Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-38

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by** **Ms Joan G. McKelvey** **the Appellant, [text deleted] did not appear but was represented by her husband, [text deleted]**
HEARING DATE:	**August 25th, 1997**
ISSUE(S):	**1. Quantum of impairment benefit for injury to nose;** **2. Whether Appellant entitled to impairment benefit for injury to neck;** **3. Whether Appellant entitled to impairment benefit for carpal tunnel syndrome;** **4. Whether Appellant entitled to continued chiropractic treatments;** **5. Whether Appellant entitled to impairment benefit for stroke suffered twenty-seven months post-MVA; and** **6. Whether Appellant entitled to IRI, commencing 181 days post-MVA.**
RELEVANT SECTIONS:	**Sections 86(1), 106(1) and (2), 110(1)(c) and 127 of the MPIC Act and Table 15 in 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, [text deleted], was the front seat passenger in a van that was rear-ended while slowing down to make a right turn off a highway in Florida on April 4th, 1994.

[The Appellant], who was [text deleted] years of age at the time of the accident, was leaning forward to retrieve her purse from the floor of the car, with her left arm stretched out so that her hand was gripping the dashboard. [Appellant's husband], who gave evidence on behalf of the Appellant, estimated that the vehicle which collided with his was travelling at 100 kilometres per hour, since that was the speed limit on the highway in question. That estimate, of course, presupposes that the driver of the offending vehicle did nothing to slow the speed of her own car once she realized that the [the Appellant's] van was slowing down to make its turn. In the event, [the Appellant] sustained injuries to her face, neck and back.

[The Appellant] was not admitted to hospital nor did she seek medical or paramedical care until she returned to [Manitoba] when she consulted her family physician, [text deleted], one week after her accident. His examination disclosed facial and nasal injuries as well as soft tissue injuries to her neck and back. He prescribed analgesics, non-steroid anti-inflammatory drugs and muscle relaxants, and recommended chiropractic treatments. [Text deleted], [the Appellant's] chiropractor, concluded that, as a result of the accident, she was suffering from a moderate hyperextension/hyperflexion strain and sprain injury to the ligaments, joints and musculature of the cervical and upper thoracic spine, as well as the lumbo-sacral and thoracolumbar spine. He prescribed chiropractic adjustive therapy, consisting of "specific manipulative corrections of interosseous disrelationships", as well as muscle relaxation techniques and cross-fibre massage aimed at loosening hypertonic musculature.

It should be noted, here, that [the Appellant] and her husband continued with their normal pattern of living in the years following her accident, in the sense that they left [Manitoba] for warmer climates in the late fall of each of the years 1994 through 1996, returning in the spring

of the following year, receiving no medical nor any chiropractic treatment related to her motor vehicle accident during the periods of those winter vacations. [Appellant's husband] confirmed that he and his wife had been following that pattern for the last nine years, mainly due to an osteoarthritic condition in his hip and back which made life in Manitoba's winter more difficult for him.

However, by October of 1995 [Appellant's chiropractor], although noting that [the Appellant's] progress had been interrupted on two occasions by extended vacations out of the province, was able to say that her progress had been very good, the global range of motion in her cervical spine had improved and 'presently', as he put it, 'all that is left of her accident related injuries is some abnormal vertebral biomechanics in the lower cervical spine and upper thoracic spine with some mild associated muscle hypertonicity'. [Appellant's chiropractor] also noted that, although [the Appellant] had been partially disabled following the accident and was then having difficulty with heavy housework, bending, twisting and heavy lifting, by the middle of July (one assumes that he means July of 1995) she was able to perform all activities, with the exception of heavy lifting. At the same time, [Appellant's chiropractor] noted that [the Appellant] was experiencing 'a radiation into her left arm' accompanied by an inability, on occasion, to pick things up with her left hand. He regarded that as the most serious lingering symptom. He nonetheless expressed the view that the prognosis in [the Appellant's] case was good at the time of his report of October 25th, 1995. He felt that, if continuing treatment for her hip, thoracolumbar region and neck were not entirely successful in relieving the symptoms in her arm and hand, she should be referred to a neurologist. Finally, he noted that [the Appellant] had a pre-existing osteoarthritic problem and that the trauma of her motor vehicle accident might cause further deterioration in her cervical spine. He felt that she would require several more months of treatment upon her return to

[Manitoba] following her 1995/96 winter vacation.

[The Appellant] was examined, at the request of MPIC, by one of its chiropractic consultants, [text deleted], on October 24th, 1995. He expressed the view that continued chiropractic treatment did not seem called for, particularly since [the Appellant], herself, had voiced the opinion that chiropractic adjustments were only helpful in relieving symptoms for about one day at a time, and she did not feel that the chiropractic treatments that she had been receiving since shortly after her accident (albeit with lengthy vacation periods without treatment) had been of any real, material help. That view was supported by [text deleted], another chiropractor in the employ of MPIC, who had reviewed [the Appellant's] file although without any first-hand examination of the patient. Accordingly, on May 17th, 1996, M.P.I.C. notified [the Appellant] that it would not assume financial responsibility for any further chiropractic treatments. That decision gives rise to part of the present appeal, since it was upheld by the insurer's Internal Review Officer.

Included in [MPIC's chiropractor #1's] report of his examination of [the Appellant] was mention of the possibility of a mild bi-lateral carpal tunnel syndrome, together with a complaint known as de Quervain's disease, or fibrosis of the sheath of a tendon of the thumb. [MPIC's chiropractor #1's] report of October 30th, 1995 contains the first reference to either of these problems by name in any of the medical literature related to [the Appellant], other than [Appellant's chiropractor's] earlier reports that reflect an occasional numbness or tingling in both hands.

In October of 1994 the injury to [the Appellant's] nose had been examined and

assessed by [text deleted], a [Manitoba] specialist in that field. He diagnosed a deviated septum as well as a deformity to the breach of [the Appellant's] nose - her family physician, [text deleted], describes it as a 'prominent nasal hump') but, fortunately, no actual obstruction of the nasal passage. She also has a small, permanent scar on the bridge of her nose.

[The Appellant] suffered a stroke on July 27th of 1996 and, although she is now up and about, she requires the use of a cane to assist her in walking - a sturdier item, popularly known as a 'walker', would be of even greater help to her, but she has difficulty gripping such equipment with her left hand and therefore relies upon the cane for which only the use of her right hand is required.

Pre-accident Medical History

In our view, [the Appellant's] medical history is significant. In addition to the osteoarthritic condition referred to above, she also has a history of hypertension or high blood pressure, hyperlipidaemia (that is, the presence of an abnormally large amount of lipids or fatty substances in the circulating blood) and ischemic heart disease, resulting from some mechanical obstruction (usually arterial narrowing) of the blood supply.

The Injury to [the Appellant's] Nose

The medical evidence in this context seems to be quite clear and uncontradicted. [the Appellant] has a flat, linear scar, one centimetre in length, classified as a very minor impairment. The maximum benefit for permanent scarring of at least one square centimetre in

area would be $1,000.00, but patently [the Appellant's] scar covers a smaller area than that, qualifying her for the sum of $500.00 under Section 127 of the MPIC Act. She has, in fact, been paid that sum.

[Appellant's husband] submitted that, since the bump on the bridge of [the Appellant's] nose might, perhaps, be removed by a surgical procedure known as septorhinoplasty, at a cost of about $2,000.00, MPIC should be ordered to pay that sum to [the Appellant] who could then decide, in due course, whether she wished to have the surgery or not. Unfortunately for [the Appellant], the system does not work that way: if she does, in fact, elect to have that surgical correction made, then MPIC will be obliged to cover the cost of it, but there is no provision in the Act or Regulations for the payment of the anticipated cost of surgery if the surgery is not, in fact, to be undertaken. However, the evidence of [Appellant's husband] was that the appellant's medical advisors were unable or unwilling to give her any firm assurance that the surgery could restore her nose to its original shape without further or other disfigurement: under the circumstances, it does not seem reasonable to suggest that she must either undergo the surgery or live, uncompensated, with the disfigured nose, when the legislation gives us an alternative. We refer to the language and format of Table 15 which forms part of Manitoba Regulation 41/94, Schedule A, Part 2, Division 2, and which we interpret to mean that, where a victim has sustained both a scarring and a change in the form and symmetry of the face, we must first determine the Class (i.e. the severity) of the damage, - which in Mrs [the Appellant's]'s case appears to be Class 2 - and then add together the permissible award of compensation for each of the scar **and** the change in form with the resultant total not to exceed (in this case) 3% of $100,000. Not having had the privilege of seeing [the Appellant] ourselves, we are obliged to rely upon the observations of others, from which we find her entitled to a total of $1500.00, of which she has already received the first

$500.00. M.P.I.C. will therefore pay her a further $1,000.00, with interest at the prescribed rate from July 12th, 1995, (this being the approximate date when the insurer would have received written confirmation from [Appellant's ear, nose and throat specialist] that [the Appellant] had, in fact sustained 'traumatic nasal deformity') to the date of actual payment. It must be understood, of course, that if [the Appellant] accepts that payment of an additional $1,000.00 plus interest, that award will have been made and accepted upon the basis that she is thereby electing to forego the septorhinoplasty for which M.P.I.C. would otherwise have been responsible. Needless to say, she cannot run with the hare and hunt with the hounds.

Claim of Impairment Benefit for Injury to Neck

A review of all of the medical and chiropractic reports contained in [the Appellant's] complete file does not indicate the existence of any permanent impairment to her neck. True, there was some initial damage to that area, of the kind commonly known as a whiplash associated disorder, but the chiropractic treatments that she received sporadically over the course of some eighteen months following her accident appear to have returned her to full range of motion and general, overall strength. We could find no evidence of any permanent disability or physical impairment for which any provision for compensation exists within the Act or the Regulations.

Claim for Impairment Benefit for Carpal Tunnel Syndrome

[Appellant's husband] submitted on behalf of the Appellant that, until she had been examined by [MPIC's chiropractor #1], the Appellant believed that the symptoms of

numbness, tingling and weakness in her left hand and arm had their root cause in the general area of her left shoulder and radiated down the arm and hand from there. It was not until they read [MPIC's chiropractor #1's] report, said [Appellant's husband], that he and his wife became aware of the concept of carpal tunnel syndrome and possible tenosynovitis. [Appellant's husband] submitted that, once this had been brought to their attention, he and the appellant became convinced that the problems with her hand and arm stemmed from the hyperextension of her wrist that occurred at the moment of collision, when the full weight of her upper body was thrust against the wrist which, in turn, had been practically at right angles to the plane of her left hand when the latter was resting against the dashboard of the vehicle. We are not prepared to be as sure as MPIC's medical advisors appear to be that the carpal tunnel syndrome did not find its origin in the motor vehicle accident. If the position of [the Appellant's] hand and arm at the time of the collision were as described by [Appellant's husband], then the available literature tells us that the resultant trauma might well have caused the carpal tunnel problem.

Having said that, however, is not to suggest that this, in turn, caused any permanent impairment giving rise to a claim under the Act and Regulations. Carpal tunnel syndrome can be treated in a variety of ways: often dangling the arms and shaking the hands and wrists will achieve the desired result; the use of a splint, particularly at night-time, has often been found effective; non-steroidal anti-inflammatory drugs, even aspirin or ibupfofen, cortisone injections and vitamin B6 injections have all been utilized, often with beneficial results. When the problem becomes more severe, comparatively simple surgery will almost invariably effect a permanent cure.

In light of the fact that the symptoms of [the Appellant's] carpal tunnel syndrome, in the form of numbness and tingling of the left hand, became evident almost immediately after her motor vehicle accident, we are prepared to say that, if she wishes to submit that problem to

neurological examination resulting in a recommendation of surgical intervention to correct an apparent carpal tunnel syndrome, that should be treated as a sequela of her motor vehicle accident and the cost of the surgery should, therefore, be borne by the insurer. We might, perhaps, add that we reach this conclusion with some minimal hesitancy, since the tingling and numbness was originally bi-lateral and the problem in her right hand could hardly be laid at the door of her motor vehicle accident. However, the problem with the right hand seems to have disappeared very quickly and we are not aware of any of the other usual causes of carpal tunnel syndrome, other than the motor vehicle accident itself, that might have given rise to [the Appellant's] problem. We must emphasize that here, just as with the claim for an impairment benefit related to her nose, [the Appellant] will only be entitled to payment for the surgery if, in fact, the surgery actually takes place. There is no permanent impairment related to the carpal tunnel syndrome, if that is, indeed, what she has - a diagnosis that, to date, only appears to have been tentative. Confirmation of that condition would presumably require nerve conduction testing or some other neurological, diagnostic procedure that has yet to be initiated

There is a distinction to be drawn between the nasal hump and the problem with the hand: in the one case, we are faced with an apparent, if mild, deformity, for which surgery promises no assurance of success, but for which a modest amount of compensation is available; in the other, the patient appears to have sustained what has now become a partial loss of function, for which (if the tentative diagnosis is borne out by more detailed and specialized diagnostic tests) a standard and simple surgical remedy is available. If those tests are conducted and if they fail to confirm that [the Appellant] is suffering from carpal tunnel syndrome, then it will be necessary to discover just what **is** causing her manual discomfort and partial loss of function and to determine whether that cause can reasonably be attributed to her motor vehicle accident. In this latter, limited context only, we shall remain seized of this appeal for a reasonable time (which we fix at three

months from the date of this Decision) within which [the Appellant] may decide to seek further diagnosis and, if necessary, treatment of the problems she has been experiencing with her left hand.

If, within that time, no decision has been made to obtain such treatment from her physician or surgeon, then she will be deemed to have abandoned that remedy - at least to the extent that the insurer might otherwise have been responsible for the cost of it.

Entitlement to Further Chiropractic Treatments

[Appellant's chiropractor's] reports impressed us as being refreshingly frank and helpful. However, when we review some of the available literature and, in particular but without limitation, the recommendations of the Quebec Task Force monograph on whiplash- associated disorders, some of the writings of Dr. Croft and the well-known text of Dr. Nordoff, in addition to the statements of the appellant herself, we find that [the Appellant] appears to have reached maximum therapeutic benefit, in the context of chiropractic, manipulative therapy, and that little purpose would be served in resuming that form of therapy. [The Appellant], herself, appears to agree with this, despite a contrary position adopted on her behalf at the hearing of this appeal. This is not to say, of course, that [the Appellant] is precluded from further chiropractic treatment if she wishes it; we find, merely, that such further treatment should not be at the expense of the insurer.

The Stroke

On July 27th, 1996, more than two years after her motor vehicle accident, [the

Appellant] was admitted to the [hospital] in [text deleted] where [text deleted], a neurological specialist, diagnosed a mild left cerebrovascular accident resulting in right hemiparesis. The report from the Medical Director at the [hospital], [text deleted], dated November 7th, 1996, confirms that fact and the history of hypertension, hyperlipideia and ischemic heart disease referred to above. [Appellant's husband] submits, on behalf of the Appellant, that the stroke is directly attributable to her motor vehicle accident of April 4th, 1994. Simply put, his argument on behalf of the Appellant may be stated this way: [the Appellant's] accident caused pain, of a chronic nature; chronic pain causes stress; stress can lead to a stroke or, at the very least, can aggravate or magnify any factors causing a predisposition to stroke. A letter from [hospital medical director], upon which the Appellant places great reliance, acknowledges that possibility, but in carefully guarded language:

> '*While it is difficult to directly relate her recent cerebrovascular accident to events surrounding her motor vehicle accident, she has undergone considerable stress due to ongoing pain. The contribution of chronic stress to vascular disease has been well documented in the literature and can be considered as a contributing factor to suffering a stroke.'*

[Appellant's husband]'s argument might be more persuasive if there were no other factors much more likely to cause the stroke than those to which he refers. [The Appellant], at the time of her stroke, was [text deleted] years of age, [text deleted] in height and slightly under [text deleted] pounds in weight. She has a personal history, as well as a parental history on both sides, of high blood pressure as well as her own hyperlipidaemia and ischemic heart disease. The stroke happened two and one-quarter years after the motor vehicle accident in which she was involved as a passenger. While we do not doubt that [the Appellant] has, indeed, suffered much discomfort as a result of that accident, we cannot find that the resultant stress was such as to cause her stroke twenty-seven months later. We are therefore of the view that [the Appellant's] stroke cannot, upon a reasonable balance of probabilities, be attributed to her automobile accident of

April, 1994.

Claim for Benefits Respecting Loss of Employment Opportunity

With respect to this facet of [the Appellant's] claim, it must be emphasized at the outset that anyone injured in a motor vehicle accident and thereby deprived of income or the opportunity to earn income is entitled to compensation. However, that loss of income or loss of ability or opportunity to earn income must be attributable to the motor vehicle accident if compensation is to be awarded.If the victim, like [the Appellant], falls within the category of a 'non-earner' within the meaning of the Act, compensation only becomes payable during the first 180 days following the accident if the victim can establish that, due to the accident, she was unable to hold an employment that she would have held during that period if the accident had not occurred. Once the 180-day period is over, the insurer must determine an employment for the victim in light of her education, training, work experience, and physical and intellectual abilities immediately before the accident. If, because of the accident, the victim is unable to hold any such deemed employment, she is entitled to receive income replacement in accordance with the scale established by the Table to Schedule C of Manitoba Regulation 39/94.

It is not suggested that [the Appellant] was prevented from holding any particular employment that, but for the accident, she would have held within the first 180 days. The question, therefore, is whether there was any employment for which [the Appellant] was qualified and in which she would have been able to engage 181 days **after** that accident, but from which she was prevented by the accident. We have reviewed the short list of potential occupations selected by M.P.I.C. as having been appropriate for [the Appellant] (e.g. cashier, grocery store clerk,beauty salon attendant, an attendant at any one of a number of businesses and premises, etc.) and have added to

that list a number of our own choosing (e.g. a wide variety of clerking jobs, telephone operators, sales positions and other, entry-level jobs) and can find none from which she would have been excluded by reason of any injuries sustained in her motor vehicle accident, once the 180-day post-accident period had elapsed. At worst, she would have been at a disadvantage had an occupation demanded much, if any, heavy lifting, but none of the occupations referred to above had that requirement . We are not satisfied, on a reasonable balance of probabilities, that even the problems she may have been experiencing with her left hand prior to her stroke were severe enough to have kept her out of the work force had work been available to her.

[Appellant's husband] argues that he had taken early retirement from his position with his Union some nine years previously but that his income from a registered retirement income fund was about to run out, thereby depriving him of some $560.00 per month. The plan which, [Appellant's husband] testified, had been worked out between him and his wife was that, while they were both still physically able to do so, they would continue taking winter vacations of between five and six months annually but that, when the RRIF money ran out (as it was scheduled to do in 1997) [the Appellant], now aged [text deleted], would re-enter the workforce in order to replace the RRIF income with her own earnings. It should, perhaps, be noted that [the Appellant] has a Grade [text deleted] education and had not been gainfully employed for many years. We are constrained to say that the plan thus outlined to us by [Appellant's husband], if not actually far-fetched, did not strike us as being very realistic although, perhaps, not completely beyond the bounds of possibility.

In the event, [the Appellant and her husband] continued to take their extended winter vacations up to and including the winter of 1996/97, and we must therefore assume that, even had that plan been put into action, it would not have been given effect until 1997 at the

earliest. By that time, from all of the medical and chiropractic evidence that we have been able to garner, [the Appellant] was no longer suffering from any disability or impairment **caused by her motor vehicle accident**, of a kind that would have precluded her re-entry into the workforce, either in her old occupation as a clerk or in any of the other entry-level occupations for which, perhaps, she might have been qualified.As we have noted above, we find that, in the context of her ability to re-enter the work force at a level for which her pre-accident education, experience and other abilities qualified her, [the Appellant] had reached pre-accident status within 180 days following that accident; the vestigial problems from which she appears then to have been suffering were not sufficiently disabling as to keep her out of the work force, had she really wished to re-enter it at the time. The fact seems to be, however, that she had not really planned to do so, if at all, until 1997, by which time all motor-vehicle-accident-related disabilities (as opposed to occasional discomfort) had long since disappeared

For the foregoing reasons, the decision of MPIC's Internal Review Officer will be varied to the extent set out above, but otherwise confirmed.

Copies of the relevant sections of the Act and Regulations are appended hereto for ease of reference.

Dated at Winnipeg this 2nd day of September 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED