



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by J.P.
AICAC File No.: AC-01-17

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Yvonne Tavares
Mr. Jeff Palamar

APPEARANCES: The Appellant, J.P., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Tom Strutt.

HEARING DATE: March 13, 2003

ISSUE(S): Calculation of interest on permanent impairment benefit.

RELEVANT SECTIONS: Sections 127, 129(1), 130, 163, 171(1) and 197.1 of The
Manitoba Public Insurance Corporation Act ('MPIC Act')

**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.P., was involved in a motor vehicle accident on February 26, 1995. As a result of that accident, the Appellant suffered injuries which resulted in permanent physical impairments. Pursuant to Section 127 of the MPIC Act, the Appellant is entitled to a lump sum indemnity as a result of the permanent physical impairments, in accordance with the Regulations to the MPIC Act.

In a decision dated September 11, 2000, MPIC's case manager advised the Appellant that he had assessed the Appellant's entitlement to a permanent impairment payment and determined that the Appellant was entitled to a permanent impairment benefit of 4%, according to Division 1, Subdivision 3; Item 21(a)(iii) of the Schedule of Permanent Impairments respecting the alteration following the herniation of an intervertebral disc without discectomy or chemonucleolysis, including any functional limitations.

The Appellant applied for an Internal Review of that decision, on the basis that he should be awarded the maximum impairment of 5% allowed by the Schedule of Permanent Impairments for the alteration following the herniation of an intervertebral disc without discectomy or chemonucleolysis, including any functional limitations. The Internal Review Officer in her decision dated February 6, 2001, determined that the Appellant was not entitled to the maximum permanent impairment benefit of 5%, as there was no evidence of radiculopathy, stemming from the motor vehicle accident of February 26, 1995.

In reaching her decision, the Internal Review Officer relied upon the medical opinion of Dr. Michael Mackay, Medical Consultant to MPIC's Health Care Services Team. In his Inter-Departmental Memorandum dated July 30, 2000, Dr. Mackay suggested that the 5% award would represent herniation with clinical evidence of radiculopathy and electrophysiological documentation of nerve dysfunction. Based upon his review of all of the medical information on the file, Dr. Mackay opined that the Appellant did not meet the criteria for the existence of a radiculopathy.

The Internal Review Officer did however award the Appellant a further 1% permanent impairment benefit for decreased sensation involving the L5-S1 dermatomes because of a permanent sensory impairment involving the S1 nerve root.

The Appellant subsequently appealed the Internal Review decision to this Commission. After the hearing of this matter, counsel for MPIC reconsidered the Corporation's position and decided to pay the Appellant the additional benefit of 1% plus interest from November 15, 2002 (the date on which Dr. Johnson forwarded his report of May 14, 2002 to MPIC). Counsel for MPIC determined that Dr. Johnson's report contained some clinical evidence of radiculopathy which satisfied Dr. Mackay's criterion for the last 1% of the benefit.

The Appellant advised the Commission that in light of MPIC's decision to pay the additional 1% benefit, he was satisfied with the total permanent impairment payment. However, he took issue with the amount of interest which MPIC had determined was payable on the award. The Appellant maintains that he is entitled to interest on the total permanent impairment benefit of 6% from the date of the motor vehicle accident on February 26, 1995.

Counsel for MPIC in his letter dated May 21, 2003, makes the following remarks with respect to the Appellant's entitlement to interest on the permanent impairment payment:

Dr. Johnson's report of May 14, 2002 does, however, contain some clinical evidence of radiculopathy other than an electrophysiological documentation of nerve dysfunction. As my March 28, 2003 letter to the Commission indicates, that satisfies Dr. MacKay's criterion for the last 1% of the award. Clearly, interest cannot run on this amount from the accident, even according to the discussion in *B*. The impairment was not "created" at the date of the accident. There is no evidence this particular impairment existed before May 2002. It would be fair, and consistent with Section 197.1 of the Act, to have interest run from November 15, 2002, the date on which Dr. Johnson forwarded the report to us. Section 171 of the Act applied here as well. Dr. Johnson's report was new information and may have warranted a fresh decision in December 2002. That decision could hardly have been made before the fresh information was available, however.

Our submission then is that J.P. is entitled to interest on the 1% award from November 15, 2002 to whatever date in April 2003 payment was made. He is not entitled to any other interest. We submit that that is the outcome necessarily flowing from the proper application of Sections 163, 171 and 197.1 of the Act.

THE LAW

The relevant sections of the MPIC Act are as follows:

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.

Evaluation of permanent impairment under schedule

129(1) The corporation shall evaluate a permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

Computation of lump sum indemnity

130 The lump sum indemnity payable under this Division for a permanent impairment is an amount equal to the product obtained by multiplying the maximum amount applicable under section 127 on the day of the accident by the percentage determined for the permanent impairment.

Successful applicant is entitled to interest

163 Where a person's application for a review or appeal is successful, the corporation shall pay interest to the person on any indemnity or expense to which the person is found to have been entitled before the review or appeal, at the prejudgment rate of interest determined under section 79 of *The Court of Queen's Bench Act*, computed from the day on which the person was entitled to the indemnity or expense.

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

Interest where benefit not paid within 30 days after entitlement established

197.1 Where the corporation fails to pay an indemnity, a retirement income or an expense to a person entitled to compensation under this Part within 30 days after the day on which the person's entitlement to the benefit is determined, the corporation shall pay to the person interest on the amount of the indemnity or expense at the prejudgment rate of interest prescribed under section 79 of *The Court of Queen's Bench Act*, computed from the day on which the person became entitled to the benefit.

DISCUSSION

The issue which arises on this appeal concerns an Appellant's right to interest on permanent impairment benefits. The determination of the entitlement to interest, as with all other entitlements under the Personal Injury Protection Plan, must be examined by reference to the specific provisions of the MPIC Act.

The Appellant received a permanent impairment benefit of 4% arising from the case manager's decision of September 11, 2000. He seeks interest on that sum from the date of the motor vehicle accident.

The determination of permanent impairment benefits arising from a motor vehicle accident necessarily requires significant claims investigation. It is not uncommon after an accident for a victim to require significant rehabilitation, ongoing medical care and time to heal. Additionally, the true extent of an individual's permanent impairments may sometimes only be determined with the passage of time.

Sections 126 to 130 of the MPIC Act, dealing with compensation for permanent impairments, do not contemplate the payment of interest on the lump sum indemnity for the permanent impairment. We therefore find that, in the normal circumstances, where the delay in the payment of permanent impairment benefits arises from a reasonable claims investigation, an award of interest is not justified and not provided for by the MPIC Act. Accordingly, in these circumstances, we find that the Appellant is not entitled to interest on the 4% permanent impairment benefit awarded to him by the case manager's decision of September 11, 2000.

The Internal Review Officer in her decision dated February 6, 2001 found that the Appellant was

entitled to an additional permanent impairment benefit of 1% for decreased sensation involving the L5-S1 dermatomes and accordingly there was an indication of a permanent sensory impairment involving the S1 nerve root. The Appellant seeks interest on that sum from the date of the motor vehicle accident.

Counsel for MPIC, in his submission to the Commission, argues that the Internal Review decision was a fresh decision and therefore interest should not accrue. Specifically, counsel for MPIC contends that:

Dianne Pemkowski's Review decision of February 6, 2001 (Tab 16) adopts the suggestion in Dr. MacKay's January 15, 2001 memo (Tab 19) that "there is evidence to suggest J.P. **might have** permanent sensory impairment involving the S1 nerve root." She awarded an additional 1%. Dr. MacKay's memo was addressed to Ms. Pemkowski. This was a fresh decision based on new information. Section 171 of the Act applies. There was no finding that J.P. was entitled to the 1% benefit in question *before* the Review. Accordingly, Section 163 does not apply to support an award of interest, nor does Section 197.1 since the entitlement was only *determined* on the Review itself. In addition, it should be observed that there remains considerable doubt whether J.P. was actually entitled to this benefit. (In fact, Ms. Pemkowski specifically observes that she is giving him the benefit of the doubt.)

Dr. Mackay in his Inter-departmental Memorandum of January 15, 2001, relied upon Dr. Conrad Hoy's report dated July 7, 1999. In his report dated July 7, 1999, Dr. Hoy found that the sensory function in the lower extremities of the Appellant was normal, but he identified a slight decrease of pin-prick sensation in the left leg from the L3 dermatome to the S1 dermatome. Dr. Hoy's report dated July 7, 1999, from which Dr. Mackay concluded that the Appellant might have permanent sensory impairment involving the S1 nerve root was not new information. Rather, we note that Dr. Mackay had previously reviewed this report when he prepared his Inter-Departmental Memorandum dated July 30, 2000. Therefore, we find that the Internal Review Officer's decision was not a fresh decision based upon new information within the meaning of Section 171 of the MPIC Act. As a result, Section 163 of the MPIC Act applies, since the

Appellant's Application for Review was successful, in that he was awarded an additional 1% permanent impairment benefit.

With respect to the Appellant's appeal to this Commission, we find that the Appellant was successful in his appeal. MPIC consented to a further 1% permanent impairment benefit award and as a result a Consent Order was issued by this Commission. In these circumstances, we find that this was an indemnity to which the Appellant was entitled before the appeal hearing. He was successful in pursuing his appeal and accordingly Section 163 of the MPIC Act applies.

Section 163 of the MPIC Act provides that interest shall be computed from the date on which the person was entitled to the indemnity or expense. The issue therefore arises as to when does an individual become entitled to the indemnity or expense.

This issue was considered previously by this Commission in the appeal by *G.B., AC-99-139*. In that decision, the Commission found that:

We do not accept the argument that, under Section 163, interest should only be calculated from the date when the corporation first became aware with some certainty of a claimant's entitlement to money. Such an interpretation would mean, for example, that if the corporation through oversight or an excessive volume of claims omitted to make the proper inquiries, or if (as is often the case) several months elapse between the date when an inquiry is directed to a medical practitioner and the date when that practitioner responds, the victim of the accident is again victimized by the resultant delay.

....

It may well be true that the full extent of G.B.'s permanent impairments had not been determined until more recent dates, and then only in the several stages noted above, but in our view his entitlement stems from the date of his accident. That is when the impairment was created and that, therefore, is the base date of his entitlement.

We agree with the decision previously rendered by this Commission, with respect to the date on

which the entitlement to interest arises respecting a permanent impairment benefit. We find that the entitlement arises at the date of the motor vehicle accident, not when MPIC determines the applicable impairment benefit or is in a position to determine that benefit. Section 163 of the MPIC Act does not refer to the date that the indemnity was determined, as does Section 197.1 of the MPIC Act, but rather, to the date from which the person was entitled to the indemnity. Although practically, that indemnity may not be determined until sometime after the motor vehicle accident, the entitlement to the indemnity arises at the time of the accident. Section 197.1 of the MPIC Act then applies to the computation of interest, once MPIC determines the applicable impairment benefit.

As a result, and for these reasons, we find that the Appellant is entitled to interest on the 1% permanent impairment benefit awarded to him by the Internal Review Officer, and on the 1% permanent impairment benefit awarded to him after the appeal hearing, from the date of the motor vehicle accident, that is February 26, 1995. The decision of the Internal Review Officer dated February 6, 2001 is, therefore, varied accordingly.

Dated at Winnipeg this 30th day of October, 2003.

MEL MYERS, Q.C.

YVONNE TAVARES

JEFF PALAMAR