

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: 00-153**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Deborah Stewart
Mr. Wilson MacLennan

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

HEARING DATES: August 15, 2001, and April 15, 2002

ISSUE: Lump sum indemnity for permanent impairment

RELEVANT SECTIONS: Section 127 of the Manitoba Public Insurance Corporation Act ('the MPIC Act') and Manitoba Regulation 41/94 Schedule A (Section 1), Schedule of Permanent Impairments, Part 1: Anatomicophysiological Deficits, Division 1: Musculo-Skeletal System, Subdivision 1; Section 4(c); Section 6(c)(ii)(E) and Table 17.

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 involved in a motor vehicle accident on March 9, 1997, and sustained a chest wall contusion, fracture of the left sixth rib, and fracture of the distal left clavicle. The Appellant recovered from these injuries but was left with residual loss of left shoulder range of motion, as well as some residual thickening around the lateral aspect of the injured clavicle.

At the request of the Commission, [independent doctor] examined the Appellant and provided a report dated January 10, 2000, outlining the Appellant's permanent impairments. [Independent doctor's] report was provided to [text deleted], a medical consultant with MPIC, who concluded that, based on the Act and Regulations, the total Permanent Impairment benefit of the Appellant's left shoulder reduced range of motion, left elbow reduced range of motion, and the change in form and symmetry between the Appellant's left and right arms entitled the Appellant to receive a total of 5.2% of \$106,429 or \$5,534.31.

The Appellant applied for a review of this decision and, in a written decision dated September 29, 2000, the Internal Review Officer confirmed the case manager's decision and dismissed the Application for Review. As a result, the Appellant appealed this decision to the Commission.

The issue on appeal is whether MPIC correctly calculated the Permanent Impairment award to which the Appellant was entitled.

The issue is governed by Section 127 of the MPIC Act which reads 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.

The calculations were based on the Manitoba Regulation MR 41/94, Schedule A (Section 1), Schedule of Permanent Impairments, Part 1: Anatomicophysiological Deficits, Division 1: Musculo-Skeletal System, Subdivision 1. The reference to the shoulder joint is found in Section

4(c), the reference to the elbow is found in Section 6(c)(ii)(E), and the reference to the change in the form and symmetry is found in Table 17 to this Regulation.

In rendering his decision dated September 29, 2000, the Internal Review Officer stated as follows:

[independent doctor] provided a report dated January 10, 2000 outlining your Permanent Impairments. [MPIC's doctor] referred to The Manitoba Public Insurance Corporation Act and Manitoba Regulation MR41/94 Schedule A (Section 1), Schedule of Permanent Impairments, Part 1: Anatomicophysiological Deficits, Division 1: Musculo-Skeletal System, Subdivision 1. The shoulder joint is found in Section 4(c) and the elbow is found in Section 6(c)(ii)(E). Change in form and symmetry is found in Table 17 to this Regulation.

The following are the Permanent Impairments sustained to your left shoulder:

- i. Loss of abduction 1%
- ii. Loss of flexion .5%
- iii. Loss of external rotation .7%
- iv. Loss of internal rotation 1%
- v. Loss of adduction .5%

For a total of 3.7%.

Under Subdivision 1; 6(c) (ii) (E) the Permanent Impairment to your elbow is a loss of flexion of less than 25% which equals 1%.

Table 17 Minor Change in Form and Symmetry Involving the Shoulder .5%

In conclusion, the calculations done by [MPIC's doctor] were correct and you are entitled to a 5.2% Permanent Impairment award for the permanent impairment to your shoulder, elbow and the change in form and symmetry involving your shoulder. That 5.2% multiplied by the indexed maximum of \$106,429.00 (maximum at March 9, 1997) leaves a total of \$5,534.31. I see no evidence of any further Permanent Impairments. Therefore, it is my decision that you have been paid your full entitlement to Permanent Impairment benefits related to the above noted accident.

The appeal hearings in this matter commenced on August 15, 2001. Submissions were heard from both the Appellant and legal counsel for MPIC. However, during the course of the hearing, the Appellant decided that he wished his treating orthopedic surgeon, [Appellant's orthopedic surgeon], to review the reports of [independent doctor] and [MPIC's doctor] and provide a report to the Commission in respect of the issue of the amount of compensation payable to the Appellant in respect of his permanent impairment. An adjournment was granted for this purpose.

On November 4, 2001, the Commission received a copy of [Appellant's orthopedic surgeon's] report to [Appellant's doctor], dated September 14, 2001, and reconvened the hearing on April 15, 2002. After hearing submissions from both the Appellant and legal counsel for MPIC, the Commission again adjourned the proceedings to consider the Appellant's appeal. Prior to determining the merits of the appeal, the Commission decided to write directly to [Appellant's orthopedic surgeon] to obtain his comments in respect of the reports of [independent doctor] and [MPIC's doctor].

The Commission wrote to [Appellant's orthopedic surgeon] on May 1, 2002, and upon receipt of his report, dated May 23, 2002, provided copies of said report to the Appellant and to legal counsel for MPIC. Legal counsel for MPIC advised the Commission by e-mail dated June 13, 2002, that there was nothing in [Appellant's orthopedic surgeon]'s letter which changes MPIC's view of the evidence which was placed before the Commission at the appeal hearing. No response to [Appellant's orthopedic surgeon's] letter was received from the Appellant.

In his report to the Commission, dated May 23, 2002, [Appellant's orthopedic surgeon] stated:

I have reviewed all the materials that were forwarded. I have also reviewed [the Appellant's] records at the [text deleted] Clinic and permanent impairment rating followed by the Manitoba Public Insurance Corporation. I did my own calculation and did conclude that the permanent impairment rating is similar to the calculation made by [MPIC's doctor] in his medical report to MPIC dated March 8, 2000....

The Commission notes that [Appellant's orthopedic surgeon] did not challenge the calculations made by [MPIC's doctor]. However, [Appellant's orthopedic surgeon] advised the Commission in his report that:

Apart from limited range of motion in the shoulder and elbow, this gentleman did have signs of pain arising from the left acromioclavicular joint when he was seen in my office on September 14, 2001 and subsequently on September 24, 2001. His problem related to the acromioclavicular joint on the left side appeared to be due to derangement at the AC joint secondary to fracture involving the lateral end of the clavicle, with minor change of relationship of lateral end of the clavicle as it articulates with acromion. At the time, x-rays were done and these did not show any signs of osteoarthritis. However, development of osteoarthritis after such derangement may take years before enough radiological changes occur at the joint to be appreciated on x-ray films. Therefore, there still remains the possibility that [the Appellant] will develop osteoarthritis in the AC joint area in future. Only with time one can determine whether he will develop any such osteoarthritis resulting in more pain at the left acromioclavicular joint that may require further treatment at a future date in the form of surgery or otherwise. If that happens, it will result in further time loss, especially if he needs to have any surgery. Perhaps this may need to be taken into consideration while awarding him permanent impairment related to that shoulder.

The Commission is not able to make an award in respect of a permanent impairment which may occur in the future. Section 127 of the Act provides a lump sum indemnity for permanent impairment made to a victim who suffers a permanent physical or mental impairment because of the accident. The osteoarthritis that [Appellant's orthopedic surgeon] refers to is a possibility which the Appellant may develop in the future but which he does not suffer from at the moment.

If, in the future, the Appellant does develop osteoarthritis in the AC joint area, and if such osteoarthritis is connected to the motor vehicle accident in question, then the Appellant is entitled to make an application to MPIC for an additional Permanent Impairment award pursuant to Section 171(1) of the Act which states:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The Commission finds that the calculations made by MPIC in awarding the Appellant the sum of \$5,534.31 in respect to his permanent impairment is correct. The Commission, therefore, dismisses this appeal and confirms the decision of the Internal Review Officer, dated September 29, 2000.

Dated at Winnipeg this 2nd day of July, 2002.

MEL MYERS, Q.C.

DEBORAH STEWART

WILSON MacLENNAN