

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-109 and AC-12-067**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Neil Cohen
Mr. Neil Margolis

APPEARANCES: The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.

HEARING DATE: October 24, 2012

ISSUE(S): 1. Whether the Appellant's Permanent Impairment Payment was correctly calculated.
2. Entitlement to Income Replacement Indemnity.

RELEVANT SECTIONS: Sections 85(1)(a) and 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(1) of 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

[The Appellant] was involved in a motor vehicle accident on August 8, 1994 in the Province of Alberta and sustained the following injuries:

- Comminuted fractured right femur with IM rod implanted
- Frontal contusion and evidence of a subarachnoid bleed
- Multiple contusions/abrasions: right forehead/cheek; left and right elbows/knees; with residual scarring to the left knee; and

- Right eye visual defect – very small inferior right “ ‘quadrantic homonymous’ (harmonious)” field loss.

The medical information indicated that prior to the motor vehicle accident the Appellant suffered from polio when she was two years old and this resulted in right leg muscular atrophy, osteoporosis involving the right leg, a deformity involving the right foot and she walked with an unsteady gait.

Prior to the motor vehicle accident the Appellant had been employed between 1978 and 1993 as a house cleaner in private homes in the [text deleted], and also provided home care services. As a result of the injuries she sustained in the motor vehicle accident, she was unable to return to work.

Following the motor vehicle accident the Appellant was transferred to [hospital #1] in Alberta where her right broken femur was treated with the insertion of three screws. Upon her return to [Manitoba], the Appellant was seen by [Appellant’s doctor #1] on several occasions. [Appellant’s doctor #1] provided an initial report to MPIC on October 31, 1994 indicating that the Appellant was walking with a cane.

The Appellant also saw [text deleted], orthopaedic surgeon, at the [text deleted] Clinic.

[Appellant’s orthopaedic surgeon’s] chart notes for February 27, 1995 indicated:

“[The Appellant] is now almost 7 months following a right femoral fracture in a motor vehicle accident. This fracture has healed perfectly with bridging callus all around. She has full range of motion of her hip and knee. She feels that her leg drags slightly, more compared to prior to the injury which is probably related to the incision through the gluteus medius. She needs no further orthopaedic care with regards to this problem. She

is discharged until she wishes to see me again with regards to this. She may down the road need nail removal but it is not mandatory.”

On October 14, 2009 the Appellant notified MPIC that she wanted to reopen her Permanent Impairment Protection Plan (“PIPP”) file (a period of 15 years after the August 8, 1994 motor vehicle accident). The Appellant notified MPIC that:

1. She was seeking to reopen her file because she had vision problems that were confirmed by a specialist to be permanent blockers and she had quit working two years ago due to this.
2. She requested funding for an eye examination by a specialist and also informed MPIC that she had a pin in her right leg which caused intermittent pain and weakness which precluded her from holding employment.
3. She was looking to claim Income Replacement Indemnity (“IRI”), treatment and permanent impairment benefits.

MPIC’s case manager, in her decision of October 12, 2010, reviewed the Appellant’s entitlement to benefits under the PIPP plan and provided the following history in respect of the Appellant’s employment subsequent to the motor vehicle accident and stated:

“At the time of the August 8, 1994 car accident you were unemployed. You declared working part time between 1995 and 2002. You relocated to [text deleted], Alberta in 1997 and worked for: [text deleted], and did private homecare. From June 8, 2002 to December 4, 2005, you were employed in housekeeping for [text deleted]. Based on employment records received from Employment Insurance (EI), you resigned from this job declaring the reason was to take care of your husband who had suffered a stroke. Records show you had applied for EI “sick” benefits without supporting medical information. EI assessed you were “disentitled” because you had not terminated your job due to your own health reasons. Following your appeal of this decision, EI reassessed your situation and sick benefits were administered to you for seven weeks followed by regular benefits for 34 weeks up until October 14, 2006.

You relocated back to Manitoba in 2006 and informed you were employed casually for 3 months at [text deleted] but that you were fired after booking off due to pain. Information extracted from the Service Canada/Canada Pension Plan (CPP) records

(Employer Questionnaire signed December 16, 2009 by [text deleted]), confirmed you worked causally (sic) in housekeeping from October 3, 2006 to January 19, 2007 and you were “dismissed” due to “unsatisfactory” work performance and not related to a medical condition.

Records from EI confirmed you were employed with [text deleted] at [text deleted] from March 6 to May 10, 2008. You declared that you quit this job after your shifts were cancelled and reassigned to another worker, and that you pursued a complaint through your union but was unsuccessful. [text deleted] confirmed your last record of employment ended May 26, 2008, due to “termination by the employee”. They confirmed your attendance was good initially but later absences were checked “not for medical reasons”. You confirmed applying for EI benefits thereafter but you were denied. The EI records indicated your claim filed August 18, 2008 was deemed “not established due to insufficient hours worked”. You declared collecting Employment Insurance Assistance off and on in 2008 and 2009.

On May 25, 2009 you applied for CPP disability benefits and declared you were not able to work because of pain in your back and legs. You stated you were limited in walking due to your pre-existing polio which affected your right leg/drop foot and your arthritis. You were notified by CPP September 17, 2009 that you did not qualify for disability benefits because your identified limitations resulting in right leg and back pain did not continuously prevent you from doing some type of work in December 2007 or by August 2008. You disagreed with this decision and in the CPP file notes dated September 28, 2009 you verbally identified you had a “significant” limp due to your post polio symptoms. You further advised that the “eye blockers” were impairing your vision, dizziness affected your ability to walk and you would not be able to perform at a sit down job due to this. You were notified February 19, 2010 that your ineligibility for CPP benefits was still being upheld. You have indicated you have appealed to the next level for a Tribunals review.”

The Appellant was seen by [Appellant’s doctor #2] at the [text deleted] Clinic and he provided a report dated December 15, 2009 and stated:

[The Appellant] came in for a visual field on December 14, 2009. It was noted there is a small visual defect in the right, and even a smaller visual defect in the left. The patient seems to be asymptomatic of these visual defects. The visual fields are enclosed.”

[Text deleted], who practices in the area of ophthalmology, provided a report to MPIC dated June 23, 2010 and stated:

“I have enclosed a copy of my notes dated June 14th, 2010 together with all visual fields. The more detailed fields for the right and left eyes show a small bilateral paracentral scotoma, which is undoubtedly due to previous trauma.

Peripheral vision is normal and she has uncorrected vision of 20/30 in each eye. This could be regarded as functionally normal.”

The case manager requested an assessment by [MPIC’s doctor #1] of MPIC’s Health Care Services to determine whether there was a functional deficit which precluded the Appellant from work re-entry and whether there was a causal relationship to the motor vehicle accident of August 1994. In addition, he was to confirm whether the ongoing eye impairment was related to the motor vehicle accident.

[MPIC’s doctor #1] provided a report on August 26, 2010 wherein he stated:

1. He had reviewed all the documents contained in the Appellant’s file.
2. The reports on file indicated that the Appellant’s condition improved to the extent that her fracture had healed and her gait had returned to normal (with a foot drop).
3. As of October 31, 1994 the Appellant was not reporting symptomatic visual disturbances and that she was able to regain full range of motion in her hip and knee.
4. In respect of her eye problems:

“It is noted that as of December 14, 2009, [the Appellant’s] Visual System assessment identified a small visual defect in the right and an even smaller visual defect on the left that was asymptomatic. It is documented that [the Appellant] was re-assessed on June 14th, 2010 at which time it was noted that she had a small bilateral paracentral sclerotoma, which was undoubtedly due to previous trauma according to the specialist that assessed her. It is documented that her peripheral vision was normal and her uncorrected vision was 20/30 in each eye, which was considered functionally normal.

Information provided in your request for review indicates [the Appellant] was employed in various capacities until May of 2008. It is further noted that [the Appellant’s] decision to discontinue work was not a result of a medical condition.”

[MPIC’s doctor #1] further stated:

“It is my opinion the file does not contain documentation indicating [the Appellant] was identified as having objective evidence of a physical impairment of function as it relates to her musculoskeletal or visual system that developed secondary to the motor vehicle incidents she was involved in.”

[MPIC's doctor #1] concluded that:

1. In his opinion the Appellant's medical file did not contain evidence indicating that she was noted to have objective evidence of a physical impairment of function that would prevent her from holding gainful employment for the past few years.
2. The information contained on the Appellant's file indicated that she had discontinued her work duties in May 2008 for non-medical reasons.
3. The Appellant's medical file did not contain any documentation or objective evidence of an impairment of function as it related to the Appellant's musculoskeletal system which would have entitled her to a permanent impairment benefit.

Case Manager's Decision – October 12, 2010 – IRI Benefits:

The case manager reviewed the Appellant's medical reports and [MPIC's doctor #1's] report of August 26, 2010 and stated:

“The medical information received from [text deleted] Clinic [Appellant's doctor #2/doctor #3] identified your various assessment dates between September 13, 2007 and January 8, 2010 for various medical issues. The only reference regarding involvement in the motor vehicle accident was documented in notes relating to assessments performed on: May 8, 2009 when a disability parking permit was filled out; and June 22, 2009 when you were assessed for a post poliomyelitis sequelae and problems involving your right leg. Although the notes confirm you reported quitting two years ago because of right leg weakness, unsteady gait and wasting of the right thigh and leg, they do not outline any objective physical findings relating other than observation of limping on your right leg.

Visual System assessment conducted on December 14, 2009 identified a small visual defect in your right eye and an even smaller visual defect on the left eye that was asymptomatic. You were reassessed June 14, 2010 by [Appellant's ophthalmologist] and you were noted to have a small bilateral paracentral sclerotoma that he assessed to be due to a previous trauma. Your peripheral vision and uncorrected vision (20/30) (in each eye) were considered functionally normal.”

The case manager rejected the Appellant's entitlement to benefits for IRI and treatment under PIPP on the following grounds:

- You demonstrated you were capable of holding gainful employment following your car accident of August 8, 1994
- Employment records indicate you self terminated from employment positions due to non medical reasons
- The file does not contain any documentation outlining any musculoskeletal findings of physical impairment after 1994 or a physical impairment of function that would preclude holding gainful employment
- In the EI records received and based on your claim filed August 18, 2008, confirmation number [text deleted], you declared the following:
 - Page 14 of 17 pages "**Availability Information – in order to be considered available for work you must be:** ready, willing and capable of working immediately..."
Response – "**I am available for work as described above:**" "yes"
 - Page 13 of 17 pages "**Workforce History** – During the last 2 years, were you at any time: *unable to work for medical reasons"
Response – "*No*"

The Appellant applied for a review of the case manager's decision on October 22, 2010.

On January 14, 2011 [Appellant's doctor #4] wrote to the Appellant's physician, [text deleted].

In his report [Appellant's doctor #4] stated:

"Unfortunately, she has had persistent discomfort, particularly in the right buttock which of lately is getting worse. Prior to her accident in 1994, she was basically not working since she had just gotten married.

After her IM rodding, she did reasonably well to the point that around 2002 she had an attempt to go back to work. She worked in different jobs, i.e. [text deleted]. Unfortunately, she could not stay in those jobs because she had persistent right buttock and right hip pain. The last time she had an attempt to work was around 2008 when she tried to do some housekeeping at [text deleted] in [text deleted].

Clinically she has marked hypertrophy of the right lower extremity. This is due to her polio. She also apparently has a bit of equinus and a drop foot, again due to her polio. In spite of her polio sequelae, she seems to move reasonably well. Unfortunately she has a frequent catching sensation and associated pain around the right buttock area. Range of motion of the hip is adequate. Deep palpation around the greater trochanteric area triggers pain secondary to the proximal end of the IM rod.

X-rays of the right hip and femur show some early osteoarthritis of the hip joint which most likely is post-traumatic. We also noticed that she has an IM rod with two proximal locking screws and one distal locking screw. The proximal end of the IM rod is quite prominent and most likely is producing some degree of impingement.

In conclusion, this lady has persistent right buttock pain, most likely coming off the proximal end of the IM rod. She also has some discomfort around the groin area that could represent the presence of post-traumatic osteoarthritis of the hip.

I think this lady might benefit with removal of the IM rod. The patient unfortunately is a bit scared to proceed with surgery and at this point is not too keen in having this taken out.”

The Appellant filed an Application for Review of the case manager’s decision dated October 22, 2010.

Internal Review Officer’s Decision – August 17, 2011 – IRI Benefits:

The Internal Review Officer issued a decision on August 17, 2011 rejecting the Appellant’s Application for Review for IRI benefits and stated:

“Your case manager conducted a thorough investigation of the period between the 1994 accident and your October 2009 request to reopen your file. The investigation uncovered the following:

- Between 1995 and 2002, while living in [Alberta], you were employed by [text deleted] and as a private homecare worker;
- From June 8 2002 to December 4, 2005, you were employed as a housekeeper for [text deleted]. You resigned from this position, your stated reason being that you had to take care of your husband, who had recently suffered a stroke;
- In 2006, you returned to Manitoba and were employed casually for 3 months at [text deleted], but were dismissed after booking off time due to pain;
- You were employed casually as a housekeeper from October 6, 2006 to January 9, 2007 when you were dismissed for unsatisfactory work performance unrelated to a medical condition;
- You were employed from March 6, 2008 to May 10, 2008 at [text deleted]. You declared that you quit this employment after your shifts were cancelled and reassigned.

The hearing took place on January 6, 2011. At the hearing you indicated that you had had quite a few jobs following the accident and that at the majority of the jobs you had been terminated for booking off too much time. You stated that you had booked off time because of your medical conditions but did not state that that was the reason you were booking off time to your employers. You stated that you were able to hold your position with [text deleted] from 2002 to 2005 because your employer was lenient and was willing to work around your restrictions. Ultimately you stated that you were terminated from this job for booking off too much time as well.

You further stated that you had not approached MPI in the intervening years until 2009 when you requested your file to be re-opened because you wanted to try to make it on your own.”

The Internal Review Officer provided the following reasons for his decision:

“I have reviewed the information on your file, and following the investigation conducted by your case manager, I find that her decision was correct that you have shown in the intervening years following your accident the ability to hold gainful employment.

Furthermore, there is no medical information on your file to indicate that any of your medical practitioners viewed you as being incapable of holding employment.”

Notice of Appeal – IRI Benefits:

On August 26, 2011 the Appellant filed a Notice of Appeal of the Internal Review Officer’s decision dismissing the Appellant’s Application for Review in respect of entitlement to IRI benefits which confirmed the case manager’s decision of October 12, 2010.

The relevant section of the MPIC Act provides:

Entitlement to I.R.I. for first 180 days

[85\(1\)](#) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

- (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

Case Manager’s Decision – Permanent Impairment – October 3, 2011:

On October 3, 2011 the case manager issued a decision confirming the Appellant was entitled to a permanent impairment award as a result of the injuries she sustained in the motor vehicle accident. The case manager stated:

“The following is a list of your injuries that are rated as permanent impairments with the corresponding percentage entitlement as outlined in Schedule A:

INJURY/IMPAIRMENT	%	APPLICABLE SECTION	APPENDIX #
Vision	11	Div. 3: Subdiv. 5	4
Right hip range of motion	3.33	Div. 1: Subdiv. 2, Item 2.4(b)	5
Right knee range of motion	1	Div. 1: Subdiv. 2, Item 3.5	6
Facial scarring – Class 4	14	Div. 13: Subdiv. 2, Table 13.1	7
Right forearm scarring	4.44	Div. 13; Subdiv. 2, Table 13.3	8
Right arm scarring	1.455	Div. 13: Subdiv. 2, Table 13.3	8
Left lower limb	8	Div. 13: Subdiv. 2, Table 13.3	8
Right lower limb	8	Div 13: Subdiv. 2, Table 13.3	8
Enhancement factor	4.33	Section 2; Manitoba Reg. 41/94	9
TOTAL	49.56		

By applying successive remainders, your permanent impairment entitlement is 49.56%. Therefore, you qualify for a total permanent impairment entitlement of **\$49,560** (\$100,000 maximum applicable for date of accident x 49.56%). Your entitlement benefit has been paid as follows.

• December 14, 2010, [text deleted]	\$10,700
• May 13, 2011, [text deleted]	5,000
• June 13, 2011, [text deleted]	23,195
• June 13, 2011, [text deleted]	4,330
• June 29, 2011, [text deleted]	<u>6,335</u>
Total	\$49,560”

On October 13, 2011 the Appellant made an Application for Review of the case manager’s decision and indicated that the Appellant’s permanent impairment award was incorrectly calculated in respect of the deformity of the right foot, osteoarthritis of the right hip/thigh and atrophy of the right thigh.

Internal Review Officer's Decision – Permanent Impairment – April 12, 2012:

The Internal Review Officer issued a decision on April 12, 2012 upholding the case manager's decision and dismissing the Appellant's Application for Review. In his decision, the Internal Review Officer stated:

“In your Application for Review you stated that:

“If you add up the percentages for impairment it comes to 55.55% and I was paid for 49.56% only (as I am not at 100% payout this does not seem fair).”

You also stated:

“Concerning the right tarsal bone fracture (the report submitted by [hospital #2] says it appears to be a congenital abnormality but the original pictures from the accident show a big gash in the exact spot. The bump on my foot was definitely from the accident.

Concerning the pin in my leg, [Appellant's doctor #4's] report does not state that the pain in my hip is from arthritis but says it is from the pin rubbing against my hip.

...

Concerning the osteoarthritis in the hip, [Appellant's doctor #4's] report states this is most likely post-traumatic which indicates that in his view it is almost certainly from the accident.

...

Concerning the thigh atrophy, there is nothing paid for this account I have polio (most definitely the accident made it worse and this is not adequately addressed.”

The Internal Review Officer further stated:

“The Health Care Services consultant stated that it could not be determined that the osteoarthritis was directly related to the accident. Nevertheless, your range of motion in the right hip was rated for a permanent impairment award pursuant to the findings of [Appellant's physiotherapist] of [text deleted].

There is no medical evidence to support that the right thigh atrophy was related to the accident. The Health Services consultant was of the opinion that it was likely related to your pre-existing poliomyelitis.

There is no medical evidence to contradict the finding of [Appellant's doctor #6] that the deformity to the right foot was congenital in nature. There was no documentation of a right foot injury occurring in the accident.

I am therefore upholding your case manager's decision of October 3, 2011 on account of the fact that your permanent impairment award was correctly calculated."

Notice of Appeal – Permanent Impairment, April 19, 2012:

The Appellant filed a Notice of Appeal to the Commission dated April 19, 2012.

The relevant provisions of the Appellant's appeal are:

MPIC Act:

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.

Manitoba Regulation 41/94:

Computation of more than one permanent impairment

5(1) Where a victim has more than one permanent impairment, the percentage of the most severe impairment is computed on the basis of 100% and the percentages of the other impairments, starting with the highest, are computed on the successive remainders, in accordance with Schedule B.

The Claimant Adviser, on April 27, 2012, provided a report from [text deleted], the Appellant's personal physician. In her medical report of April 23, 2012 [Appellant's doctor #5] stated:

"Thank you for your letter of April 3, 2012. In my opinion I think that [the Appellant] has more than one diagnosis. Scoliosis is one of them. She has scoliosis, polio myelitis and post polio syndrome. She also has osteoarthritis of the right hip, which is secondary to the injury from the MVA. This is called post traumatic osteoarthritis. Also the intramedullary rod that was inserted in her right femur contributes to her symptoms.

In my opinion this patient is disabled from working because of the above aforementioned multiple conditions.

In my opinion, her multiple conditions are partly related to and affected by the MVA of August 8, 1994." (Underlining added)

On June 4, 2012 [MPIC's doctor #2], MPIC's medical consultant, provided a report to MPIC's legal counsel.

[MPIC's doctor #2] reviewed the reports of [Appellant's doctor #5] and [Appellant's doctor #4] and in respect of these reports indicated that:

1. The Appellant had a variety of medical conditions which might have adversely affected her level of functions i.e. scoliosis, poliomyelitis, post polio syndrome, post traumatic osteoarthritis, symptoms associated with the IM rod in the femur.
2. The documents did not contain any objective physical findings indicating the Appellant had a physical impairment that would negatively affect her ability to perform gainful employment or indicate that her physical status had deteriorated with additional time.

[MPIC's doctor #2] also reviewed the Review Tribunal's Decision in respect of the Appellant's application for CPP Disability benefits. [MPIC's doctor #2] stated that:

1. The Tribunal Decision found that the appellant had a disability and provided her with benefits.
2. This decision did not indicate any objective physical findings that were identified by a health care professional that would indicate the Appellant had a severe physical impairment that would contribute to her reported severe disability.
3. She therefore concluded it appeared that the Review Tribunal was satisfied that the Appellant's reporting of her various severe symptoms and functional limitation in the absence of medical evidence was sufficient to confirm that the Appellant qualified for CPP Disability benefits.

[MPIC's doctor #2] also commented on the documentation in the Appellant's file which indicated that she had developed osteoarthritis involving the right hip. [MPIC's doctor #2] noted that:

1. [Appellant's doctor #4] had indicated that the Appellant's right hip symptoms might be the by-product of soft tissue impingement which occurred as a result of the femoral rod extending beyond the bony structure. This could result in localized pain and tenderness but it appeared that the Appellant did not wish to proceed with the removal of the rod.
2. It was not medically probable that the impingement of soft tissue that might take place secondary to the protruding rod would result in a significant disability.
3. It was not medically probable that minor arthritic changes involving the hip would result in a significant impairment and/or a disability.
4. "[The Appellant] has a pre-existing impairment relating to her right leg as a result of the poliomyelitis and post polio syndrome. These will affect her gait and could contribute to leg, hip, and back symptomatology. These conditions could also contribute to [the Appellant's] poor tolerance for physical activities. At the present time the file does not contain documentation indicating these medical conditions were enhanced by the incident in question.

Based on the results of this review, it is my opinion the medical conditions that developed as a direct result of the incident in question, by themselves, do not result in a physical impairment to the extent that [the Appellant]. is not capable of performing gainful employment. It is also my opinion the minor impairment relating to loss of range of motion involving the right hip and knee when combined with the pre-existing impairment arising from the poliomyelitis and post polio syndrome does not tip the scale to the extent she is no longer physically capable of pursuing gainful employment is she so desires..." (Underlining added)

[MPIC's doctor #2] further indicated that:

1. The documents reviewed did not indicate the Appellant's physical and/or visual function deteriorated in May of 2008 to the extent that she could not perform her gainful employment.
2. The reports do not contain information indicating assessments of the Appellant's physical

status identified a significant impairment that would prevent her from performing gainful employment.

3. From a visual perspective, the Appellant did not have an impairment that would prevent her from performing gainful employment as her present visual impairment is in keeping with what she had when she was performing gainful employment.

[MPIC's doctor #2] concluded:

"It is my opinion [the Appellant] did not develop a physical impairment of function as a result of the incident in question that prevents her from performing gainful employment as of May 2008 up to the present time."

A Notice of Appeal was filed on April 19, 2012.

Appeal Hearing:

The appeal hearing took place on October 24, 2012. The Appellant was represented by the Claimant Adviser, Ms Nicole Napoleone and MPIC was represented by Mr. Andrew Robertson.

The Appellant testified at the hearing and described the history of her employment in [text deleted], her employment in [Manitoba] and in [Alberta] and described the significant injuries she obtained in the motor vehicle accident and the effect it had on her life and her ability to continue employment.

The Appellant testified that:

1. She had to quit her job as a housekeeper for [text deleted] in 2005 because of the injuries she sustained in the motor vehicle accident.
2. She was unable to do heavy lifting and light duties were not available.

3. She returned to [text deleted], she went back to work but terminated her employment with [text deleted] in [text deleted] on May 10, 2008 due to the injuries she sustained in the motor vehicle accident as she did not have the strength to continue that employment.

In cross-examination, MPIC's legal counsel referred her to documentation from Canada Pension Plan ("CPP") and Employment Insurance (EI) which indicated that she had resigned her employment from the [text deleted] in December 2005 because her husband had a stroke and she was required to take care of him and not because of health reasons. The Appellant denied that those were the reasons provided to Employment Insurance and maintained that she had resigned due to ill health.

In respect of the termination of her employment at [text deleted], MPIC's legal counsel produced documentation which indicated the EI records confirmed she had quit her employment because her shifts were cancelled and reassigned to another worker. The Appellant denied taking that position and she maintained that she had left her employment due to health reasons.

The Commission questioned the Appellant in respect of the information she had given to EI and CPP in 2002, 2005 and 2008. She admitted she had several discussions with EI and CPP in the years between 1995 and 2002, as well as in 2008 and 2009 but she could not recollect exactly what she said to EI and CPP in these years in her testimony before the Commission.

The Commission notes that notwithstanding the significant contradiction in the Appellant's testimony for the reasons why she was absent from work for the periods 1995 to 1998 and from May 11, 2008 onward, she continued to testify that she was absent from work during these

periods because of the injuries she sustained in the motor vehicle accident and not from any non-medical reasons.

The Appellant also testified that:

1. She was entitled to a permanent impairment award in respect of the deformity of her right foot and the osteoarthritis of her right hip/thigh and atrophy of her right thigh, all of which occurred as a result of the injuries sustained in the motor vehicle accident.
2. MPIC had incorrectly calculated her Permanent Impairment Award.

MPIC did not call any witnesses.

Claimant Adviser Submission – IRI Benefits:

The Claimant Adviser submitted that:

1. The Appellant suffered significant injuries as a result of the motor vehicle accident; she was unable to work between the periods 1995 to 1998 and after May 11, 2008.
2. The Appellant's testimony in this respect should be accepted by the Commission and the Commission should reject the reported comments she made to CPP and EI in respect of the reason for her lack of employment from 1995 to 1998 and after May 11, 2008 and onward because these reported comments were incorrect.

In support of the Appellant's position the Claimant Adviser referred to [Appellant's doctor #4's] report of January 14, 2011 and submitted that [Appellant's doctor #4] stated:

1. The X-rays of the Appellant's right hip and femur showed some early osteoarthritis of the hip joint which was most likely post-traumatic.
2. The Appellant had persistent right buttock pain which was due to the length of the IM rod

which was inserted in her right femur as a result of the motor vehicle accident which prevented her from continuing to work.

In support of the Appellant's position the Claimant Adviser referred to [Appellant's doctor #5's] medical report of April 23, 2012 and stated:

1. The Appellant was disabled from working because of the multiple conditions of scoliosis, polio myelitis, post polio syndrome, and osteoarthritis of the right hip.
2. The intramedullary rod that was inserted in her right femur contributed to her symptoms.
3. The multiple conditions were partly due to and affected by the motor vehicle accident of August 8, 1994.

The Claimant Adviser therefore submitted that the medical reports of [Appellant's doctor #4] and [Appellant's doctor #5] corroborated the Appellant's testimony that as a result of the significant injuries she sustained in the motor vehicle accident she was unable to return to work during the periods 1995 to 1998 and from May 11, 2008 onward.

Claimant Adviser Submission – Permanent Impairment Award:

The Claimant Adviser further submitted that:

1. The Appellant was entitled to a permanent impairment award for the injuries she suffered in the motor vehicle accident which resulted in a deformity of her right foot, osteoarthritis of the right hip/thigh and atrophy of her right thigh.
2. MPIC had incorrectly computed the Appellant's Permanent Impairment award when MPIC failed to consider that the motor vehicle accident had caused in whole, or in part, the Appellant's femoral fracture, the pain in her hip, atrophy and the impact that the injuries she sustained had adversely affected her condition of polio.

3. For these reasons the Claimant Adviser requested that the Appellant's appeal be allowed and the decisions of the Internal Review Officer be rescinded.

MPIC's Submission – IRI and Permanent Impairment Award:

MPIC's legal counsel submitted that:

1. The Appellant's appeal for IRI benefits and a Permanent Impairment award should be dismissed on the grounds that the Appellant had failed to establish on a balance of probabilities entitlement to IRI benefits and a Permanent Impairment award. MPIC's legal counsel submitted that the Appellant's testimony regarding the reasons why she was absent from work between 1995 to 1998 and May 11, 2008 onward were inconsistent with the statements she made to CPP and EI.
2. The medical opinions of [MPIC's doctor #2] and [MPIC's doctor #1] established that the Appellant has failed to produce objective medical evidence to establish that there was a causal relationship between the injuries she sustained in the motor vehicle accident and her absence from work for the periods in question.
3. The Appellant has not demonstrated that MPIC incorrectly calculated her Permanent Impairment award and the Internal Review Officer's decision of April 12, 2012 should be accepted and the Appellant's appeal should be dismissed.

Decision - IRI:

The Commission finds that the Appellant has failed to establish on a balance of probabilities that the Appellant was absent from work between the periods 1995 to 1998 and May 11, 2008 onward due to the injuries she sustained in the motor vehicle accident. The Commission notes that the motor vehicle accident occurred in 1994 and the Appellant sought to reopen her PIPP claim in 2009, a period of 15 years after the motor vehicle accident.

The Appellant testified before the Commission on October 24, 2012 in respect of events that occurred between 1995 and 1998 and from May 11, 2008 onward. In her testimony the Appellant indicated that the EI and CPP reports were in error but she was unable to recall what her discussions were with CPP and EI.

The Commission finds that:

1. Since the Appellant could not recall the discussions which took place many years ago, she was unable to contradict the records from EI and CPP as to her absence from work.
2. The Appellant did not provide any evidence to explain why the officers of EI and CPP would have misreported the reasons why she was absent from work.
3. The Appellant did not provide any independent corroboration that the CPP and EI records were incorrect.
4. The Appellant's husband was present during the appeal hearing but was not called upon to testify in support of the Appellant's position as to the reasons why she was absent from work.

For these reasons the Commission gives greater weight to the CPP and EI reports for the reasons why the Appellant was absent from work than it does to the testimony of the Appellant in this respect.

The Commission finds that based on the reports of [MPIC's doctor #2] and [MPIC's doctor #1], there was no objective evidence which would indicate that the Appellant's physical impairment would negatively affect her ability to perform gainful employment. [MPIC's doctor #1], in his report of August 26, 2010, reviewed all of the relevant medical documents on the file and noted:

1. That the Appellant's fracture had healed and her gait had returned to normal.

2. The Appellant was able to regain full range of motion to her hip and knee.
3. Although there were minor visual defects to her right and left eyes, her peripheral vision was normal, her uncorrected vision was 20/30 in each eye which was considered functionally normal.

In conclusion, [MPIC's doctor #1] stated:

“At the present time, the file does not contain documentation indicating [the Appellant] has been noted to have objective physical findings of a permanent impairment that developed secondary to the motor vehicle incident she was involved in.”

[MPIC's doctor #2] also reviewed all of the relevant medical reports in the Appellant's file and provided a report to MPIC on June 4, 2012 wherein she indicated:

1. After reviewing [Appellant's doctor #5's] and [Appellant's doctor #4's] reports, although the Appellant had a variety of medical conditions which might have adversely affected her level of function, the reports did not contain any objective physical findings to indicate she had a physical impairment that would prevent her from gainful employment.
2. The Appellant's right hip symptoms might be a by-product of soft tissue impingement which occurred as a result of the femoral rod and could result in pain and tenderness but it was not medically probable that the impingement of soft tissue would result in a significant disability.
3. It was not medically probable that the Appellant's minor arthritic changes involving the hip would result in a significant impairment and/or disability.
4. This medical condition in itself did not result in a physical impairment to the extent of preventing the Appellant from performing gainful employment.
5. The Appellant's visual and/or physical functions did not deteriorate to the extent that she could not perform gainful employment.

Like [MPIC's doctor #1], [MPIC's doctor #2] concluded that the Appellant did not develop a physical impairment of function as a result of the motor vehicle accident in question which would prevent her from performing gainful employment. [MPIC's doctor #2] also stated after reviewing CPP's tribunal decision that the decision did not indicate any objective physical findings by healthcare professionals that would indicate the Appellant had a severe physical impairment that would contribute to her reported severe disability.

The Commission notes that [MPIC's doctor #2] and [MPIC's doctor #1] had the opportunity of reviewing all of the medical reports on the Appellant's file including the CPP and EI records, while [Appellant's doctor #4] and [Appellant's doctor #5] did not have that opportunity. The Commission finds that both [MPIC's doctor #1] and [MPIC's doctor #2] provided detailed reasons why they concluded there was no objective medical evidence to establish that the Appellant was incapable of working during the periods in question as a result of the motor vehicle accident injuries. For these reasons the Commission gives greater weight to the medical opinions of [MPIC's doctor #1] and [MPIC's doctor #2] than it does to the medical opinions of [Appellant's doctor #4] and [Appellant's doctor #5].

The Commission accepts [MPIC's doctor #2's] opinion that CPP review tribunal's decision in respect of the Appellant's application for CPP Disability Benefits does not support the Appellant's position that her absence from work was due to motor vehicle accident injuries.

For these reasons the Commission finds that the Appellant has failed to establish, on the balance of probabilities, her absence from work during the periods 1995 to 1998 and May 11, 2008 onward were due to the injuries she sustained in the motor vehicle accident. The Commission

therefore dismisses the Appellant's appeal for IRI benefits and confirms the Internal Review Decision of August 17, 2011.

Decision – Permanent Impairment Award:

The Commission finds that the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly determined the Appellant's Permanent Impairment Award. The Appellant submitted that by her calculation the percentage of impairment should come to 55% and she was only allowed an award to 49.56%.

The Internal Review Officer's decision on April 12, 2012 noted that the Appellant's physician did not state that the pain in the Appellant's hip is from arthritis, but from a pin rubbing against her hip and that she decided not to have surgery to remove the pin. As well, the Health Care Services consultant stated that it could not be determined that the Appellant's osteoarthritis was directly related to the motor vehicle accident.

The Internal Review Officer found that

“There is no medical evidence to contradict the finding of [Appellant's doctor #6] that the deformity to the right foot was congenital in nature. There was no documentation of a right foot injury occurring in the accident.

I am therefore upholding your case manager's decision of October 3, 2011 on account of the fact that your permanent impairment award was correctly calculated.”

The Commission finds that the Appellant did not provide any medical information to challenge MPIC's calculation of the Permanent Impairment award.

The Commission therefore finds that MPIC correctly determined the Permanent Impairment award and that the Appellant has failed to establish, on a balance of probabilities that she is entitled to a Permanent Impairment award of 55%. For these reasons, the Commission rejects the Appellant's appeal in this respect and confirms the Internal Review officer's decision dated April 12, 2012.

Dated at Winnipeg this 13th day of December, 2012.

MEL MYERS, Q.C.

NEIL COHEN

NEIL MARGOLIS