

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-173**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Mary Lynn Brooks
Dr. Patrick Doyle

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Kathy Kalinowsky.

HEARING DATE: December 14, 2007

ISSUE(S): Entitlement to further permanent impairment benefits.

RELEVANT SECTIONS: Sections 104(1)(b), 126, 127 and 129(2) of The Manitoba
Public Insurance Corporation Act ('MPIC Act') and
Manitoba Regulation 41/94 (as amended by M.R. 41/2000),
Division 13, Subdivision 2, Table 13.3; Division 13,
Subdivision 2, Item 1.3, Appendix 4; Division 1, Subdivision
1, Items 1.5(a)(iii), 1.5(b)(iii) and 1.5(c)(iii) Range of Motion –
Right Shoulder; Definition of “alteration in form and
symmetry”

**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 motor vehicle accident on November 29, 2003. She was a belted driver at the time of the accident and was struck on the front driver's side by another vehicle and her vehicle was rendered a total loss. The airbag deflated as a result of the impact.

As a result of the accident she had numbness in both her arms, pain in her right side, and bruising of the ribs and hips. The Appellant, the day after the motor vehicle accident, saw her family physician and was subsequently referred for physiotherapy. The Appellant indicated that her treatment progressed fairly well but that she continued to have nerve pain, particularly in her right arm. She advised her doctor that her right arm went completely numb and her doctor subsequently advised her to abstain from all work activities, and to continue to attend physiotherapy to address her symptoms.

She was referred to [Appellant's Orthopedic Surgeon #1], who, in a report to MPIC dated February 19, 2004, diagnosed the Appellant with a posterior glenoid labral tear. [Appellant's Orthopedic Surgeon #1] referred the Appellant to [Appellant's Orthopedic Surgeon #2], for an arthroscopy surgery of her shoulder.

MPIC's case manager referred the Appellant to [Rehabilitation (Rehab) Consulting Service #1] to assist the Appellant in returning to her work as a [text deleted]. [Text deleted], the [text deleted] case manager of this firm, wrote to MPIC on March 5, 2004 and indicated that he had met with the Appellant on March 1, 2004 and she advised him that the majority of her soft tissue complaints had essentially resolved. He further stated in his letter:

. . . that the posterior aspect of her right shoulder presented as a constant pain. The pain radiates to the anterior region of her shoulder. If she stops the activity she is participating in when this pain occurs, it dissipates. However, if she continues on with activities (such as looking after her children) the pain radiates to her right clavicular region and also affects the right side of the neck (with radiating headaches). She advised that this occurs approximately twice per week. She noted a constant ache in her right shoulder. She no longer experiences numbness in the right arm, but she does experience a burning pain down her right arm. [The Appellant] reported intermittent soreness on the left side of her neck. She also described intermittent low back pains. She advised that her right shoulder and neck range of motion are variable.

Sleep Patterns

[The Appellant] advised that her sleep is intermittently disrupted due to her right shoulder symptoms. If she is sleeping on her right side, this tends to wake her up. If she is able to sleep through the night she feels rested and her sleep is restorative.

The Appellant indicated that for pain management she was taking Naproxen, twice a day, as well as Extra Strength Tylenol. She also has been attending physiotherapy two (2) or three (3) times a week.

On August 19, 2004 [Appellant's Orthopedic Surgeon #2] wrote to MPIC and advised that he saw the Appellant on July 15, 2004. Upon examination [Appellant's Orthopedic Surgeon #2] reported that the Appellant indicated that she had no previous shoulder problems. He noted, on clinical examination, no obvious muscle wasting and reported that his impression was that the Appellant had a posterior labral tear and he ordered an MRI to confirm this.

[Appellant's Orthopedic Surgeon #2] provided a further report to MPIC dated May 3, 2005 and stated that the Appellant had undergone a shoulder scope and bursectomy on December 6, 2004 and:

. . . At that time, arthroscopic examination did not reveal any rotator cuff tearing or labral tearing. Bursectomy was completed to treat theoretical tendonitis of the shoulder. (underlining added)

[Appellant's Orthopedic Surgeon #2] further stated that the Appellant could return to [text deleted] on March 1, 2005 and also stated:

. . . I think that in retrospect she had rotator cuff tendonitis and should make an eventual complete recovery. No further impairment is anticipated. (underlining added)

MPIC referred the Appellant to [Rehabilitation (Rehab) Consulting Service #2] to complete an

assessment for range of motion and scarring of the Appellant's right shoulder, which she received as a result of the motor vehicle accident.

On March 6, 2006 [Appellant's Occupational Therapist] of [Rehabilitation Consulting Service #2] provided a written report to MPIC and stated:

COMMENTS

The claimant reported that she has a daily pain in her right shoulder. Her right shoulder aches with activity and she occasionally feels a burning sensation in the posterior part of her right shoulder. The claimant also reported weakness in her right arm. She reported having difficulty with home activities such as carrying and breastfeeding her baby, vacuuming, blow-drying her hair, and dressing her children. The claimant reported (sic) using her left arm to complete most activities.

OTHER

Deformity: Right Shoulder (See photos #5 and 6)

A moderate deformity was observed of the right shoulder. The claimant's right shoulder is situated lower than her left shoulder.

Neck Lateral Flexion Range of Motion

The claimant reported that she has limited movement with neck lateral flexion especially to the left and therefore neck lateral flexion was measured using the goniometer. The claimant reported pain in the left side of the neck with lateral flexion.

Site Measured	Movement Observed	# Degrees
Neck	Lateral Flexion – Right	0° - 32°
	Lateral Flexion – Left	0° - 15°

On April 4, 2006, in a note to file, the case manager reported that the Appellant's file was reviewed by [MPIC's Doctor], a medical consultant with MPIC, to determine if the Appellant is entitled to a permanent impairment award for reported loss of neck range of motion. The case manager further stated that [MPIC's Doctor] advised that there is no entitlement for loss of neck range of motion.

Case Manager's Decision

On April 25, 2006 the case manager wrote to the Appellant in respect of her entitlement to a permanent impairment award as a result of the injuries the Appellant sustained in the motor vehicle accident. The case manager, in her letter, stated that the Appellant was entitled to a permanent impairment award of \$1,200.83 on the following basis:

Assessment report indicates scarring to your left shoulder which would allow for a 0.28% entitlement as per Division 13: Subdivision 2, Table 13.3. However, since the change in form and symmetry entitlement for the right shoulder is 1.0% as noted above, the scarring entitlement would not apply in accordance with Division 13, Subdivision 2, Item 1.3 (Appendix 4 – only the highest percentage is paid when there is both scarring & change in form & symmetry).

The restriction in neck range of motion noted in [Rehabilitation Consulting Service #2's] report of March 6, 2005 has been reviewed by our Health Care Services Team and it has been determined that loss of neck range of motion is not a ratable impairment. Therefore, there is no permanent impairment for this.

You may be entitled to a further permanent impairment award for loss of shoulder range of motion, however, this will be reviewed and measured at the end of your treatment.

A cheque in the amount of \$1,200.83 will be forwarded to you under separate cover.

On June 16, 2006 the case manager prepared a further Impairment Assessment in respect of the Appellant dealing with the range of motion restrictions of the Appellant's right shoulder and stated:

**Division 1: Subdivision 1, Items 1.5(a)(iii), 1.5(b)(iii) & 1.5(c)(iii)
Range of Motion – Right Shoulder**

Flexion/Extension – 2%

Abduction/Adduction – 1%

Internal/External Rotation – 1%

Total range of motion for right shoulder – $2 + 1 + 1 = 4\%$

Percentage to be used for the calculation of total entitlement – **4%**

On June 20, 2006 MPIC forwarded to the Appellant a cheque in the amount of \$4,803.32 in respect of this permanent impairment award. As a result, the Appellant received the total sum of \$6,004.15 in respect of permanent impairment awards computed as follows:

1.	Range of Motion – Right Shoulder	4%	\$4,803.32
2.	Change in form and symmetry – right shoulder	1%	<u>1,200.83</u>
	TOTAL:		\$6,004.15

The Appellant made an application to review the case manager's decision in respect of the permanent impairment award on July 15, 2006.

On September 18, 2006 the Internal Review Officer wrote to [MPIC's Doctor], and requested [MPIC's Doctor] to answer certain questions relating to the Appellant's Application for Review. [MPIC's Doctor], in an Inter-Departmental Memorandum dated September 18, 2006 responded to the Internal Review Officer as follows:

1. In response to [Appellant's Doctor's] diagnosis that the Appellant had glenohumeral laxity, and that there was decreasing scapular stability, [MPIC's Doctor], upon review of all of the medical evidence on file, stated:

Therefore, at this time, I do not see probable evidence from the patient's clinicians that she sustained a traumatic glenohumeral dislocation which led to subsequent instability. Therefore, I do not believe that a permanent impairment award for this disagnostic (sic) construct applies.

2. In respect of the severity of the change in form and symmetry relating to the Appellant's right shoulder, [MPIC's Doctor] stated:

The coverage interpretations for the Manitoba Public Insurance legislation have definitions with regard to alterations in change in form and symmetry. The definition of an alteration in form and symmetry is found on page 16 of the Interpretations of the

impairment section. This definition is as follows:

“Alteration in form and symmetry refers to a skin disfigurement resulting in a change in tissue bulk, consistency, length, or texture as compared to the opposite of the body.”

It does not refer to the presence of a scar.

In this patient’s case, the independent assessor judged the patient as having a moderate deformity of the right shoulder. This is stated as being because the patient’s shoulder was situated lower than her left.

I have been unable to find a consistent description of other abnormalities in form and symmetry such as tissue texture, tissue bulk, or other disfigurements. In my opinion, the photographs supplied in the March 6, 2006 assessment do not identify such significant disfigurement.

The change in height of the patient’s shoulder, is a change in form and symmetry, but would be described in my opinion as mild to moderate. Therefore, I think the moderate assessment is appropriate. In general, this is a subjective impression based on the assessor’s visual inspection of the patient.

In answer to your second question, I do not see this patient manifesting severe changes in form and symmetry of her shoulder girdle region.

In this Inter-departmental Memorandum [MPIC’s Doctor] also commented on the reduction in range and motion of the Appellant’s shoulder/glenohumeral joint. [MPIC’s Doctor] concluded that after reviewing the American Medical Association Guide as to the valuation of permanent impairment, having regard to the diagnosis of a probable rotator cuff tendonitis responsible for the Appellant’s difficulties that such a condition was not typically associated with a long standing restriction in adduction and he rejected any additional permanent impairment entitlement to the Appellant’s shoulder range of motion.

Internal Review Officer’s Decision

The Internal Review Officer issued his written decision on September 22, 2006 and stated that the only issue on this review:

. . . is whether you are entitled to any further Permanent Impairment awards, particularly with respect to gleno-humeral instability, cosmetic changes (scarring, and changes in form and symmetry) to the shoulder, reductions in shoulder ranges of motion, and a reduction in left lateral flexion of the neck.

The Internal Review Officer indicated that [MPIC's Doctor], in his September 18, 2006 memorandum, had given careful consideration to the Appellant's concerns raised in her Application for Review and that he was satisfied that the Appellant had received her full entitlement under the MPIC Permanent Impairment Schedule. As a result, the Internal Review Officer confirmed the case manager's decisions dated April 25, 2006 and June 20, 2006.

Appeals

The Appellant filed a Notice of Appeal on October 23, 2006. In this Notice of Appeal the Appellant raised nine (9) issues for determination by the Commission.

The relevant provisions of the MPIC Act and Regulations are as follows:

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.

At the time of MPIC's assessment, the Appellant's permanent impairment awards maximum amount permitted by the MPIC Act was \$120,083.

Manitoba Regulation 41/94 (as revised):

DIVISION I: THE MUSCULOSKELETAL SYSTEM

Subdivision 1: The Upper Limb

- 1.5 Range of motion loss of the shoulder joint complex
 - (a) flexion-extension (motion in the scapular plane):
 - Combined range of motion in degrees: Normal total range of motion for this

plane is 230 degrees.

...
 (iii) 121 to 180 2%

...
 (b) abduction-adduction (motion in the coronal plane):
 Combined range of motion in degrees: Normal total range of motion for this plane is 230 degrees.

...
 (iii) 121 to 180 1%

...
 (c) internal rotation – external rotation:
 Combined gleno-humeral range of motion in degrees: Normal total range of motion for this plane is 180 degrees.

...
 (iii) 91 to 135 1%

DIVISION 13: THE SKIN
Subdivision 2: Disfigurement of Other Parts Of The Body

Table 13.3: Evaluation Of Disfigurement For Other Parts Of The Body

Body Region	Alteration in Form and Symmetry		Scarring		Maximum Impairment Rating
Arms, SHOULDERS and elbows	Minor or moderate change	1%	Conspicuous	0.5%/cm ²	4%
	Severe change	4%			

Hearing

The Appeal Hearing took place on December 14, 2007. The Appellant attended the hearing, together with her husband, and Ms Kathy Kalinowsky was legal counsel for MPIC. At the commencement of the hearing a discussion took place between the Commission, the Appellant and MPIC’s legal counsel in respect of the issues in the appeal. At the conclusion of this discussion the Appellant withdrew the appeal issues set out in paragraphs 1, 2, 4, 5 & 6 which are contained in the last page of the attachment to her Notice of Appeal. The Appellant indicated

that she was prepared to proceed with her appeal in respect of an entitlement to additional compensation or permanent impairment awards in respect of :

- (a) range of motion – right shoulder; and
- (b) alteration in form and symmetry – right shoulder.

The Appellant testified at the hearing and described the impact that the alteration to the form and symmetry of her right shoulder and the limited range of motion to her right shoulder had on her quality of life and stated that:

1. her right shoulder was significantly lower than her left, was quite conspicuous and would be easily noticed by other people.
2. the appearance of this significant alteration made her extremely self-conscious when she was in the presence of other people, and adversely affected her self-esteem.
3. she had limited use of the right arm, which was often painful after use.
4. the alteration in the form and symmetry to her right shoulder, combined with the restrictive range of motion to both her right shoulder and her neck, adversely affected her ability to carry out her daily duties as a mother, as a wife and as a housekeeper.

The Appellant submitted that after discussion with the Commission and MPIC's legal counsel, that MPIC had correctly computed the permanent impairment award in respect of her shoulders but submitted that this method of computation was flawed and resulted in an unfair impairment award in this respect. She further submitted that there was a limited left sided lateral flexion of her neck and that was not taken into account by MPIC in assessing the permanent impairment award in respect of the range of motion of her right shoulder. She therefore requested that there be an increase in her permanent impairment award from four (4%) percent to nine (9%) percent.

In respect of the alteration in form and symmetry of her shoulder, she submitted that, having regard to the conspicuous appearance of her disfigurement, the impairment award should be increased from one (1%) percent to four (4%) percent.

In respect of scarring the Appellant submitted that, having regard to the provisions of the MPIC Act, she was requesting additional compensation relating to the scarring.

Not surprisingly MPIC's legal counsel disagreed with the submission of the Appellant in respect of the disfigurement to the Appellant's body caused by the alteration of the height of her right shoulder compared to her left shoulder, and submitted that:

1. the Appellant's request for additional compensation for an alteration to her form and symmetry must be considered having regard to the definition of the term alteration in form and symmetry (Division 13, Section 1 of M.R. 41/94 (as revised)) which defined such an alteration to a skin disfigurement as a result of a change in tissue bulk, consistency, length or texture.
2. [MPIC's Doctor], in his report dated September 18, 2006, was correct in indicating that, having regard to this definition, there is no reference to the presence of a scar and that he was unable to find a consistent description in form and symmetry in respect of tissue texture, tissue bulk or other disfigurement.
3. [MPIC's Doctor] was further correct in finding that since the changes in the height of the Appellant's shoulder could only be described as mild or moderate, and not severe, an award of one (1%) percent is appropriate in the circumstances.

MPIC's legal counsel further submitted:

1. The Appellant's request for an increase in compensation in respect of the restriction in the range of motion of her neck was covered by Manitoba Regulation 41/94 (as revised), Division 1; Subdivision 1; Section 105 entitled Range of Motion Loss of the Shoulder Joint Complex. This provision covered both the restriction to the Appellant's neck and right shoulder and, as a result, the impairment award of four (4%) percent was appropriate in the circumstances.
2. [MPIC's Doctor] had correctly concluded that there should be no additional permanent impairment entitlement for shoulder range of motion loss as there was no evidence to support it.
3. The Commission should dismiss the Appellant's appeal and confirm the Internal Review Officer's decision dated September 22, 2006.

Discussion

Restriction of Range of Motion to Right Shoulder

The Commission finds that the Appellant was an excellent witness, testified in a clear and convincing manner as to the restriction of the range of motion of her right shoulder and the adverse impact this had on her ability to carry out the essential tasks of her daily life. [MPIC's Doctor], however, concluded that there should be no additional permanent impairment for this restriction because there was no medical evidence on file to support it. The Commission also notes that in arriving at this conclusion, [MPIC's Doctor] considered the American Medical Association Guide for the evaluation of permanent impairments which he stated was the most comprehensive guide to impairment of shoulder range of motion.

The Commission further notes that the restriction related to the range of motion of the Appellant's right shoulder was measured by the [Appellant's Occupational Therapist], who provided these measurements to the case manager in her report dated March 6, 2006. The Commission also notes that the case manager applied these measurements to determine the severity of the restriction of the Appellant's range of motion to her right shoulder when determining the impairment award.

The Commission also notes that the Appellant, in her testimony and any documentary evidence, did not challenge the measurements obtained by the [Appellant's Occupational Therapist], nor the manner in which they were applied by the case manager in determining the impairment award in respect to the restrictions to the Appellant's right shoulder.

Decision

The Commission, having regard to the medical reports of [MPIC's Doctor], and the report of the [Appellant's Occupational Therapist], determines that the Internal Review Officer did not err in his decision dated September 22, 2006 in rejecting the Appellant's Application for Review in respect of the impairment award in respect of this restriction. The Commission therefore finds that the Appellant has not established, on a balance of probabilities, that MPIC erred in determining the amount of the permanent impairment award in respect of the restrictions to the Appellant's right shoulder and the Commission therefore dismisses the Appellant's appeal in this respect and confirms the decision of the Internal Review Officer dated November 22, 2006.

Alteration in Form and Symmetry to the Appellant's Right Shoulder.

The Commission notes that [MPIC's Doctor], in determining the severity of the alteration to the form and symmetry of the Appellant's right shoulder, incorrectly applied the definition of

“alteration of form and symmetry” as set out in the revised Manitoba Regulation as follows:

DIVISION 13: THE SKIN

1. Definitions

In this Division,

“alteration in form and symmetry” means a skin disfigurement that results in a change in tissue bulk, consistency, length or texture. It does not refer to the presence of a scar;

This definition applies only to skin alterations and has no relation to an alteration of the Appellant’s right shoulder which is governed by Manitoba Regulation 41/2000, Division 1, Subdivision 1, Items 1.5(a)(iii), 1.5(b)(iii) and 1.5(c)(iii) (Range of Motion).

[MPIC’s Doctor] rejected any increase in the permanent impairment award in respect of the alteration in form and symmetry of the Appellant’s right shoulder. In arriving at this opinion, [MPIC’s Doctor] relied on the independent assessment of [Appellant’s Occupational Therapist] of [Rehabilitation Consulting Service #2], who described the Appellant’s deformity as moderate in nature. [MPIC’s Doctor], as well, had the opportunity of examining the photographs in respect of the Appellant’s deformity of the right shoulder.

Discussion – Alteration to Form and Symmetry of Shoulders

The Commission rejects MPIC’s legal counsel’s submission that there should be no increase in the permanent impairment award relating to the alteration in the form and symmetry of the Appellant’s right shoulder.

Section 126 of the MPIC Act states:

Meaning of "permanent impairment"

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

MPIC has published its Personal Injury Protection Plan ('PIPP') Policy setting out its procedures for the administration of the PIPP. This Policy refers to Section 126 of the MPIC Act, as well as Manitoba Regulation 41/94, together with Schedules A and B thereof, and states:

GENERAL PRINCIPLES:

1. Intent of this Section:
 - a. The intent of this Section is to provide for compensation by way of a lump sum payment; to any claimant who suffers permanent impairment which includes anatomicophysiological deficit (Part 1) and permanent disfigurement (Part 2).
 - b. "**Anatomicophysiological**" means "pertaining to the structure (anatomy) or function (physiology) of the body".
 - c. "**Permanent Disfigurement**" refers to both **scarring** (cicatrical impairment) and physically observable **disfigurement** (change of form and symmetry).

The definition of disfigurement as set out in paragraph 1(c) is consistent with the following dictionary definitions:

1. The Dictionary of Canadian Law, Second Edition:
DISFIGUREMENT. *N.* An external injury which detracts from personal appearance.
2. Webster's New World College Dictionary, Fourth Edition:
dis-fig-ure-ment (-ment) *n* . . . **2** anything that disfigures; blemish, defect; deformity
3. Black's Law Dictionary, Seventh Edition:
disfigurement (dis-fig-yer-ment). An impairment or injury to the appearance of a person or thing.

The Commission agrees with the submission of MPIC's legal counsel that the Appellant is not entitled to additional compensation for an alteration to the form and symmetry of her shoulders pursuant to Manitoba Regulation 41/94 (as revised), Division 13, Table 13.3, which only applies to a skin disfigurement and not to a physically observable disfigurement suffered by the Appellant as a result of the motor vehicle accident.

Manitoba Regulation 41/94 (as revised), Division 13, Table 13.3, states:

Table 13.3: Evaluation Of Disfigurement For Other Parts Of The Body

Body Region	Alteration in Form and Symmetry	Scarring	Maximum Impairment Rating
Arms, SHOULDERS and elbows	Minor or moderate change	1%	4%
	Severe change	4%	

The definition of Alteration in Form and Symmetry as set out in Division 13, Section 1, which states:

1. Definitions

In this Division,

"alteration in form and symmetry" means a skin disfigurement that results in a change in tissue bulk, consistency, length or texture. It does not refer to the presence of a scar;

MPIC has found that the Appellant's right shoulder was disfigured and awarded the Appellant a permanent impairment award of one (1%) percent. The Internal Review Officer confirmed the case manager's decision in this respect based on the medical opinion of [MPIC's Doctor], as set out in his memorandum dated September 18, 2006. In this memorandum [MPIC's Doctor] noted that the occupational therapist had assessed that the Appellant had a moderate deformity of the right shoulder and he indicated that in his opinion the photographs supplied in respect of the

Appellant's shoulder did not identify a significant disfigurement. As a result, [MPIC's Doctor] concluded that the moderate assessment was appropriate.

The Commission further notes that the Appellant's disfigurement is not covered by the compensation schedules set out Manitoba Regulation 41/94 as amended. The Commission is, therefore, required to find a remedy pursuant to Section 129(2) of the MPIC Act which states:

Impairment not listed on schedule

129(2) The corporation shall determine a percentage for any permanent impairment that is not listed in the prescribed schedule, using the schedule as a guideline.

This provision provides that a percentage amount shall be established by MPIC by analogy to the compensation schedule set out in the Regulation. In appropriate cases the Commission is also entitled to apply Section 129(2) in determining an impairment award pursuant to Section 184(1)(b) of the MPIC Act which states:

Powers of commission on appeal

184(1) After conducting a hearing, the commission may

...

(b) make any decision that the corporation could have made.

In the decision [*text deleted*] (AC-96-51), decided on January 13, 1997, the Commission applied Section 129(2) as follows:

Regulation No. 41/94 contains a Schedule that lists many forms of permanent impairment, along with the compensation formula that must be applied to each such impairment. There does not appear to be any category listed in that Schedule into which [the Appellant's] functional loss may properly be fitted, and we are therefore obliged to find her remedy in Section 129(2) of the Act, which reads as follows:

"Impairment not listed on schedule

129(2) The corporation shall determine a percentage for any permanent impairment that is not listed in the prescribed schedule, using the schedule as a guideline."

Since [the Appellant's] functional loss effectively flows from her sensory loss, and since neither party appears to have taken issue with the assessment of 3.5% compensation for

the latter, we find that the closest parallel that we can achieve is to apply that same percentage to the former.

The Commission, unlike [MPIC's Doctor], had the opportunity of personally observing the Appellant as she testified both in examination-in-chief and in cross-examination. The Commission finds that she testified in a clear and unequivocal manner and the Commission determines that she was a credible witness. The Commission accepts the Appellant's testimony that as a result of the motor vehicle accident her right shoulder was significantly lower than her left and this disfigurement was quite conspicuous and would be easily noticed by other people. The Appellant's testimony in respect of the conspicuous nature of the Appellant's shoulders is confirmed by the Commission's own observation of the Appellant's shoulders. The Commission finds that this disfigurement significantly detracts from the personal appearance of the Appellant.

Decision

For these reasons the Commission rejects MPIC's assessment that the disfigurement is of a minor or moderate nature and finds that the Appellant's physically observable disfigurement in respect of her shoulders is of a severe nature. The Commission notes that in Manitoba Regulation 41/94 (as revised) – Division 13, Table 13.3, the compensable schedule for an alteration in form and symmetry in respect of a skin disfigurement relating to shoulders, provides for a four (4%) percent award in respect of a severe change. This provision is the closest parallel the Commission can find in order to determine a percentage amount by analogy to this schedule. Pursuant to Section 129(2) of the MPIC Act the Commission finds by analogy that the alteration of the Appellant's form and symmetry to her shoulders constitutes a severe change. As a result, the Commission increases the Appellant's permanent impairment award from 1% to 4%.

The Commission therefore allows the Appellant's appeal in this respect and, accordingly, varies

the decision of the Internal Review Officer dated November 22, 2006.

Dated at Winnipeg this 14th day of January, 2008.

MEL MYERS, Q.C.

MARY LYNN BROOKS

DR. PATRICK DOYLE