Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-18-037, AC-18-059

PANEL:	**Ms Jacqueline Freedman, Chair** **Mr. Trevor Anderson** **Ms Janet Frohlich**
APPEARANCES:	**The Appellant, [text deleted], was self-represented. Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Andrew Robertson.**
HEARING DATE(S):	**November 28, 2019**
ISSUE(S):	**Whether the Appellant is entitled to PIPP benefits in respect of his January 18, 2018, right knee arthroplasty.** **Whether the Appellant is entitled to a further permanent impairment benefit in connection with his March 19, 2013, left knee revision arthroplasty.**
RELEVANT SECTIONS:	**Subsections 70(1) and 127(1) of The Manitoba Public Insurance Corporation Act ("MPIC Act") and Division 1, Subdivision 2, section 3.2, paragraph (f) of Schedule A to 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:

[Text deleted] (the "Appellant") slipped and fell while exiting a vehicle on April 16, 2004 (the "MVA"). The Appellant injured his left knee as a consequence of the MVA and as a result he was entitled to benefits under the Personal Injury Protection Plan ("PIPP") provisions of the MPIC Act.

The Appellant's pre-existing left knee osteoarthritis was enhanced due to the MVA, requiring a total knee replacement (arthroplasty) on March 25, 2009. On March 25, 2010, the case manager issued a decision awarding the Appellant various permanent impairment benefits, including an 8% benefit under Division 1, Subdivision 2, paragraph 3.2(f), for "knee, thigh or leg injuries requiring a knee arthroplasty".

Due to ongoing problems with his left knee, the Appellant underwent a left knee revision arthroplasty (essentially a repeat of the first procedure) on March 19, 2013. In July, 2017, the Appellant sought a further 8% permanent impairment benefit in connection with his March 19, 2013, left knee revision arthroplasty.

MPIC considered the Appellant's request. The case manager issued a decision letter dated September 22, 2017, which provides, in part, as follows:

> As discussed, you have previously been paid an entitlement for the left knee arthroplasty therefore there is no additional entitlement for the secondary left knee arthroplasty.
>
> A review of your file indicates that you have been paid the maximum permanent impairment entitlement for left lower limb scarring, however range of motion to the left knee was not measured and no permanent impairment entitlement has been paid to date. As discussed, an assessment of your left knee range of motion is required to determine if there are further ratable impairments. You indicated that due to your upcoming relocation, it would be preferable to complete this assessment following your move. I will follow up with you to discuss this assessment following your relocation.

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager, and issued an Internal Review decision dated December 15, 2017, which provides, in part, as follows:

> MPI's medical consultant reviewed your file and concluded that "*There is no extra rating for a revision total knee replacement surgery unless the scarring has increased or the range of motion of the knee has decreased.*"
>
> Your 2010 permanent impairment rating/payment under this section (i.e. Division 1: Subdivision 2, Item 3.2 (f)) recognized that you have been left with a permanent deficit in terms of your anatomy (left knee) and physical function. You have already received the applicable impairment rating specific to a left knee arthroplasty (See Fact #3). The permanent impairment rating is not cumulative or associated with the number of procedures or surgeries performed.
>
> Giving consideration to the evidence on file and the intent of the *Act* and its legislation, I agree with the case manager's decision, which is supported by MPI's medical consultant's opinion, and conclude that you are not entitled to a second permanent impairment rating specific to the revision arthroplasty surgery performed on March 19, 2013.

In addition, the Appellant had earlier contacted the case manager to advise that, although he did not injure his right knee in the MVA, he would require arthroplasty of his right knee, which was deteriorating due to the continual limping and other effects of surgery on his left knee. The Appellant underwent right knee arthroplasty on January 18, 2018. He sought PIPP benefits in respect of that surgery.

MPIC considered the Appellant's request. The case manager issued a decision letter dated February 9, 2018, which provides, in part, as follows:

> Based on the information we have on file, we have been unable to confirm the injury and subsequent surgery to the right knee resulted due to the incident of April 16, 2004.
>
> […]
>
> As you did not report any injury to your right knee and we are unable to plausibly conclude the condition for which you required surgery developed secondary to the left knee injury, we are unable to offer any additional benefits.

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager, and issued an Internal Review decision dated May 29, 2018, which provides, in part, as follows:

> MPI's medical consultant completed a thorough review of the medical evidence on file. The consultant concluded (based on a balance of medical probability) that your right knee osteoarthritis and January 18, 2018 right knee arthroplasty is not directly related to the remote slip and fall of April 16, 2004.
>
> […]
>
> Giving consideration to all information on your file, I agree with the case manager's decision, which is supported by MPI's medical consultant's opinion, and conclude your right knee osteoarthritis and January 18, 2018 right knee arthroplasty, on a balance of probabilities, is not causally related to the accident of April 16, 2004. As such, you are not entitled to PIPP benefits in relation to your January 18, 2018 right knee arthroplasty.

The Appellant disagreed with the both decisions of the Internal Review Officer and filed this appeal with the Commission.

Issues:

The issues which require determination on this appeal are as follows:

1. Whether the Appellant is entitled to PIPP benefits in respect of his January 18, 2018, right knee arthroplasty; and
2. Whether the Appellant is entitled to a further permanent impairment benefit in connection with his March 19, 2013, left knee revision arthroplasty.

Decision:

For the reasons set out below, the panel finds as follows:

1. That the Appellant has failed to establish, on a balance of probabilities, that he is entitled to PIPP benefits in respect of his January 18, 2018, right knee arthroplasty; and

2. That the Appellant has failed to establish, on a balance of probabilities, that he is entitled to a further permanent impairment benefit in connection with his March 19, 2013, left knee revision arthroplasty.

Legislation:

The relevant provisions of the MPIC Act are as follows:

> **Definitions**
>
> 70(1) In this Part,
>
> **"accident"** means any event in which bodily injury is caused by an automobile;
>
> **"bodily injury caused by an automobile"** means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile [...]
>
> **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 (the "Regulation") provides, in part, as follows:

> **Compensation for permanent impairment based on Schedule**
>
> 1 Compensation for permanent impairments shall be determined on the basis of Schedule A.

Division 1, Subdivision 2 of Schedule A to the Regulation provides, in part, as follows:

> **3. Knee and leg**
>
> […]
>
> **3.2 Fractures**
>
> (a) tibial, fibular or patellar fractures with non-specified abnormal healing. 1%

Fracture complications:

(b) patellar fractures resulting in its surgical removal. 5%

(c) fracture or dislocation of the patella resulting in quadriceps atrophy 2%

(d) leg (tibial or fibular) fractures resulting in single or multi-planar angulation:
(i) greater than 15 degrees 3%
(ii) 10 to 15 degrees 2%

(e) leg (tibial or fibular) fractures resulting in mal-rotation:
(i) greater than 20 degrees 3%
(ii) 10 to 20 degrees 2%

(f) knee, thigh or leg injuries requiring a knee arthroplasty. 8%

(g) intra-articular fracture of the knee 2%

These awards include any limb shortening or weakness.

Evidence of the Appellant:

The Appellant testified at the appeal hearing, and was also cross-examined by counsel for MPIC.

He described the 2004 MVA, and said that as he was getting out of the car, his left knee turned over and this caused a lot of damage. It took a long time, and three surgeries, to repair the damage. Throughout the whole time period his left leg was unstable, weak and painful. He had his first major surgery in 2009, but that surgery did not go well and he continued to have extreme pain. He tried to go back to work but he was unable to do so.

In 2013, [orthopedic surgeon] did a revision total left knee arthroplasty. Subsequently, the left knee became infected. The Appellant said he was continually in rehab mode, which kept him from being employed. There was never a break, until 2018, that he did not have knee problems. He walked with a strange gait, which was commented upon by his physiotherapist. He also gained weight, which further affected how he walked, and all of this affected his right knee.

The Appellant said that his right knee started hurting a couple of years after the MVA. He acknowledged that there is a lack of documentation regarding his right knee, but he pointed out that the medication he was taking in respect of his left knee was medicating his whole body. He noted that in 2005, [Appellant's health care provider] commented on his right knee, and in a report dated June 15, 2009, [Appellant's health care provider] said that his right knee would likely need to be replaced. The Appellant was firm in his view that the injury to his left knee caused consequential damage to his right knee. He said that every medical person he spoke to said it's going to happen, "but we can't draw a line to it". The Appellant said that for the most part, his right knee was ignored because it was not as big an issue as his left knee. There was no trauma to the right knee; it was degenerative change, which continued to get worse over time.

Prior to 2004, the Appellant said his knees were fine. He played hockey and was active. It bothers him that MPIC doesn't believe him about his right knee, when they always believed everything regarding his left knee. The damage to his left knee definitely affected his gait, which caused damage to his right knee.

Counsel for MPIC questioned the Appellant regarding when his health care providers first noted his right knee symptoms. He referred the Appellant to a chart note dated January 6, 2009, made by [sport's medicine specialist], that identified osteoarthritis in his right knee, which the Appellant agreed was accurate. The Appellant said that he had mentioned his right knee earlier to [Appellant's health care provider]; however, counsel pointed out that [Appellant's health care provider] did not make note of the Appellant's right knee issues until his report dated June 15, 2009, which the Appellant acknowledged.

Counsel also questioned the Appellant in connection with a consultation note from [orthopedic surgeon] dated January 19, 2009, which states that the Appellant "had bilateral knee pain for years, left greater than right". The Appellant said that during his visit with [orthopedic surgeon], the focus was on his left knee but they did talk about his right knee. He didn't exactly recall the conversation or whether he said pain in his right knee was happening for years; at that time his right knee was an ache. The Appellant said that his right knee pain began before the first left knee arthroplasty, which was in March, 2009. The major issue impacting his right knee was the limp caused by his left knee pain, which threw his body out of kilter.

The Appellant was then referred by counsel to a report from [pain management specialist] dated February 17, 2015, which notes "complaints of bilateral knee pain". In response to a question from counsel regarding why there is no mention of the Appellant's right knee problems in the medical documentation subsequent to [Appellant's health care provider]'s June, 2009, report until the report from [pain management specialist] in 2015, the Appellant responded that he thought he mentioned his right knee every time, but the focus was on the left knee.

Counsel noted that in an email to his case manager dated September 13, 2017, the Appellant stated that certain of his health care providers supported his position that his right knee problems were caused by the damage to his left knee and he was going to approach them for medical information. The Appellant identified those providers as [Appellant's health care provider], [orthopedic surgeon] and his physiotherapist [text deleted]. In response to questions from counsel for MPIC, the Appellant said that he wasn't able to approach them for their opinion, and that none of them has provided a specific opinion.

Submission for the Appellant:

The Appellant provided oral argument as well as a written submission at the hearing, which was appreciated.

He first addressed his entitlement to a further permanent impairment ("PI") benefit in respect of his March 19, 2013, left knee revision arthroplasty. The Appellant pointed to the wording of paragraph 3.2(f) of Division 1, Subdivision 2 of Schedule A of the Regulation, as follows:

> (f) knee, thigh or leg injuries requiring a knee arthroplasty. 8%

He argued that paragraph 3.2(f) provides for payment of a PI benefit where a claimant has a knee arthroplasty. He submitted that there is nothing in the wording of that paragraph which says the PI benefit should not be paid every time an arthroplasty is done; the legislation says if you have a knee arthroplasty, you should be paid for it. He argued that he had two left knee arthroplasty surgeries, and therefore he should be paid the PI benefit twice. The MPIC Act and the Regulation are MPIC's wording, and MPIC has not lived up to the wording. He has had two left knee arthroplasties and has only received a PI benefit for one of them. The Appellant also noted that MPIC's Health Care Services consultant provided an opinion on the meaning of the Regulation and he argued that it is not appropriate to ask a medical consultant to give an opinion on a question of law.

The Appellant then addressed his entitlement to PIPP benefits in connection with his January 18, 2018, right knee arthroplasty. He acknowledged that he did not injure his right knee in the 2004 MVA. He submitted that the damage to his right knee occurred as a result of the damage to his left knee; it was a slow erosion of the right knee that happened due to being out of kilter and limping. The Appellant pointed out that he had numerous medical problems related to his left knee,

including multiple surgeries, nerve damage, loss of sensation, weakness, and as a result, the right knee slowly degenerated over time. He suffered from loss of range of motion and weakness in his left knee, which caused him to limp and tilt to the left, and this caused unusual stress to his right knee joint. This went on over a period of 13 years. The time during rehab was the worst. He was constantly limping and putting extra pressure on his right knee. He also had difficulty maintaining his weight as he was unable to properly exercise and be active, which also added stress to the right knee.

The Appellant acknowledged that there was a lack of documentation regarding the damage to his right knee, but he argued that this is because the right knee was not the major issue; the left knee was consuming him completely. However, over time the stress on his right knee continued and caused degenerative damage to the point where he required the right knee arthroplasty in 2018. The Appellant pointed to an article that he had submitted to the indexed file, which was from a supplement to the [newspaper] on Thursday, May 9, 2019, promoting physiotherapy services. That article stated that "unfavourable mechanical joint stress can be caused by previous injury of the involved joint or even of another joint". The Appellant submitted that this article supports his position.

The Appellant noted that he has over thirty years of experience in the insurance industry. He said there are times when you just have to listen to the claimant, and MPIC did not give any weight to what he said. He is certain that the damage to his right knee was consequential upon the injury to his left knee in the MVA. Even though there is not a lot of documentation, he tried to clarify things through his oral evidence. It is hard to pinpoint a moment in time when his right knee deteriorated, as it was a slow erosion, and he was being treated at the time with medication for his left knee,

which also helped his right knee; however, the deterioration was caused by the damage to his left knee. The Appellant submitted that he is entitled to PIPP benefits with respect to his right knee, including a PI benefit with respect to the right knee arthroplasty, a PI benefit for scarring with respect to his right knee, as well as related travel and accommodation costs in connection with the surgery and other medical visits.

Submission for MPIC:

Counsel for MPIC provided oral argument at the hearing. He noted that MPIC accepted that the Appellant's left knee was injured in the MVA, and MPIC provided PIPP benefits to him in respect of that injury.

Counsel first addressed the Appellant's claim for PIPP benefits in respect of his January 18, 2018, right knee arthroplasty. It is MPIC's position that the Appellant's right knee arthroplasty is not related to the MVA. The Appellant described his right knee damage as an erosion over time. Counsel reviewed the documentary evidence related to the Appellant's right knee. He identified the medical reports from early to mid-2009, from [sport's medicine specialist], [orthopedic surgeon] and [Appellant's health care provider], which mention the pain in the Appellant's right knee. Counsel pointed out that the next mention of pain in the Appellant's right knee in the medical documentation is in 2015, six years later, in the report from [pain management specialist]. Shortly after that, there is regular reporting up until the 2018 arthroplasty.

Counsel submitted that the documentary evidence does not support that there was an ongoing, gradual erosion of the Appellant's right knee and increasing pain. Rather, the documentary evidence reflects a few mentions of pain in the Appellant's right knee in 2009; then, starting in

2015 his right knee became a problem. None of the Appellant's treating practitioners have provided a report with respect to causation of the Appellant's right knee damage; they have treated it, but they have not commented on causation. The Appellant told the case manager on September 13, 2017, that three of his health care providers said that there was "at least a partial causal relationship for the right knee problems". However, these providers did not submit opinions on this issue. The Appellant said that every person that he spoke to said that this was going to happen but that you couldn't "draw a line".

The only medical information on the file regarding causation of the Appellant's right knee problem is the Health Care Services report of January 25, 2018, which states, in part, as follows:

> On balance it is medically probably [*sic*] that the claimant's right knee OA and total knee arthroplasty is not directly related to the remote April 16, 2004 slip and fall for the following reasons;
>
> …
>
> - Finally, there is no medical evidence in the literature to suggest that an injury to one lower extremity would have any significant impact on the opposite uninjured limb; unless the injury resulted in major muscle or nerve damage causing partial or complete paralysis of the damaged leg and/or shortening of the injured lower extremity resulting in a limb length discrepancy of more than 4-5 centimeters such that the gait pattern has altered to the extent that there is a significant lurching type gait.

Counsel pointed out that the Health Care Services report said that there must be either major muscle or nerve damage resulting in partial or complete paralysis of the damaged leg, which is not the case here, or an altered gait which results from shortening of the leg of more than 4 to 5 centimeters, which is also not the case.

He addressed the article referred to by the Appellant, promoting physiotherapy services in the [newspaper]. Counsel submitted that this article is simply an advertisement, trying to entice people

to use physiotherapy services. Further, at best it may be suggestive of how joints can become overloaded, but it has no connection to the Appellant's specific situation. The Appellant has seen numerous health care providers who could have provided an opinion on his specific circumstance, but none of them has done so. The Appellant has the burden to show that the Internal Review Decision was wrong. Given the lack of evidence, counsel submitted that the Appellant has failed to meet the burden and his appeal on this issue should be dismissed.

Counsel then addressed the Appellant's claim for a further PI benefit in connection with his March 19, 2013, left knee revision arthroplasty. He referred to the wording of paragraph 3.2(f) of Division 1, Subdivision 2 of Schedule A of the Regulation, quoted above, and noted that MPIC paid to the Appellant a PI benefit of 8% under paragraph 3.2(f) in respect of his first left knee arthroplasty, which took place on March 25, 2009. MPIC denies that the Appellant is entitled to a second award under paragraph 3.2(f) in respect of his March 19, 2013, left knee revision arthroplasty.

Under section 127 of the MPIC Act, a victim who suffers a permanent impairment is entitled to a lump sum indemnity. Counsel submitted that according to the MPIC Act, the compensation is for the impairment; treatments are dealt with under other sections. The Appellant is essentially arguing that it is the arthroplasty itself that entitles him to an award. However, that is not how the Regulation reads. The wording of paragraph 3.2(f) states that the award is for knee, leg or thigh injuries requiring an arthroplasty. The important factor is the knee, leg or thigh injury, not the arthroplasty. The arthroplasty triggers the application of paragraph 3.2(f), as opposed to a different paragraph dealing with knee and leg injuries, but the compensation is for the knee injury itself.

In this case, the Appellant had a knee injury which required an arthroplasty on March 25, 2009, and he received a PI award for that injury. The fact that a revision arthroplasty was required on March 19, 2013, does not change the nature of the original injury; the injury remains the same. Given that there was no new injury, counsel submitted that the Appellant is not entitled to a further PI award in connection with his March 19, 2013, left knee revision arthroplasty, and his appeal on this issue should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to PIPP benefits in respect of his January 18, 2018, right knee arthroplasty, and that he is entitled to a further PI benefit in connection with his March 19, 2013, left knee revision arthroplasty.

In making our decision, as set out below, the panel has carefully reviewed all of the documentary evidence filed in connection with this appeal. We have given careful consideration to the testimony of the Appellant and to the submissions of the Appellant and of counsel for MPIC. We have also taken into account the provisions of the relevant legislation and the applicable case law.

January 18, 2018, Right Knee Arthroplasty

The Appellant is seeking PIPP benefits under the MPIC Act in respect of his January 18, 2018, right knee arthroplasty. In order to be entitled to those benefits, he must establish, on a balance of probabilities, that he suffered a "bodily injury caused by an automobile", within the meaning of subsection 70(1) of the MPIC Act, with respect to his right knee that required him to have the arthroplasty.

There is no dispute that the Appellant's right knee was not directly injured in the MVA. It is the Appellant's position that the damage to his right knee occurred as a consequence of the MVA, resulting from a slow erosion over time due to the damage caused by the MVA to his left knee. It is MPIC's position that the Appellant's right knee arthroplasty is not related to the MVA.

The Appellant testified that his right knee started hurting a couple of years after the 2004 MVA. There is nothing noted about the Appellant's right knee in the medical documentation until January, 2009, when each of [sport's medicine specialist] and [orthopedic surgeon] made one note in their respective charts. The next medical record which mentions the Appellant's right knee is from [Appellant's health care provider]. His report, dated June 15, 2009, states as follows:

> […] His right knee is now bothering him. I suspect at some point he will need to have this replaced as well.

There is then no mention of the Appellant's right knee in the medical documentation until a report from [pain management specialist] dated February 17, 2015, which notes "complaints of bilateral knee pain, the left greater than the right". Subsequent to that report, the Appellant's right knee pain is mentioned in the medical documentation with some frequency up until the January 18, 2018, arthroplasty.

When discussing the lack of documentation regarding his right knee pain, the Appellant's testimony was somewhat inconsistent. On the one hand, he said that his right knee was ignored because it was not as big an issue as his left knee. As well, he said that the medication he was taking in respect of his left knee was medicating his whole body (thus also helping his right knee). On the other hand, in response to a question from counsel for MPIC regarding why there was no mention in the medical documentation regarding his right knee between 2009 and 2015, the

Appellant responded that he thought he mentioned it every time, even though the focus was on the left knee.

Similarly, when discussing the lack of medical opinions supporting his position, the Appellant's evidence was also somewhat inconsistent. On the one hand, he had advised the case manager in an email dated September 13, 2017, that three of his health care providers said that there is "at least a partial causal relationship for the right knee problems as relates to the continuous limp". He said further in that email that he would be approaching them for "medical information and opinion" (thus, it seems, recognizing that their opinions could be helpful). On the other hand, in response to a question from counsel for MPIC regarding whether any health care provider did provide such an opinion, he acknowledged that none of them did. He said that despite the lack of documentation, there are times when you just have to listen to the claimant.

While we accept that the Appellant testified in a frank manner, and he acknowledged that there were deficiencies in the documentation regarding his right knee, we were nonetheless troubled by these inconsistencies, as well as by the lack of documentation (as the Commission has seen in past cases (see, for example, AC-12-069 and AC-15-113)).

The panel has considered the lack of documentation of the Appellant's right knee pain, including the fact that the Appellant saw several health care professionals on numerous occasions between June 15, 2009, the date of the report from [Appellant's health care provider], and February 17, 2015, the date of the report from [pain management specialist]. There are at least eighteen medical reports from health care providers whom the Appellant visited during that time period. In reviewing those records, it is evident that the Appellant reported his left knee complaints on each

occasion, and these complaints were recorded in the medical documentation, but, as noted, there is no record of his right knee pain. The Appellant has said that his right knee was ignored because it was not as big an issue as his left knee; thus, it is possible that he did not report his right knee pain, at least on occasion. However, he also said that he thought he mentioned his right knee pain during those visits; if so, then his medical providers recorded his left knee complaints but failed to record his right knee pain. We find it unlikely that the Appellant would report all of his left knee complaints but not his right knee pain, if it was present during that time period, and we find it equally unlikely that his medical providers would have failed to record the right knee pain if he had reported it.

Contrary to reflecting the Appellant's description of an ongoing increase in his right knee problems beginning shortly after the MVA, what the medical records do reflect is an occasional indication of right knee pain in 2009, and then, beginning in 2015, the development of a problem with his right knee which led to the arthroplasty on January 18, 2018.

Although the panel appreciates the Appellant's conviction that the damage to his right knee was a consequence of the constant limping resulting from the MVA-related damage to his left knee, this is not supported by the medical evidence. The only medical opinion on file dealing with causation of the Appellant's right knee problems is from MPIC's Health Care Services ("HCS") consultant.

The HCS report dated January 25, 2018, states as follows:

> On balance it is medically probably [*sic*] that the claimant's right knee OA and total knee arthroplasty is not directly related to the remote April 16, 2004 slip and fall for the following reasons;
>
> - There was no accident related injury reported at the right knee at the time of the accident.

- The right knee became symptomatic many years later, therefore a temporal relationship to the accident is not present.

- Finally, there is no medical evidence in the literature to suggest that an injury to one lower extremity would have any significant impact on the opposite uninjured limb; unless the injury resulted in major muscle or nerve damage causing partial or complete paralysis of the damaged leg and/or shortening of the injured lower extremity resulting in a limb length discrepancy of more than 4-5 centimeters such that the gait pattern has altered to the extent that there is a significant lurching type gait.

We note that there is no evidence that Appellant suffered any major muscle or nerve damage resulting in partial or complete paralysis of the damaged leg, or that he had an altered gait resulting from shortening of the leg of more than 4 to 5 centimeters.

The Appellant referred the panel to an article promoting physiotherapy services, which he submitted support his position. However, this article is general in nature, in the nature of an advertisement, and we find that it does not assist us in addressing the specifics of the Appellant's situation and so we give it little weight. We note that none of the Appellant's treating health care professionals has provided an opinion in support of his position.

The panel finds that the HCS consultant, in the preparation of his report dated January 25, 2018, had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant's file and was thorough and comprehensive in his analysis. The panel preferred the evidence provided by the HCS consultant to that of the Appellant, whose evidence was somewhat inconsistent, and to the general statements contained in the physiotherapy advertisement, to which we assign little weight.

Based on the evidence of the HCS consultant, we find that the Appellant has not established a causal connection between his January 18, 2018, right knee arthroplasty and the MVA. As a result, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that he is entitled to PIPP benefits in respect of his January 18, 2018, right knee arthroplasty.

March 19, 2013, Left Knee Revision Arthroplasty

The Appellant is seeking PI benefits under the MPIC Act in connection with his March 19, 2013, left knee revision arthroplasty. In order to be entitled to a further PI benefit, the Appellant must establish, on a balance of probabilities, that the Regulation permits the PI benefit he is seeking.

As indicated above, MPIC does not dispute that that the Appellant's left knee was injured in the MVA. MPIC paid to the Appellant a PI benefit of 8% in respect of his first left knee arthroplasty, which took place on March 25, 2009. That benefit was paid pursuant to paragraph 3.2(f) of Division 1, Subdivision 2 of Schedule A of the Regulation, which provides as follows:

> (f) knee, thigh or leg injuries requiring a knee arthroplasty. 8%

It is the Appellant's position that he is entitled to a further payment of 8% under paragraph 3.2(f) in respect of his March 19, 2013, left knee revision arthroplasty. He argued that paragraph 3.2(f) provides for payment of a PI benefit where a claimant has a knee arthroplasty, and since he had two left knee arthroplasty surgeries, he should be paid a PI benefit under this paragraph a second time. It is MPIC's position that the proper interpretation of the Regulation does not support a further PI benefit.

Therefore, in order to assess whether the Appellant is entitled to a further PI benefit, we need to determine the proper interpretation of paragraph 3.2(f) of Division 1, Subdivision 2 of Schedule A of the Regulation.

As has been noted by the Commission in past cases (see, for example, AC-18-105), the Manitoba Court of Appeal, in *Pelchat v. Manitoba Public Insurance Corporation*, 2007 MBCA 52, has pointed out that there are certain well-accepted general principles of statutory interpretation, as follows (at paragraphs 36 and 37):

> Before proceeding to answer the questions raised on this appeal it is useful to quickly review the general principles of statutory interpretation. The principle was set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, as follows (at para. 21):
>
> > Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> In this context it is also useful to recollect what Freedman J.A. said of the *Act* in *Menzies* (at para. 36):
>
> > Words in a statute are to be given "the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction" (R. v. D.A.Z., 1992 CanLII 28 (SCC), [1992] 2 S.C.R. 1025 … at p. 1042 [S.C.R.]). The Act is intended to provide compensation based on "real economic loss" (Bill 37, The Manitoba Public Insurance Corporation Amendments and Consequential Amendments Act, Manitoba, 1993), and see McMillan v. Thompson (Rural Municipality) (1997), 1997 CanLII 11522 (MB CA), 115 Man.R. (2d) 2 … (C.A.), where Helper, J.A., said the legislature in the Act: "created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile" (at para. 54).

Thus, in construing the meaning of paragraph 3.2(f) of Division 1, Subdivision 2 of Schedule A of the Regulation, we are required to look at it not in isolation, but rather to interpret its words in the context of the scheme of the MPIC Act, and as well having regard to the purpose of the MPIC Act.

The PI benefit scheme is governed by subsection 127(1) of the MPIC Act, which provides that "a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity" for the permanent impairment. Section 1 of the Regulation provides that "Compensation for permanent impairments shall be determined on the basis of Schedule A". Schedule A lists permanent, measurable deficits of physical or mental function, as well as observable disfigurements that may have been caused by an accident. It expresses the amount available for each type of permanent impairment as a percentage of the maximum indemnity.

As set out above (see pages 5 and 6 of these Reasons), section 3 of Division 1, Subdivision 2 of Schedule A of the Regulation deals with impairments of the "Knee and leg". In particular, section 3.2 provides PI benefits for "Fractures" (and certain other injuries of the knee and leg). Paragraph 3.2(a) applies to fractures that have "non-specified abnormal healing", while the remaining paragraphs apply to injuries that are described as "Fracture complications". In the case of an injury to the knee, a specific PI benefit applies for each of paragraphs (a), (b), (c), (f) and (g), with the amount depending on the specific type of fracture or complication. In this case, as noted above, we are looking at paragraph (f), "knee, thigh or leg injuries requiring a knee arthroplasty", which provides for a PI benefit of 8%.

Reading the words of section 3.2 in their "grammatical and ordinary sense" (per *Driedger*, cited above), we conclude that the impairment for which a victim is to be compensated under section

3.2 is the fracture or other specific injury of the knee. While the amount of compensation depends on the specific type of injury (i.e. under paragraph 3.2(f), an injury to the knee which requires an arthroplasty entitles the victim to a PI benefit of 8%), if there is no injury, then section 3.2 is inapplicable.

The Appellant argues that because he had a second arthroplasty surgery, he should be entitled to a second PI award. However, for this to be the correct interpretation, the words of paragraph 3.2(f) would have to be construed so that they read, in effect, something like "knee arthroplasties resulting from knee, thigh or leg injuries", thus suggesting that it is the injury complication or treatment, rather than the injury itself, which is being compensated. But that is not what paragraph 3.2(f) says, and we cannot accept the Appellant's interpretation of it. Giving paragraph 3.2(f) its plain and ordinary meaning, consistent with the scheme of the MPIC Act, requires that the impairment being compensated is the knee injury; the type of complication or treatment involved merely affects the amount of compensation.

This is also consistent with the purpose of the MPIC Act, as identified above in *Menzies*, which is to provide "compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile". As indicated above, under subsection 127(1), a victim who suffers a permanent impairment is "entitled to **a** lump sum indemnity" (emphasis added) for that impairment. The impairment here is the Appellant's knee injury that required arthroplasty, and he has already been paid one lump sum indemnity for that impairment under paragraph 3.2(f). The purpose of the MPIC Act is to provide compensation to the Appellant for his impairment, but to allow the compensation to be paid to him twice under paragraph 3.2(f) for the same injury would be to ignore the purpose of the MPIC Act.

Here, the Appellant suffered one injury to his left knee, while exiting a vehicle on April 16, 2004. That injury resulted in a permanent impairment, requiring a knee arthroplasty on March 25, 2009, which falls under paragraph 3.2(f), thus entitling him to a PI award of 8%, which was paid to him on March 25, 2010. We reviewed the evidence to determine whether the Appellant suffered a second specific injury of his left knee within the meaning of section 3.2 of Division 1, Subdivision 2 of Schedule A of the Regulation that required him to have the left knee revision arthroplasty on March 19, 2013.

Shortly after the Appellant's knee replacement surgery, he saw [Appellant's health care provider], who provided a report dated August 5, 2009, which states, in part, as follows:

> … I saw [the Appellant] at the clinic in [city] on July 28, 2009. There was some discussion about a graduated return to work program however [the Appellant]'s knee has not been doing that well lately. He is now approximately 3 months from his knee replacement. He is having a bit more pain and he is finding it difficult to do the duties that he is trying to do at work. I have advised him to abandon the gradual return to work program for now and he will be seeing [orthopedic surgeon] who was his orthopedic surgeon who performed the procedure. …

The Appellant saw [orthopedic surgeon], an orthopedic surgeon, to assess his knee. [Orthopedic surgeon] provided a report dated April 18, 2011, which states, in part, as follows:

> As you are aware, I assessed [the Appellant] on February 8th, 2011, regarding ongoing knee pain following a total knee arthroplasty. …
>
> With regard to his knee replacement at present, he continues to experience pain and persistent swelling. …
>
> I have not prescribed any medications to this gentleman. It is unfortunate that in up to 20% of patients with a clinically and radiographically normal knee replacement, there will be ongoing pain which can be quite disabling. This can sometimes slowly settle with time. Revision surgery could be entertained. However, in the absence of any definitive underlying diagnosis for the problems, success rate is only approximately 50%.

[Orthopedic surgeon] provided a further report dated December 20, 2012, which states, in part, as follows:

> [The Appellant] is suffering from ongoing inflammation in his left total knee arthroplasty for which a definite cause cannot be determined. He has reached the point now where he is requiring Tylenol #3s and anti-inflammatories with no significant benefit. We had a long discussion with him regarding the possibility of revision surgery. He has been made fully aware that in these situations even with revision surgery there is a strong likelihood that he will continue to suffer dysfunction in this knee. He does feel, however, that the symptoms have reached the point where he must try and do something to make it better.

Subsequent to the March 19, 2013, revision arthroplasty, [orthopedic surgeon] provided a follow-up report dated January 17, 2014, which states, in part, as follows:

> As you are aware, the patient has undergone a left total knee arthroplasty revision, which was performed on March 19th, 2013. The patient was reassessed on October 28th, 2013, seven months postoperatively. The patient at that time complained of ongoing discomfort in the lateral side of his knee, which was limiting his walking and waking him from sleep at night. He denied any problems with instability and denied any signs or symptoms of infection.
>
> […]
>
> At this time, no specific cause for his ongoing discomfort can be identified. We have discussed the possibility of a corticosteroid injection and this will be reassessed at his next visit. At this time, he does remain limited by the ongoing knee pain. It is difficult to predict at this point whether this will improve. There is some chance that the pain will get better; however, would not be uncommon to have ongoing chronic pain in the knee replaced knee [*sic*] even if no clinical or radiographic abnormality can be detected. In most of these incidents, this pain will be permanent and unable to be resolved with any surgical intervention.

MPIC's HCS consultant recognized the Appellant's ongoing pain, stating in a report dated November 24, 2015, that the Appellant had an "ongoing chronic left knee pain condition" that was causally related to the MVA.

A review of the above-noted medical evidence indicates that although the Appellant did develop pain and swelling in his left knee subsequent to his first left knee arthroplasty, he did not suffer a

second specific injury of his left knee prior to his March 19, 2013, left knee revision arthroplasty, within the meaning of section 3.2 of Division 1, Subdivision 2 of Schedule A of the Regulation. Therefore, based on our analysis of the proper interpretation of paragraph 3.2(f), we determine that the Appellant is not entitled to a further PI award under that paragraph.

That is not to say that the Appellant was not entitled to other PIPP benefits under the MPIC Act as a result of the March 19, 2013, revision left knee arthroplasty. MPIC's HCS consultant reviewed this issue and provided a report dated September 5, 2017, which states, in part, as follows:

> There is no extra rating for a revision total knee replacement surgery unless the scarring has increased or the range of motion of the knee has decreased.

The case manager, in the decision on this issue dated September 22, 2017, noted the report of the HCS consultant, and stated as follows:

> A review of your file indicates that you have been paid the maximum permanent impairment entitlement for left lower limb scarring, however range of motion to the left knee was not measured and no permanent impairment entitlement has been paid to date. As discussed, an assessment of your left knee range of motion is required to determine if there are further ratable impairments. You indicated that due to your upcoming relocation, it would be preferable to complete this assessment following your move. I will follow up with you to discuss this assessment following your relocation.

On a review of the material in the indexed file, it appears that these assessments were subsequently conducted. As the Appellant had already received the maximum PI benefit award for scarring, his left knee was assessed for range of motion as well as for sensory impairment. He was subsequently awarded a PI benefit of 12% for loss of range of motion in his left knee and PI benefit of 1% for sensory impairment in his left lower limb, as set out in a case manager's decision dated January 3, 2018.

However, as indicated above, based on our interpretation of the legislation, as well as on the evidence, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that he is entitled to further PI benefits under paragraph 3.2(f) of Division 1, Subdivision 2 of Schedule A of the Regulation.

Conclusion

For the reasons set out above, the Commission finds as follows:

1. That the Appellant has failed to establish, on a balance of probabilities, that he is entitled to PIPP benefits in respect of his January 18, 2018, right knee arthroplasty; and
2. That the Appellant has failed to establish, on a balance of probabilities, that he is entitled to a further permanent impairment benefit in connection with his March 19, 2013, left knee revision arthroplasty.

Disposition:

Accordingly, the Appellant's appeal is dismissed and the Internal Review decisions dated December 15, 2017, and May 29, 2018, are upheld.

Dated at Winnipeg this 9th day of April, 2020.

JACQUELINE FREEDMAN

TREVOR ANDERSON

JANET FROHLICH