

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-98-114**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Dr. Patrick Doyle
Ms Carole Wylie

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Morley Hoffman.

HEARING DATE: November 21, 2007

ISSUE(S):

1. Adequacy of permanent impairment award in respect of Organic Brain Syndromes.
2. Entitlement to a permanent impairment award in respect of reduction of range of neck rotation.
3. Entitlement to permanent impairment award in respect of the changes in form and symmetry to ears.
4. Entitlement to greater interest payment with respect to scarring to head.

RELEVANT SECTIONS: Sections 127 and 197.1 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 41/94, Division 9, Section 3; Subdivision 3, Section 18(h); and Table 15 (Item 3, Division #2)

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

Reasons For Decision

[The Appellant] was involved in a motorcycle accident on July 21, 1995 and sustained significant injuries. The medical records from the [Hospital #1] indicate that as a result of the motor vehicle accident the Appellant sustained:

- a) a right parietal depressed skull fracture with three types of hemorrhaging

- b) cortical and subarachnoid hemorrhaging in the right frontoparietal lobe, below the fracture site
- c) subdural hematoma over the right frontoparietal lobe
- d) intraventricular hemorrhage, in the trigone of the left lateral ventricle. The medical records further indicated that the Appellant was unconscious at the scene of the accident and, after an assessment at the [Hospital #1] he was then transferred to [Hospital #2] on July 21st, where he remained until being discharged on August 14th, 1995.

As of September 14, 2006 the Appellant was provided with impairment awards in the total amount of [text deleted] dollars pursuant to Section 127 of the MPIC Act and Manitoba Regulation 41/94 in respect of several injuries he sustained in the motor vehicle accident.

[Appellant's Neuropsychologists #1 and #2] provided a report to MPIC dated October 10, 1995 which consisted of an abbreviated neuropsychological assessment. [Appellant's Neuropsychologists #1 and #2] described the Appellant as "openly hostile and critical of the testing and examiner" and several subtests were incomplete. [Appellant's Neuropsychologists #1 and #2] opined that the Appellant had an estimated low average to average range of intellectual functioning and that his verbal memory fell within a low average range.

MPIC referred the Appellant to [Rehabilitation (Rehab) Consulting Service] to assist MPIC in determining the Appellant's injuries in respect of scarring resulting from the motor vehicle accident. [Appellant's Rehab Consultant], of [Rehab Consulting Service], in his report to MPIC dated February 10, 1997, comments on the Appellant's neuropsychological issues and states that

the Appellant had reported changes in his concentration, mood and memory and, as a result, he recommended a neuropsychological follow up.

The case manager, in a note to his supervisor dated March 4, 1997, indicated:

It should be noted that the claimant was not cooperative during the neuropsych testing and cognitive deficits were not established. There is no clear indication of whether the negative behaviour issues are premorbid, or not. There is some non-corroborated suggestion that this individual was difficult to deal with prior to the accident and had problems dealing with “authorities”. Regardless, the brain injury itself appears not to warrant an impairment rating of its own given that the claimant has experienced little to no impact on his ADL. (underlining added)

The case manager wrote to the Appellant on April 9, 1997 indicating that an impairment award would be provided in respect of the permanent injuries to the Appellant’s nose and alteration of air flow but did not provide any impairment award in respect of the Appellant’s brain injury or orbital rim fracture. As a result, the Appellant applied for a review of the case manager’s decision on April 28, 1997.

MPIC referred the Appellant to [Appellant’s Neuropsychologist #3] for a neuropsychological consultation. [Appellant’s Neuropsychologist #3] saw the Appellant on two (2) occasions and, in his second report to MPIC, dated September 17, 1997, he stated:

IMPRESSIONS

- 1) The most complete and reliable information that we have are on [the Appellant’s] attention, concentration and memory. We find his attention to be generally within normal limits, and with the majority of memory abilities also within an average range. However, [the Appellant] does appear to have a specific limitation in his verbal noncontextual anterograde memory. This ranges from mild to moderate decreases depending upon the specific function. This would correlate with the information that [the Appellant] had shared with [Rehab Consulting Service] on specific memory difficulty. Since this test was administered during the period of time in which [the Appellant] had appeared to be comfortable, with good mental stamina, I would attribute this as being related to his head injury. (underlining added)

[Appellant's Neuropsychologist #3] further stated in this letter that he was unable to finish the assessment and, as a result, his report was not complete.

Case Manager's Decision

On January 22, 1998 the case manager wrote to the Appellant and, relying on [Appellant's Neuropsychologist #3's] assessment, ordered the Appellant receive an impairment award of five (5%) percent (in the total amount of \$5,070) in respect of the Appellant's cognitive deficits. The case manager stated:

Based on [Appellant's Neuropsychologist #3's] impressions we have reassessed your entitlement to permanent impairment benefit with regards to your traumatic brain injury.

This payment is made to you under Section 127 of the Regulations of the Manitoba Public Insurance Act, which reads:

Lump sum indemnity for permanent impairment

127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500 and not more than \$100,000.00 for the permanent impairment.

Your entitlement, based on Division 9, Mental Function System, Subdivision 1, Organic Brain Syndromes, Category 5, which reads as follows:

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-effect of medication: 1 to 5%

You have been awarded the top of this range or 5% of the maximum amount payable (\$101,400.00 indexed in 1995) or \$5,070.00.

On February 17, 1998 MPIC received a letter from the Appellant's solicitor indicating that he was not satisfied with the total impairment award of 46.6% which MPIC had awarded to the Appellant. He asserted that a higher permanent impairment rating was appropriate.

Internal Review Officer's Decision – May 13, 1998

At the request of the Appellant the Internal Review Officer reviewed the case manager's decision and issued a decision on May 13, 1998 which included confirmation of the case manager's award of five (5%) percent in respect of the Appellant's cognitive deficits.

The Appellant's solicitor referred the Appellant to [Appellant's Neuropsychologist #4], for a neuropsychological assessment. [Appellant's Neuropsychologist #4] issued a report dated July 26, 1999 wherein he indicated that he saw the Appellant on October 30, November 10, 12, 23, and 26, and December 2, 8, 21 and 28, 1998. In a further report, dated July 3, 2000, [Appellant's Neuropsychologist #4] stated:

. . . I believe that as a result of this individual's motor vehicle accident that he had sustained "alteration of higher cognitive or integrative mental functions which slightly impair the performance of the tasks necessary for everyday life", and would therefore suggest a Disability Rating of between 7 to 15 percent. I do, however, believe that if [the Appellant's] current behavioural presentation is reflective of an exacerbation of premorbid tendencies (based upon impairment to frontal lobe functions), I believe that an even higher rating might be warranted, . . . (underlining added)

The Appellant's solicitor made application to MPIC on December 19, 2000 to have MPIC review its impairment decision in respect of the Appellant's cognitive deficits on the grounds that [Appellant's Neuropsychologist #4's] reports contained "new information" pursuant to Section 171 of the MPIC Act. The Appellant's solicitor referred MPIC to [Appellant's Neuropsychologist #4's] July 3, 2000 report wherein he indicates that in his view the Appellant falls within Category 4 of the Organic Brain Syndromes pursuant to Manitoba Regulation 40/94, Division 9, Subdivision 1.

MPIC's case manager referred the Appellant's medical file to [MPIC's Psychologist], a psychological consultant with MPIC's Health Care Services. [MPIC's Psychologist] provided a

report to MPIC dated February 13, 2002 wherein he indicated that he had reviewed the Appellant's entire medical file in order to provide an opinion as to the Appellant's permanent impairment award rating in respect to his brain injury and stated that:

1. MPIC's medical file, together with the raw test data that [Appellant's Neuropsychologist #4] had provided him, formed the basis of his opinion.
2. after reviewing the abbreviated neuropsychological assessments of [Appellant's Neuropsychologists #1 and #2] (report dated October 10, 1995), as well as the reports of [Appellant's Neuropsychologist #3] and the reports of [Appellant's Neuropsychologist #4], he gave greater weight to [Appellant's Neuropsychologist #4's] assessment than to [Appellant's Neuropsychologist #3's] because [Appellant's Neuropsychologist #4] was able to get the Appellant's participation and co-operation in completing the assessment.
3. in arriving at his conclusion, [Appellant's Neuropsychologist #4] utilized certain measures which were superceded by newly-normed measures which [MPIC's Psychologist] had applied.
4. as a result, [MPIC's Psychologist] decided that there should be an increase in the impairment award of five (5%) percent which MPIC had awarded in respect of the Appellant's cognitive deficits.

[MPIC's Psychologist] noted that [Appellant's Neuropsychologist #4], in his report dated July 3, 2000, had provided an impairment rating between seven (7%) percent to fifteen (15%) percent, and that he had also stated that he believed an even higher rating might be warranted. In respect of [Appellant's Neuropsychologist #4's] neuropsychological testing, [MPIC's Psychologist] stated:

. . . [Appellant's Neuropsychologist #4] describes personality change resulting from the motor vehicle accident including decreased frustration tolerance, increased emotional lability (sic), decreased noise tolerance, social withdrawal, decreased attention and concentration memory, speech and spatial functions. [Appellant's Neuropsychologist #4] indicates that [the Appellant] is on no medications at the time of the motor vehicle accident and no use of illicit substances was reported.

[MPIC's Psychologist] further stated:

[Appellant's Neuropsychologist #4] found a pattern of cognitive compromise specifically involving left side sensory-perceptual functions, some mild attention and concentration issues, cognitive compromise specifically involving left side sensory-perceptual functions, some mild attention and concentration issues, memory issues, difficulties in problem-solving efficiency and spatial reasoning with low incidental memory scores on this task, and abstract problem-solving.

...

SUMMARY

Based on the information that I have available to me, my recommendation for permanent impairment awards would differ from those provided from [Appellant's Neuropsychologist #4] as, indeed, he indicates may well be the case in his July 3, 2000 correspondence. I would recommend consideration of an award within Category 3 based on the extent and nature of the cognitive difficulties revealed in [Appellant's Neuropsychologist #4's] 1998 testing. This assessment appears to be the most accurate picture of [the Appellant's] cognitive functioning to date with relatively limited and transitory irritability and issues with cooperation noted, a pattern quite different from those documented in [Appellant's Neuropsychologists #1 and #2's] 1995 and [Appellant's Neuropsychologist #3's] 1997 reports. [The Appellant's] veracity assessment results on the cognitive components of the assessment fell within normal range and again, this adds confidence to the test results as a relatively accurate reflection of his cognitive status. On the GNDS, [the Appellant's] score falls at the lower limit of the moderately impaired range. Given the probable underestimate of his abilities given the older normed tests used, I would recommend adjusting the award up slightly from the lower limit of Category 3. (underlining added)

[MPIC's Psychologist] concluded his report by stating:

In summary, with the information provided, and taking into consideration the possible underestimates of the neuropsychological test battery utilized (due to older norms) as a possible source of underestimating his current relative function compared to age peers, I believe an award in Category 3 of 25% accurately reflects the degree of cognitive compromise identified on the 1998 assessment. (underlining added)

Case Manager's Decision – February 22, 2002

On February 22, 2002 the case manager varied the five (5%) percent award in respect of the Appellant's Organic Brain Syndromes and confirmed an award of twenty-five (25%) percent. The Appellant applied to have this reviewed by an Internal Review Officer.

Internal Review Officer's Decision – May 26, 2003

On May 26, 2003 the Internal Review Officer confirmed the decision of the case manager and concluded that the material currently on file did not substantiate an entitlement to an award greater than twenty-five (25%) percent in the Appellant's Organic Brain Syndromes as recommended by [MPIC's Psychologist].

The Internal Review Officer stated:

You agreed at the hearing that Category 3 is the correct one in terms of your organic brain syndrome, but you maintained that the reward of 25% was insufficient compensation because of the adverse impact the injury has had on your daily life. The range for Category 3 is 20% to 45%.

[MPIC's Psychologist] – then a member of the MPI Health Care Services Team – reviewed the July 26, 1999 and July 3, 2000 reports from [Appellant's Neuropsychologist #4]. [MPIC's Psychologist] also reviewed the raw data from the tests administered by [Appellant's Neuropsychologist #4].

In his July 3, 2000 report, [Appellant's Neuropsychologist #4] had placed you Category 4 (7-15%) but suggested the possibility of a higher award, depending on how the wording of MPI Permanent Schedule was interpreted.

In his comprehensive review dated February 18, 2002, [MPIC's Psychologist] concluded that you were entitled to an award at the lower end of Category 3 and he stipulated 25% as the appropriate figure.

There is nothing in the material to suggest that [MPIC's Psychologist] overlook any relevant factors in arriving at the 25% figure. There are no subsequent expert reports suggesting that his assessment was in error.

I am therefore confirming the 25% award for organic brain syndrome.

Internal Review Officer's Decision – March 8, 2007

On March 8, 2007 the Internal Review Officer issued a third Internal Review decision and stated:

Entitlement #11: This impairment was previously confirmed in my decision dated May 26, 2003. No new information has been provided which calls into question the validity of the award. The report from [Appellant's Neuropsychologist #4] dated December 6, 2004 does not provide any information which calls into question the validity of the previous award (25%) originally made in 2002. The award is, in fact, somewhat higher than that recommended by [Appellant's Neuropsychologist #4] at that time (7%-15%). The award is hereby confirmed.

In a Notice of Appeal, dated April 6, 2007, the Appellant appealed the decision of the Internal Review Officer.

Appeal Hearing

The Appellant testified at the hearing and asserted that as a result of the brain injury he suffered in the motor vehicle accident there were significant changes in his cognitive functioning and his personality as follows:

1. lost his ability to concentrate;
2. developed long and short term memory problems;
3. became easily frustrated;
4. was easily upset emotionally;
5. had mood swings;
6. became severely depressed;
7. lost his self confidence;
8. no longer enjoyed being with groups of people and increasingly became socially isolated;
9. had difficulty maintaining relationships with people; and

10. had spatial problems and testified by way of example that he had trouble putting a neck chain on.

MPIC did not call any witnesses at the hearing.

Submissions

The Appellant submitted that the brain injury he suffered as a result of the motor vehicle accident had a significant adverse effect on his daily life. He reviewed at length his testimony and pointed out the significant change in his personality and his cognitive functioning before and after the motor vehicle accident.

He further submitted that MPIC was correct in determining that he was entitled to an award within Category 3, but that MPIC's award of twenty-five (25%) percent was inadequate and he requested there be an increase in the amount of this award.

Not surprisingly, MPIC's legal counsel rejected the Appellant's submission and asserted that:

1. the MPIC award for Organic Brain Syndromes of twenty-five (25%) percent was adequate.
2. in support of his position, MPIC's legal counsel submitted that the Internal Review Officer had correctly determined that [MPIC's Psychologist's] report was comprehensive and he was correct in concluding that the Appellant was entitled to an award at the lower end of Category 3.
3. the case manager, in his response to [MPIC's Psychologist's] report, increased the impairment award from five (5%) percent to twenty-five (25%) percent.

4. there was no medical evidence produced by the Appellant which would support that [MPIC's Psychologist's] assessment was in error.
5. as a result the Appellant's appeal should be rejected and the Internal Review Officer's decision of May 26, 2003, which was confirmed in the Internal Review Officer's decision of March 8, 2007, be upheld.

Discussion

The Commission notes that the Appellant's testimony in respect of his complaints relating to his cognitive functioning and change in personality is corroborated by his friend, [text deleted], and by his mother. [Appellant's Friend], in a written statement dated July 19, 2000, indicates that the Appellant now portrays significant frustration in daily activities and that before the accident they would have no effect on him. She also confirmed the Appellant suffers from long and short term memory loss, a lack of confidence, and a lack of patience as a result of the motor vehicle accident. She has known the Appellant for seventeen (17) years, both before and after the motor vehicle accident. [Appellant's Friend] states:

As someone who has known [the Appellant] for many years I believe that this accident of July 21, 1995 has fundamentally changed both his behavior patterns, his self confidence and his ability to trust. [The Appellant] now is quicker to anger and becomes easily frustrated whereas this was not the case prior to his motorcycle accident. While I also believe that he made a remarkable recovery, he is just not the "same".

The Appellant's mother also provided a written statement dated September 17, 1999 and set out the changes in the Appellant's personality:

Since the accident I have noticed a tremendous change in his emotional attitude. [The Appellant] now has mood swings that change very quickly, he becomes defensive almost immediately, his level of patience is lower, and he gets angry quite fast.

[The Appellant] spends almost all his spare time alone, where as before the accident he was always on the go, and he had a lot of friend's (sic).

...

[The Appellant] quite often now has periods of feeling down, sad and lonely.

The Commission found that the Appellant testified in a direct, sincere and unequivocal manner both in examination-in-chief and in cross-examination.

The Commission notes that the Appellant was personally interviewed by both [Appellant's Neuropsychologist #3] and [Appellant's Neuropsychologist #4], who are both experienced psychoanalysts, and who both accepted the Appellant's complaints as valid, and that neither of them raised any concerns about the Appellant's credibility. Although [Appellant's Neuropsychologist #4] disagreed with [Appellant's Neuropsychologist #3's] assessment, there is nothing in [Appellant's Neuropsychologist #3's] report that indicated any concern that the Appellant had exaggerated his symptoms.

[Appellant's Neuropsychologist #4] concluded that the Appellant's personality changes were as a result of the cognitive deficits caused by the motor vehicle accident. [MPIC's Psychologist] accepted [Appellant's Neuropsychologist #4's] assessment and found that as a result of the older normed test used by [Appellant's Neuropsychologist #4] that he had underestimated the Appellant's current relative function compared to age peers.

The Commission, unlike [MPIC's Psychologist], personally observed the manner in which the Appellant testified, both in examination-in-chief and in cross-examination. The Commission finds that:

1. the Appellant was an impressive witness and candidly testified as to the traumatic effects that the Organic Brain Syndromes caused to his quality of life.

2. having regard to the Appellant's testimony and the documentary evidence filed in these proceedings, it is established that the motor vehicle accident, which caused the Organic Brain Syndromes had a significant adverse effect upon his quality of life.
3. [MPIC's Psychologist] underestimated the nature of the negative impact of the Organic Brain Syndromes upon the Appellant's quality of life.
4. the Appellant has established, on a balance of probabilities, that the impairment of the Appellant's personality and cognitive functions, as a result of the Organic Brain Syndromes, were at a higher level than determined by [MPIC's Psychologist].

Decision

For these reasons the Commission allows the Appellant's appeal and increases the impairment award in respect of the Organic Brain Syndromes from twenty-five (25%) percent to twenty-eight (28%) percent in Category 3.

Permanent Impairment – Neck Problems

The Appellant complained that as a result of the motor vehicle accident he had limited neck rotation which he compensates by trunk rotation and he has requested a permanent impairment award in respect of his neck problem. The Appellant had been referred to [Independent Physiotherapist], [text deleted], for an independent physical examination. [Independent Physiotherapist] provided a report to the case manager on March 31, 1998 and in this report he states in respect of the Appellant's neck problem:

. . . He notes no specific functional limitations but indicated that it is inconvenient such that he is unable to rotate his head as much.

The relevant provision in respect of the Appellant's request is set out in Manitoba Regulation 41/94, Subdivision 3, Section 18(h):

- | | |
|---|----|
| (h) Functional limitations following a sprain, including any
Instability | 2% |
|---|----|

The Internal Review Officer, in his decision dated May 26, 2003, rejected the Appellant's request for a permanent impairment award on the following grounds:

2. The provisions of the MPI Permanent Impairment Schedule ("the Schedule") regarding neck injuries are found at Page 28 (copy enclosed).

There are no indications of bony alterations (ankylosis, pseudoarthrosis, compression fractures, etc.) in the medical evidence, so the only provision which could possibly apply would be Item 18(h).

While there are details noted of reduced ranges of neck motions, the report from [Independent Physiotherapist] does not identify anything which could be classified as a "functional limitation". He wrote that, when he examined you, you noted "no specific functional limitations but indicated it is inconvenient such that [you are] unable to rotate [your] head as much".

This report does not, in my view, substantiate an entitlement to award under Item 18(h).

Discussion

The Appellant disagreed with the decision of the Internal Review Officer in respect of the functional limitations to his neck. He testified that:

1. when he was operating a motorcycle or a motor vehicle he had difficulty in turning his head in order to check for vehicles when he wished to change from one traffic lane to another.
2. due to the limited range of motion when turning his head, in order to safely change from one traffic lane to another, he was required to rotate his entire body trunk and not merely his neck.

3. the need to rotate his entire body trunk was extremely awkward when he was operating his motorcycle or his motor vehicle and created difficulties for him in operating either of these vehicles in a safe manner.
4. when operating his motorcycle he is required to wear a helmet and, as a result, after a short period of time when operating his motorcycle, his neck becomes extremely sore and this prevented him from operating this vehicle for lengthy periods of time as he had prior to the motor vehicle accident.
5. reduction of his range of neck motion adversely affected his ability to work effectively as an [text deleted].

The Appellant therefore submitted that the reduction in his neck range of motion was:

- (a) of a permanent nature,
- (b) not merely an annoyance as determined by the Internal Review Officer,
- (c) a significant functional limitation which adversely affected his quality of life.

The Appellant also submitted that MPIC erred in failing to provide him with an impairment award in respect of this functional limitation.

In response, based on the report of [Independent Physiotherapist], who found no specific functional limitations in respect of the Appellant's neck motion, MPIC's legal counsel submitted that the Commission should reject the Appellant's appeal in this respect.

Decision

The Commission has found the Appellant to be a credible witness who testified in a sincere, direct manner, without equivocation, both in examination-in-chief and in cross-examination. The Commission accepts the Appellant's testimony, setting out the reasons why the reduction in the range of his neck motion affected his quality of life and which constituted functional limitations within the meaning of Manitoba Regulation 41/94, Subdivision 3, Section 18(h). For these reasons the Commission gives greater weight to the testimony of the Appellant than it does to the opinion of [Independent Physiotherapist].

The Commission finds that the Appellant has established, on a balance of probabilities, that he has a functional limitation in respect of his neck rotation which entitles him to a permanent impairment award of one (1%) percent pursuant to Manitoba Regulation 41/94, Subdivision 3, Section 18(h). The Commission allows the Appellant's appeal in this respect and varies the previous decisions made by the Internal Review Officer dated May 26, 2003 and March 8, 2007 accordingly.

Entitlement to Permanent Impairment Award – Right Ear

The Appellant asserted that in respect of his head injury, as a result of the motor vehicle accident, his left ear became one-half ($\frac{1}{2}$) inch lower than his right ear. The Appellant appealed MPIC's denial of his request for a permanent impairment award in respect of the discrepancy in the height of his right ear in relation to his left ear.

The relevant provision of the Regulations in respect of this request is set out in Manitoba Regulation 41/94, Table 15:

TABLE 15
(Item 3 in Division 2)

EVALUATION OF PHYSIOGNOMY IMPAIRMENTS

Class of physiognomy Impairments	Changes in the form and symmetry	Cicatricial Impairment	Max Disfig.
Class 1			
No impairment	Inconspicuous change	Inconspicuous Impairment	-----
Class 2			
Very minor impairment	Very minor change	Conspicuous Impairment 1% per cm ²	3%

The Internal Review Officer, in his decision dated May 26, 2003, rejected the Appellant's request for an impairment award in respect of the discrepancy in height between his left ear and right ear on the following grounds:

5. There is a slight discrepancy in the height of your right ear in relation to your left ear. When invited to do so by you (and after you had removed your sunglasses), I was able to see the discrepancy. I had not noticed it before that time.

Table 15 of the Schedule (copy enclosed) provides no award for an "inconspicuous change" in form and symmetry, so there is no entitlement for this item.

MPIC's legal counsel at the hearing submitted that the only time one could see the discrepancy between the height of the Appellant's right ear and left ear is when the Appellant is bald. He further submitted that since the Appellant's hair length covered both his left and right ear, a member of the public would not notice any discrepancy between the height of the Appellant's ears. He also submitted that as a result the Internal Review Officer was correct in determining that the discrepancy between the two (2) ears was not a "inconspicuous change" within the meaning of the Regulation and, therefore, no award should be made.

The Appellant, on the other hand, testified that there was a significant discrepancy between the height of the two (2) ears, which constituted a conspicuous change to the form and symmetry of his head. He also testified that his entitlement to an impairment award should not be dependent on his hair length or baldness, but whether there had been a very minor change in the height of his left ear in relation to his right ear. The Appellant submitted that this change entitled him to an impairment award.

Decision

The Commission agrees that the Appellant's entitlement to an impairment award should not be dependent upon the Appellant's hair length, but whether or not there was a very minor change to the form and symmetry of the Appellant's ears in accordance with Manitoba Regulation 40/94, Table 15 (Item 3, in Division 2).

The Commission finds that the Appellant has established, on a balance of probabilities, that the change in the form and symmetry of the Appellant's ears was a very minor change pursuant to Manitoba Regulation 41/94, Table 15, Item 3 in Division 2. As a result, the Commission determines that the Appellant is entitled to an impairment award of one (1%) percent. The Commission therefore allows the Appellant's appeal in this respect and varies the previous decisions made by the Internal Review Officer dated May 26, 2003 and March 8, 2007.

Entitlement to greater interest with respect to scarring to head

The relevant provision in respect of this appeal is set out in Section 197.1 of the MPIC Act:

Interest where benefit not paid within 30 days after entitlement established

197.1 Where the corporation fails to pay an indemnity, a retirement income or an expense to a person entitled to compensation under this Part within 30 days after the day on which the person's entitlement to the benefit is determined, the corporation shall pay to the person interest on the amount of the indemnity or expense at the prejudgement rate

of interest prescribed under section 79 of *The Court of Queen's Bench Act*, computed from the day on which the person became entitled to the benefit.

The Appellant submitted that the motor vehicle accident occurred on July 21, 1995 and, as a result of that accident, he suffered a permanent scar to his skull. The Appellant referred to the [Hospital #1] X-Ray Report of July 21, 1995 which indicated that there was a right parietal skull fracture with depression of the bony fragments, the full width of the diploe. The Appellant further submitted that MPIC should have known in 1995, upon examining the x-ray, that he had a significant scar to his skull as a result of the motor vehicle accident and that he was entitled to interest in respect of his impairment award in respect of this scarring in 1995 and not from June 30, 2002.

The Appellant also testified that at his request [text deleted], a nurse employed at the Appellant's place of employment, took pictures of various scars on the Appellant's body and provided a written statement in respect of the various scars. The pictures and statement were provided to [text deleted], the rehabilitation consultant at [Rehab Consulting Service], and were filed in evidence in these proceedings. In respect of the scarring of the Appellant's right scalp, the written statement indicated:

1. Head Right scalp area 10 cm long 5 cm wide at widest part. Large depression in skull underlying this scarring – These residual scars etc are hidden by his hair.

The Commission notes that on March 3, 1997 [Appellant's Rehab Consultant] wrote to the case manager at MPIC and enclosed [Appellant's Nurse's] statement, together with the photographs, to the case manager. The Appellant submitted that since 1995 MPIC knew about his skull depression as well as his skull scar. As well, the Appellant further asserted that this information was specifically set out in [Appellant's Rehab Consultant's] report to the case manager in a letter dated March 3, 1997 but he did not receive any interest in respect of the scarred skull until June

30, 2002. The Appellant therefore claimed that he was entitled to interest in respect of the skull scarring impairment award from the date MPIC became aware of the x-ray report in 1995 or when they received [Appellant's Rehab Consultant's] report dated March 3, 1997. The Appellant therefore submits that MPIC erred when they awarded interest in respect of this impairment award on June 30, 2002.

Internal Review Officer's Decision – May 26, 2003

The Internal Review Officer rejected the Appellant's request for additional compensation and in his decision dated May 26, 2003 stated:

You have not, however, received any compensation for the scar. It may be that the scar was covered with hair at the time of the original assessment. Because your head is now shaved, the scar is clearly visible.

The case manager will contact you to arrange to have the scar measured and categorized, after which a cheque will be sent to you.

It should be noted that there were photographs taken of your skull at [Hospital #2] in late 2002. They were received by the case manager on May 31, 2002.

The original photographs are not on any of the MPI files in my possession. I have made inquiries of several MPI staff, but the photographs cannot be located. I have not been able to determine their current whereabouts. The [Hospital #2] has indicated that the original photographs and negatives were all sent to MPI and they have no copies in their records.

Section 197.1 of the *Act* (copy enclosed) provides that interest is payable to a claimant where MPI fails to pay an indemnity within 30 days after the entitlement to the benefit is determined.

If the photographs had not been misplaced, the award for the scar could have been made by June 30, 2002. You are therefore entitled to interest on this award from June 30, 2002 to the date of payment.

Internal Review Officer's Decision – March 8, 2007

In the Internal Review decision dated March 8, 2007 the Internal Review Officer reviewed this matter again and stated:

Interest from 2005: With respect to the scar on your head, my May 26, 2003 review decision indicated that you were to be paid interest from June 30, 2002 to the date of payment for this particular impairment.

Upon receipt of my decision, the case manager made several attempts to arrange for measuring and assessment of the scar. The file indicates you declined to cooperate, so no further efforts were made at that time.

In May, 2005, you attended at [Rehabilitation Clinic] for the assessment. MPI was not advised of the attendance, nor provided with a copy of the report until late April, 2006.

The interest calculation dated September 1, 2006 indicates that interest was, in fact, calculated from February 22, 2002.

In my view, you have received all of the interest you are entitled to in connection with this impairment.

The Appellant, in his submission to the Commission, argued that MPIC should have been aware that at the time he suffered the motor vehicle accident injuries on July 21, 1995 he had suffered a scar to his head. The Appellant referred the Commission to the x-ray report of [Appellant's Doctor], dated July 21, 1995, which indicated that the Appellant suffered a right parietal skull fracture with depression bony fragments the full width of the diploe. The Appellant also referred to the report from [Appellant's Rehab Consultant] who provided a photograph and statement in respect of the Appellant's right scalpel scar to MPIC on March 3, 1997. The Appellant therefore submitted that he is entitled to interest from the time the x-rays were taken in 1995 and, if not in March 1997, when MPIC received [Appellant's Rehab Consultant's] letter.

MPIC's legal counsel, in response, relied on the provisions of Section 197.1 of the MPIC Act which provides that interest does not commence until thirty (30) days after the day on which the person's entitlement to the benefit was determined. MPIC's legal counsel further submitted that the explanation provided by the Internal Review Officer sets out the reasons why interest was

properly paid from February 22, 2002 and not earlier.

Decision

The Commission understands why the Appellant believed that MPIC had erred in determining the commencement date of the payment of interest. The Appellant had reasonable grounds to believe that MPIC knew, in 1995, and for certain in 1997, that the Appellant had suffered a scar to his skull. On this basis the Appellant made vigorous arguments:

- a) that MPIC had not satisfactorily explained the delay in determining his entitlement to an impairment award for the scarring to the skull; and
- b) that MPIC erred when determining that the commencement date for the payment of interest occurred in the Spring of 2002.

The Commission finds that if it was not for the existence of Section 197.1 of the MPIC Act, it would have agreed with the Appellant's submission in this respect. However, Section 197.1 required MPIC to commence the payment of interest thirty (30) days after June 30, 2002, which was the date that MPIC determined that the Appellant was entitled to a permanent impairment award in respect of the scar to the Appellant's head. The Commission notes, however, that the Internal Review Officer, in his decision, indicated that the payment of interest commenced on February 22, 2002.

The Commission finds that the Internal Review Officer has correctly interpreted and applied Section 197.1 of the MPIC Act in respect of the Appellant's entitlement to interest and, as a result, rejects his request for interest from either 1995 or 1997. The Commission therefore confirms the Internal Review Officer's decisions dated May 26, 2003 and March 8, 2007 and dismisses the Appellant's appeal in respect of his claim for additional interest in respect of his

head scar.

Dated at Winnipeg this 14th day of December, 2007.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

CAROLE WYLIE