

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-148**

PANEL: Ms Laura Diamond, Chairperson
Mr. Paul Johnston
Ms Jean Moor

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

HEARING DATE: August 7, 2013 with submissions dated November 13, 2013,
November 25, 2013 and December 5, 2013.

ISSUE(S): Whether the Appellant is entitled to a further Permanent
Impairment Award for TMJ.

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation
Act ('MPIC Act') and Division 3, Subdivision 1, Section 1.1
of Manitoba Regulation 41/94 (amended 41/2000).

**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

Background:

On April 13, 2008 the Appellant was injured in a motor vehicle accident. As a result of the injuries sustained in the motor vehicle accident the Appellant was in receipt of Income Replacement Indemnity ("IRI") benefits as well as chiropractic treatment benefits.

Previous decisions of the Commission in AC-08-117, AC-09-111 and AC-09-148 dealt with the Appellant's entitlement to IRI benefits and chiropractic treatment.

On December 7, 2010 the Appellant's case manager issued a permanent impairment award of .5% for a concussion, pursuant to Manitoba Regulation 41/94 (amended 41/2000, Division 2, Subdivision 1, Item 1.1.(a)). The Appellant challenged this assessment, sought Internal Review by MPIC, and filed appeals with the Commission.

In a decision dated September 15, 2011 (in AC-09-148 and AC-11-049), the Commission made the following finding in connection with the Appellant's claim for a permanent impairment benefit in connection with temporomandibular joint dysfunction ("TMJ") connected to the motor vehicle accident:

"The Appellant has shown that she continues to have issues with temporomandibular joint dysfunction which are possibly connected to the motor vehicle. As a result, the Commission finds that the Appellant has shown, on a balance of probabilities, that her temporomandibular joint dysfunction was caused by the motor vehicle accident and she is entitled to a permanent impairment benefit as a result.

Accordingly the panel allows the Appellant's appeal in this regard and the Decision of the Internal Review Officer dated March 17, 2010 will be varied accordingly.

The Commission will refer the assessment of the Appellant's temporomandibular joint dysfunction to her case manager in order to obtain an independent assessment by a qualified independent dental practitioner regarding the precise permanent impairment benefits to which the Appellant should be entitled pursuant to Regulation 41/00 – Division 3: Maxifacial System, Subdivision 1, Section 1, Temporomandibular joints (TMJ)."

As a result of this direction the Appellant attended an independent assessment with [Independent Prosthodontist]. On September 5, 2012, she was provided with a decision letter from MPIC indicating that based upon the measurements taken in the independent assessment, she did not qualify for a further permanent impairment payment. The Appellant sought an Application for

Review, stating that [Independent Prosthodontist's] assessment was incomplete and MPIC arranged for her to attend for an additional measurement. This resulted in a permanent impairment calculation of 1% for TMJ as follows:

ENTITLEMENT #2

**Division 3: Subdivision 1, Item 1.1. (d) (ii)
Temporomandibular joints (TMJ)**

(ii) current protrusion 4 to 7 mm – **1%**

The Appellant disagreed with this assessment and requested that the Commission (which had retained jurisdiction in its decision of September 15, 2011, should the parties be unable to agree on the amount of compensation) deal with the issue between the parties. Accordingly, the issue of the amount of the Appellant's entitlement to a permanent impairment benefit for TMJ dysfunction was referred back to the Commission for determination.

Evidence and Submissions:

A hearing was convened on August 7, 2013 to hear evidence and submissions regarding the amount of permanent impairment to which the Appellant should be entitled for TMJ dysfunction. The Appellant indicated that she was seeking a permanent impairment award of 6% in this regard, while MPIC had only allowed an award of 1%. The Appellant sought an award of 3% for jaw extrusion and 3% in regard to protrusive range.

The Appellant gave evidence at the hearing. She indicated that she had attended at [Independent Prosthodontist's] office for an independent assessment and that he had only done two measurements, failing to do the third. Accordingly, she attended to a second appointment where he did a third measurement, measuring 30 mm for her jaw opening. She stated that she was not very symptomatic that day.

The Appellant also indicated that her own dentist, [Appellant's Dentist], had measured 6 mm for overbite and [Independent Prosthodontist] had measured 8 mm. She indicated that both her dentist and her physiotherapist were far more familiar with the proper measurements, as they had seen her many times, often when her jaw was in its acute phase, and requiring treatment.

The Appellant queried the relevance of the overbite to the permanent impairment calculations. She also questioned [Independent Prosthodontist's] technique and she noted that he made her open her jaw as far as she possibly could, beyond her level of comfort.

In a letter dated June 20, 2013, the Appellant's physiotherapist, [text deleted], described her physiotherapy treatment of the Appellant's jaw. She stated:

“On examination I found that she has 22 mm of jaw opening. Minimal functional opening is 35 mm. Normal values for women range between 40-45 mm. She has significant increased tone in all of her jaw muscles, along with significant sensitivity. She has decreased cervical range of motion in all directions, increased tone throughout all her neck muscles, and decreased upper cervical joint mobility (all of which affect the jaw).

(The claimant) was treated 10 times between March 14-May 28/13. She was treated with manual therapy, acupuncture, and was prescribed some self-treatment exercises. She had a moderate improvement of symptoms, muscle tone, and her opening was 30 mm at its best.”

MPIC's Health Care Services Dental Team provided a memorandum from the dental consultant indicating that, in accordance with [Independent Prosthodontist's] protrusive measurement, the Appellant should be entitled to a 1% permanent impairment benefit for reduction of protrusion.

Counsel for MPIC submitted that [Independent Prosthodontist] was an expert prosthodontist and that his measurements should be accepted. However, when the panel inquired as to the relevance

of the overbite measurement, counsel for MPIC could not explain its relevance or impact on the permanent impairment assessment under the regulation.

Accordingly, the hearing was adjourned in order for the Commission to receive further evidence from [Independent Prosthodontist], and from [Appellant's Dentist] and MPIC's Health Care Services Dental Team, should the parties wish.

Further Evidence and Submissions:

At the hearing of August 7, 2013 the Appellant discussed a report from [Appellant's Dentist], dated February 2013, where [Appellant's Dentist] referred to a measurement of a 6 mm overbite. However, this letter was not located by the Appellant or by the Commission staff and no further evidence from [Appellant's Dentist] was submitted to the Commission.

No further evidence was submitted from MPIC's Health Care Services Dental Team.

Counsel for MPIC wrote to [Independent Prosthodontist] requesting further information. On August 12, 2013, [Independent Prosthodontist] wrote to indicate:

“In response to your letter of August 7, 2013, I measure maximum opening between the incisal edges of the upper and lower centrals. To calculate the total opening, it is necessary to add to that measurement the total vertical overlap of the same teeth.

For (the claimant) the total range of motion for unforced opening would be 38 mm...”

[Independent Prosthodontist] wrote again on September 3, 2013. His letter stated:

“In response to your letter of August 27, 2013 for an “explanation of how & why an overbite affects the TMJ measurements:”

The maximum opening is measured between the incisal edges of the upper and lower front teeth.

If there is an overbite – ie a vertical overlap of the upper front teeth over the lower front teeth that measurement would have to be added to the measured opening distance to get the true range of motion.

If there is an open bite – ie the upper and lower front teeth have a vertical open space at complete closure, then that measurement would have to be subtracted to establish the true R.O.M.

If the teeth are edge to edge at closure, then the measured distance is the R.O.M.

The R.O.M. is a guideline to the functional impact of an injury – a limited R.O.M. may impact eating, dental treatment, some medical procedure...”

The parties provided additional submissions in writing to the Commission.

A copy of the Appellant’s submission, dated November 25, 2013, along with additional documentation forwarded on December 5, 2013, is attached.

The Appellant questioned the accuracy and precision of [Independent Prosthodontist’s] measurements. She submitted that the restriction in her bite should be defined as “malocclusion” and should be recognized in the impairment scheme as an “add on to TMJ injury”.

The Appellant submitted that a range of motion opening of 30 mm should be considered as abnormal and should be awarded 3% under the permanent impairment schedule. She submitted that her physiotherapist’s assessment was more precise, as it was an unforced range of motion measurement. Given the nature of the injury, its permanence and tendency to flare up, the measurement should attract a higher percentage to compensate for her need to see a physiotherapist for 10 treatments in order to relieve discomfort and restore her opening to 30 mm. She submitted that [Independent Prosthodontist’s] measurement was a misguided assessment and a forced range of motion.

The Appellant also submitted that [Appellant's Dentist] had measured a protrusive range of 3 mm, as opposed to 5 mm and that the percentage of permanent impairment in this regard should be 3%. However, she indicated that her ability to obtain an opinion from [Appellants Dentist] on this issue was unsuccessful.

Further, she sought an additional award, independent from TMJ, for joint clicking or disc displacement.

In summary, the Appellant requested that the Commission award her a 6.5% award for TMJ injury with malocclusion with an additional 2% award for jaw excursion, or 3% for jaw excursion plus 2% for current laterotrusion, and 3% for current protrusion less than 4 mm (8%).

Counsel for MPIC provided a written submission on November 13, 2013, a copy of which is attached. She referred to [Independent Prosthodontist's] reports dated May 1, 2012, February 5, 2013, August 12, 2013 and September 3, 2013. She referred to the permanent impairment awards for TMJ set out in Division 3, Subdivision 1 of the Permanent Impairment Schedule. Counsel indicated that the Appellant had been assessed by an expert in the field and the measurements of range of motion were as follows:

1. "Jaw excursion – 38mm
2. Laterotrusion – 11mm for both right and left
3. Protrusion – 5mm

According to the PI Schedule, [the Appellant] is entitled to the following awards for the corresponding measurements:

1. Jaw excursion – 0%
2. Reduction of laterotrusion – 0%
3. Protrusion – 1%"

Counsel submitted that the Appellant had already been provided with her 1% permanent impairment award, plus interest, by a case manager’s letter dated April 19, 2013. Accordingly, it was MPIC’s position that the Appellant had received the entire permanent impairment award to which she is entitled for TMJ dysfunction pursuant to the MPIC Act and Regulations and that therefore, the present appeal ought to be dismissed.

Discussion:

The MPIC Act provides:

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.

Manitoba Regulation 41/94 (amended 41/2000) provides:

**DIVISION 3: MAXILLOFACIAL SYSTEM
Subdivision 1**

1. Temporomandibular joints (TMJ)

- ...
- (b) jaw excursion (as measured between the free edge of the upper and lower incisors):
- ...
- (iv) current opening 20 to 30 mm 3%
- (v) current opening greater than 30 mm 0%
- ...
- (c) reduction of laterotrusion...
- ...
- (iii) current laterotrusion greater than 8 mm 0%
- (d) reduction of protrusion:
- ...
- (ii) current protrusion 4 to 7 mm 1%

The onus is on the Appellant to show, on a balance of probabilities, that MPIC’s assessment of her permanent impairment for TMJ was incorrect.

The panel has reviewed the evidence provided by the Appellant, as well as the medical reports on the Appellant's indexed file, and the submissions of the parties.

The Commission has paid particular attention to the reports received from [Independent Prosthodontist], who is a prosthodontist and an expert in the area. He indicated that on May 1, 2012 he measured the Appellant's unforced range of motion at an opening of 30 mm, plus approximately 8 mm to account for deep overbite. He also measured right and left lateral at 11 mm.

[Independent Prosthodontist] reported again on February 5, 2013 to indicate that he had measured total protrusive range at 5 mm.

On August 12, 2013, [Independent Prosthodontist] explained that he had measured maximum opening between the incisal edges of the upper and lower centrals and then added total vertical overlap of the same teeth to that, in order to calculate the total opening. His conclusion was that the Appellant's total range of motion for unforced opening was 38 mm.

He provided further detail on September 3, 2013, indicating that when measuring the maximum opening between the incisal edges of the upper and the lower front teeth, an overbite (a vertical overlap of the upper front teeth over the lower front teeth) measurement would have to be added to the measured opening distance to get the true range of motion.

Although the Appellant submitted that the panel should prefer the verbal evidence provided by her, as well as evidence provided by her physiotherapist and an earlier report from [Appellant's

Dentist] (from 2009), the panel prefers the evidence provided by [Independent Prosthodontist], which was also reviewed by MPIC's dental consultant.

When the permanent impairment awards set out in Division 3, Subdivision 1 of the Permanent Impairment Schedule are applied to [the Independent Prosthodontist's] assessment findings, the panel concludes that the Appellant is entitled to the following awards:

- | | | |
|--|---|-----------|
| 1. Jaw excursion – 38 mm - (Division 3: Subdivision 1, Section 1.1 (b) (v)) | = | 0% |
| 2. Laterotrusion – 11 mm for both right and left -
(Division 3: Subdivision 1, Section 1.1 (c) (iii)) | = | 0% |
| 3. <u>Protrusion (Division 3: Subdivision 1, Section 1.1 (d) (ii))</u> | = | 1% |
| Total | | 1% |

Accordingly, the panel finds that the Appellant has failed to establish, on a balance of probabilities, that the permanent impairment award of 1% for temporomandibular joint dysfunction (TMJ) was incorrect and that she should be entitled to further permanent impairment benefits in this regard. Accordingly, the Commission finds that the permanent impairment award for the Appellant's TMJ condition has been properly assessed and awarded by MPIC.

Dated at Winnipeg this 29th day of January, 2014.

LAURA DIAMOND

PAUL JOHNSTON

JEAN MOOR