

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-99-35**

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Mr. Charles T. Birt, Q.C.
Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC')
represented by Ms Joan McKelvey;
the Appellant, [text deleted], was represented by
[Appellant's representative]

HEARING DATE: January 17th, 2000

ISSUE(S): Quantum of award for facial scarring.

RELEVANT SECTIONS: Sections 126 to 130, inclusive, of the MPIC Act, and Tables
15 and 17, being part of Manitoba Regulation No. 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

By the time [the Appellant's] appeal came before this Commission, only one issue remained to be determined, namely: the proper amount to be paid to the Appellant as compensation for permanent impairment, in the form of scarring to her face and neck, that she sustained in a motor vehicle accident of November 16th, 1994.

The nature of [the Appellant's] accident and of any other injuries that she sustained in the course

of it are not material to this appeal. What are relevant are the descriptions of the five scars that she sustained and the proper application of Manitoba Regulation 41/94 to those scars.

DESCRIPTION OF IMPAIRMENT:

MPIC referred [the Appellant] to [rehabilitation consulting company] for an assessment of her facial scarring. The assessment was performed on May 27th, 1997 by [text deleted], who is a registered nurse and rehabilitation consultant. He described five scars which, adopting both [Appellant's rehabilitation consultant's] description and that of [text deleted] (MPIC's medical consultant) may be summarized this way:

Area A a "Y"-shaped flat linear scar at the medial end of the right eyebrow, unobscured by hair, measuring 2.0 plus 0.5 centimeters in length and 0.5 centimeters in width, having a resultant surface area of 1.25 square centimeters.

Area B a flat, diagonal, linear scar on the right upper eyelid, noticeable whether the eye is open or closed, measuring 1.5 centimeters in length by 0.1 centimeter in width, with a resultant, surface area of 0.15 square centimeters.

Area C a diagonal, depressed, linear scar on the right lower eyelid, measuring 1 centimeter in length by 0.2 centimeters in width, with a resultant surface area of 0.2 square centimeters and classified as 'faulty'.

Area D a conspicuous, irregular, depressed scar measuring 4 centimeters in length by 0.1 centimeter in width on the right side of the bridge of the nose, having an additional component measuring another 1 centimeter in length. The resultant surface area is 0.5 square centimeters and the scar is properly classified as 'faulty'.

[Appellant's rehabilitation consultant] also notes that this scar causes "an asymmetrical appearance" to the nose.

Area E a faint, inconspicuous, flat scar, having a surface area calculated at 1.0 square centimeters, described by [Appellant's rehabilitation consultant] as being on the underside of the Appellant's left jawbone and by [MPIC's doctor] as being on the neck. [Appellant's rehabilitation consultant] adds that this scarring is "not noticeable unless head is tilted upwards".

[MPIC's doctor] calculated the amount of the impairment award payable to [the Appellant] by using Class 4 in Table 15 of Part 2 in the Schedule of Manitoba Regulation 41/94 for Areas A through D, and by using Table 17 in that same Schedule to calculate the award for Area E. Table 15 covers scarring to the face; Table 17 includes scarring to the neck. Using those tables (copies of which will be annexed to and form part of these Reasons) [MPIC's doctor] arrived at the following calculations.

Area A $1.25 \text{ cm}^2 \times 1\%/\text{cm}^2 = 1.25\%$

Area B $0.15 \text{ cm}^2 \times 1\%/\text{cm}^2 = 0.15\%$

Area C $0.2 \text{ cm}^2 \times 3\%/\text{cm}^2 = 0.6\%$

Area D $0.5 \text{ cm}^2 \times 3\%/\text{cm}^2 = 1.5\%$

Area E $1 \text{ cm}^2 \times 1\%/\text{cm}^2 = 1\%$

In addition, because the scarring on [the Appellant's] nose is reported to create an asymmetrical appearance, [MPIC's doctor] added a further 10% upon the basis that this constituted a 'conspicuous change that holds one's attention and affects one anatomical element'. Adding that

10% to the figures noted above resulted in a total award of 14.5% which, as a percentage of the maximum applicable at the time of [the Appellant's] accident of \$100,000.00, gave her a total, permanent impairment benefit of \$14,500.00.

Counsel for [the Appellant] argues forcefully that the Appellant is being short-changed by the foregoing calculation since, she submits, the Appellant sustained changes in form and symmetry affecting not one, but two anatomical elements - the nose and the eyelids. She refers us to Section 1 of Division 1, Part 2 of the Schedule, as shown on the copy of page 98 that is annexed to these Reasons. She points out that the Appellant's right and left eyelids were in symmetry prior to her accident and the resultant scarring, but they now differ since the right eyelids are scarred and the left are untouched. She therefore submits that [the Appellant's] award should be calculated as follows:

Area A, (Table 15, Class 4)	1.25%
Area B, (Table 15, Class 4)	0.15%
Area C, (Table 15, Class 4)	0.60%
Area D, (Table 15, Class 4)	1.50%
Add, for change in form and symmetry involving two anatomical elements	<u>12.00%</u>
	15.50% *
Area E, Table 17 (neck)	<u>1.00%</u>
	16.50%

(* Since the maximum award for facial disfigurement is 15%, the claim advanced on behalf of [the Appellant] is reduced to 16%.)

With deference, we do not interpret the Regulations in quite the same way. As we read the

reports of [Appellant's rehabilitation consultant] and of [MPIC's doctor] as well as a report of [text deleted], plastic surgeon, of March 17th, 1997 (".....with regard to your request regarding evaluation for physiognomy, I would think she is a Class 4 affecting one anatomical element, i.e. her nose") and having had the benefit of seeing [the Appellant] in person, we cannot conclude that the scarring of her upper and lower right eyelids constitute a "conspicuous change that hold one's attention" nor even, merely, a "conspicuous change". There is a distinction between a cicatricial, or scarring, impairment on the one hand, and a change in form and symmetry on the other. From [Appellant's rehabilitation consultant's] description, there is no doubt that the nasal scarring has produced a conspicuous change that holds one's attention, bringing that aspect of [the Appellant's] claim within subparagraph A of Class 4 in Table 15 and resulting in the 10% award. The same cannot, in our respectful view, be said of the scarring to the eyelids. In the latter case, [the Appellant] has been awarded 1% per square centimeter for the flat scar on her right upper eyelid, and 3% per square centimeter for the faulty scar on the lower eyelid. At the same time, and although [the Appellant] may be conscious of their existence when she looks for them in the mirror, the fact is that the scars on her eyelids did not present a conspicuous change in form and symmetry to the members of this panel who observed her at a distance of about ten feet, nor even to [Appellant's rehabilitation consultant] and [Appellant's plastic surgeon], who presumably examined her very closely. Counsel for the Appellant argues that [Appellant's plastic surgeon] was only examining [the Appellant's] nose and, hence, only spoke of the "one anatomical element". With deference, the very language of his letter indicates that he was not only offering an opinion about possible plastic surgery to correct the Appellant's nasal problem but, as well, was responding to a specific request for an "evaluation for physiognomy" and obviously had a copy of Table 15 before him, since he refers in particular to Class 4.

Whether the scar on the underpart of [the Appellant's] jaw is described as 'neck' or 'underside of left jawbone' is not material. It creates no change in form or symmetry and the award is, therefore, 1% in either case.

DISPOSITION:

It follows, then, that [the Appellant's] award for physiognomy impairments were properly calculated, and that her appeal must be dismissed.

Dated at Winnipeg this 19th day of January, 2000.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED