

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-21**

PANEL: Mr. Mel Myers, Chairperson
Mr. Paul Johnston
Ms Deborah Stewart

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

HEARING DATE: August 27, 2008 & November 17, 2008

ISSUE(S): Entitlement to permanent impairment benefits for loss of
range of motion to left knee and facial scarring

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation
Act ('MPIC Act') and Manitoba Regulation 41/94

**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 June 15, 2005. He was the driver of a taxi when another vehicle turned in front of his automobile and there was a head-on collision. As a result of the collision the airbags were deployed in the Appellant's automobile. There was also significant damage to the front of the Appellant's automobile and he was required to climb out through the driver's side window in order to exit the taxi. The Appellant filed an Application for Compensation on July 12, 2005 and described his motor vehicle accident injuries as follows:

I hurt my lower back and my left knee. I have a cut on the top of my left knee and the knee cap is broken. I also have a cut on my right wrist just above my thumb. I have no other injuries. (underlining added)

On August 11, 2006 MPIC requested [Appellant's Physiotherapist], of [Rehabilitation (Rehab) Facility] to provide a permanent impairment assessment in respect of the following injuries the Appellant sustained in the motor vehicle accident:

Diagnosis/Injuries: Fractured left patella, lacerations/abrasions to left knee and right wrist.

[Appellant's Physiotherapist] provided a report to the case manager on September 20, 2006. In respect of the Appellant's left knee [Appellant's Physiotherapist] reported:

<u>AROM</u>	<u>AROM</u>
<u>Left Knee</u>	
flexion	135°
extension	-5°

Scars

1. Forehead (see Photo 1): 1.5 x 0.3 = 0.45cm². This scar is faulty, brownish, mildly conspicuous, and is a Class 2 scar.

Case Manager's Decision

On October 23, 2006 the case manager wrote to the Appellant and advised him that the Appellant was receiving a permanent impairment award of \$14,962.68 based on an impairment rating of twelve (12%) percent (using successive remainders) which was comprised of the following:

➤	Thigh muscular atrophy	2%
➤	Patellofemoral pain syndrome	2%
➤	Scarring – right forearm	4%
➤	Scarring – left knee	5%
	Total (using successive remainders)	12%

The Appellant made an Application for Review of the case manager's decision dated October 23, 2006 wherein he stated:

- 1 Facial scar is related to accident
- 2 Left knee does not have full strength or range of motion

Internal Review Decision

On December 14, 2006 the Internal Review Officer rejected the Appellant's Application for Review and confirmed the case manager's decision.

The Internal Review Officer in his report stated:

5. At the hearing, you explained that you did not mention the cut to your forehead because it was only sore for a few days. You were not aware at the time of your accident that you would be entitled to a Permanent Impairment award for scarring, therefore, you never thought to mention it to your case manager. You do not agree that the range of motion to your left knee falls within the normal range. You explained that you have difficulty folding your legs when having to sit on the floor at the [Text deleted].

The Internal Review Officer further stated that the impairment award of twelve (12%) percent was correctly assessed and calculated and that the Appellant was not entitled to a permanent impairment award for scarring on the forehead or loss of range of motion to his left knee.

The Internal Review Officer also stated:

DISCUSSION AND RATIONALE FOR DECISION

Section 127 of the Act provides a lump sum indemnity for permanent impairments. In 1994, the maximum indemnity was \$100,000.00. Sections 164 through 167 of the Act provide a formula for indexing this amount. At the time you were injured, the maximum indemnity had increased to \$124,689.00.

Manitoba Regulation 41/94 (as amended by 41/2000) sets out the amount to be awarded for particular types of permanent impairments. The Regulation expresses the amount

available for each type of permanent impairment as a percentage of the maximum indemnity.

The Internal Review Officer asserted that the permanent impairment award was based on an assessment completed by [Appellant's Physiotherapist] with [Rehab Facility], and further stated:

Based on my review of the file, you are not entitled to a Permanent Impairment award for loss of range of motion to your left knee because all measurements completed by [the Appellant's Physiotherapist] fall within the acceptable norms. With respect to facial scarring, your case manager was correct in not providing you with a Permanent Impairment award. Permanent Impairment awards are based solely on the medical information in your file, and nowhere in the medical reports or in your Application for Compensation does it confirm or indicate that you sustained an injury to your forehead. In your Application, you indicate that you hurt your lower back and left knee and you have cuts to your right wrist and left knee. You wrote in your Application "I have no further injuries". I am not saying that I don't believe you; I am saying that there is no medical evidence on file to support what you are saying.

Based on my review of the file, your Permanent Impairment award was correctly assessed and calculated. I am, therefore, confirming the case manager's decision and dismissing your Application for Review.

The Appellant filed a Notice of Appeal dated February 12, 2007.

Subsequent to the filing of the Notice of Appeal, [Appellant's Doctor] provided a report to a Commission Appeals Officer, dated November 14, 2007, wherein he indicated that when he saw the Appellant on October 10, 2007 he was not examined. [Appellant's Doctor] further stated that he saw the Appellant again on November 5, 2007 and his findings were:

- He could bend (L) knee completely with some clicking sound. He mentioned, he had fracture patella.
- Small scar (L) frontal region on head measuring 1/3 inch.

Appeal

The relevant provisions of the MPIC Act are:

Section 127, which states:

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.

Section 164 through 167 of the MPIC Act provides a formula for indexing the amount of the permanent impairment award:

Manitoba Regulation 41/94 (as amended by 41/2000) sets out the amount to be awarded for particular types of permanent impairments. The Regulation expresses the amount available for each type of permanent impairment as a percentage of the maximum indemnity (*of \$124,689.00*)

The Appellant testified at the hearing and stated that:

1. as a result of the fractured patella to his left knee he did not have full flexion when bending his knee.
2. he disagreed with the assessment of the physiotherapist who reported that the Appellant's left knee range of motion was within acceptable norms.
3. he was unable to bend his knee properly and demonstrated lack of flexion in his left knee to the Commission.
4. in response to a question from the Commission he could not explain [Appellant's Doctor's] diagnosis that he could bend his left knee completely with some clicking sound.

In respect of his small scar to his forehead he testified that:

1. he did not initially complain about a cut to his forehead due to the other significant injuries he sustained in the motor vehicle accident and because his forehead was only sore for a few days.
2. as a result, he did not report the cut to his forehead to the case manager and he did not include the forehead cut injury in his Application for Compensation, on July 12, 2005, which was approximately one (1) month after the motor vehicle accident.
3. as a result of the collision in the motor vehicle accident the airbags in his taxi were deployed, his body was thrust forward, and his head hit the windshield of his taxi and cracked the windshield.

Submissions

Impairment Award – Left Knee Restricted Flexion

In his submission the Appellant repeated his testimony that as a result of the motor vehicle accident the injury to his left knee resulted in a restricted flexion when he attempted to bend this knee. The Appellant therefore requested that the Commission rescind the decision of the Internal Review Officer and direct MPIC to provide a permanent impairment award in respect of the restricted flexion to his left knee.

In response, MPIC's legal counsel submitted that the Internal Review Officer was correct in rejecting the Appellant's application for an impairment award in respect of the complaint about lack of full range of motion to his left knee and for the scar to his forehead. MPIC's legal counsel further submitted that, based on the report of the [the Appellant's Physiotherapist], the Appellant was not entitled to a permanent impairment award for loss of range of motion to his

left knee because all the measurements completed by [Appellant's Physiotherapist] fell within the acceptable norms.

MPIC's legal counsel also referred to [Appellant's Doctor's] letter to the Appeals Officer dated November 14, 2007 wherein he reported that he saw the Appellant on November 5, 2007, approximately twenty-nine (29) months after the motor vehicle accident, and that the Appellant could bend his left knee completely with some clicking sounds. MPIC's legal counsel submitted that, having regard to the medical opinion of the Appellant's physician, [Appellant's Doctor], and the opinion of [Appellant's Physiotherapist], the Appellant had failed to establish, on a balance of probabilities, that he had a loss of motion in respect of his left knee as a result of the motor vehicle accident.

Decision – Left Knee Flexion

The Commission agrees with the submission of MPIC's legal counsel that, having regard to the medical opinion of the [Appellant's Doctor], and the opinion of the physiotherapist, the Appellant has failed to establish, on a balance of probabilities, that he had a loss of motion in respect of his left knee as a result of the motor vehicle accident. [Appellant's Physiotherapist] concluded, upon his assessment, that there was no loss of range of motion to the Appellant's left knee because all of the measurements completed by [Appellant's Physiotherapist] fell within the acceptable norm. [Appellant's Doctor] stated in his report of November 5, 2007, that the Appellant could bend his left knee completely with some clicking sound. The Commission therefore concludes that MPIC did not err in rejecting the Appellant's claim for a permanent impairment award in respect of a loss of range of motion to his left knee. As a result, the Commission confirms the decision of the Internal Review Officer, dated December 4, 2006, in this respect and rejects the Appellant's appeal.

Submissions – Facial Scarring

In respect of the facial scarring MPIC's legal counsel submitted that:

1. the Internal Review Officer was correct in confirming the case manager's decision not to provide a permanent impairment award on the grounds that there were no medical reports or any reference in the Appellant's Application for Compensation where, in his discussion with the case manager, he had indicated that the Appellant had sustained an injury to his forehead.
2. on July 12, 2005, one (1) month after the motor vehicle accident, the Appellant filed an Application for Compensation describing the injuries he sustained in the motor vehicle accident which did not include facial scarring and stated "I have no further injuries".
3. as well, the Appellant met with the case manager on July 12, 2005 and described all of the injuries he sustained in the motor vehicle accident, and did not mention an injury to his forehead.
4. the Appellant has not established, on a balance of probabilities, that there was a causal connection between the motor vehicle accident and the Appellant's facial scarring.

At the conclusion of both submissions the Commission requested that MPIC's legal counsel obtain and file with the Commission a copy of the photographs obtained by MPIC from its collision file and provide a copy to the Commission.

The Commission adjourned the proceedings.

On August 28, 2008 MPIC's legal counsel sent a letter to the Commission enclosing two (2) colour copies in respect of the Appellant's vehicle. In her letter MPIC's legal counsel states:

. . . These five (5) photographs obtained from the collision file clearly demonstrate an “intact” and clear windshield. There is no visible “impact point” or crack to the windshield that resulted from [the Appellant] hitting his head on the windshield as he had testified at the hearing.

On September 3, 2008 the Commission wrote to the Appellant and provided him with a copy of [text deleted] letter, together with colour copies of the five (5) photographs of the Appellant’s automobile, for his review. In its letter the Commission advised the Appellant that if he wished to respond to MPIC’s legal counsel’s comments in respect of the front windshield as displayed in the photographs he could do so by sending a letter to the Commission setting out his position. However, if he wished to make a verbal submission to the Commission that he could contact the Commissioners’ Secretary and the Commission hearing would be reconvened. The Appellant was further advised that if he did not wish to make any further submission, or if he did not wish to have the appeal hearing reconvened, the Commission would, in due course, issue a written decision and provide a copy of the decision to both himself and MPIC’s legal counsel.

The Commission also wrote to MPIC’s legal counsel enclosing a copy of the Commission’s letter to the Appellant and indicated that if the Appellant responded in writing MPIC’s legal counsel would be entitled to reply to this response or, if necessary, request that the appeal hearing be reconvened.

In response to the Commission’s letter to the Appellant dated September 3, 2008 the Appellant advised the Commissioners’ Secretary that he wished to make further submissions to the Commission and, as a result, the Commission set the date of November 17, 2008 for the purpose of reconvening the hearing.

The Commission requested a copy of MPIC's Vehicle Condition Report and Estimate Sheet in respect of the motor vehicle that was involved in the accident which caused the Appellant's injuries. These documents were provided by [text deleted], an employee of MPIC, who had completed the Estimate and Vehicle Condition Report. On receipt of these documents MPIC's legal counsel, on November 4, 2008, e-mailed [text deleted] and stated:

I am the lawyer handling [the Appellant's] appeal to the Commission on his PIPP injuries. In the course of the hearing, it came out that [the Appellant] hit his head on the windshield. When I looked at the photos, it did not look like there was any damage to the windshield (such as a person hitting their head against it). Now, the Commission is requesting a copy of the Estimate, and the Vehicle Condition Report. I was viewing the estimate in CARS and see that at "item 56 & 57" refer to remove/replace windshield. There is also a reference to "line discount %20.00." Could you pls explain what that means?

Also, could you please send me a copy of the estimate (I am only able to print off the Vehicle Condition Report myself) so that I can forward it to the Commission.

In response, [text deleted] e-mailed MPIC's legal counsel and stated:

Hi [text deleted], the drivers side airbag was deployed, this would make it pretty well impossible for the insured to hit his head on the windshield especially if he was wearing his seatbelt, the windshield was probably replaced due to the corner of the hood hitting the glass as the hood got pushed back from impact. Pictures show no evidence of anyones head hitting the windshield. Line disc.20% means that aftermarket glass is available and should be used as opposed to oem (factory glass). I will send you a copy of the estimate. I am on my way to [text deleted] right now to do an estimate, should be back in the office tomorrow. Talk to you later [text deleted].

The Commission requested that MPIC's legal counsel arrange for [text deleted] to attend the hearing to testify in respect of the Vehicle Condition Report and Estimate Sheet that he had provided to MPIC's legal counsel. The appeal hearing was reconvened on November 17, 2008 and [text deleted] testified that:

1. on examining the photographs of the windshield of the Appellant's motor vehicle, he was of the view that there was no indication on the windshield that the Appellant's head had struck the windshield.
2. marks that appeared to be on the windshield were a reflection of an automobile that had been situated behind the Appellant's motor vehicle when the photographs were taken.
3. he was unable, however, to state with certainty that these marks were inconsistent with the Appellant's forehead striking the windshield.

[Text deleted] further testified that:

1. the windshield of the Appellant's motor vehicle would have to be replaced because a portion of the motor vehicle hood was bent in the automobile accident and, as a result, struck and broke the windshield glass.
2. he acknowledged, however, that there did not appear to be any visible evidence in the photographs to indicate there was damage to the windshield at that location.
3. if the Appellant was wearing a seatbelt at the time of the motor vehicle accident the seatbelt would have restrained the Appellant and, as a result, it would have been impossible for the Appellant's head to hit the windshield.

In response to questions from the Commission, the Appellant testified that:

1. he was wearing a seatbelt but, due to the constant use of the seatbelt by taxicab drivers when going in and out of the taxicab, the seatbelt material had been loosened.
2. as a result, the seatbelt did not provide any effective restraint to prevent the Appellant's forehead from hitting the windshield when the motor vehicle accident occurred.

3. as a result of the motor vehicle accident he was propelled forward and his forehead hit the windshield and broke the windshield glass.
4. the area of the windshield where his forehead came into contact with the windshield is disclosed in the photograph.

Further Submissions – Facial Scarring

MPIC's legal counsel submitted that:

1. the Appellant has failed to establish, on a balance of probabilities, that as a result of the motor vehicle accident the Appellant's forehead hit the windshield causing the scar to his forehead.
2. on July 12, 2005, the Appellant, in making an Application for Compensation and in discussions with the case manager, had outlined the injuries he sustained in the motor vehicle accident but had not mentioned the injury to his forehead.
3. had the Appellant suffered an injury to his forehead he would have reported it in his Application for Compensation or in his discussions with the case manager.

MPIC's legal counsel further submitted that:

1. the Commission should rely on the testimony of [text deleted] who had examined the Appellant's motor vehicle, determined the damage to this motor vehicle, and had taken photographs of this motor vehicle.
2. [Text deleted] testified that the windshield was replaced because the hood of the motor vehicle had struck the windshield cracking the windshield glass.
3. [Text deleted] testified that there did not appear to be any damage in the area of the windshield where the Appellant had testified that his forehead struck the windshield.

4. [Text deleted] concluded that it was impossible for the Appellant's head to have struck the windshield because he was wearing a seatbelt.

The Appellant, in a brief submission, asserted that:

1. as a result of the motor vehicle accident he sustained significant injuries to his knee and at that time considered the cut to his forehead to be a minor incident and therefore did not report it initially to either the case manager or include it in his Application for Compensation.
2. although he wore a seat belt the seat belt material had stretched and provided no restraint to his body when the motor vehicle accident occurred.
3. as a result of the impact of the accident, his body was propelled forward and he struck his head on the windshield.
4. the photographs disclosed damage to the windshield in the area where his forehead struck and cracked the windshield glass.

Discussion

The Commission finds that the Appellant has established, on a balance of probabilities, that as a result of the motor vehicle accident the Appellant's forehead struck the windshield of the motor vehicle which caused the cut to the Appellant's forehead.

The Commission further finds that the Appellant was a credible witness who testified in a clear and direct fashion and we accept his testimony in all issues in dispute between MPIC and himself. The Commission accepts the Appellant's explanation that he did not initially advise the MPIC case manager or note in his Application for Compensation that he had injured his forehead because he treated that as a minor incident and was concerned with the major injury to his ankle.

The Commission also accepts the Appellant's testimony that although he was wearing a seatbelt it did not provide an effective restraint to prevent his forehead from hitting the windshield as a result of the motor vehicle accident.

The Commission further finds that an examination of the photographs:

1. disclosed that there is damage to the windshield in the area where the Appellant states his forehead came in contact with the windshield.
2. does not disclose any damage to the windshield in the area where [text deleted] testified the hood of the motor vehicle came into contact with the windshield.

The Commission agrees with MPIC's legal counsel's submission that both [text deleted] and the Appellant were credible witnesses. However, the Commission notes that [text deleted] candidly acknowledged in his testimony that he had no independent recollection of examining the motor vehicle in question in the month of June 2005, after the motor vehicle accident had occurred. He further testified that in providing his testimony he relied on his review of the photographs, which he had taken and the Vehicle Condition Report and Estimate sheet which he had prepared at that time.

The Commission, however, finds that:

1. the Appellant had a vivid recollection of the events of the motor vehicle accident and he clearly remembered his head striking the windshield and cracking it.
2. an examination of the photographs corroborate the Appellant's testimony that his head struck the windshield cracking the windshield glass.

In these circumstances, the Commission gives greater weight to the testimony of the Appellant than it does to the testimony of [text deleted].

For these reasons the Commission finds that the Appellant has established, on a balance of probabilities, that the Appellant's facial scarring was caused by the motor vehicle accident which occurred on June 15, 2005. As a result, the Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated December 4, 2006. The Commission refers this matter back to MPIC in order to determine the permanent impairment award in respect of facial scarring.

Dated at Winnipeg this 1st day of December, 2008.

MEL MYERS, Q.C.

PAUL JOHNSTON

DEBORAH STEWART