Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-08-074

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Trevor Anderson** **Ms Jacqueline Freedman**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.**
HEARING DATE:	**April 10 and 11, 2013**
ISSUE(S):	**Entitlement to further permanent impairment benefits.**
RELEVANT SECTIONS:	**Sections 127 and 129(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Schedule A, Division 1, Subdivision 2, Sections 17(a)(ii)(A) and 17(d) 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 was injured in a motor vehicle accident on August 8, 1999. As a result of his injuries, he was in receipt of Personal Injury Protection Plan ("PIPP") benefits from MPIC, including permanent impairment benefits. The Appellant was awarded permanent impairment benefits in relation to left lower limb scarring/discolouration, right forearm scarring, left forearm scarring and a dental injury to teeth #26 and #27. A case manager's decision dated January 14, 2008 concluded that the Appellant was not entitled to receive any further permanent impairment

payments with respect to injuries sustained in the motor vehicle accident. The Appellant sought an Internal Review of this decision, and on June 18, 2008, an Internal Review Officer for MPIC upheld the case manager's decision and concluded that the Appellant was not entitled to any further permanent impairment benefits. The Internal Review Officer relied upon reports provided by a doctor and a psychologist with MPIC's Health Care Services team in order to conclude that the Appellant was not entitled to permanent impairment benefits for injury to his left ankle, left knee, right shoulder, right hip, kidneys and/or spleen, tinnitus and vertigo, anxiety disorder or chronic pain condition.

The Appellant's permanent impairment entitlement was confirmed by MPIC, with calculations, on March 20, 2009. The Appellant sought a further Internal Review of this decision. On October 20, 2009, an Internal Review Officer for MPIC reviewed the case manager's decision and the permanent impairments that had been awarded for left lower limb, right forearm, left forearm and alteration or loss of teeth. The Internal Review Officer concluded that the amounts assessed were appropriate and that the Appellant was not entitled to a further permanent impairment benefit in relation to his motor vehicle accident.

It is from these decisions of the Internal Review Officer that the Appellant has now appealed.

The Appellant took the position that further permanent impairment benefits should be awarded for:

a) loss of range of motion in his ankle;
b) an alteration of the calcaneum necessitating custom fitting shoes or orthotics for his foot and ankle;
c) shrinkage of his left foot.

Evidence for the Appellant:

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident and his transfer to the [Hospital] for treatment. He described his injuries as a broken tibia, broken first and fifth metatarsal, cracked breast plate or separated shoulder, smashed teeth and jaw, injury to left ankle, right leg pulled out of the socket, bruises and scarring.

The Appellant described a long road to recovery and referred to a decision of this Commission in AC-05-107 which found that MPIC should continue funding replacement orthotics for the Appellant.

The Appellant described his work as a [text deleted]. He indicated that he was a lead hand so he had to walk a lot at his job. He found this difficult and dealt with it by sitting down as much as he could and taking pain killers. He indicated that he still has a lot of pain and problems with his left foot when walking.

The Appellant testified that a year or so after the motor vehicle accident he noticed that it was difficult to fit shoes. He indicated that his employer paid for his shoes and that there was a shoe truck that comes around. The Appellant could no longer fit properly into these shoes, as his left foot was smaller. He indicated that his right foot is a size 12 and his left foot is now a size 10. The Appellant testified that he never had any problems fitting shoes prior to the motor vehicle accident. He has known the same shoe truck guy for 20 years and never had any problems before with having two different size feet.

The Appellant provided medical reports from his physician, [Appellant's Doctor #1], as well as from [Appellant's Doctor #2] of the [text deleted] Clinic. He also referred to reports provided by [Appellant's Physiotherapist #1], with [text deleted] and [Appellant's Physiotherapist #2].

[Appellant's Physiotherapist #2] reported on May 17, 2005. His report indicated that the Appellant's left foot was 1.5 centimetres shorter than the right, with the Appellant reporting that this can be a full size and a half in some footwear. [Appellant's Physiotherapist #2] also assessed the Appellant as demonstrating decreased range of motion in extension and flexion of his left great toe.

[Appellant's Physiotherapist #1] reported on October 23, 2007. In regard to the discrepancy in the Appellant's foot size, [Appellant's Physiotherapist #1] noted:

> "[The Appellant] stated that his left foot is now smaller due to the fractures (see Photo 3). Upon examination, the distance between the heel to the tip of the 1st toe was 28.0cm on the right, and 27.0cm on the left, a difference of 1.0cm with the left being smaller than the right. The width of the feet across the MTP's were 10.5cm on the right and 9.5cm on the left, a difference of 1.0cm with the left being smaller than the right. These changes likely reflect abnormal healing of the left foot fractures. [The Appellant] currently takes a size 12 shoe for his right foot, and size 10 – 10 ½ for his left foot."

[Appellant's Physiotherapist #1] also noted that the Appellant has mildly reduced flexion and extension of the toes of his left foot and that his left ankle was mildly altered which "may reflect a region of abnormal healing". Ankle range of motion was measured at 5° dorsiflexion (knee extended) in the left and 20° in the right. Dorsiflexion (knee flexed) was measured as 10° in the left and 25° in the right.

[Appellant's Doctor #2] reported on January 23, 2012. He stated:

> "I cannot comment on any shrinkage of [the Appellant's] left foot myself as I have not had a chance to examine him since this complaint came about and it wasn't stated in my notes back in 2005.
>
> Again, I cannot comment on the range of motion [the Appellant's] left foot as of 2007 because the last time I examined him in March 2005, my notes state there was some first MTP osteoarthritis which certainly would have caused decreased range of motion of his MTP joint, however, previous to that, the last time my records state he had decreased range of motion was in May of 2000 when he had decreased range of motion of his ankle, according to my chart records. I cannot state if the 2007 findings are still related to this as I would have had to reassess him since then."

[Appellant's Doctor #1] provided a report dated April 17, 2012. He described the fracture of the Appellant's first and fifth metatarsal in his left foot and concluded that:

> "...It would be reasonable to expect that he may develop some chronic pain secondary to these fractures and therefore it would be reasonable to conclude that the need for foot orthotics would be related to these injuries.

He also found that it would be reasonable to conclude that the functional deficit in the Appellant's left foot was related to injuries he sustained in the motor vehicle accident and that the shrinkage in his left foot was related to abnormal healing of his previous foot fractures, as there did not appear to be any other logical explanation for the findings in his left foot.

[Appellant's Doctor #1] indicated that he had been unable to detect a reduced range of motion in the Appellant's left foot upon examination of the foot and ankle in February 2012. He added that:

> "The chronic pain and functional deficiencies in his left foot appear most likely to be related to his injuries from the motor vehicle accident of 1999. He does not appear to have sustained any other significant injuries or have any medical conditions that would reasonably explain these problems."

[Appellant's Doctor #1] also testified at the hearing into the Appellant's appeal. He was qualified as a family doctor and an expert in the area of family medicine. He explained that the Appellant had been his patient since approximately February of 2000. He reviewed his letter of

April 17, 2012, and explained that when he used the word “reasonable” to assess certain injuries, he had meant that it was more likely than not that these findings were caused by the motor vehicle accident.

[Appellant’s Doctor #1] also provided some clinical notes regarding the Appellant as well as notes and reports from [Appellant’s Doctor #2].

[Appellant’s Doctor #1] explained that his review of the Appellant’s file, including notes from [Appellant’s Doctor #2], had raised concerns regarding post motor vehicle accident healing in the Appellant’s foot. Although he had not been involved in the Appellant’s care at the time of the motor vehicle accident, a review of these notes suggested to him that perhaps some neuro-muscular injury had caused a reduction in the size of the Appellant’s foot, although it was difficult for him to provide a definite explanation for it.

[Appellant’s Doctor #1] stated that he reviewed [Appellant’s Doctor #2’s] notes, saw there was swelling and tenderness some ten weeks following the motor vehicle accident, as well as a possible suggestion of RSD (reflex sympathetic dystrophy) and the effects of disuse. [Appellant’s Doctor #1] then concluded that these could be signs of abnormal healing which led, in his view, to the shrinkage of the foot in some way.

His examination of the Appellant’s left foot had shown that it appeared to be two centimetres shorter than the right foot, and after examining the Appellant and X-rays, he hypothesized that this was soft tissue related. [Appellant’s Doctor #1] confirmed from his experience in day-to-day medical practice, he noticed gross abnormality between the Appellant’s two feet which he could see even without measuring. He then measured this to confirm his initial findings. He did

not believe it was simply the non-displaced fracture to the foot which contributed to its shrinkage, but rather attributed it to the general trauma to the foot and perhaps to its abnormal healing. He indicated that this was an unusual situation and it was difficult to say what resulted in the shrinkage. He could only hypothesize that the trauma and soft tissue injury around the fracture led to some atrophy related to the musculature in the foot, since there was no obvious bony abnormality.

Submission for the Appellant:

a) Restriction of Movement:

Counsel submitted that the physiotherapists' assessments and measurements show that the Appellant suffered a loss of range of motion of his ankle. These assessments were done with proper and accurate measuring instruments and should be given great weight.

Counsel noted that under the applicable, older Regulation 41/94 [Section 17(a)(ii)(A)] there is a range between 1% and 7% for loss of range of motion of the tibiotarsal joint. He recommended, having regard to the new schedule for permanent impairment awards under the MPIC Act and Regulations, that the panel should have regard to the 5° and 10° measurements in dorsiflexion, and the Appellant should be entitled to a permanent impairment rating of 3% as an appropriate award.

b) Alteration of the calcaneum or other bones of the forefoot:

Counsel for the Appellant submitted that the Appellant should be entitled to a permanent impairment award of .5% for an alteration of the calcaneum or other bones of the forefoot, making it necessary to wear a custom fitted shoe (which includes orthotics) due to a pathological condition. Counsel argued that the fracture of the metatarsals in the

Appellant's foot represents an alteration of "other bones of the forefoot". This resulted, he submitted, in soft tissue pathology to the foot, as such pathology need not be limited to bony abnormalities. [Appellant's Doctor #2] had previously confirmed that ongoing metatarsalgia related to fractured metatarsals were responsible for the Appellant's current foot problems and need for orthotics. After 13 years, this condition was clearly permanent and the Appellant should be entitled to a permanent impairment award of .5% in this regard.

c) <u>Shrinkage of the left foot:</u>

Counsel also submitted that in accordance with [Appellant's Doctor #1's] report of April 17, 2012, the panel should find that the shrinkage in the Appellant's left foot was related to abnormal healing of his previous foot fractures. Although the radiographic reports on file did not indicate that there were any bone abnormalities in the Appellant's left foot which would result in shrinkage, [Appellant's Doctor #1] testified that soft tissue injuries suffered in the motor vehicle accident would more likely be the cause of the condition. He also testified that the swelling and tenderness noted by [Appellant's Doctor #2] in his notes, more than 10 weeks after the casting of the non-displaced metatarsal fractures, would be an indication of abnormal healing. [Appellant's Doctor #1's] own findings of tenderness in that foot in February of 2012, almost 13 years after the motor vehicle accident, were further evidence of abnormal healing.

The Appellant testified that prior to the motor vehicle accident he had no trouble being fitted for footwear, but that approximately a year or so after the motor vehicle accident, his boot salesman at work started having difficulty fitting boots because of the difference in the size of his feet.

[Appellant's Physiotherapist #1] stated that the Appellant's left foot was now smaller due to the fractures and provided measurements of the difference between his feet. Counsel submitted that these changes likely reflect abnormal healing of the left foot fractures and that [Appellant's Doctor #1's] findings of an even greater discrepancy in 2012 would indicate a definite progression in the shrinkage of the foot.

Counsel submitted that [MPIC's Doctor's] evidence on this issue was somewhat contradictory. He rejected [MPIC's Doctor's] opinion that it was common sense that a foot could not shrink due to soft tissue problems. [Appellant's Doctor #1], [Appellant's Physiotherapist #2] and [Appellant's Physiotherapist #1] had all opined that this must have been what happened, yet only [MPIC's Doctor] had suggested that this was impossible.

Counsel submitted that although there was no specific permanent impairment rating for shortening of the foot, the panel should have regard to the permanent impairment award set out for shortening of the leg. For example, in Schedule A, Division 1, Subdivision 2, Article 11(p)(vi) and (vii), shortening by more than 1 centimetre but less than 2.5 centimetres results in an award of 1.5%, while shrinkage between 2.5 centimetres and 3.5 centimetres results in an award of 2%. Since the Appellant's foot is smaller by 2 centimetres in length and at least 1 centimetre in width, counsel submitted that the two figures should be added together to obtain a more accurate picture of the shrinkage of the foot, resulting in 3 centimetres and a rating of either a 1.5% or 2% permanent impairment award.

Alternatively, counsel submitted that if the Commission finds that this analogy is not appropriate, it should accept [MPIC's Doctor's] suggestion that it might fall under Table 16 of the old schedule of permanent impairments. He rejected [MPIC's Doctor's] contention

that the maximum benefit applicable for one leg is 8%, based upon the total maximum of 16%. He took the position that the maximum award for a lower limb could be 16% and not 8% and thus, an assessment of 1.5% to 2.5% would not result in an award in excess of the allowable maximum.

Evidence for MPIC:

MPIC relied upon two reports from [MPIC's Doctor], of MPIC's Health Care Services team, dated September 19, 2011 and October 1, 2012. [MPIC's Doctor] also testified at the hearing into the Appellant's appeal.

In his report of September 19, 2011, [MPIC's Doctor] reviewed information contained in the reports submitted from [Appellant's Physiotherapist #1] and [Appellant's Physiotherapist #2] as well as the Commission's decision in AC-05-107 regarding the Appellant's orthotics.

Based upon his review, [MPIC's Doctor] concluded that the Appellant did not qualify for a permanent impairment benefit for an injury to the foot and/or ankle that would lead to a loss of range of motion. Nor was the Appellant entitled to an award for alteration of the calcaneum or other bones of the forefoot making it necessary to wear a custom fitted shoe due to this pathological condition. Since the Appellant's fracture had been un-displaced, it is not medically probable that this would later result in permanent deformity of the metatarsal bone requiring him to wear a custom fitted orthotic. [MPIC's Doctor] also opined that the file did not contain documentation indicating the Appellant sustained an injury to the foot and/or ankle that would lead to a loss of range of motion in these joints.

On October 1, 2012, [MPIC's Doctor] reviewed the Appellant's file again, along with new reports from [Appellant's Doctor #2] and [Appellant's Doctor #1]. He noted that the Appellant's X-rays had revealed some osteo-arthritic changes but that [Appellant's Doctor #2] had not been certain how this was related to the motor vehicle accident. As well, [Appellant's Doctor #2] had been unable to comment on whether any shrinkage of the left foot or loss of range of motion was a by-product of the incident in question, and had not noted any loss of foot range of motion, although he had documented a decrease in ankle range of motion in May 2000.

Although [MPIC's Doctor] acknowledged that the trauma affecting the first MTP joint could later lead to development of osteo-arthritic changes, the file did not contain documentation indicating that the fracture was intra-articular and as such would increase the potential for osteo-arthritic changes to develop in the future.

[MPIC's Doctor] addressed [Appellant's Doctor #1's] opinion that the shrinkage of the left foot was related to abnormal healing of the foot fractures since there did not appear to be any other logical explanation for the finding. [MPIC's Doctor] indicated there was no documentation indicating the fractures healed in an abnormal way and noted again that "from a medically probable perspective, it is extremely unlikely non-displaced fractures affecting the foot would contribute to shrinkage of the left foot".

[MPIC's Doctor] also pointed out that [Appellant's Doctor #1] had not assessed or identified any loss of range of motion in the Appellant's foot and that [Appellant's Doctor #2] could not make any comments with regard to range of motion valuation.

Accordingly, his views on the permanent impairment benefits for the Appellant remained unchanged.

[MPIC's Doctor] also testified at the hearing into the Appellant's appeal. The parties agreed that [MPIC's Doctor] was qualified as an expert in sports medicine with experience in forensic reviews and permanent impairment assessment.

[MPIC's Doctor] explained the importance of the issue of causation and the standards he applied in that regard in assessment of MPIC files. He also explained his familiarity with the permanent impairment guideline schedules (both the old and the new). He explained that for the most part, an injury was considered permanent, if no change had occurred in approximately one year and there was no indication of improvement.

[MPIC's Doctor] then reviewed the three permanent impairments sought by the Appellant in the current appeal.

a) Restriction of Movement:

He described the range of motion measurements and agreed that pain could be a factor in limiting range of motion and would as such be factored into the determination of range of motion impairment. However, he noted the importance of passive range of motion tests in this determination, as well as the assessment of structural change or joint impairment.

Upon a review of the notes, X-rays and reports from [Appellant's Doctor #2] and [Appellant's Doctor #1], [MPIC's Doctor] was not of the opinion that there had been abnormal healing of the Appellant's fracture or that there were any healed residual

deformities. He also noted that it was not uncommon to develop some disuse osteo-arthritis after a prolonged period of immobility in a cast, but that this was most often not permanent.

[MPIC's Doctor] was not of the view that the assessment of the Appellant's active range of motion indicated that there was a permanent injury sustained – the Appellant had not fractured his ankle in the accident, and the documents indicated that he regained full range of motion in that ankle.

[MPIC's Doctor] reviewed the report from [Appellant's Sport Medicine Specialist] dated January 8, 2013. [Appellant's Sport Medicine Specialist] is a specialist expert in sports/musculoskeletal medicines. He described a normal exam in regard to inversion, pain, swelling and range of motion. He noted that the Appellant suffered from metatarsalgia and advised the trial of arch support and metatarsal pads. [Appellant's Sport Medicine Specialist] indicated the Appellant had no inverted ankle, no twisted ankle, pain, swelling or inability to bear weight. There was no restricted tibiotalar range of motion. In [MPIC's Doctor's] view, the fact that [Appellant's Physiotherapist #1's] assessment did find some range of motion difficulties in an earlier report was not persuasive, as it merely implied that those findings had not been permanent, since they were not reflected in [Appellant's Sport Medicine Specialist's] more recent report.

He concluded that this report did not disclose any evidence of permanent injury in the motor vehicle accident.

b) <u>Alteration of the calcaneum or other bones of the forefoot:</u>

[MPIC's Doctor] explained that Section 17(d) of the regulations required an alteration of the calcaneum (heel bone) or bones of the forefoot which included the metatarsal. [MPIC's Doctor] noted that the Appellant's foot fractures were un-displaced and had healed and that the Appellant was able to regain full range of motion of the adjacent joints. No arthritic changes were identified in that regard and he noted that a small plantar calcaneal spur was a bony outgrowth commonly seen in the aging population which was never the result of a single traumatic event. There was no displacement of the bone leading to instability or any mal-alignment leading to a pathological condition and [MPIC's Doctor] believed that the X-ray did not show any alteration or pathological condition in the foot.

c) Shrinkage of the left foot:

In reviewing the question of a permanent impairment for shrinkage of the Appellant's foot, [MPIC's Doctor] pointed out the difficulties in obtaining landmark measurements. Although [Appellant's Doctor #1] testified to a 2 centimetre difference between the two feet, it was [MPIC's Doctor's] opinion that the only accurate way to measure the true length of a foot was to obtain X-rays which could be measured and compared. [MPIC's Doctor] also testified that there was no way that an un-displaced fracture of the foot could result in a bone in the foot becoming shorter, if it healed with no complications, as was the case for the Appellant. There was no angulation or displacement resulting from the Appellant's fracture. The left foot swelling was not indicative of abnormal healing, as most often swelling is the result of soft tissue contusion. There was no radiological or diagnostic evidence of abnormal healing which would result in impairment or a permanent impairment. Soft tissue cannot make the foot shorter, [MPIC's Doctor] testified, as only bones can do that. Wasting atrophy could occur with a soft tissue finding, but that would not account for shortening of the foot without bone changes.

[MPIC's Doctor] also noted that even if a change in form and symmetry did occur, attracting a permanent impairment benefit, the Appellant had already been awarded scarring for that leg to the maximum level under the Regulations (8% for each leg) and would not be entitled to any further awards in that regard.

Submission for MPIC:

Counsel for MPIC submitted that, as a sports medicine physician with experience in forensic review concerning causation and permanent impairments, [MPIC's Doctor] was in the best position to speak to the Appellant's three requests for impairment benefits.

a) Restriction of Movement:

In regard to the Appellant's claim for a permanent impairment for restriction of movement of the tibiotarsal joint, counsel pointed out that the evidence was clear that there had been no fracture of the left tibia and no abnormality of the tibia fibula was found on X-rays. Accordingly, while the left ankle may have suffered some swelling and tenderness following the motor vehicle accident, and particularly following immobolization (sic) in a cast for six to eight weeks, there was no injury to the ankle causing a permanent loss of range of motion. Further, counsel pointed out that the Appellant's ankle did regain full range of motion, as [Appellant's Sport Medicine Specialist's] report of January 8, 2013 showed that there was:

> "No inverted ankle, No twisted ankle, pain, swelling, No unable to weight bear, No able to return to activity, No bruising, No heard pop/snap, worse with activities, No night pain, No trauma, No stiffness... No restricted tibiotalar rom..."

This is consistent with [Appellant's Doctor #1's] clinical notes which indicated that the left ankle had full range of motion by February 23, 2012.

Accordingly, the most recent evidence showed that the Appellant had not suffered any loss of range of motion or injury to the ankle.

b) Alteration of the calcaneum or other bones of the forefoot:

Counsel addressed Section 17(d) and the Appellant's claim for a permanent impairment benefit due to the necessity to wear orthotics as a result of a pathological condition. She emphasized that while the prior AICAC decision from 2007 found a continued need for orthotics as a result of the motor vehicle accident, no conclusion had been drawn by the Commission regarding a permanent condition at that time. The regulation requires an alteration of the foot and a pathological condition with a degree of permanence. As [MPIC's Doctor] testified, the calcaneum spur found on X-rays was a bony outgrowth and was a common finding in an aging population, and was never due to a traumatic event. The metatarsal had been fractured, but the fracture was un-displaced and there was no disruption of the ligament and bone structure, no osteo-arthritis at the calcaneal mid-foot, no loss of arch or ligament instability. No arthritic changes were detected. As [MPIC's Doctor] opined, counsel submitted that an un-displaced fracture which heals without deformity and regains full range of motion, as was the case in this appeal, would not qualify for a permanent impairment under this section of the regulations.

c) Shrinkage of the left foot:

Counsel then addressed the Appellant's claim regarding shrinkage of his foot. She emphasized [MPIC's Doctor's] comments on the lack of clear landmarks, making measurements difficult and dependent upon the person taking the measurements. She also submitted that it was not uncommon for individuals to have one foot smaller than the other.

She addressed [Appellant's Doctor's #1's] view that soft tissue injury and abnormal healing might cause the foot to shrink. [Appellant's Doctor #1] could not give a credible explanation for what had caused the foot shrinkage and it was not supported by anything that [Appellant's Doctor #2] had opined. [MPIC's Doctor] testified that, given his considerable expertise in the area, he considered it impossible that the shrinkage could be related to the motor vehicle accident. [MPIC's Doctor] had characterized any delay in the Appellant's healing as merely that: delayed healing. He did not view it as abnormal healing and was of the opinion that there was no foot shrinkage caused by the motor vehicle accident which would lead to a permanent impairment award.

Further, counsel noted that even a possible permanent impairment award for a form and symmetry issue did not arise, as the Appellant had already received the maximum of 8% per leg of permanent impairment in this regard, in connection with his scarring.

Accordingly, counsel for MPIC submitted that the Appellant had failed to meet the burden of proof of showing, on a balance of probabilities, that he was entitled to any of the three permanent impairment awards sought, and that the appeal should be dismissed.

Discussion:

Sections 127 and 129 of the MPIC Act provide 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.

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.

As the motor vehicle accident occurred in 1999, the relevant permanent impairment guideline schedule is found in the old, and subsequently amended, Regulation 41/94. The schedule provides, in **Schedule A, Division 1** (Musculo-skeletal System), **Subdivision 2** (Pelvis and Lower Limb):

S. 17. Ankle and foot

(a) Ankylosis of the ankle or foot:

(ii) restriction of movement:

(A) tibiotarsal 1 to 7%

...

(d) Alteration of the calcaneum or other bones of the forefoot making it necessary to wear a custom-fitted shoe due to this pathological condition: 0.5%

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to any further permanent impairment awards on the basis of evidence before the panel.

The panel has reviewed the evidence, both oral and documentary, provided by the parties and has considered the submissions of counsel. We have addressed each of the requests for a permanent impairment award.

(a) Restriction of movement of the tibiotarsal – S.17(a)(ii)(A):

The panel's review of the evidence shows that the physiotherapist, [Appellant's Physiotherapist #1], assessed range of motion restrictions in the Appellant's left ankle.

Dorsiflexion with knee extended was 5% (as compared to 20% in the right) and dorsiflexion with knee flexed was 10% (as compared with 25% in the right). He also noted mildly reduced flexion and extension of the toes of the left foot.

Another physiotherapist, [Appellant's Physiotherapist #2] reported on May 17, 2005 that the Appellant demonstrated decreased range of movement in the active range of movement of his left great toe, extension and flexion.

However, more recent measurements or assessments performed by the Appellant's family doctor, [Appellant's Doctor #1], found full range of motion of the toes and left ankle full range of motion.

[Appellant's Sport Medicine Specialist], a specialist in sports and musculoskeletal medicine, found no restricted tibiotalar range of motion, as well as no restricted subtalar range of motion, no decrease in TP joint range of motion. He concluded that the Appellant had a normal exam.

Accordingly, the panel finds that the Appellant has failed to show, on a balance of probabilities, that he suffered from a restricted range of motion on a permanent basis that has persisted.

Accordingly, the Internal Review Decisions dated June 18, 2008 and October 20, 2009 are upheld and the Appellant's appeal is dismissed in this regard.

(b) Need for orthotics due to a pathological condition – alteration of the calcaneum or

other bones of the forefoot – S. 17(d):

S. 17(d) requires, in part, that the Appellant has an ongoing need for a custom-fitted shoes (or orthotics). The panel finds that this is the case, in accordance with the Commission's previous decision in AC-05-107. However, the regulation also requires that the Appellant have an alteration of the calcaneum or other bones of the forefoot due to a pathological condition.

The panel finds that there is no evidence that the Appellant suffered an alteration of the calcaneum. The only evidence before the panel in regard to the calcaneum are old heel spurs found on X-ray. We accept the evidence of [MPIC's Doctor] that such spurs are commonly found in the aging population as a bony outgrowth where the plantar fascia attaches to the heel bone. We accept his evidence that this is never the result of a single traumatic event, and was not a result of the motor vehicle accident.

The panel finds that the reference in the regulation to other bones of the forefoot does apply to metatarsal fractures. The Appellant argues that the alteration to the bones of the forefoot was the fracture itself, which created a soft tissue pathology that was permanent. Despite the fact the fractured metatarsals healed, they gave rise to a soft tissue pathology, metatarsalgia and trauma which make it necessary to wear a custom-fitted shoe.

It was [Appellant's Doctor #1's] hypothesis that the problems in the Appellant's foot stemmed from trauma and were soft tissue related.

MPIC took the position that there was no alteration of the bones pursuant to the regulation,

as the alteration itself must be permanent. This can result where there is a displaced fracture, but an un-displaced fracture that heals normally and goes back to the way it was cannot result in a permanent impairment under this section of the regulations.

In addition, MPIC argued that there has to be a pathological condition to result in an impairment award. [MPIC's Doctor] gave examples of pathological conditions such as osteo-arthritis, mid-foot instability, ligamentous instability or loss of arch. There is no evidence of these pathological conditions, or other pathological conditions on the Appellant's file.

The panel recognizes that this section of the regulations is not completely clear, and that there may be some ambiguity in the wording. The panel does not doubt the Appellant's testimony that he has pain and that there was trauma to the foot at the time of the motor vehicle accident. However, there is no evidence that this led to a permanent or pathological soft tissue condition. The evidence in the reports and testimony, beyond [Appellant's Doctor #1's] hypothesis, do not support this.

The panel further finds that the Appellant has failed to provide sufficient evidence to meet the onus upon him of showing, on a balance of probabilities, that any specific "pathological condition" resulted from an alteration, which necessitated the need for orthotics.

Accordingly, the decisions of the Internal Review Officer dated June 18, 2008 and October 20, 2009 are upheld and the Appellant's appeal dismissed in this regard.

(c) Shrinkage of the foot:

The panel has reviewed the evidence before it and concludes that there was a difference in size of between one (1) and two (2) centimetres between the Appellant's left and right feet. This conclusion is based upon the Appellant's testimony as well as the measurements reported by [Appellant's Physiotherapist #2] on May 17, 2005 and by [Appellant's Physiotherapist #1] on October 23, 2007. In addition, the panel has considered [Appellant's Doctor #1's] report dated April 17, 2012 and his note of February 23, 2012 indicating that the Appellant's left foot was two centimetres shorter than his right foot. He testified that he found this to be a significant difference.

[Appellant's Doctor #2] also noted, on March 7, 2012 that the Appellant's left foot was definitely narrower and shorter than his right foot.

Although [MPIC's Doctor] questioned the validity of these measurements, expressing caution about the landmarks used and indicating that the best way to take such a measurement was by X-ray, the panel accepts that the Appellant has met the onus upon him of showing, on a balance of probabilities, that there is a significant difference between the size of his feet, as described by the Appellant and by much of the documentary evidence on the file and by several of his caregivers.

The Appellant submits that this difference in size was caused by the motor vehicle accident, while MPIC takes the position that the motor vehicle accident was not the cause.

The evidence before the panel was that the width of a foot could be affected by soft tissue injuries or atrophy, while length could not. Yet in the Appellant's case the evidence showed a difference in both width and length. Although it was [Appellant's Physiotherapist #1] and

[Appellant's Doctor #1's] conclusion that this reflected abnormal healing of the left foot fractures, [Appellant's Doctor #2] could not comment on the causes of such shrinkage, noting that while the Appellant needs different shoe sizes he was not exactly sure as to why. Nor could [Appellant's Doctor #1] explain how "abnormal healing" had caused the foot to shrink. He could not definitively explain why this could have occurred, beyond connecting it to general trauma to the foot.

[MPIC's Doctor] also reviewed [Appellant's Doctor #2's] notes and commented upon the significance of those findings of swelling and tenderness at the ten week mark. He interpreted these as signs, not of abnormal healing, but rather of delayed healing.

The panel finds that while the length of time it took to heal may have taken longer than usual, and [MPIC's Doctor] did recognize that the healing was delayed, we have also considered [MPIC's Doctor's] clear testimony that the non-displaced healed fracture could not have caused shrinkage of the foot. He explained that soft tissue injuries cannot make a foot shorter, because only injuries to the bones can do that. Although wasting atrophy could occur with soft tissue findings, this would not account for a shortening of the foot, which would have to be caused by a bone change. The evidence established that if muscles atrophied, a foot could look smaller in width, but length would not be affected unless the ligaments are affected, which was not the case in the Appellant's appeal, where the X-rays did not show any bones or ligaments affected.

[MPIC's Doctor] was emphatic that it is impossible that an un-displaced fracture could contribute to length shrinkage in a foot. He indicated that he had never seen it, had never heard of it and could not find a plausible explanation for how this could happen.

The panel concludes that, aside from the anecdotal evidence of the Appellant, he has failed to establish, on a balance of probabilities, that the difference in his foot sizes did not exist prior to the motor vehicle accident. When that is considered, along with the speculative character of the evidence for the Appellant regarding causation, weighed against the emphatic, clear and definitive evidence of MPIC's witness (an expert in sport medicine with experience in the area of forensic causation review) the panel concludes that the Appellant has failed to prove on a balance of probabilities that he is entitled to a permanent impairment award for shrinkage in his left foot caused by the motor vehicle accident.

Accordingly, the decisions of the Internal Review Officer dated June 18, 2008 and October 20, 2009 are upheld and the Appellant's appeal dismissed in this regard.

Accordingly, the panel finds that the Appellant has failed to meet the onus upon him of showing that the Internal Review Decisions of June 18, 2008 and October 20, 2009 are in error and that the Appellant should be entitled to further permanent impairments in that regard. The decisions of the Internal Review Officer are upheld and the Appellant's appeal is dismissed.

Dated at Winnipeg this 22nd day of May, 2013.

LAURA DIAMOND

TREVOR ANDERSON

JACQUELINE FREEDMAN