

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by E.M.H.

AICAC File No.: AC-97-139

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mr. Charles T. Birt, Q.C. Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC') represented by
Ms Joan McKelvey
the Appellant, E.M.H., was represented by Mr. Norman
Rosenbaum

HEARING DATE: February 20th and April 9th of 1998

ISSUE: Compensation for scarring of scalp - whether Appellant entitled
to compensation for both cicatricial impairment and change of
form and symmetry.

RELEVANT SECTIONS: Sections 126, 127, 129(1), 130, 165(3), 166(1) and 166(2) of the
MPIC Act, and Divisions 1, 2 and 3 of Part 2 of Schedule A to
Regulation 41/94

**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:

The Appellant, E.M.H., was involved in a motor vehicle accident on July 11th of 1996 when the driver of the vehicle in which she was a passenger lost control of the vehicle and rolled it into a ditch. E.M.H. sustained multiple scalp and facial lacerations as well as some stiffness on the right side of her neck. She was attended by Dr. R. L. Isaacs, a general practitioner at Ashern, Manitoba, who reported the following scarring:

(a) to the right of her right eye a "Y" shaped scar with total length 8 cm and width 0.5 cm;

- (b) the tip of her nose, 1 cm by 0.5 cm;
- (c) scarring of her scalp
 - (i) 5 cm by 1 cm, top of scalp, left of midline;
 - (ii) 2 cm by 1 cm, left of midline;
 - (iii) 6 cm long by 0.5 cm wide, curved, starting at her hairline, just 3 cm to the right of midline forehead. This one would be visible if her hair were combed back. It is also bumpy.

Dr. Isaacs' report describing E.M.H.'s scarring also made reference to scarring to the dorsum of her right hand, scarring of her right arm and some limitation to the range of motion of her neck, but none of these is relevant to the present appeal. It is enough to say that we agree with the awards of \$3,644.83 and \$260.35 respectively paid to her for the scarring to her right hand and right arm.

MPIC awarded E.M.H. damages for permanent impairment, including facial, scalp, right hand and right arm scarring, in the total amount of \$19,525.88. The only portions with which we are here concerned relate to the three scars on her scalp.

When compensation is claimed for permanent impairment in the form of scarring, we are governed by Divisions 1, 2 and 3 of Part 2 (including Tables 15 and 17) of Schedule A to Regulation 41/94. Copies of these and of the relevant sections of the Act, are annexed to and intended to form part of these Reasons. The percentages referred to in Tables 15 and 17 were originally percentages of \$100,000.00, but that figure had, by the date of E.M.H.'s accident, been increased to \$104,138.00 by virtue of Sections 165 and 166 of the Act (quantum of award tied to Consumer Price Index).

The Respondent insurer, when calculating the award to which E.M.H. was entitled by reason of the scarring to her face and scalp, allowed her nothing for the two smaller scars near the top of the scalp - (c)(i) and (c)(ii) above - on the basis that they were inconspicuous. That is confirmed, not only by the opportunity given to this Commission to observe the Appellant, but also by Dr. Isaacs who describes them as 'smooth, not raised and not visible ordinarily'. E.M.H.'s solicitor, in a written submission to this Commission, advanced two arguments: firstly, he argued, the two inconspicuous scars in question fell within Class 2 of Table 15, but the fact is that Table 15 pertains to impairments of physiognomy - that is to say, facial disfigurements - whereas the scalp scarring is specifically covered by Table 17 which only provides compensation for scarring that is conspicuous or results in a change in form and symmetry, or both; secondly, he argues, a woman's scalp scar concealed by hair should be treated in the same way as is a man's leg scar covered by trousers, particularly since a woman might elect to shave her head and thus render the scalp scarring conspicuous. Apart from the obvious facts that men do not invariably wear long trousers and women seldom, if ever, shave their heads unless that step is required for surgery or as part of a temporary, socio-political statement, we need only note that we are governed by the regulations, under which an inconspicuous, flat scar to the scalp is non-compensable.

There remains, then, the question whether the amount awarded by MPIC for the scars that are compensable was correct. We are the view that it was not, and although the end result differs little from MPIC's own figures the principle is worth stating.

The Corporation treated the 6 cm by 0.5 cm scar (No. 3(c) above) as a physiognomy impairment whereas, in our view, it is clearly an impairment of the scalp. Counsel for the insurer argues forcefully that, although that scar certainly qualifies as a cicatricial impairment, we are not entitled to consider any compensation under the heading of 'changes in the form and symmetry'. She submits that this latter phrase was intended by the legislature to refer only to an impairment other than a cicatricial one. For example, she argues, if a scar is so deep as to affect the symmetry of the face or scalp, that might give rise to a two-fold claim - the one award for the scar and the other for the change in form and symmetry. If the scar itself can give rise to the two types of claim, says counsel for the insurer, then almost every scar would qualify; both types of claim should only be available where, for example, a drooping eyelid, the loss of an eyebrow or the wasting of a muscle results.

With deference, we cannot agree. We point out, firstly, that much of Ms McKelvey's argument is only applicable to facial scarring or, as the legislative draftsman likes to call it, 'physiognomy impairments'. Facial scars and changes in form and symmetry of the face are dealt with in Division 2, Table 15 of Regulation 41/94, divided into six, separate classes of severity and categorized in a much more sophisticated way than are scars to the scalp.

For scalp impairments we must look to Division 3 of the Regulation, at pages 104 and 106.

We had referred E.M.H. back to Dr. Isaacs for the specific purpose of obtaining a professional description and measurement of her scalp scars and, in his letter to this Commission, he says

To the right of the midline, and extending to the hairline, is a 6-7 cm long curved,

raised, tender scar. If her hair were worn combed back, this scar *would* be visible.

In his earlier letter to MPIC, Dr. Isaacs had described that same scar as measuring 6 cm by 0.5 cm and, in light of that small discrepancy, we propose to use a length of 6.5 cm and a width of 0.5 cm, for a total area of 3.25 sq. cm. We note, parenthetically, that both E.M.H. and her husband testified that, prior to her motor vehicle accident, she did indeed wear her hair long and combed back from the forehead.

We take the view that this scar not only constitutes conspicuous cicatricial impairment which, taken alone, would entitle the Appellant to an award of \$1,692.24, but that the fact that the scar is 'faulty' (within the definition on page 98 of the Regulations) and is raised above the level of the remainder of the scalp results in a change in form and symmetry which, taken alone, would give rise to an award of 1% or \$1,041.38.

However, having said all that, we also find that, by virtue of paragraph 3 on page 104 of the Regulation, we may not add the two facets of the claim together; rather, we are limited to the higher percentage obtained under either heading, without exceeding the maximum percentage which, in the context of scalp and skull, is 5%. E.M.H.'s entitlement for the conspicuous cicatricial impairment to her scalp is, therefore, \$1,692.24.

As a result, her total entitlement is as follows:

Facial scars:

8 cm by 0.5 cm = 4 sq. cm x \$3,124.14 =	\$12,496.56
1 cm by 0.5 cm = 0.5 sq. cm x \$3,124.14 =	1,562.07

Scalp scars:	
6 ½ cm by 0.5 cm = 3.25 sq. cm x \$520.69 -	1,692.24
Right hand scar , as agreed	3,644.83
Right arm scars , as agreed	<u>260.35</u>
Total	\$19,656.05

Since E.M.H. has already been paid \$19,525.88, there remains the sum of \$130.17 to which E.M.H. is entitled, with interest thereon from August 29th, 1997 to the date of actual payment.

Dated at Winnipeg this 20th day of April 1998.

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J. F. REEH TAYLOR, Q.C.

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CHARLES T. BIRT, Q.C.

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LILA GOODSPEED