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## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]  
AICAC File No.: AC-03-29**

**PANEL:** Ms. Laura Diamond, Chairperson  
Mr. Robert Chernomas  
Ms. Diane Beresford

**APPEARANCES:** The Appellant, was represented by [Appellant's representative];  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

**HEARING DATE:** July 12, 2005

**ISSUE(S):**

1. Entitlement to Greater Permanent Impairment Award for Concussion.
2. Entitlement to Permanent Impairment benefits for alteration of higher cognitive or integrated mental functions.

**RELEVANT SECTIONS:** Section 126, 127, 129 of the Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 41/94.

**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

On August 2, 1999, the Appellant, [text deleted], was injured in a motor vehicle accident when, due to the driver falling asleep, the car in which she was a seat-belted passenger left the road, rolled over, hit an approach, and came to rest in a ditch. Her injuries included lacerations, one of which required a skin graft, a fractured shoulder and a concussion. As a result of the injuries, the

Appellant became entitled to compensation for permanent impairment benefits pursuant to Part two of the MPIC Act.

By September 1999, the Appellant had healed sufficiently to enter first year at [text deleted]. On October 28, 1999 while practicing with the [text deleted] hockey team, the Appellant ran into another player and fell to the ice, suffering another concussion. Following this incident, the Appellant experienced serious headaches which affected her grades, causing her to fail one course. She did not practice with the team again until February 2000.

Upon her return to [text deleted] in the fall of 2000, the Appellant was awarded a hockey scholarship to the value of US\$1,000.00 per year for up to two years. In November of 2000, she suffered another concussion after being hit during a hockey practice. This concussion ended her hockey career and she lost the scholarship.

In a decision dated September 5, 2001, the Case Manager notified the Appellant of MPIC's assessment of her entitlement to permanent impairment benefits. The Appellant was awarded permanent impairment benefits for scarring, sensory impairment to the right forearm and concussion. The concussion was determined to be a minor one and was assessed at a rate of .5%.

The Appellant sought an internal review of the award for concussion, claiming that the concussion was much more serious than the award of .5% would suggest. She also suggested that the persistent headaches sufficiently impaired her cognitive functions for her to be awarded permanent impairment benefits for alteration of higher cognitive or integrated mental functions.

### **Internal Review Decision**

The decision of the case manager was confirmed by an Internal Review Officer on January 3, 2003. She reviewed the medical reports submitted by the Appellant's caregivers and of [text deleted], Medical Consultant to the MPIC Health Care Services team. She noted that the Act and Regulation in force at the time of the accident provide for a permanent impairment rating of between .5 and 2% for a minor concussion and further noted that the Appellant was awarded .5% because the medical information in the file indicates that the Appellant lost consciousness for less than 5 minutes and had no post-traumatic amnesia greater than 30 minutes.

The Internal Review Officer also noted that there is no information in the medical records that would support a finding that the Appellant suffered impairment to her mental functions.

It is from this Internal Review decision that the Appellant now appeals.

### **Submissions**

The Appellant was not able to attend the hearing and was represented by her father. The Appellant submitted that the concussion suffered in the motor vehicle accident was of such severity that it increased her susceptibility to further concussions and left her vulnerable to suffering concussions from even very minor impacts. She argued that the severity of the impact is evidenced by the fact that she experienced numbness in the side of her head for more than a year. The Appellant also noted that, immediately following the accident, the seriousness of the wound in her arm initially took the focus away from the other injuries she suffered. Regarding the lack of documentation of effects of a concussion in the medical reports, the Appellant noted that some things do get overlooked in emergency situations and noted, for example, that the broken shoulder suffered in the accident was not found until two (2) days after the accident.

All this, the Appellant submitted, is evidence that the concussion was more severe than is suggested by an award of only .5%.

In relation to the claim for an award of permanent impairment to her cognitive functions, the Appellant argued that, but for the very severe concussion suffered in the motor vehicle accident, she would not have suffered a concussion from the minor hit during practice in October and would not have suffered the debilitating headaches which followed that concussion.

The Appellant argued that the severe headaches affected her abilities to concentrate in her studies and caused her grades to suffer that year, leading to her failing one course. This, she submitted, is evidence of the impact on her of the concussion suffered in the motor vehicle accident and is an alteration of the higher cognitive or integrative functions which either slightly, or very slightly impair the performance of tasks of everyday life, sufficient to meet the requirements of Section 4 or 5 of Division 9 of the Permanent Impairment Schedule set out in Regulation 41/94 of the Act.

Counsel for MPIC submitted that the medical records clearly show that the concussion was, at most, a minor one. He noted that the legislation in force at the time of the accident required that there be an “alteration of cerebral tissue following a concussion” in order to be considered a compensable concussion (MR 41/94, Division 2, subdivision 1, s. 5). He submitted that there is no evidence in the Appellant’s medical records of any such alteration.

He noted that the Ambulance Report did not document anything which might represent a concussion and showed an initial assessment of 15/15 on the Glasgow Coma Scale. Counsel further noted that a report by [text deleted], Pediatric Neurologist, of her December 23, 1999

consultation with the Appellant and her parents indicates that the concussion was a “minor” one, in that the loss of consciousness lasted less than 5 minutes. Counsel for MPIC commented that one could take guidance from the current Regulation 41\2000, Division 2, Subdivision 1, Section 1.1(a), which sets .5% for a concussion with a loss of consciousness for less than 5 minutes. All this suggests, counsel argued, that the concussion should be assessed at the “low end of minor”.

The medical record is conclusive, counsel for MPIC submitted, that the concussion suffered in the motor vehicle accident was a minor one.

With regard to the Appellant’s second point, counsel for MIPC submitted that the records show no evidence of any post-concussion effects from the motor vehicle accident. He noted that both the Appellant and her parents indicated to [Appellant’s pediatric neurologist] in December 1999 that the Appellant “did not experience any neurological symptoms after this injury”. Counsel for MPIC argued that any post-concussion effects suffered by the Appellant occurred after the concussion suffered in the hockey practice October 28 and cannot be attributed to the motor vehicle accident.

In relation to the Appellant’s argument that the hit in hockey practice on October 28, 1999 was minor in comparison to that suffered in the motor vehicle accident, Counsel for MPIC argued that there is no certainty as to its severity and, given that the Appellant was knocked to the ice and rendered unconscious for a short time, it too could have been a severe blow. He noted that the Appellant had suffered a previous minor head injury while playing hockey in 1997. This history, he argued, makes it impossible to apportion the impacts of the various incidents. The concussion of October 28, 1999, Counsel for MPIC argued, is an intervening event which would be responsible for any new symptoms.

In relation to the headaches experienced by the Appellant, Counsel for MPIC argued that headaches are not compensable as a permanent impairment. As well, even if they were compensable, Counsel argued, the medical reports are clear that the headaches began after the further concussion of October 28, 1999. He noted that [text deleted], a registered psychologist with special expertise in neuropsychology (and with whom the Appellant partially completed a neuropsychological test battery in October 2003), concluded in her April 23, 2004 Report,

“All reports containing a history or timeline of the relevant events (including [The Appellant’s] own letter) indicate that it was the October incident that caused an abrupt departure from previous levels of functioning.”

Counsel for MPIC argued that the medical records show no evidence of permanent impairment, noting that [Appellant’s psychologist] found no evidence of any “lasting cognitive sequelae of the concussions that the patient sustained in the late 1990s including the one with the motor vehicle accident”.

### Discussion

The Appellant’s entitlement to Permanent Impairment benefits is governed by Sections 126 and 127 of the Act which provide as follows:

**Meaning of "permanent impairment"**

126 In this Division, "**permanent impairment**" includes a permanent anatomicophysiological deficit and a permanent disfigurement.

**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.

Permanent impairments are evaluated pursuant to Section 129(1)

**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.

The applicable schedule for permanent impairments in this appeal is set out in Manitoba Regulation 41/94. The provisions in effect at the time of the accident are found in Part 1 of Schedule A of that Regulation.

The provision relevant to the Appellant's claim as to the severity of the concussion is set out in Division 2, Subdivision 1, section 5:

- |   |           |
|---|-----------|
| 5. Alteration of cerebral tissue following a concussion, contusion, laceration or intracerebral haematoma |           |
| (a) Severe:   | 3 to 5%   |
| (b) Minor:  | 0.5 to 2% |

The provisions relevant to the Appellant's claim of alteration of higher cognitive or integrative functions are set out in Division 9, Subdivision 1, Sections 4 and 5:

- |   |  |           |
|---|--|-----------|
| 4 | Alteration of the higher cognitive or integrative mental functions which slightly impair the performance of the tasks necessary for every day life, including any side effects of medications:     | 7 to 15 % |
| 5 | Alteration of the higher cognitive or integrative mental functions which very slightly impair the performance of the tasks necessary for every day life, including any side-effects of medication: | 1 to 5%   |

The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to a greater permanent impairment award for concussion and to an award for alteration to higher cognitive or integrated mental functions, as a result of the motor vehicle accident

### **Issue No. 1 – Entitlement to Greater Permanent Impairment Award for Concussion**

There was a lack of clear evidence before the Commission as to the length of the Appellant's loss of consciousness or post-traumatic amnesia. Counsel for MPIC submitted that this loss of consciousness was definitely under five minutes, which would be a Grade 2 head injury, according to [Appellant's pediatric neurologist's] report of December 23, 1999. Counsel

suggested we also use the new Regulations, which came into effect on April 15, 2000, for guidance as to the severity of the concussion. These new regulations set out a .5% impairment for a minor concussion which involves post-traumatic amnesia less than thirty minutes or loss of consciousness for less than five minutes.

He suggested there may have even been no loss of consciousness, but that, based upon the reports following the accident, the Appellant was being given the benefit of the doubt in this regard.

On behalf of the Appellant it was submitted that although no one knew how long the Appellant's loss of consciousness lasted, she had suffered not from a minor concussion, but from a major or severe concussion.

The Panel has reviewed all the medical documentation on file, and has concluded that the Appellant has not established that she suffered more than a minor concussion in the motor vehicle accident.

Based upon this lack of evidence, the panel is of the view that the Appellant has not met the onus of proving, upon the balance of probabilities, that the Internal Review Officer was incorrect in his assessment of the concussion as "minor". There is nothing to show that the Appellant suffered more than a minor concussion or that it should attract a permanent impairment award of greater than .5%.

**Issue No. 2 – Entitlement to Permanent Impairment benefits for alteration of higher cognitive or integrated mental functions**

The results of the neuropsychological examination and assessment performed by [Appellant's psychologist] showed that the Appellant performed within normal limits on all measures that were given to her. She stated, in a report dated December 30, 2003:

Once again, my clinical impression is that there are no lasting cognitive sequelae of the concussions sustained by [The Appellant] in the late 1990s. Her only cognitive complaints pertain to concentration and associated memory difficulties that are restricted to periods when she is struggling with unmanageable levels of headache pain. Complaints of cognitive inefficiencies are very widespread among chronic pain sufferers.

The fact that [The Appellant's] difficulties resolve in response to resolution of headache pain is a very strong sign that she does not have any permanent neuropsychological dysfunction.

An earlier CT scan performed on the Appellant, performed in November 1999, showed normal results.

The evidence before the Commission was that the Appellant was able to continue with her studies, and in fact graduate from [text deleted] and to obtain a job in her chosen profession.

Accordingly, the panel finds that the Appellant has failed to establish, on a balance of probabilities, that she suffered a permanent impairment compensable under the Act and Regulations, in regard to her cognitive or integrated mental functions.

Accordingly, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated January 3, 2003.

Dated at Winnipeg this 16<sup>th</sup> day of August, 2005.

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**LAURA DIAMOND**

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**ROBERT CHERNOMAS**

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**DIANE BERESFORD**