

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-37**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Wendy Sol
Dr. Sharon Macdonald

APPEARANCES: The Appellant, [text deleted], was represented by Ms Laurie Gordon of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: March 31, 2009

ISSUE(S): Entitlement to additional Permanent Impairment benefits

RELEVANT SECTIONS: Sections 127 and 129 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 1 and Schedule A of Manitoba 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 involved in a motor vehicle accident on January 5, 1998. As a result of the injuries which the Appellant suffered in that accident, the Appellant sustained permanent physical impairments which, pursuant to Section 127 of the MPIC Act, entitle her to a lump sum indemnity in accordance with the regulations to the MPIC Act.

The medical information on the Appellant's file indicates that, as a result of the accident, she sustained permanent damage to her craniofacial muscles. In a letter dated July 4, 2002, MPIC's

case manager awarded the Appellant a 1% permanent impairment benefit for myofascial pain pursuant to Part 1, Division 3, Maxillofacial System, Subdivision 1, Section 1(d)(i) of the Schedule of Permanent Impairments. The Appellant sought an Internal Review of that decision. In a decision dated February 11, 2003, the Internal Review Officer awarded the Appellant a further 1% permanent impairment benefit for her craniofacial muscle disorder myofascial pain.

The Appellant has appealed from that decision to this Commission. The issue which requires determination in this appeal is whether the Appellant is entitled to any additional permanent impairment benefits.

Relevant Legislation:

Section 127 of the MPIC Act provides that:

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 regulations set out the amount available for each type of permanent impairment as a percentage of the total amount available.

Section 1 of Manitoba Regulation 41/94 provides that:

Compensation for permanent impairment based on Schedule

1 Compensation for permanent impairments shall be determined on the basis of Schedule A.

The relevant portion of Schedule A sets out the following:

**DIVISION 3: MAXILLOFACIAL SYSTEM
Subdivision 1**

1. Temporomandibular articulations

...

- (d) Craniofacial muscle disorder:
 - (i) myofascial pain1 to 2%
 - (ii) myositis:1 to 2%

- (iii) spasm: 1 to 2%
- (iv) splinting: 1 to 2%

Appellant’s Submission:

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant is entitled to a further permanent impairment benefit of 2% for myositis pursuant to Part 1, Division 3, Subdivision 1, item 1(d)(ii). In support of her position, the Claimant Adviser relies upon the note dated January 13, 2003 of [MPIC’s dentist], dental consultant to MPIC’s Health Care Services Team, [MPIC’s dentist] wrote his note of January 13, 2003 in response to a memorandum from the Internal Review Officer, requesting his opinion as to which category of the craniofacial muscle disorder would apply and be substantiated in the Appellant’s case.

[MPIC’s dentist], in his note of January 13, 2003, indicated that:

- i) myofascial pain, possibly ii) myositis.
- Because both categories are difficult to define & substantiate they have been all replaced in the new guide with one category (craniofacial muscle disorder) and only 1% award. That is why I don’t see awarding more than one category or a large award.

Based upon that response, the Claimant Adviser argues that the Appellant should have received permanent impairment awards for both myofascial pain and myositis. The Claimant Adviser also refers to [MPIC’s dentist]’s opinion of December 16, 2002 in support of her position that the Appellant should receive permanent impairment awards for both categories. In his opinion of December 16, 2002, [MPIC’s dentist] indicates that:

- Therefore the only category of impairment that I can see is applicable would be
- d) Craniofacial disorder
- Which one i) to iv) you pick is based on the interpretation of the reports – usually you do not pick all! Even if you did they would not all be at the maximum 2%. So if you apply [Appellant’s doctor #1]’s report it mainly mentions headache + muscle pain – i) + ii)
- Therefore at most
- i) 2%
 - ii) 2%
 - iii) 1%
 - iv) 1%

However I am reluctant to approve all of these because I don't see substantiation for most of the categories.

Based upon that opinion of [MPIC's dentist], the Claimant Adviser submits that the Appellant is entitled to a permanent impairment benefit of 2% for myositis as [MPIC's dentist] specifically referred to that award in his opinion. Accordingly, the Claimant Adviser submits that the Appellant should receive an additional 2% permanent impairment benefit together with interest from the date of the motor vehicle accident.

MPIC's Submission:

Counsel for MPIC submits that the Appellant is not entitled to a further permanent impairment benefit of 2% for myositis. Counsel for MPIC submits that [MPIC's dentist] clearly indicated that he did not see substantiation for most of the categories in the Appellant's file and he didn't agree with awarding more than one category. Counsel for MPIC maintains that the Appellant received a fair and appropriate award in the circumstances. He submits that the Appellant's appeal should be dismissed and the Internal Review Decision confirmed.

Decision:

Upon a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant has not established, on a balance of probabilities, that she is entitled to a permanent impairment benefit of 2% for myositis pursuant to Part 1, Division 3, Subdivision 1, Section 1(d)(ii) of the Schedule of Permanent Impairments.

The Commission finds that, in his note of January 13, 2003, [MPIC's dentist] was indicating that, of the categories set out under craniofacial muscle disorder, either myofascial pain or

possibly myositis, would be applicable for the Appellant. However, since the two categories were difficult to define and substantiate, [MPIC's dentist] did not feel there was much difference between the two, and he would only award one category to the Appellant. Based upon this opinion, the Internal Review Officer awarded the Appellant a further 1% for myofascial pain. [MPIC's dentist] concluded that in his opinion only one category should be awarded. We do not find that his opinion was supportive of awarding the Appellant an impairment award under two categories. As a result, the Commission finds that, the Appellant did not establish that an additional award for myositis, separate from that encompassed by the myofascial pain award was applicable in this case.

The Commission also relies upon the report of [Appellant's doctor #2] dated April 12, 2007, wherein [Appellant's doctor #2] noted that "*There was no tenderness in any muscles of mastication detected*". We find that this report also does not support the award of a permanent impairment benefit for myositis. According to this report, there is no basis to conclude that the Appellant's myositis, or muscular inflammation, is so severe or persistent so as to qualify for an additional award for myositis separate and apart from that encompassed under the award for myofascial pain.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated February 11, 2003 is therefore confirmed.

Dated at Winnipeg this 19th day of May, 2009.

YVONNE TAVARES

WENDY SOL

DR. SHARON MACDONALD