Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-12-029

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Brian Hunt** **Ms Susan Sookram**
APPEARANCES:	**The Appellant, [the Appellant], was not present at the appeal hearing;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**October 20, 2015 and written submission dated February 24, 2017.**
ISSUE(S):	**Whether the Appellant's permanent impairments were correctly assessed and calculated.**
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 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

Background:

The Appellant was injured in a motor vehicle accident on January 17, 2003. He was involved in a high speed motor vehicle accident (MVA) and suffered a severe unstable compression fracture of the T7 requiring open reduction and internal fixation. He developed osteomyelitis requiring removal of the hardware in September of 2003 and was left with a permanent severe compression deformity with some associated significant kyphosis of his thoracic spine.

The Appellant's treating orthopedic surgeon was of the view that he had sustained a serious injury which is often accompanied by a permanent impairment. Unfortunately, his condition then worsened, when a staphylococcus aureus spinal hardware infection was documented and the Appellant had to have the hardware removed from his spine, resulting in laminectomies at four levels. This was also accompanied by permanent consequences. Caregivers indicated that such patients often manifest relative spinal instability, with the tendency to develop increasing degenerative change in the mid-thoracic region.

MPIC concluded that a relapse in the Appellant's condition in September of 2006 was also causally related to the MVA injuries of January 2003. Further, it was determined that his spinal pain was probably related to that incident.

The Appellant's permanent impairment awards were assessed by MPIC and he was provided with a case manager's decision dated June 23, 2010. The Internal Review Officer summarized those entitlements as follows

ENTITLEMENT #1

Division 1: Subdivision 3, Item 2(a)(ii)
Thoracic spine #7 fracture
Loss of height from 25%-50% = 4%

Percentage to be used for application of successive remainders = - 4%

ENTITLEMENT #2

Division 1: Subdivision 3, Item 2(c)
Fusion of Thoracic spine
T5 - T6 = 4%
T6 - T7 = 4%
T7 - T8 = 4%
T8 – T9 = 4%
Total entitlement = 16%

Percentage to be used for application of successive remainders = 16%

ENTITLEMENT #3

Division 13: Subdivision 2, Table 13.3
Right hand scarring
Scar – 1.0 x 0.1cm2 = 0.lcm2
Entitlement = 0.lcm2 x 1% per cm2 = 0.1%

Percentage to be used for application of successive remainders = 0%

ENTITLEMENT #4

Division 13: Subdivision 1, Table 13.1
Facial scarring, class 3

Flat in appearance:
Scar - 1.5 x 0.2 = 0.3cm2
Scar - 1.0 x 0.1 = 0.lcm2
Scar - 1.0 x 0.1 = 0.1 cm2
Scar - 0.8 x 0 1 = 0.08cm2
Total scarring = 0.58cm2
Entitlement = 0 58cm2 x 1% per cm2 = 0.58%

Faulty in appearance:
Scar - 1 5 x 0.2 = 0.3cm2
Entitlement = 0.3cm2 x 2% per cm2 = 0.6%

Total entitlement = 0.58 + 0.6 = 1.18%

Percentage to be used for application of successive remainders = 1%

ENTITLEMENT # 5

Division 13: Subdivision 2, Table 13.3
Posterior trunk scarring
Scar - 24 x (1.5 + 2) = 40.8cm2 (total area)*

*Maximum entitlement for posterior trunk scarring = 6%

Percentage to be used for application of successive remainders = 6

ENTITLEMENT #6

Division 3: Subdivision 1, 4.2(a)
Alteration or loss of teeth
Previously damaged teeth
Tooth 11 0.5%
Tooth 12 0.5%

Percentage to be used for application of successive remainders = 0.5% x 2

Through implementation of the chart of successive remainders as dictated by the MPIC Act, the Appellant received 27% of the maximum indemnity. He filed an Application for Review of his case manager's decision.

Subsequent to the case manager's decision of June 23, 2010, the Appellant was also treated for psychological issues resulting from the trauma of the accident. The Appellant advised the Internal Review Officer that he continued to struggle and remain off work due to stress and major depression from the MVA and that when his permanent disfigurement and permanent back condition, along with his scarring and psychological issues were considered, he should be entitled to a higher permanent impairment award.

Although the Appellant indicated that he would provide the Internal Review Officer with additional information in support of the review, no such information was received. The Appellant's comments regarding a permanent impairment for his psychological condition were submitted for review by MPIC's Health Care Services psychological consultant. This information was communicated to the Appellant by way of an Internal Review decision dated November 25, 2011. It is from this decision of the Internal Review Officer that the Appellant filed a Notice of Appeal dated February 25, 2012.

Subsequent to the filing of the Notice of Appeal, further medical and psychological reports were received and reviewed by MPIC. On July 14, 2014, the Appellant's case manager wrote to him to provide confirmation that he was entitled to a permanent impairment benefit of 32.28% of the maximum amount payable, equalling $38,152.38 plus interest. The previous amount paid to him was subtracted from the total entitlement and a cheque in the amount $9,629.96 was forwarded to the Appellant. This calculation included a permanent impairment award of 5% for a

psychiatric condition, pursuant to Division 11: Class 5 under Manitoba Regulation 41/94. According to counsel for MPIC, this award was based on a report of [Appellant's psychiatrist #1], dated June 20, 2014, which had been reviewed by MPIC's Health Care Services psychological consultant on July 11, 2014.

Appeal Hearing:

The Appellant was self-represented.

Through its case management process, the Commission held a number of Case Conference Hearings (CCH) regarding the status of the Appellant's appeal and the scheduling of a hearing date. Although the Appellant received Notices of CCH, he participated in some of the CCH's held, by teleconference, but did not participate in others.

In discussions with Commission staff, and through the case management and CCH process, the Commission determined that the Appellant could participate in his appeal hearing by teleconference.

Following a CCH of July 23, 2015, the Commission issued a Notice of Hearing dated August 19, 2015 to the Appellant and to MPIC's legal counsel which fixed the date for the appeal hearing for October 20, 2015 at 9:30 a.m., at the Commission's office in Winnipeg. In this Notice of Hearing, the Commission stated that:

> If you do not attend the hearing, the Commission may proceed with the hearing of your appeal in your absence, and may issue its final decision either granting or dismissing your appeal in whole or in part.

The Commission was advised by the Commissioner's Secretary at the appeal hearing that a Notice of Hearing (a copy of which is attached hereto and marked as Exhibit "A") in respect of this appeal, dated August 19, 2015 was forwarded by Canada Post Xpresspost and by regular mail to the Appellant's address at P.O. Box 729, Ste. Rose du Lac, Manitoba R0L 1S0, being the address of the Appellant as set out in his Notice of Appeal. The Commission's Secretary further advised that the Commission received a print-out form from Canada Post which indicated that on August 21, 2015, delivery of the Notice of Hearing (Exhibit "A") was accepted.

The Notice of Hearing sent by regular mail was not returned to the Commission.

The hearing commenced at 9:30 a.m. on October 20, 2015. Counsel for MPIC was in attendance. The Appellant was expected to participate by teleconference, but he did not answer his telephone.

Section 184.1 of the MPIC Act provides:

> **Powers of commission on appeal**
>
> 184(1) After conducting a hearing, the commission may
>
> (a) confirm, vary or rescind the review decision of the corporation; or
>
> (b) make any decision that the corporation could have made.
>
> **Commission to give copy of decision to parties**
>
> 184(2) The commission shall as soon as reasonably practicable give a copy of its decision to the appellant and the corporation and advise them of their right to apply to The Court of Appeal for leave to appeal on a question of jurisdiction or law.

The Commission determined that the Appellant had been properly served with a Notice of Hearing in accordance with the provisions of the MPIC Act and, as a result, decided to proceed with the appeal hearing.

Counsel for MPIC reviewed the evidence on the Appellant's indexed file and provided a submission.

Following the adjournment of the hearing and a review of the evidence, the panel asked counsel to briefly reconvene. The panel indicated to counsel for MPIC that it required more evidence from the Appellant's caregivers, including [text deleted], his family physician, and his psychiatrists, [text deleted], to ask how often they saw the Appellant and provided follow-up. Because a key component of the permanent impairment award for a psychiatric condition is the frequency of treatment required, the panel wished to ask these caregivers for their opinions as to how often the Appellant required psychiatric treatment and follow-up.

Additional Evidence:

A report dated December 16, 2015 was received from [Appellant's psychiatrist #1]. A report from [Appellant's doctor] was received and dated December 21, 2015. [Appellant's psychiatrist #2] reported on February 24, 2016. [mental health therapist], a mental health therapist who had counselled the Appellant reported on October 20, 2016. Copies of these reports were provided to both parties. MPIC advised that the reports were then submitted to its Health Care Services psychological consultant for review. A report from Health Care Services was provided on November 18, 2016 and forwarded to the Appellant.

These reports were received and reviewed by the Commission, who wrote to the parties on January 24, 2017 requesting their written submissions regarding their positions as to the impact of this new evidence upon the Appellant's appeal and claim for permanent impairment benefits. A Supplemental Index containing the new documentation was prepared and provided to the parties for their reference. The parties were asked to provide written submissions regarding the impact of the new psychiatric evidence by February 24, 2017.

Counsel for MPIC provided a written submission by letter dated February 24, 2017.

No written submission was received by the Appellant.

Evidence and Submission for the Appellant:

Although the Appellant participated in some CCHs leading up to the appeal, he did not participate in the appeal hearing. Accordingly, the panel has considered the written submissions of the Appellant contained in his Application for Review and Notice of Appeal.

In his submission to the Internal Review Officer, the Appellant submitted that the permanent impairment benefits awarded by his case manager's decision of June 23, 2010 failed to address all of the permanent impairment benefits to which he should be entitled.

According to the Appellant's Application for Review dated July 31, 2010, the Appellant took the position that:

> I believe I am not being compensated enough for my injuries.
> All my injuries weren't looked at
> More info and updates to follow.
> Right now I'm off with stress and major depression due to this accident.
> I receive this letter on the June 30/10.

> ...I'm still stressed out and in major depression moods, and feel I was pressured... I've been really stressed out... It all stems back from the accident. I can't sleep at night and have flashbacks...
>
> ...The MRI's clearly show the hunch back, and from the outside you can see me hunched back even when I walk. If this ain't permanent disfigurement, I don't know what is...
>
> ...Nowhere's do I see getting paid for my permanent injury. I see getting paid for fusion, scarring, the fracture and the teeth, but nothing for my ongoing permanent back condition... I see fusion of thoracic spine but nothing about the infection or deterioration of the vertebrae, or the compressed fractured vertebrae which can collapse at any time.
>
> Posterior trunk scarring again. Provide me with calculations. This should be doubled as I was cut twice because of two surgeries.

In his Notice of Appeal dated February 25, 2012, the Appellant stated:

> I don't believe it to be correct, my life is a complete mess (stress & depression) that MPIC has caused me. They lied to me, and treated me with no respect to the matter at all.

In a letter to his Appeals Officer dated March 27, 2012, the Appellant wrote:

> I suffer from severe bouts of depression which often bring me to tears daily. Compounded by endless sleepless nights and paranoia that MPI is watching my every move just so they can find an ounce of reason to withhold benefits, my family has suffered as well. Trying to raise a family under such circumstances has been nearly impossible, knowing I will never return to the physical and mental health I was at prior to an auto accident that was not my fault.
>
> There are periods of days, weeks even months that go by and I can barely recall what has happened. Depression is a very lonely world in which definition of time, place, and hope are often missing. ...

From this, the panel finds that the Appellant believes he should be awarded additional permanent impairment benefits for impact to his mental health, hunchback disfigurement (kyphosis), permanent back condition, infection, deterioration, compression fracture of vertebrae, and additional scarring.

Evidence and submission for MPIC:

MPIC submitted that the Appellant had failed to provide any new or additional physical evidence to support his claims of additional physical impairment. Counsel submitted that medical reports from the Appellant's family physician, [text deleted], submitted prior to and after the Internal Review decision, on June 12, 2011 and December 3, 2012, referred to the Appellant's feelings of disability as well as the stress and mental health challenges he experiences. However, no further impairments were identified.

Counsel for MPIC went on to review each component of the permanent impairment award which had been provided to the Appellant and relevant sections of Regulation 41/94 under the MPIC Act.

1. Thoracic spine compression fracture:

   Division 1: Subdivision 3, item 2(a)(ii)(n) between 25% to 50%

   The appropriate percentage of 4% was used

2. Fusion of thoracic spine:

   Division 1: Subdivision 3, item 2(c)

   4% per interspace x 4

   The appropriate percentage of 16% was used

3. Trunk scarring:

   Division 13: Subdivision 2, Table 13.3

   Apply Division 13, subdivision 2, Table 13.3

   The appropriate percentage of 6% was used

4. Facial scarring:

   Division 13: Subdivision 1, Table 13.1

Class 3 – 1.18%.

The appropriate percentage of 1% was used

5. Loss of Teeth:

   It was submitted that dental reports from [Appellant's dentist] dated June 23, 2003 and August 19, 2003 established that teeth #11 and #21 were lost as a result of the motor vehicle accident but that remaining teeth requiring extraction had pre-existing damage, not due to the motor vehicle accident. As a result, two permanent impairment awards of .5% each should be allowed.

   The appropriate percentage of 1% was used

6. Hunchback disease (kyphosis):

   Counsel submitted that the Appellant had already received the maximum amount awardable for trunk scarring and disfigurement and that no further award for trunk disfigurement was available, as the Appellant had received the maximum impairment rating.

   The appropriate percentage of 0% was used.

7. Sensory loss:

   Counsel submitted that on November 25, 2009, [Appellant's doctor] reported that "on neurological examination there is minimal deficit except for some mild parastesia around the area of his incision of his thoracic spine".

   Counsel submitted that according to the regulations, this described a Class 1 sensory loss with a permanent impairment entitlement of 0%.

   The appropriate percentage of 0% was used.

8. Psychiatric Condition:

   Division 11: Psychotic Condition, Syndrome or Phenomenon

Counsel for MPIC reviewed the reports from the doctors and mental health counsellor received by the Commission between December 16, 2015 and October 20, 2016.

[Appellant's doctor] reported that the Appellant had developed symptoms consistent with acute major depression in the spring of 2010 and was diagnosed with Post-Traumatic Stress Disorder (PTSD). He was referred to [Appellant's psychiatrist #2] in May 2010 and, from May 2010 to March 2011 he was seen on a monthly basis, with medication adjustments. He began seeing [Appellant's psychiatrist #1] in May 2013 and showed improvement up to September 2014. Since December 2014 the Appellant has shown significant improvement and stabilization of his major depression and was coping better with his PTSD. According to [Appellant's doctor], the Appellant now only requires regular office visits for review of his major depression and other medical conditions every two to three months. He advised that the Appellant would continue to need regular follow-up medical office treatment approximately every two to three months to review his chronic psychiatric and other medical issues on a long-term basis.

[Appellant's psychiatrist #2]'s report, dated February 24, 2016, indicated that he had no further contact with the Appellant since April 2013. The Appellant had shown some therapeutic response to medication, and although he was seeing the Appellant on a regular basis, the appointments were not every month. They were every three to four months, and at times they were even less frequent. He noted that it was difficult to assess whether the Appellant would have benefited from more frequent treatment.

[Appellant's psychiatrist #1] indicated that he had first seen the Appellant in July of 2013, with follow-up appointments in October 2013 and January 2014, but had not seen the Appellant since April of 2014.

Lastly, counsellor [mental health therapist] provided a report dated October 20, 2016 in which he wrote that she had no record of the Appellant seeing her for PTSD treatment.

Counsel also reviewed a report from MPIC's Health Care Services consultant dated November 18, 2006 which reviewed the new reports received. The consultant indicated that these reports did not change the opinion that the Appellant's entitlement to a permanent impairment award would lie under Class 5, for a psychiatric condition impairing the person's ability and requiring regular medication, psychiatric intervention or both on an occasional basis of less than once per month.

Counsel submitted that this opinion should be accepted and the appeal dismissed. A permanent impairment award compensates a victim for permanent injury they are left with as a result of a motor vehicle accident. In terms of a psychological condition, that means that the person's condition giving rise to a permanent impairment award must stabilize to a level that is expected to be permanent, and the award should be based on the condition at that level. Permanent impairment awards are not given based on symptoms that are temporary or that are in the process of improving.

The psychiatric and counselling reports referred to above show that the Appellant is stable and requiring ongoing treatment. His condition has stabilized such that he requires

care every two to three months. This equates to a Class 5 psychiatric impairment, which has already been paid to the Appellant.

The appropriate percentage of 5% was used.

Discussion:

The MPIC Act provides:

> **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.

Regulation 41/94 provides:

Division 11: Psychiatric Condition, Syndrome or Phenomenon

Class	Symptom or condition	Impairment Rating
Class 4	A psychiatric condition, syndrome or phenomenon that, including adverse effects of medication, impairs the person's ability to perform the activities of daily living, ability to function socially or sense of well-being, to such an extent that he or she requires psychiatric follow-up on a monthly basis.	15%
Class 5	A psychiatric condition, syndrome or phenomenon that, including adverse effects of medication, impairs the person's ability to perform the activities of daily living, ability to function socially or sense of well-being, to such an extent that he or she requires regular medication, psychiatric intervention or both on an occasional basis (less than once per month).	5%

The panel has reviewed the documentary evidence on the Appellant's indexed file, the Appellant's Application for Review and MPIC's submissions, both oral and written. We have concluded that MPIC has properly awarded the Appellant all the permanent impairment benefits to which he is entitled to date.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in her assessment of the applicable permanent impairment awards. However, the Appellant did not provide any further evidence to support his position. He provided no further medical evidence to support and establish his claim for additional permanent impairment benefits for "back disfigurement", "permanent back condition", "infection, deterioration, compression and fracture of vertebrae" or "additional scarring".

In regard to the Appellant's kyphosis (or hunchback disease), back condition, infection deterioration, compression and fractured vertebrae, the panel considered the evidence of [MPIC's doctor], who assessed the loss of height resulting from the vertebral body compression fracture as 40%. We have also considered [MPIC's doctor's] opinion that the Appellant suffered four fusions of the thoracic vertebrae, entitling him to a permanent impairment of 4% per interspace (x4) for a total of 16%.

These awards, along with the maximum allowable award of 6% for trunk scarring and disfigurement, comprise the total entitlements which, to date, have been established by the evidence for the Appellant's thoracic spine and trunk injuries.

We have also reviewed physiotherapist [text deleted's] report of January 19, 2010. The physiotherapist met with and examined the Appellant and objectively measured his scars. This formed the basis of the permanent impairment award for facial and trunk scarring. The panel concludes that based on this evidence, as well as the failure of the Appellant to provide any contradictory evidence, the permanent impairment awards for scarring should also be upheld.

In regard to the Appellant's dental injuries, we have reviewed [Appellant's dentist's] reports, which provided the basis for concluding that only the loss to tooth #11 and #21 were related to the motor vehicle accident in question. The Appellant provided no further evidence to show that any other dental injuries resulted from the motor vehicle accident.

In regard to the Appellant's psychiatric condition, the panel carefully reviewed the evidence on the Appellant's indexed file and wrote to four different caregivers to receive further information regarding the frequency of psychiatric care required by the Appellant.

The responses provided by [Appellant's psychiatrist #1] (December 16, 2015), [Appellant's doctor] (December 21, 2015), [Appellant's psychiatrist #2] (February 24, 2016), and counsellor [mental health therapist] (October 16, 2016) clearly established that the Appellant requires psychiatric/psychological care, pursuant to Class 5, under Division 11 of the Regulations, at a frequency of less than once per month. Therefore, the 5% permanent impairment award provided to the Appellant for a psychiatric condition on July 14, 2014 appropriately addresses this impairment. The panel notes that the 5% permanent impairment award for a psychiatric condition was awarded on July 14, 2014, after the Internal Review decision of November 25, 2011. Accordingly, the panel finds that the Internal Review decision of November 25, 2011, as

amended by the permanent impairment entitlement decision of July 14, 2014, should be upheld. The Appellant's appeal for further permanent entitlement awards is hereby dismissed.

Dated at Winnipeg this 19th day of April, 2017.

LAURA DIAMOND

BRIAN HUNT

SUSAN SOOKRAM