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Indexed as:
J.S. (Re)

IN THE MATTER OF an appeal by J.S.
AICAC File No.: AC-97-50

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[1997] M.A.I.C.A.C.D. No. 37

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.,
and L. Goodspeed
Heard: October 16, 1997.
Decision: October 20, 1997.
(6 pp.)

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Issue(s):
Whether scarring located on chin or neck?

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Relevant Sections:
Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, ss. 126, 127, 129 and 130.
Regulation No. 41/94, Part 2, Tables 15 and 17 of
Schedule A.

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Appearances:
Manitoba Public Insurance Corporation ('MPIC') represented by
Keith Addison.
J.S., the appellant, appeared in person.

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MAIC 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 FACTS:

[para1] J.S., the Appellant, was operating his pickup truck at 6:45 in the evening on the 7th of September 1995 when it was in collision with another vehicle. The Appellant sustained certain injuries, the only one relevant to this appeal being a bad cut across his lower jaw which, after surgery, resulted in a permanent scar 11 centimetres in length

by 5 millimetres in width - the total scar of 5.5 square centimetres.

[para2] MPIC described this impairment as 'a neck scar', whereas J.S. submits that his scarring affects a portion of his face - namely, his chin - rather than his neck and has therefore launched this appeal from the decision of MPIC's Internal Review Officer.

[para3] The Internal Review Officer, Ms D. Pemkowski, unfortunately did not have an opportunity to inspect J.S.'s permanent impairment in person, since he had elected to have what amounts, in effect, to a paper review of his file. Since the medical reports from Dr. K.C. Mallick, J.S.'s physician, seemed to need some clarification, Ms Pemkowski spoke with Dr. Mallick on the phone and he seems to have confirmed that, as she puts it in her decision letter, "The scarring at no time crosses the jaw bone into the chin or cheek area".

[para4] We have had the benefit of seeing J.S. in person and, while the scarring is undoubtedly not as attention-grabbing as it must have been during the first year after his surgery, we are left in no doubt that, to quote a paragraph from J.S.'s original request for an internal review, the scar runs along his jaw bone, comes up on his chin and down across the other side of his jaw; it is clearly visible on both cheeks and the underside of his chin.

[para5] Counsel for MPIC submits that we should apply the real spirit of the Act and Regulations, of which the relevant portion refers to disfigurement of the face. He suggests that most, if not all, of the scarring sustained by J.S. lies underneath the point of the chin and is therefore not readily visible to someone looking the Appellant straight in the face. It is upon that basis that MPIC takes the position that the scarring is really to J.S.'s neck.

[para6] Schmidt's Attorneys' Dictionary of Medicine defines neck as being "the part of the body which connects the head with the trunk". While it is not, perhaps, our position to attempt a medically accurate definition of 'neck', we are satisfied that anything higher than about 1 inch above the thyroid cartilage of the larynx (i.e. the Adam's apple) would more properly be described as part of the the chin or lower jaw rather than the neck. In J.S.'s case, his scarring is well above that and, clearly, part of his chin and lower jaw.

[para7] To use the criterion that MPIC would have us adopt would be far too subjective a test, begetting the question "Can I see that scar when I look at this victim face on?". That, of itself, then leads to the further question of whether the observer was viewing the victim from above or below, depending upon their relative heights or where each happened

to be sitting or standing, and so on. In our respectful view, the question posed needs to be objective, namely, whether the scarring is on the chin. It should not matter, in interpreting the Regulations, whether it is the upper or more visible part of the chin or that portion of the chin underneath the jaw line; in J.S.'s case, his scarring covers parts of both the upper and the lower chin.

THE LAW:

[para8] The point of J.S.'s appeal has significance, in that, where there is cicatricial impairment without any material change of form or symmetry, the maximum amount that can be awarded for scarring of the neck is substantially less than would be the case for scarring of the face, including the chin. More specifically, Table 17 would allow an award of 1% of \$100,140.00 (that is, \$1,014.00) for each square centimetre of the neck scarring, resulting in an award made by MPIC to J.S. of \$5,577.00.

[para9] Section 1 of Part 2 of the Regulation defines "cicatricial impairment" as any qualitative or quantitative change in the skin including flat and faulty scars; "faulty scar" is defined as a scar that is misaligned, irregular, depressed, deeply adhering, pigmented, scaly, retractile, keloidal or hypertrophic". We find that J.S. has sustained a permanent impairment in the form of a faulty scar to his chin, that the impairment falls within Class 3 in Table 15 of the Regulation, of which a copy will be annexed to these Reasons and intended to form part of them, and that he is therefore entitled to 2% rather than 1% per square centimetre.

[para10] As noted above, we have found that J.S.'s impairment falls within Class 3. In reaching that conclusion, we had to decide whether the assessment of his impairment should be made as of some date almost immediately following his surgery in 1995, or now, in 1997. J.S. testified that, in the months following his surgery, the attention of many of his friends and acquaintances on first meeting him was immediately drawn to the scar. He testified that one lady in particular, who and whose husband had known him for many years, was made so uncomfortable by the sight of his scarring that she walked away, unwilling to speak to him directly. Fortunately, we have no hesitation in saying that this would not be the case today, and has probably not been so for many months, now. His scarring, while certainly visible, does not attract nor hold the attention of the casual observer. It is our view that the assessment of such an impairment as this should be made at a time when the lasting and serious degree of impairment of disfigurement can more readily be determined, and that requires at least a sufficient post-surgery period to allow a reasonable amount of healing to occur.

DISPOSITION:

[para11] In summary, therefore, J.S. is entitled to payment of \$11,154.00, less such amount as he may have already received together with interest thereon at the prescribed rate from October 3rd, 1996 (the date of MPIC's original decision). MPIC sent him a cheque but there is some suggestion on the file that J.S. returned it by reason of his dissatisfaction with the quantum.

[para12] J.S.'s claim for further compensation due to the numbness and minor degree of lack of movement of his left facial muscles at the angle of the mouth apparently remains to be adjusted, and is therefore not a subject of this appeal.

[para13] The decision of the Internal Review Officer is therefore varied accordingly.

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