

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by J.E.F.

AICAC File No.:

PANEL: **Mr. J. F. Reeh Taylor, Q.C. (Chairperson)**
 Mrs. Lila Goodspeed
 Mr. F. Les Cox

APPEARANCES: **Manitoba Public Insurance Corporation ('M.P.I.C.')**
 represented by Ms. Joan G. McKelvey;
 J.E.F., the Appellant appeared in person

HEARING DATE: **July 20, 1998**

ISSUE: **Quantum of claim for permanent impairment**

RELEVANT SECTIONS: **Sections 126 to 130 of the MPIC Act and Section 14(d)(ii) of**
 Division 1, subdivision 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 Appellant, J.E.F., was involved in a motor vehicle accident on January 14th 1996. His injuries were initially diagnosed as: a grade II whiplash associated disorder, moderate left sacroiliac and lumbosacral joint injury, non-specific right arm pain, contusive type laceration at the tibial tuberosity of left leg and possible cartilage and/or ligament disruption in left knee. His injuries resulted in certain permanent impairments.

Compensation for permanent impairment is calculated as a percentage of \$104,138.00. J.E.F. was rated with an impairment rating totalling 8%, or \$8,331.04, made up as follows:

- 1) Mild instability in the left knee 4%

2) Meniscal problems	2%
3) Patellofemoral pain	1%
4) Scarring on the left knee	1%
Total	8%

The only issue with which we are here concerned relates to the amount J.E.F. was awarded him by M.P.I.C. for the instability of his knee.

J.E.F. testified that his knee injury developed complications requiring surgery, which was undertaken by Dr. W. Froese, for the removal of bone chips. He stated that his ability to continue in self-employment as a heavy equipment operator has been greatly hampered. As well, the injury has affected his family life as he can no longer play with his children as energetically as was the case prior to his injury, nor undertake his usual recreational activities such as hunting and hiking. Due to his discomfort causing instability when he walks for any distance, J.E.F. testified, he can not comfortably perform such normal activities as taking walks, shopping at the mall, or taking his children to walk around the Red River Exhibition.

He had undertaken physiotherapy for a 2 to 3 month period but said it had not helped. He was assigned an occupational therapist to assess his work situation, but this assessment has not been conducted to date.

Because his work activity is very restricted, J.E.F. has had to hire help to undertake some of the jobs that he would normally perform himself. These heavy equipment jobs are often in uneven, unstable, slippery and muddy terrain, which requires a great deal of physical activity and mobility. He is not able to kneel down but has to sit down with his left leg stretched straight out in front of him, putting him in an awkward position to carry out his work.

Since his accident, J.E.F. has been receiving medical care from Dr. Neil Craton, who is also the senior member of M.P.I.C.'s in-house medical team.

J.E.F. further testified that, in order to accommodate the work situation and to stabilize J.E.F.'s leg, Dr. Craton prescribed a leg support and advised J.E.F. to wear it full time when working. He was fitted with three different kinds of support consecutively: first, a corrective stocking, which did not help; then a soft brace, which was equally ineffective; finally, a molded brace was prescribed that restricted his movement so greatly and caused burns to his skin to the degree that the discomfort made it impossible to wear.

Dr. Froese has discovered that there are further bone chips that also cause some instability in J.E.F.'s knee and make him anxious about carrying out his activities. Surgery is scheduled for December 1998 to remove the bone chips. He hopes that, as a result, the pain will subside but he has been told by Dr. Froese that he is likely to have discomfort for the rest of his life.

J.E.F. is appealing the decision of the Internal Review Officer because he feels the impairment

award does not sufficiently cover the continuing instability and deterioration of his leg. A permanent impairment in the form of knee instability is covered by Sections 126 to 130 of the Act and Section 14(d) of Subdivision 2, Division 1 of Schedule A to Regulation 41/94 (copies annexed). J.E.F. testified that although Dr. Craton reports that he has full range of motion of his left knee, he does not, in fact, have full mobility, has continuing instability and is restricted in doing his work.

The Commission has carefully examined the numerous medical reports, including those of the appellant's physician, Dr. Neil Craton, his chiropractor, Dr. D. Minuk, who provided treatment for the management of the Appellant's injuries, and Dr. Warren Froese, Orthopaedic Surgeon, who performed the first arthroscopic surgery to repair the damaged meniscus and is slated to perform the further surgery in December.

On October 15th 1997, Dr. Craton reported on J.E.F.'s condition, in part, as follows: "he is complaining of ongoing pain and catching in his left knee...he denies any significant or recurrent swelling or giving way". When J.E.F. was questioned about what he meant by "catching in his left knee", he replied that when he walks something 'catches' in his knee and he has to stop and give it a 'hit' in order to get it into position where he can move again. He said that he used to carry his children but no longer does so because of the probability that his knee will slide away out from underneath him. Dr. Craton reported that the Appellant was provided with a derotational and unloading brace because of some mild instability which qualified him for an impairment award of 4% for his meniscal dysfunction.

Dr. Craton had prescribed a brace for J.E.F. to be worn fulltime when he was carrying out his work activities. In that the brace was prescribed for fulltime use, and in light of the other evidence referred to above, we are persuaded that the impairment award falls in the category of severe instability with an award of 7%. It was pointed out by Counsel for MPIC that although the brace had been prescribed for fulltime use, the Appellant has not in fact been wearing it. While it is true that, because of the inflexibility and abrasion, the Appellant found it impracticable to wear his third brace while trying to carry out his work.

We are of the view that whether or not J.E.F. wore the brace is not of major significance. The fact is that his medical advisor instructed him to use the brace on a regular basis which, weighed together with the other testimony, denotes a severe instability and thus he is entitled to a percentage impairment award for that instability of 7% rather than 4%.

We note, in passing, that M.P.I.C., on Dr. Craton's advice, has apparently also agreed to an additional award of 1% for superficial venous insufficiency and, although that was not part of this appeal, we bring it to the attention of MPIC to ensure its payment.

DISPOSITION

Since J.E.F. has already been paid an 8% permanent impairment award there remains the sum of 1% for superficial venous insufficiency and an additional 3% for an instability award to which J.E.F. is entitled, with interest thereon from November 7th 1997, to the date of the actual payment, calculated at the statutory rate.

Dated this 29th day of July, 1998.

J.F.REEH TAYLOR, Q.C.

LILA GOODSPEED

F. LES COX