

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-122**

PANEL: Ms Laura Diamond, Chairperson
Mr. Brian Hunt
Dr. Chandulal Shah

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

HEARING DATE: December 2, 2015

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits for
brain injury.

RELEVANT SECTIONS: Section 127(1) of The Manitoba Public Insurance
Corporation Act ('MPIC Act') and Division 2, Subdivision 1,
4.7(d) and (e) of Manitoba Regulation

**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 5, 2000. He sustained numerous injuries, including a fractured nose, sore right shoulder, cervical injuries (whiplash) and was in receipt of numerous benefits from MPIC, including permanent impairment payments.

Initially, the Appellant's case manager indicated by letter dated September 27, 2007 that MPIC was unable to consider any entitlements under the Personal Injury Protection Plan ("PIPP") which would be related to a brain injury.

The Appellant sought Internal Review of this decision and on December 5, 2007, an Internal Review Officer for MPIC upheld the case manager's decision, relying upon evidence from MPIC's Health Care Services' psychological consultant which cited the absence of indicators of cognitive symptoms and the time elapsed since the motor vehicle accident in question. He found that it was improbable that the Appellant's complaints of difficulties with memory were a result of a brain injury sustained in the motor vehicle accident in question.

However, subsequent to this Internal Review decision, further reports were received and further entitlements were recognized by MPIC, which included acceptance by MPIC's chiropractic consultant that ongoing headache complaints were collision related. New medical information was also found to establish a probable relationship between the Appellant's sleep disturbance and the motor vehicle accident.

Accordingly, MPIC's Health Care Services team revisited the possibility of a causal relationship between the Appellant's cognitive difficulties and the motor vehicle accident and concluded as follows:

"Therefore, on the basis of the foregoing, it is the writer's opinion that the claimant has developed a permanent impairment of cognitive functioning as a result of medication side-effects (probable) and sleep disturbance (possible). The cognitive deficits are variable and "scattered" and, to the extent that they are caused by sleep disturbance and/or medications, will likely be variable. The cognitive deficits do not prevent the claimant from working, and do not require that he have supervision for the performance of his activities of daily living."

As a result, on May 21, 2015 the Appellant was awarded the following permanent impairment payments:

INJURY/IMPAIRMENT	%	APPLICABLE SECTION
Scalp Scarring	4.01	Division 13: Subdivision 2, Table 13.3
Right Arm Scarring	2.64	Division 13: Subdivision 2, Table 13.3
Right Forearm Scarring	5	Division 13: Subdivision 2, Table 13.3
Right Hand Scarring	3.28	Division 13: Subdivision 2, Table 13.3
Left Forehead Scarring	0.52	Division 13: Subdivision 2, Table 13.1
Scalp loss of sensation	2	Division 2: Subdivision 4, Table 2.2
Olfactory Nerves	2	Division 2: Subdivision 3, Item 1 (a)
Functional Alteration the Brain	8	Division 2: Subdivision 1, Item 4.7 (e)
TOTAL	27.45%	

This award included an award of 7.5% for functional alteration of the brain (pursuant to Division 2, Subdivision 1, Section 7.5(e) of the Regulation), which was then rounded up to 8% by MPIC.

It is from the decision of the Internal Review Officer, dated December 5, 2007, as amended by this subsequent permanent impairment entitlement award, that the Appellant has now appealed.

The issue which remains between the parties is the Appellant's contention that he should be entitled to a higher permanent impairment award than the 7.5% awarded by MPIC for cognitive impairment.

Evidence and Submission for the Appellant:

The Appellant did not submit any additional documentary or medical evidence following the permanent impairment entitlement letter provided to him on May 21, 2015.

The Appellant testified at the hearing into his appeal. He described his life and daily routines. He also described the difficulties which he had been having with short term memory since the motor vehicle accident and how this affects his life.

The Appellant indicated that he was employed as a [text deleted] operator for a [text deleted] business and that he had been employed there for approximately one year. Prior to that, he held other employment, also as a [text deleted] operator, but had been let go because he was forgetting too many things, such as where he put certain materials or orders for customers. He said that he still sometimes does this or gets paperwork mixed up, but he has help at work from labour aids who “get everything together”.

On cross-examination, the Appellant indicated that prior to the motor vehicle accident, he had been employed in industries such as construction, roofing or basement foundations, doing physical general labour work [text deleted].

His duties at work include assisting with customer pick-ups or picking customers’ orders and getting them ready. He said that it is not a difficult job and since he is afraid of being laid-off from a more demanding job, he just prefers to stay with this job, which provides easy work.

The Appellant explained that he lives at home with his girlfriend and [text deleted] daughter. Before that he had been living with his father, who assisted him with many things. Now his

mother and girlfriend help him around the house with physical housekeeping duties, as he finds that difficult due to his pain levels.

He described getting up in the morning and looking after his own hygiene, and dressing. A co-worker picks him up in a car-pooling arrangement, as he indicated that he did not have the money for a driver's license and was still nervous in cars, even as a passenger. He explained that since the motor vehicle accident he has felt some anxiety and sometimes forgets his cell phone, house keys, lunch or other things.

He indicated that after work he comes home and takes a shower or bath and that his girlfriend does all the meal preparation. He helps with some of the childcare for his [text deleted] daughter, but he is never left alone with or in sole charge of her. His mother and girlfriend do all the yard work, shovelling and leaf raking and his girlfriend does the grocery shopping and clothes shopping.

The Appellant indicated that he still has nightmares, which have been bad since the motor vehicle accident. He said he has a few friends but he does not play any sports or exercise, as he used to do.

The Appellant indicated that he takes two or three Percocet pills a day and takes Zopiclone for sleeping. He manages his own medication and there is no need for his mother or girlfriend to monitor his drug usage. The Appellant indicated that he felt capable of living alone, but he had not done so for the past few years. He said he is used to having somebody there and that makes him feel comfortable, helping with any of the little issues that he may have.

Evidence and Submission for MPIC:

MPIC took the position that the 8% permanent impairment award (rounded up from the 7.5% award set out in the Regulations) was correct, given all the medical information on the Appellant's file.

Although MPIC's initial Internal Review decision of December 5, 2007 determined that the Appellant did not sustain a brain injury as a result of the motor vehicle accident, MPIC recognized that the Appellant sustained a laceration to his head and complained of nausea, weakness, dizziness and blurred vision. These were noted in the ambulance patient care report dated August 5, 2000 as well as the [hospital] Emergency treatment record of the same date. On August 6, 2000, records from the [hospital] indicated that the Appellant attended the Emergency Room the day after the motor vehicle accident complaining of dizziness, nausea and blurred vision. He underwent a CT scan of his brain in November 2000 and no intracranial abnormality was seen.

The Appellant's general practitioner, [Appellant's doctor #1], referred him to [Appellant's neurologist], neurologist, who provided reports dated January 9, 2001. [Appellant's neurologist] noted that the Appellant was reporting that he was not knocked out in the accident but that he had daily headaches since that time which were affecting his sleep. He reported minor dizziness with standing and mild blurring of vision. [Appellant's neurologist] also noted that the Appellant denied memory problems, but concluded that he had likely sustained a concussion in the accident.

Then, six years after the 2000 accident, the Appellant's father contacted the case manager regarding issues with his son's short term memory. [Appellant's neurologist] provided a second

report dated December 22, 2006 noting reports of short term memory loss but indicating that there was a normal CT of the brain on the file and MRI results were unremarkable. However, the reports of short term memory issues continued. MPI then agreed to send the Appellant to [Appellant's neuropsychologist] for neuropsychological testing. [Appellant's neuropsychologist] provided reports dated January 12 and 13, 2012 wherein he wrote that the assessment confirmed scattered difficulties in memory and some limitations in attention and concentration, with particular limitation in one type of problem solving. Although he requested the Appellant provide his academic transcripts so that he could complete his assessment, these were not provided and it was discovered that these records no longer exist.

[Appellant's neuropsychologist] also recommended that the Appellant consult a psychiatrist regarding increasing levels of depression and chronic sleep disorder and recommended that he consult with [Appellant's doctor #2] regarding his chronic headaches. He concluded that the Appellant had sustained a concussion in the motor vehicle accident and had scattered difficulties in memory, attention/concentration. In his view the possible causes of cognitive dysfunction included a significant sleep disorder, medication side-effects, discouragement during testing and/or musculoskeletal discomfort.

Following [Appellant's neuropsychologist's] report, another review by MPIC's psychological consultant did not lead to an assessment of a permanent impairment rating regarding cognitive issues. The Appellant did not receive psychiatric treatment, but did see [Appellant's doctor #2].

At the request of counsel for MPIC, the medical and psychological Health Care consultants again reviewed the Appellant's file to determine entitlement to any further permanent impairment benefits. On February 4, 2015, the psychological consultant indicated that the Appellant had

developed a permanent impairment of cognitive functioning as a result of medication and side-effects and sleep disturbance which were related to injuries sustained in the motor vehicle accident. The consultant opined that the Appellant's impairment should be rated at 7.5% (rounded up to 8%) which reflected "*a cognitive disorder that minimally disrupts the performance of the activities of daily living, without the need for supervision, including the side-effects of medication*".

Counsel submitted that the Appellant's evidence confirmed that he is working full-time and able to fulfill his duties as a [text deleted]. Although he is not doing housework, mainly due to musculoskeletal issues, he does not require help or reminders to take his medication. Examples of forgetfulness which he explained are issues which the average person might encounter, such as forgetting a cell phone or lunch, etc.

Counsel submitted that nowhere in the file is there any evidence from a healthcare practitioner indicating that supervision is required for the Appellant in aspects of his daily life. His general practitioner, [Appellant's doctor #1], did not note, for example, that his girlfriend or mother have to administer or supervise his medications, there is no indication anybody recommended that he not have a driver's license, and he is not subject to any work restrictions. There are several detailed reports from [Appellant's Dr. #1] on the file which refer to reports of memory issues, but at no time does he indicate that supervision is required for the Appellant.

There is no evidence to indicate that the Appellant does require such supervision or that the assessment of MPIC's psychological consultant awarding the Appellant a 7.5% permanent impairment award for "*a cognitive disorder that minimally disrupts performance of the activities*

of daily living, without the need for supervision, including the side-effects of medication” was in error.

Accordingly, counsel submitted that the appeal should be dismissed.

Discussion:

Lump sum indemnity for permanent impairment

127(1) 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 provides:

Division 2, Subdivision 1:

4.7 Alterations of consciousness (Posttraumatic cataplexy, coma, epilepsy, narcolepsy, syncope and other neurological disorders and disturbances of consciousness)

(d) cognitive disorder that moderately disrupts the performance of daily living not requiring institutionalization, but requiring occasional supervision..... 15%

(e) cognitive disorder that minimally disrupts the performance of the activities of daily living, without the need for supervision, including the side effects of medication... 7.5%

The onus is on the Appellant to show, on a balance of probabilities, that MPIC erred in awarding him the permanent impairment entitlement of 7.5%, pursuant to Section 4.7(e) of the Regulation, instead an award of 15% pursuant to Section 4.7(d).

The difference between the two subsections set out above is that for an Appellant to be entitled to the higher permanent impairment award of 15%, he/she must require “occasional supervision”.

The panel has reviewed the testimony of the Appellant, the medical evidence on the Appellant's indexed file and the submissions of the Appellant and counsel for MPIC. We recognize that the psychological consultant undertook only a paper review and did not examine or interview the Appellant, in accordance with MPIC's practice in this regard.

However, in spite of this, the majority of the panel is of the view that there is a lack of evidence on the indexed file which indicates that the Appellant requires supervision. More importantly, his testimony showed that he does not receive such supervision. The supervision and assistance that he does receive, particularly in performing household duties, according to the Appellant, is due to his physical impairments rather than any cognitive difficulties. The majority of the panel accordingly finds that the Appellant does not receive or require supervision with the activities of daily living, and therefore, that he does not meet the requirements set out under Section 4.7(d) for a 15% permanent impairment award for cognitive disorder. We find that, on the evidence, the permanent impairment entitlement of 7.5% awarded pursuant to Section 4.7(e) of the Regulation was appropriate.

Accordingly, the majority of the panel finds that the decision of MPIC should be upheld and the Appellant's appeal for a higher permanent impairment benefit for cognitive impairment should be dismissed.

Dated at Winnipeg this 17th day of December, 2015.

LAURA DIAMOND

BRIAN HUNT

See Attached “Dissent”

Dissent:

Following my review of the Appellant’s file, as well as his evidence and the submission of counsel for MPIC, I must note that MPIC’s psychological consultant conducted only a paper review and did not interview or examine the Appellant. There was a lack of evidence on the Appellant’s indexed file indicating whether he requires supervision. In my view, MPIC’s Health Care Services team should have requested such information either from the Appellant’s caregivers, or by seeking an independent medical examination to address that question.

Further, although the majority of the panel has concluded that the evidence before us, either documentary, or from the Appellant’s testimony, did not meet the onus of establishing that the Appellant required supervision, I disagree.

I am of the view, based upon the Appellant’s testimony, that he does require occasional supervision and that he should be entitled to a permanent impairment award for cognitive impairment of 15%, pursuant to Section 4.7(d) of the Regulation. Accordingly, I would have allowed the Appellant’s appeal on that basis.

Dated at Winnipeg this 17th day of December, 2015.

DR. CHANDULAL SHAH