

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-85**

PANEL: Ms Laura Diamond, Chairperson
Ms Jean Moor
Ms Deborah Stewart

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

HEARING DATE: February 28, 2011

ISSUE(S): Whether the Appellant's Permanent Impairment Benefits in
relation to her right hand were properly assessed and
calculated.

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation
Act ('MPIC Act') and Manitoba Regulation 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

The Appellant was injured in a motor vehicle accident on March 25, 2004. Amongst other injuries, she suffered from right wrist and hand pain and underwent several surgeries related to carpal tunnel syndrome in her right hand.

[MPIC's Doctor] reviewed the Appellant's file and provided a report regarding her hand and wrist injuries on March 3, 2009. He indicated:

“You would be entitled to a Permanent Impairment benefit as it relates to motor and sensory dysfunction involving the right median nerve according to Division 2, Subdivision 4, Table 2.2. Impairment relating to motor dysfunction – 2%. Impairment

relating to a sensory dysfunction 11.5%. [MPIC's Doctor] wrote that these impairments are based on information obtained from nerve conduction studies performed by [Appellant's Doctor] indicating a moderate impairment to the right median nerve function."

[Appellant's Occupational Therapist], [text deleted], conducted a Permanent Impairment Assessment and reported on December 31, 2009. She reviewed the scarring to the Appellant's right hand as well as range of motion to her shoulder, elbow, wrist and her digits. A Permanent Impairment Assessment was calculated and on February 25, 2010, the Appellant's case manager wrote to her setting out the following permanent impairment entitlements:

INJURY/IMPAIRMENT	%	APPLICABLE SECTION	APPENDIX #
Right hand motor & sensory peripheral nerves	14	Division 2: subdivision 4, Table 2.2	4
Right hand scarring	1	Division 13: Subdivision 2, Table 13.3	5
Right shoulder range of motion	2	Division 1: Subdivision 1, Item 1.5(a)(b)(c)	6
Right elbow range of motion	2	Division 1: Subdivision 1, Item 2.5 (a)(b)	7
Right wrist range of motion	3	Division 1: Subdivision 1, Item 3.5 (a)(b)	8
Total	22%		

The Appellant sought an Internal Review from this decision. She indicated to the Internal Review Officer that her right hand is her dominant hand and that she was having difficulties with her day to day activities. She indicated that as a result she would like an additional permanent impairment benefit of 14% over and above the 14% she had already been awarded in regard to her hand and wrist.

The Internal Review Officer sought a further review from [MPIC's Doctor] who provided a memo on April 27, 2010. The conclusions of [MPIC's Doctor] were set out in the Internal Review Officer's Decision dated June 1, 2010. The Internal Review Officer concluded that there

was no further medical evidence to substantiate any further impairment entitlements with respect to the Appellant's upper limbs. The case manager's decision was upheld.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She emphasized the difficulties which she was having due to the injury to her right hand. She indicated that the injury had ruined her social life as she could not eat with her right hand and her [text deleted] religion considers it unholy to eat with the left hand. As a result, she was reluctant to go anywhere where eating and socializing would be involved.

She also testified that it was difficult to cook for her [text deleted] children.

The Appellant testified that her right hand was getting worse. She provided pictures and gestured to the differences between her right and left hand. She noted that there was nerve and bone sticking out, that the hand was discoloured and that it was difficult for her to form a fist. She indicated that she had been trying to reach MPIC to tell them that her hand was getting worse and to ask them to send somebody out to look at it again, but was having difficulty reaching them.

The Appellant submitted that due to the devastating nature of the injury to her hand, she should be entitled to an additional 14% permanent impairment benefit.

Submission for MPIC:

Counsel for MPIC submitted that the Permanent Impairment Assessment which had been conducted was based upon the Permanent Impairment Regulations and the medical information regarding the Appellant's injuries. The Appellant was given the appropriate award based on these injuries and there was no documented evidence to show that she had further injuries. He noted that if she felt the injury had gotten worse, she should contact her case manager to arrange for another assessment based upon new information.

Counsel for MPIC referred to a medical report provided by the Appellant's surgeon, [text deleted] who reported on the carpal tunnel decompression the Appellant had undergone on her right hand, with continuing pain, weakness and loss of function of the right upper extremity.

[Appellant's Surgeon] indicated:

“[The Appellant] will have some degree of disability of the right upper extremity due to these injuries.”

[Appellant's Surgeon] noted that it was unlikely that she would regain any significant strength of her right upper extremity. She would have some degree of permanent loss of sensation.

[Appellant's Doctor] also provided a report based upon his examination of August 11, 2009. He performed a neuro-conduction study and provided the specific data which resulted, concluding that the Appellant had moderate impairment of right median conduction across the wrists and that the diagnostic criteria for carpal tunnel syndrome was fulfilled.

[MPIC's Doctor] reviewed all of this information and, in a report dated November 9, 2009 recommended permanent impairment entitlement of 2% relating to motor dysfunction and of 11.5% relating to sensory dysfunction.

The assessment conducted by the [Appellant's Occupational Therapist], dated December 31, 2009 also recognized an impairment award of 1% for scarring on the right hand, 1% for each square centimetre of scarring and .92% impairment for right hand scarring.

A further review by [MPIC's Doctor] was dated April 27, 2010. [MPIC's Doctor] recommended impairment awards of 2% pursuant to Division 1, Subdivision 1, Item 3.5a(a)(iv) pertaining to combined range of motion of right wrist in the planes of flexion/extension between 61 and 90°, 1% pursuant to Division 1, Subdivision 1, Item 3.5(a)(iii) for ulnar and radial deviation, 2% under Division 1, Subdivision 1, Item 2.5(b)(iv) regarding pronation and supination, and .08% for impairment for scarring pursuant to Division 13, Subdivision 2, Item 1.5, Table 13.3.

Counsel submitted that although [MPIC's Doctor's] review of these impairment awards was prefaced by the comment that "based on this information it is my opinion [the Appellant] is also entitled to the following permanent impairment benefits", [MPIC's Doctor] was not suggesting any awards in excess of the 2% listed by the case manager. Rather, he was specifically showing the basis of percentage of impairments found by the case manager enlisting the specific regulations under which they were found.

Counsel submitted that there was no basis in the medical information for a more extensive award for the Appellant's range of motion. Although the Appellant had claimed that the amounts she was awarded were not sufficient, the calculation of permanent impairment awards for the Appellant was based upon specific enumerated amounts in the permanent impairment schedule. The Appellant has not presented any evidence to show that these amounts were not calculated correctly or that she should be entitled to receive fair amounts.

Accordingly, the Internal Review Decision of June 1, 2010, it was submitted, should be upheld.

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.

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer upholding the case manager's calculation of permanent impairment benefits to which the Appellant is entitled, was an error.

The Appellant submitted that the condition of her right hand and wrist has changed and deteriorated since the last assessment performed in December 2009. The panel notes that there was no independent medical evidence regarding this question before the panel at the hearing. However, counsel for MPIC advised that should this be the case, it is open to the Appellant to contact her case manager to advise that there is new information or a change in her circumstances, and to request a reassessment. When the Appellant indicated that she attempted to do so but had had difficulty reaching her case manager, counsel for MPIC provided the Appellant with a telephone number for MPIC's main customer service line, in order that she might pursue this issue. Counsel also indicated to the Appellant that if she still encountered difficulty with this process, she could request that the customer service department provide her with contact information for MPIC's Fair Practices Office.

In regard to the evidence before the panel at the hearing, we have reviewed [Appellant's Occupational Therapist's] report dated December 31, 2009, the Impairment Assessment dated February 22, 2001, the case manager's decision of February 25, 2010, [MPIC's Doctor's] report of April 27, 2010 and the Internal Review Decision dated June 1, 2010. We find that there are a number of discrepancies and inconsistencies between these reports and decisions.

The main issue in contention between the parties is the assessment of permanent impairment entitlement for injuries to the Appellant's right hand and wrist.

These can be examined under the following entitlements:

1. *Right Hand Scarring:*

Division 13: Subdivision 2, Table 13.3 –

[Appellant's Occupational Therapist's] report measures the total scarring as .92 centimetres squared with an entitlement, of 1% per centimetre squared or 92%. The impairment assessment assigned a percentage to be used (by application of successive remainders) of 1%.

[MPIC's Doctor's] report of April 27, 2010 notes an impairment of .98 centimetres squared or 98%.

The case manager awarded 1% permanent impairment for scarring which was upheld by the Internal Review Officer.

Although there is a slight discrepancy between [Appellant's Occupational Therapist's] assessment of .92 and [MPIC's Doctor's] notation of .98, due to the application of the

successive remainder, rounding up the award to the nearest whole number, both arrive at the conclusion that the Appellant is entitled to a permanent impairment award of 1% for scarring.

The panel finds that this was correctly assessed and upheld by the Internal Review Officer.

2. *Right Elbow Range of Motion:*

[Appellant's Occupational Therapist] measured restrictions to the Appellant's combined right elbow pronation/supination at 137°. The Impairment Assessment then concluded that under the Regulations (Division 1, Subdivision 1, Item 2.5(a)(b)) the Appellant was entitled to a permanent impairment benefit of 2% in this regard.

The panel finds that the assessment of the case manager and Internal Review Officer in this regard was not in error.

3. *Right Wrist Range of Motion:*

[Appellant's Occupational Therapist] assessed the Appellant's right wrist flexion/extension at 81° and right wrist deviation at 28°.

The Impairment Assessment concluded, pursuant to Division 1: Subdivision 1, Item 3.5, that this would result in a 2% impairment entitlement for flexion/extension and a 1% impairment award for radial/ulnar deviation. The 1% impairment of radial/ulnar deviation was based upon [Appellant's Occupational Therapist's] measurement of 28°.

However, [MPIC's Doctor's] report notes:

“It is documented that combined wrist flexion/extension as well as ulnar/deviation on the right side measured 81° and 20° respectively”

Pursuant to Item 3.5(b)(2), this would result in an impairment award of 2%.

However, [MPIC's Doctor] then cites Division 1, Subdivision 1, Item 3.5(a)(iii) as establishing a “combined range of motion of right wrist in the planes of ulnar and medial deviation and between 26° and 40°.

While this may be the result of a minor or typographical error in reporting, we find that there is a discrepancy between [MPIC's Doctor's] report and [Appellant's Occupational Therapist's] report, and it is not completely clear to the panel what the proper permanent impairment entitlement should be for this impairment.

Further, the panel finds [MPIC's Doctor's] comments in his report of April 27, 2010 to be somewhat confusing. [MPIC's Doctor] sets out and reviews the Permanent Impairment Assessment conducted by [Appellant's Occupational Therapist] and her findings. He goes on to state:

“Based on this information, it is my opinion [the Appellant] is **also entitled** (emphasis ours) to the following permanent impairment benefits...”

The Internal Review Officer quotes [MPIC's Doctor's] report but does not comment or attempt to reconcile his comments with those used for calculation purposes by the Impairment Assessment in the case manager's decision. Counsel for MPIC submitted that [MPIC's Doctor] simply made an unfortunate choice of words in using the phrase “also entitled” and that it was his belief that [MPIC's Doctor's] words in the report of

April 27, 2010 were meant to be inclusive of the case manager's calculated amounts, and that he intended to confirm those findings.

This is certainly a possibility, but [MPIC's Doctor] was not asked to testify at the hearing or to provide a written note clarifying this interpretation of his report. As a result of the inconsistencies of the reports before the panel, we are of the view that this matter should be referred back to MPIC for clarification. The reports of [Appellant's Occupational Therapist], the Impairment Assessment and [MPIC's Doctor] are not completely consistent with each other and, as such, we find that the Appellant has met the onus upon her of showing that the position of the Internal Review Decision in regard to the impairment benefit for right hand or wrist range of motion, which relied upon and confirmed these reports and decisions, should not be upheld.

As a result, the Appellant's appeal in this regard is allowed.

The question of the appropriate permanent impairment entitlement for the Appellant's right hand or wrist range of motion will be referred back to the Appellant's case manager for a careful assessment, calculation and description of the permanent impairment benefits to which she is entitled in this regard.

Dated at Winnipeg this 13th day of April, 2011.

LAURA DIAMOND

JEAN MOOR

DEBORAH STEWART