.

In his correspondence dated July 11, 2001, [Appellant's orthopedic specialist #2] indicated that the tear of the medial meniscus involving the posterior horn of the right knee was probably the type of injury which could have developed from the accident itself.

In [Appellant's orthopedic specialist #2's] letter to the Appellant's legal counsel dated December 17, 2001 he states:

> "This is to clarify my letter dated July 11th, 2001. In regards to my second paragraph, it should be clarified that the medial meniscal tear which [the Appellant] suffered in May of 1998 is most probably from the accident at that time. With this associated injury and with the chronological x-rays and x-ray reports which have been supplied to us, it is also quite probable that the osteoarthritis that developed in the knee is of consequence from this same accident."

[MPIC's doctor], in an inter-departmental memorandum dated February 18, 2002 to MPIC reviewed [Appellant's orthopedic specialist #2's] letter of July 11, 2001 and disagreed with [Appellant's orthopedic specialist #2's] findings.

[MPIC's doctor] concluded:

> "It is my opinion that from the medical evidence contained in [the Appellant's] file, the following conclusions can be made:
>
> 1. [The Appellant] had pre-existing osteoarthritis involving both knees prior to the incident in question, more on the left than the right.
>
> 2. The motor vehicle incident could have exacerbated any symptoms [the Appellant] was experiencing as a result of the pre-existing osteoarthritis. Based on [Appellant's orthopedic specialist #1's] arthroscopic findings and the mechanism of injury, the meniscal pathology identified occurred through the process of degeneration over time and not as a direct result of the incident in question.
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> 3. [The Appellant's] osteoarthritis involving her knee has progressed with time. As to how the incident in question factored into the progression is difficult to objectively determine.

> FINAL COMMENTS:
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> [Appellant's orthopedic specialist #2's] opinion pertaining to the meniscal pathology and the osteoarthritis noted in [the Appellant's] knee appears to be based, to some extent, on radiological films and reports provided to him. It might be beneficial to obtain the x-rays taken of [the Appellant's] knee prior to and after the incident in question to see if this would lead me to draw any additional and/or difference conclusions."

In a further inter-departmental memorandum dated October 21, 2002, [MPIC's doctor] wrote to legal counsel for MPIC wherein he indicated that he had examined the x-rays performed on the Appellant's knees on November 26, 1998, September 3, 1999, November 30, 2000, April 15, 2002, and May 29, 2002, and stated:

> "Based on [the Appellant's] history in conjunction with the radiological findings, it is concluded that the meniscal tear she was identified as having in November 1999 was not a direct result of the incident in question. A more probable conclusion would be that the meniscal tear developed over time (i.e., degenerative tear), which [Appellant's orthopedic specialist #1] identified arthroscopically. [Appellant's orthopedic specialist #1] documented that a degenerative meniscus could have happened at the time of the incident in question. In the absence of the above noted clinical findings, it is my opinion that this would be a less probable conclusion. It should be noted that [Appellant's orthopedic specialist #1] opined that [the Appellant's] pre-existing degenerative arthrosis was not caused or aggravated by the incident in question.
> It is my opinion that the more rapid change in the osteoarthritic findings involving the right knee between September 1999 and November 2000, could have been a consequence of the arthroscopic meniscectomy she underwent in November 1999. The minor change in the osteoarthrotic findings between November 26, 1998 and September 3, 1999 would be in keeping with the natural history of knee osteoarthrosis."

APPEAL

The issues under appeal were:

1. Whether the current problems with the Appellant's knees are as a result of the accident.
2. Entitlement to Personal Injury Protection Plan coverage for ongoing treatment of knee condition.
3. Whether the Appellant was properly classified as a "non-earner" for Income Replacement Indemnity (IRI) purposes.
4. Whether the Appellant was incorrectly denied a 180-day determination and whether the Appellant was entitled to IRI at any time since the 181st day after the accident."

CAUSATION

In respect of the issues of appeal set out in paragraphs 1 and 2 above, the relevant sections of the MPIC Act and Regulations are as follows:

> **Definitions:**
> **70(1)** In this Part,
>
> **"accident'** means any event in which bodily injury is caused by an automobile;
>
> **"bodily injury"** means any physical or mental injury, including permanent physical or mental impairment and death;
>
> **"bodily injury caused by an automobile"** means any bodily injury caused by an automobile....
>
> **Reimbursement of victim for various expenses**
> **136(1)** Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under The Health Services Insurance Act or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
>
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care.
>
> **M.R. 40/94**
> **Medical or paramedical care**
> **5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:
>
> (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

THE EVIDENCE OF THE APPELLANT

The Appellant testified that since the accident she has been unable to carry on the life she experienced prior to the motor vehicle accident. She is unable to conduct her kennel business

and unable to breed or show her dogs. She further testified that she is in constant discomfort and has experienced a marked deterioration in the quality of her life because of the pain and disability of her knees. She walks, but has difficulty walking up and down stairs and must place her second foot on the negotiated step before proceeding to the next step. She is also unable to kneel or squat. Her testimony in this regard is corroborated by the report of her physiotherapist, [text deleted], in his report to MPIC dated February 18, 2000 which was referred to earlier in this decision.

THE EVIDENCE OF [APPELLANT'S DOCTOR]

[Appellant's doctor] testified at the Appeal Hearing and stated that prior to the motor vehicle accident the Appellant had no problems with her knees. [Appellant's doctor] further testified that at two routine pre-accident examinations of the Appellant performed by [Appellant's doctor] on July 11, 1996, and August 12, 1997, [Appellant's doctor] found the Appellant to be essentially normal. [Appellant's doctor] did testify that the Appellant had some crepitus on her left knee but that her knee and leg were essentially symptom free. As a result of lack of problems and complaints expressed by the Appellant, [Appellant's doctor] conducted no further examination.

The motor vehicle accident occurred on May 7, 1998, and [Appellant's doctor] examined the Appellant on May 13, 1998, as a result of complaints of pain to her knees and particularly her right knee. Upon examination, [Appellant's doctor] found that there was some tenderness to the back of the body of the right knee. The Appellant testified that there was an increasing pain to her right knee, with problems walking long distances and ascending stairs. X-rays were taken of the Appellant's knees which indicated moderate osteoarthritis on the left knee with minimal changes to the right knee and the Appellant was advised to consider physiotherapy. The

Appellant's condition worsened and on September 3, 1999, she saw [Appellant's doctor] again and reported that there was a severe pain to her right knee and now she was limping and unable to walk stairs at all. A repeat x-ray indicated a progression of osteoarthritis in both knee joints with more severity to the left knee. The Appellant made no complaints to [Appellant's doctor] prior to the motor vehicle accident. However, immediately after the accident, the Appellant began complaining about pain to her knee joints which in due course was determined to be caused by osteoarthritis.

[Appellant's doctor] was in the best position to determine whether or not the trauma the Appellant sustained to her knees due to the motor vehicle accident caused the osteoarthritis. She not only examined the Appellant prior to the motor vehicle accident but examined the Appellant on several occasions subsequent to the motor vehicle accident and throughout this entire time, she consistently maintained that the meniscal tear and the osteoarthritis were caused by the injuries sustained by the Appellant in the motor vehicle accident. [Appellant's doctor] was an impressive witness during her examination-in-chief and cross-examination at the Appeal Hearing and the Commission accepts her evidence on these issues.

THE EVIDENCE OF [APPELLANT'S ORTHOPEDIC SPECIALIST #2]

As earlier indicated in this decision, [text deleted], an orthopedic surgeon, testified at the Appeal Hearing and stated:

1. The severe degenerative changes to the Appellant's knees were caused by the motor vehicle accident and these degenerative changes probably developed within one year of the motor vehicle accident.

2. In the alternative, if there was a pre-existing condition in respect to the Appellant's knees, this condition would have been severely exacerbated by the injury the Appellant suffered in the motor vehicle accident. [Appellant's orthopedic specialist #2] concluded that the trauma the Appellant suffered to both knees in the motor

vehicle accident materially contributed to an acceleration of the osteoarthritis to the Appellant's knees and resulted in the pain and disability that she has suffered from.

3. The tear of the Appellant's medial meniscus involving the posterior horn of the right knee was the type of injury that probably developed from the accident itself.

4. The injury that the Appellant sustained was not a "dashboard injury" where the knee at the patellar level hits the dashboard with external bruising to the pre-patellar area.

5. The injury to the Appellant occurred when the Appellant's feet, which were firmly planted on the floor of the car, were subjected to the stress of an impact between the automobile and the knee. As a result the Appellant's knee sustained forceful torsion leading to meniscal tearing.

6. In summary:

    a) the motor vehicle injuries to the Appellant's knees caused the development of osteoarthritis and in the alternative materially contributed to the acceleration of the osteoarthritis.

    b) the motor vehicle injuries to the Appellant's knees caused the meniscal tear.

THE EVIDENCE OF [MPIC'S DOCTOR]

In reviewing the evidence of [MPIC's doctor], the Commission notes that [MPIC's doctor] is not totally consistent in his medical opinions in respect to the causation relating to osteoarthritis and the meniscal tear.

The Internal Review Officer, in his decision dated October 16, 2000, stated that initially [MPIC's doctor] in his narrative report dated November 19, 1999, based on a review of [Appellant's doctor's] clinical notes and her narrative report, was of the opinion that the Appellant's problems to her right knee were accident-related. The Commission further notes [MPIC's doctor] shifts grounds after reviewing [Appellant's physiotherapist's] physiotherapy report and advised MPIC that the osteoarthritic changes likely predated the accident and that the motor vehicle accident did not directly cause the osteoarthritis. However, in a further inter-departmental memorandum dated October 21, 2002, [MPIC's doctor] wrote to MPIC's legal counsel and indicated that after

he examined the x-rays performed on the Appellant's knees in 1998, 1999, 2000, and 2002, he concluded that the more rapid change in the osteoarthritic findings involving the right knee between September 1999 and November 2000, could have been a consequence of the arthroscopic meniscectomy she underwent in November 1999. [MPIC's doctor] further stated that the minor change in the osteoarthritic findings between November 26, 1998, and September 3 1999, would have been in keeping with the natural history of knee osteoarthrosis.

Having regard to the lack of consistency of [MPIC's doctor's] medical opinion in respect to the issue of causation relating to osteoarthritis and having regard to the consistency of [Appellant's doctor] and [Appellant's orthopedic specialist #2's] medical opinions on this issue, the Commission gives greater weight to the medical opinions of [Appellant's doctor] and [Appellant's orthopedic specialist #2] than it does to the medical opinion of [MPIC's doctor] in this respect.

EVIDENCE OF [APPELLANT'S ORTHOPEDIC SPECIALIST #1] AND [MPIC'S DOCTOR]

[Appellant's orthopedic specialist #1] is consistent in his medical opinions that the degenerative osteoarthritis to the Appellant's knees were not caused or aggravated by the accident. However, [Appellant's orthopedic specialist #1] in his medical reports does not provide any reasons why, in his view, there is no causal connection between the Appellant's osteoarthritis and the trauma the Appellant sustained to her knees as a result of the accident. It is for this reason the Commission gives greater weight to the medical opinions of [Appellant's doctor] and [Appellant's orthopedic specialist #2] in respect of the issue of causation relating to the osteoarthritis than it does to the medical opinion of [Appellant's orthopedic specialist #1].

In respect of the meniscal tear injury suffered by the Appellant to her right knee, [MPIC's doctor] was of the view initially that the meniscal tear was possibly, but not probably, caused by the accident. Subsequently, [MPIC's doctor] shifts grounds in his inter-departmental memorandum to MPIC dated February 18, 2002, and concludes, having regard to the pre-existing osteoarthritis in both of the Appellant's knees prior to the motor vehicle accident, the motor vehicle incident:

> "could have exacerbated any symptoms [the Appellant] was experiencing as a result of the pre-existing osteoarthritis. Based on [Appellant's orthopedic specialist #1's] arthroscopic findings and the mechanism of injury, the meniscal pathology identified occurred through the process of degeneration over time and not as a direct result of the incident in question."

However, in a further inter-departmental memorandum dated October 21, 2002, [MPIC's doctor], after reviewing x-rays performed on the Appellant's knees in 1998, 1999, 2000, and 2002, concludes that the meniscal tear was not a direct result of the motor vehicle accident and could have developed over time, contrary to the opinion of [Appellant's orthopedic specialist #1]. He stated in this memorandum:

> "It is my opinion that the more rapid change in the osteoarthritic findings involving the right knee between September 1999 and November 2000, could have been a consequence of the arthroscopic meniscectomy she underwent in November 1999. The minor change in the osteoarthrotic findings between November 26, 1998 and September 3, 1999 would be in keeping with the natural history of knee osteoarthrosis."

DISCUSSION

[Appellant's orthopedic specialist #2], [Appellant's doctor] and [Appellant's orthopedic specialist #1] are consistent in their views that the meniscal tear was caused by the motor vehicle accident and they all disagree with [MPIC's doctor] in this respect. [Appellant's orthopedic specialist #1] performed the arthroscopy and was in the best position to determine the causation of the meniscal tear. It is for this reason that the Commission gives greater weight the opinion of [Appellant's orthopedic specialist #1] than it does to the opinion of [MPIC's doctor] in respect of

the causation relating to the meniscal tear. In respect of the causation relating to the meniscal tear, the medical opinion of [Appellant's orthopedic specialist #1] is consistent with the opinions of [Appellant's orthopedic specialist #2] and [Appellant's doctor].

In respect of the causal connection between the motor vehicle accident and the osteoarthritis, the medical opinions of [Appellant's orthopedic specialist #2] and [Appellant's doctor] corroborate the testimony of the Appellant. In respect of the causal connection between the motor vehicle accident and the meniscal tear to the right knee, the Appellant's testimony is corroborated by [Appellant's doctor], [Appellant's orthopedic specialist #2] and [Appellant's orthopedic specialist #1].

The Commission notes that the Internal Review Officer, unlike the members of the Appeal Commission, did not have the advantage of hearing the testimony of [Appellant's doctor] and [Appellant's orthopedic specialist #2] who both testified at the Appeal Hearing. [Appellant's doctor] and [Appellant's orthopedic specialist #2] were examined-in-chief and cross-examined at the Appeal Hearing and their evidence was totally consistent throughout their testimony. It should be noted [MPIC's doctor] and [Appellant's orthopedic specialist #1] did not testify at the Appeal Hearing and as a result, the Commission did not have the benefit of hearing the testimony of these two doctors.

In summary, having regard to the totality of the medical evidence, the Commission gives greater weight to and accepts the medical opinions of:

A [Appellant's orthopedic specialist #2] and [Appellant's doctor] on the issue of causation in respect of osteoarthritis rather than to the medical opinions of [Appellant's orthopedic specialist #1] and [MPIC's doctor].

B [Appellant's orthopedic specialist #2], [Appellant's doctor] and [Appellant's

> orthopedic specialist #1] on the issue of causation in respect of meniscal tear rather than to the medical opinion of [MPIC's doctor].

The Appellant who testified at the Appeal Hearing and was an excellent witness and provided her testimony in a forthright and direct manner without equivocation on both examination-in-chief and cross-examination. The Commission finds the Appellant to be a credible person and accepts her testimony in respect to the nature of the injuries she sustained in the motor vehicle accident and that this accident caused her to develop osteoarthritis to her knees and caused the meniscal tear to her right knee. The testimony of the Appellant is corroborated fully by [Appellant's orthopedic specialist #2] and [Appellant's doctor] as to the connection between the motor vehicle accident and the injuries the Appellant sustained. As well, in respect of the connection between the motor vehicle accident and the meniscal tear to the Appellant's right knee, her testimony is also corroborated by [Appellant's orthopedic specialist #1].

DECISION

Having regard to the medical reports of [Appellant's orthopedic specialist #1] in respect to the meniscal tear to the Appellant's right knee, the testimony of the Appellant and the medical reports and testimony of [Appellant's doctor] and [Appellant's orthopedic specialist #2], the Commission finds that, on the balance of probabilities, the meniscal tear to the Appellant's right knee and the degenerative arthrosis that the Appellant suffered to both her knees was caused by the motor vehicle accident.

The Appellant has established, on a balance of probabilities, that the paramedical care she received in respect of the injuries she sustained in the motor vehicle accident was medically required pursuant to Section 5 of M.R. 40/94 of the Act.

As a result, the Commission rescinds the decision of MPIC to terminate reimbursement of the Appellant's physiotherapy treatments effective May 8, 2000, and directs MPIC to reimburse the Appellant in respect of the physiotherapy treatments and any other medication or personal care expenses relating to the Appellant's knees subsequent to May 8, 2000, together with interest to the date of payment pursuant to Section 136(1)(a) of the Act.

CAUSATION - MATERIAL CONTRIBUTION

[Appellant's orthopedic specialist #2], in his testimony before the Commission, opined that the osteoarthritis was directly caused by the motor vehicle accident. In the alternative, [Appellant's orthopedic specialist #2] further testified that if there was a pre-existing condition of osteoarthritis, the trauma suffered by the Appellant to her knees had materially contributed to her knee pain and physical disabilities which rendered her unable to conduct her business operation.

The Commission in the past has dealt with the issue of causation. In [text deleted], dated April 29, 1997 the Commission stated at page 7:

> "Causation is not always based upon exact scientific principles; one must apply experience and conventional wisdom along with proof based on a balance of probabilities."

The Commission determines that in order for an Appellant to establish an accident under Section 70(1) of the Act, the Appellant must establish, on the balance of probabilities, that a motor vehicle accident directly caused the Appellant's bodily injuries in question or materially contributed to the bodily injuries in question.

The Commission in its decisions in *[text deleted]*, dated September 19, 2001, and *[text deleted]* dated October 7, 2002, adopted the principles of causation as set out by the Manitoba Court of Appeal in *McMillan v. Thompson (Rural Municipality)* (1997), 115 Man. R. (2d) 2 (Man. C.A.).

In this case, the Manitoba Court of Appeal was required to interpret the provisions of Section 70(1) the definition section of the MPIC Act. Madam Justice Helper, whose decision was concurred by Mr. Justice Philp and Mr. Justice Kroft stated:

> "36 As noted, s. 70(1) is the definition section. The definition which require examination are: "accident," "bodily injury" and "bodily injury caused by an automobile"
>
> > *"accident"* means any event in which bodily injury is *caused by* an automobile;
> >
> > *"bodily injury"* means any physical or mental injury, including permanent physical or mental impairment and death;
> >
> > *"bodily injury caused by an automobile"* means any bodily injury *caused by an automobile, by the use of an automobile, or by a load,* including bodily injury *caused by* a trailer used with an automobile, but not ...[underlining added]
>
> 37 The appeal will be determined by the meaning to be attributed to the underlined phrases."

In respect of the legislative objective of the Act, Madame Justice Helper stated:

> "53 I also looked to s. 12 of *The Interpretation Act*, R.S.M. 1987, c. I80 for guidance:
>
> > Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects.
>
> 54 I have concluded that the legislature created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile. I find favour with the observations of Pitt J. in the case of *Economical Mutual Insurance Co. v. Lott,* [1995] I.L.R. 1-3205 (Ont. Gen. Div.):
>
> > I am of the view that the main objective of motor vehicle insurance legislation in the nineties is the reduction in the volume and costs of litigation. The means to achieve that objective is the limitation of access to the courts. For that reason alone I would agree with the observations of Matlow J. in *Canadian General Insurance Co. v. Jevco Insurance Co.,* dated October 21, 1994, that: the no-fault provisions of the Act were intended to constitute a comprehensive code determining the rights of insured persons against their insurers and the rights of insurers against other insurers."

In respect to the words "caused by" as found in the definition of "accident" and "bodily injury caused by an automobile" under Section 70(1) of the Act, Madame Justice Helper stated:

> "57 *Black's Law Dictionary,* 6th ed., defines "cause" as: to be the cause of occasion of;

> to effect as an agent; to bring about; to bring into existence; to make to induce.
>
> 58 "Cause of injury" is defined in that same text as "That which actually produces it."
>
> 59 *Shorter Oxford English Dictionary* and *The Dictionary of Canadian Law,* Dukelow & Nuse, Carswell (1991), defines "cause" similarly."

Madam Justice Helper concluded that the motions judge had placed an unnecessarily restrictive interpretation on the phrase "caused by" and further indicated that a restrictive interpretation of these words is contrary to current jurisprudence. Arriving at her decision, Madame Justice Helper stated (at paragraph 67):

> "Surely the legislation is to be interpreted in a manner that results in equality and equity. A restrictive interpretation of the words "caused by" would defeat many of the objectives identified by the legislators prior to the introduction of the enactment: the introduction of a simplified insurance scheme, the elimination of litigation for bodily injuries received in the use of an automobile and the desire to ensure that all victims receive timely compensation..."

Having regard to the introduction of no-fault automobile insurance plans, Madame Justice Helper stated:

> "83 The Court referred to *Driedger on the Construction of Statutes* (3rd ed., 1994) at p. 301:
>
> When used in legislation, common law terms and concepts are presumed to retain their common law meaning, subject to any definition supplied by the legislature.
>
> And to Brown and Menezes, *Insurance Law in Canada* (2nd ed., 1991) at p. 158:
>
> Automobile insurance has evolved to a point where statutory and contractual insurance doctrines converge in both private/competitive and public/monopoly systems. While legislators do intend to get the cost and other efficiencies when a monopoly is introduced, it does not follow that they also intend to re-invent the language. Where identical or similar concepts to private insurance are made a part of public plans it ought to be assumed that legislators intend identical or similar results."

In interpreting the words "caused by" in Section 70(1), Madam Justice Helper followed the decision of Lord Denning in *Minister of Pensions v. Chennel* [1947] K.B. 250 and stated:

> "97 An English case is particularly helpful. In *Minister of Pensions v. Chennell*, [1947] K.B. 250, a bomb dropped by enemy aircraft was found unexploded by a boy and

> was taken home. The boy subsequently took the bomb to a public thoroughfare. He tampered with it with the result that it exploded causing injury to a girl. The issue before the Court was whether the girl's injury was a war injury under the *Personal Injuries (Emergency Provisions) Act, 1939.*
>
> 98 Denning J., as he then was, considered whether the injury was "caused by" the discharge of the bomb by the enemy (as required by the provisions of the *Act*) . He began at p. 252:
>
> Much depends on the right approach. The best way is to start with the injury and inquire what are the cause of it. Sometimes there may be a single cause. More often there is a combination of causes. If the discharge of a missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of a pension, notwithstanding that there may be other causes co-operating to produce it, whether they be antecedent, concurrent or intervening. It is not necessary that the discharge of the missile or other event should be "the" cause of the injury in the sense either of the sole cause or of the effective and predominant cause.
>
> He concluded at p. 257:
>
> ...applying the principles that I have stated, I am of the opinion that in this case the dropping of the bomb by the enemy was a cause of the injury and that the boy's interference was not so powerful an intervening cause as to supersede it. The injury was therefore "caused by" the dropping of the bomb by the enemy."

Lord Dennings' comments in respect of causation are totally consistent with the decision of the Supreme Court of Canada in *Athey v. Leonati et al* (1996), 140 D.L.R. (4th) 235. In a unanimous decision, Mr. Justice Major states:

> A. *General Principles*
>
> (13) Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> (14) The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
>
> (15) The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, (supra). A contributing factor is material if it falls outside the de minimis range: *Bonnington Castings, Ltd. v. Wardlaw*, (supra); see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

In *Liebrecht v. Egesz et al*, 135 Man.R. (2d) 206 Justice De Graves, in arriving at his decision cites *Athey v. Leonati et al* (supra) and states:

> "(64) Causation must be proved on a balance of probabilities. But it is only necessary by that civil standard of proof to prove that the defendants' negligence materially contributed to the injury.
>
> (65) On the question of causation Major, J., for the court (S.C.C.) in *Athey v. Leonati et al* (1996)... restated the principle in the context of competing causes as follows:
>
> > "It is not now necessary, nor has it ever been for the plaintiff to establish that the defendant's negligence was the sole cause of the injury.
> >
> > "The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the 'but for' or material contribution test. Future or hypothetical events can be factored into the degrees of probability, but causation of the injury must be determined to be proven or not proven. (p. 245-246)
> >
> > ....
>
> This decision was appealed to the Manitoba Court of Appeal, and on the issue of causation, the Manitoba Court of Appeal unanimously confirmed the decision of Mr. Justice De Graves. (150 Man. R (2d) 257)."

Although the decisions in *Minister of Pensions v. Chennel* (supra), *Athey v. Leonati et al* (supra), and *Liebrecht v. Egesz* (supra), were decisions decided under a tort system and also dealt with the issue of negligence, the legal principles in respect of causation as established by the Courts in these cases are applicable to the meaning of "accident" and "bodily injury caused by an accident" under Section 70(1) of the Act. The Commission finds that in order for the Appellant to establish an accident under Section 70(1) of the Act, the Appellant must establish, on a balance of probabilities, that the motor vehicle accident directly caused the bodily injuries in question or materially contributed to the bodily injuries in question.

Madame Justice Helper in *MacMillan v. Thompson (*a unanimous decision of the Manitoba Court

of Appeal) when determining the meaning of the words "accident", "bodily injury", and "bodily injury caused by an automobile" under Section 70(1) of the Act, clearly approved the decision of Lord Denning in *Minister of Pensions v. Chennel* (supra), which decision was not determined under a no-fault system. Madame Justice Helper found that this decision was "particularly helpful" in interpreting the meaning of the words accident, bodily injury, and bodily injury caused by an automobile under Section 70(1) of the Act.

In this Appeal, the Commission is required to interpret the meaning of the term "accident" within Section 70(1) of the Act which is the identical section of the Act which Madame Justice Helper interpreted in *MacMillan v. Thompson* (supra). The Commission finds that, on the balance of probabilities, the motor vehicle injuries to the Appellant's knees directly caused the development of osteoarthritis and a meniscal tear to her right knee.

If the Commission is incorrect in this determination than, in the alternative, the Commission finds that on the balance of probabilities, that if the Appellant had a pre-existing condition of osteoarthritis, prior to the motor vehicle accident, then the motor vehicle injuries in question materially contributed to the acceleration of the Appellant's osteoarthritis. As a result, the Appellant has established, on a balance of probabilities, that an accident occurred within the meaning of Section 70(1) of the Act.

The Commission, therefore, directs MPIC to reimburse the Appellant in respect to the cost of all paramedical care in respect of the injuries she sustained in the motor vehicle accident.

APPEAL - INCOME REPLACEMENT INDEMNITY BENEFITS

The Commission, having concluded that the injuries the Appellant sustained in the motor vehicle

accident caused the meniscal tear to her right knee and the degenerative arthrosis to both knees, must then determine the following two issues in the appeal:

1. Whether the Appellant was properly classified as a "non-earner" for Income Replacement Indemnity (IRI) purposes.

2. Whether the Appellant was incorrectly denied a 180-day determination and whether the Appellant was entitled to IRI at any time since the 181st day after the accident."

INTERNAL REVIEW DECISION

The Internal Review Officer in his decision dated October 16, 2000, states:

> 4. "[Appellant's husband] reported the income from the business (such as it was) on his income tax returns. You drew no salary or remuneration whatsoever from the business.
>
> 5. In 1997, [Appellant's husband] reported revenues from the business of $11,526 (including $4,492 from boarding and $6,000 from breeding) and claimed expenses totaling $11,351, leaving a net income of about $174.
>
> 6. In 1998 (the accident having occurred in the fifth month of the year), [Appellant's husband] reported revenues from the business of $4,285 (including $3,935 from boarding and $0 from breeding) and claimed expenses totaling $12,280, leaving a net loss of about $7,995.
>
> 7. No income tax returns have been provided for any other years, although I note that there is an undated letter from you on the IRI package which indicates that in 1996 the business generated revenues of $4,248 from boarding and $3,762 from breeding. There is no indication of expenses incurred that year in connection with the business.
>
> 8. The file also indicates that the business purchased a [text deleted] for breeding purposes in December 1997 and that you have not yet been able to breed it. You have estimated the revenue losses from the [text deleted] and [text deleted] breeding operations at $10,000 to $18,000, but the file does not indicate how this estimate was arrived at. There is also no indication of the expenses the business would have incurred to generate those revenues."

The Internal Review Officer further stated:

> "I am satisfied, therefore, you do not fall into any of the "earner" classifications and that you were, indeed, a "non-earner" at the time of the accident.
>
> The effect of classifying you in this manner is that you are not entitled to IRI during the first 180 days unless you can establish that you would have held remunerative employment during this time period. No evidence has been offered in this regard and it

seems unlikely, given your lack of a remunerative work history during the 24 years prior to the accident, that you would have sought out paid employment during this time even if you had not been involved in the accident.

The entitlement to a 180-day determination arises when a non-earner remains disabled from employment for which they are otherwise suited at, and beyond, the 181st day after the accident as a result of a medical condition, or medical conditions, which are causally connected to the accident in question.

Apart from a few notes made by [Appellant's doctor] in late 1998, and your own evidence regarding your inability to carry on with your breeding and showing duties, there is very little upon which to base a finding that you were disabled (and therefore, entitled to IRI) between the 181st day post-accident and September, 1999 when you saw [Appellant's orthopedic specialist #1] for the first time and were scheduled for surgery.

Your ongoing disability, if any, is more likely to be attributable to the surgery for the meniscal tear than from any sequelae from the accident. I note that [Appellant's orthopedic specialist #1] seems to harbour some doubts as to whether you are disabled at all from animal husbandry duties."

The relevant provision of the MPIC Act and Regulation 39/94 are as follows:

MPIC ACT

Definitions
70(1)

"employment" means any remunerative occupation;

"**full time earner":** means a victim who, at the time of the accident, holds a regular employment on a full-time basis, but does not include a minor or student;

"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

Entitlement to I.R.I.
81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

Determination of I.R.I. for full-time earner
81(2) The corporation shall determine the income replacement indemnity for a full-time earner on the following basis:

(a) under clauses (1)(a) and (b), if at the time of the accident

(ii) the full-time earner is self-employed, on the basis of the gross income determined in accordance with the regulations for an employment of the same class, or the gross income the full-time earner earned from his or her employment, whichever is the greater,

MANITOBA REGULATION 39/94

GYEI from self-employment
3(1) In this section, "**business income**" means the income derived from self-employment, by way of a proprietorship or partnership interest, less any expense that relates to the income and is allowed under the *Income Tax Act* (Canada) and *The Income Tax Act* of Manitoba but not including the following:

(a) any capital cost allowance or allowance on eligible capital property;

(b) any capital gain or loss;

(c) any loss deductible under section 111 (losses from other years) of the *Income Tax Act* (Canada).

GYEI from self-employment
3(2) Subject to section 5, a victim's gross yearly employment income derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time:

(a) for the 52 weeks before the date of the accident;

(b) for the 52 weeks before the fiscal year end immediately preceding the date of the accident.

The Commission rejects the finding of the Internal Review Officer that the Appellant was a non-earner within the meaning of the Act. On the contrary, the Commission finds that the Appellant was a full-time earner within the meaning of the Act. The evidence at the hearing was that for approximately 24 years, the Appellant in partnership with her husband, operated [text deleted] and that the business name in respect of [text deleted] was registered with the Department of Consumer and Corporate Affairs on November 21, 1974.

The Appellant further testified that as a self-employed person, she worked each day during the calendar year in the operation of the business. The Appellant reported to the Internal Review

Officer that she answered the phones, fed and trained the animals, cleaned the kennels and worked 6-8 hours per day every day of the year just doing routine animal husbandry.

The Commission also finds in the last full year of operations prior to the accident, the business income generated by [text deleted] was $174. Having regard to the definition of business income in Section 3(1) of M.R. 39/94, the Commission finds that this constitutes business income derived from self-employment. Although the Appellant was a joint partner with her husband in the business, the Commission accepts the testimony of the Appellant that she operated this business on a full-time basis and received incidental assistance from her husband. The Commission, therefore, finds that the income generated by the business in the last full year of its operations prior to the motor vehicle accident was earned solely by the Appellant.

It should be noted that there is no minimum amount of business income set out either in the Act or in the Regulations that the Appellant must satisfy in order to be entitled to be classified as a full-time earner under the Act and in order to be entitled to Income Replacement Indemnity (IRI) Benefits. The Commission recognizes that there are many businesses that in some years generate income while in other years these businesses may produce losses. The Act or Regulations does not require that a business operation be profitable each and every year in order for an Appellant to receive income replacement indemnity benefits. The only requirement in order to be entitled to IRI benefits is that the business was in operation at time of the accident.

The Internal Review Officer noted in his decision that the Appellant's husband reported the income for the business on his income tax return. The Appellant testified that the reason the income was reported on her husband's return rather than her own return was based on the advice provided by the Appellant's accountant. The Commission finds the Appellant to be a truthful

witness and accepts her testimony in this respect.

For the purposes of the Income Tax Act, the Canada Customs and Revenue Agency ("CCRA") may treat this as income of [Appellant's husband] However, for the purposes of Manitoba Public Insurance, the Commission is not bound by the Income Tax Act or the policies of the "CCRA" in this respect. The Commission therefore finds, having regard to the Appellant's testimony, that notwithstanding the income in question was filed in [Appellant's husband's] income tax return, that this income was generated by the efforts of the Appellant and was the Appellant's business income in the 52 weeks prior to the date of the accident pursuant to section 3(1) of M. R. 39/94.

The Commission therefore determines that the Appellant was a full-time earner under the Act and rejects the decision of the Internal Review Officer dated October 16, 2000, the Appellant did not fall into any of the earner classifications but was a non-earner at the time of the accident. The Commission finds that pursuant to section 81(2)(a)(ii) of the Act, the Appellant was entitled to IRI benefits pursuant to Sections 3(1)(2) of M.R. 39/94.

Pursuant to section 184(1)(b) of the Act, the Commission has the power to make any decision that MPIC could make. The Commission has heard evidence as to the nature of the work performed by the Appellant at [text deleted] for the past 24 years and accepts her testimony that she worked 6 to 8 hours each day during the calendar year in the operation of this business.

MPIC, however, has not had an opportunity to determine the amount of IRI benefits to which the Appellant would be entitled to under schedule C of M.R. 39/94. The Commission, therefore, refers this issue back to MPIC for determination and directs MPIC to make the appropriate

determination as to the amount of IRI owing to the Appellant within one month of the receipt of this decision.

Dated at Winnipeg this 6th day of January, 2003.

MEL MYERS, Q.C.

WILSON MACLENNAN

PATRICK DOYLE