



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by C.N.

AICAC File No.: AC-03-178

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Barbara Miller
Mr. Paul Johnston

APPEARANCES: The Appellant, C.N., was represented by Mr. Reuben Potash; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: September 7, 2004

ISSUE(S): Adequacy of Permanent Impairment Award for scarring and deformity to front and back trunk.

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Table 17, in Division 3, of Schedule A to Manitoba 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

C.N. (hereinafter referred to as the "Appellant") was involved in a motor vehicle accident on June 29, 1994 when she suffered a punctured bowel as well as a fractured vertebrae. As a result of the motor vehicle accident injuries the Appellant developed abdominal/trunk scarring as well as changes in form and symmetry to the posterior trunk region. The case manager, in a decision dated September 9, 1997 determined that the Appellant was entitled to a 6% permanent

impairment benefit as it relates to scarring of the trunk and this represented a maximum impairment benefit for this region of the body.

The Appellant applied for a review of the case manager's decision asserting that there had been an improper assessment of impairment benefits. The Appellant's legal counsel provided MPIC with a report from Mr. Jim Caithness of Mobile Therapy Services, dated July 8, 2003 wherein he documented the following:

1. Abdominal scar – $1.5 \times 0.1 = 0.15\text{cm}^2$
2. Right anterior trunk – 4 scars
 - (a) $7.0 \times 0.2 = 1.4\text{cm}^2$
 - (b) $5.0 \times 0.2 = 1.0\text{cm}^2$
 - (c) $1.2 \times 0.2 = 0.24\text{cm}^2$
 - (d) $5.0 \times 0.3 = 1.5\text{cm}^2$
3. Left anterior trunk – $7.0 \times 0.3 = 2.1\text{cm}^2$
4. Abdominal scars – $13.0 \times 0.3 = 3.9\text{cm}^2$
5. 26 stitch scars measuring $0.2 \times 0.1 = 0.02\text{cm}^2$ each, for a total surface area of $26 \times 0.2 = 0.52\text{cm}^2$.
6. Back – The spinous processes of L2 and T12 project outward during normal standing. Mr. Caithness reports that these deformities increase in size in forward bending and he would rate these and moderate changes in form and symmetry.
7. Mr. Caithness wrote that your umbilicus is more depressed than prior to the motor vehicle accident and he would rate this as a mild change in form and symmetry.

Upon receipt of this report MPIC requested that Dr. Michael J. MacKay, its medical consultant, review Mr. Caithness' report of July 8, 2003 to determine whether the Appellant was entitled to an increase in respect of a permanent impairment award relating to the disfigurement to the Appellant's trunk. Dr. MacKay reviewed the Appellant's medical file, as well as Mr. Caithness' report, and provided a report to the case manager dated August 19, 2003 and stated:

It is documented in the file that [C.N.] (sic) was entitled to 6% impairment benefit as it related to scarring of the trunk. This would represent the maximum impairment benefit for this region of the body. According to the Schedule, claimant's that develop scarring as well as change in form and symmetry of a region of the body except for the face are entitled to the higher of the two impairment percentages. With this in mind, it is my opinion that [C.N.] would not be entitled to the mild change in form and symmetry as it relates to the umbilicus as noted by Mr. Caithness.

The scarring noted over the trunk region appears to involve the anterior aspect. I was unable to locate information indicating that [C.N.] was noted to have scarring over the posterior trunk region.

It is possible that the prominences over the spine are a byproduct of the trauma [C.N.'s] spine was exposed to that resulted in the compression fracture. With this in mind, it is my opinion that [C.N.] would be entitled to an impairment benefit as it relates to change in form and symmetry of the posterior trunk region. Based on the Schedule of Permanent Impairments, Division 3, Table 17, it is my opinion that [C.N.] is entitled to a 3% impairment benefit for the change in form and symmetry noted by Mr. Caithness and evident on the photographs.

Internal Review Decision

The Internal Review Officer issued her decision on October 1, 2003. In her decision the Internal Review Officer adopted Dr. MacKay's opinion and confirmed the case manager's decision that the Appellant was entitled to a maximum of 6% impairment benefit as it relates to the scarring of the trunk and that this represented a maximum impairment benefit for this region of the body. The Internal Review Officer also noted that Dr. MacKay had concluded in his report to the Internal Review Officer, dated August 19, 2003, that the Appellant was entitled to an additional 3% impairment benefit for the change in form and symmetry as per Division 3, Table 17 of Manitoba Regulation 41/94 and, accordingly, the Internal Review Officer amended the case manager's decision by increasing the permanent impairment award rating by 3%.

Appeal

The Appellant, on November 26, 2003, filed a Notice of Appeal stating that there was a failure by MPIC to pay a maximum of 12% for both scarring and deformity of the Appellant to the front and back trunk.

The relevant legislation in respect of this appeal is Section 127 of the MPIC Act:

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.

In respect of the permanent impairment award relating to the disfigurement of the trunk, Schedule A, Division 3, Table 17 of Manitoba Regulation 41/94 provides in part:

Disfigurement of other parts of the body

- Where there are both changes in the form and symmetry and scarring, the higher percentage obtained under either heading is awarded, without exceeding the maximum percentage prescribed for that part of the body, according to Table 17.

Evaluation of impairments to other parts of the body

Parts of the body	Change of form and symmetry	Cicatricial impairment
Trunk	Minor or moderate change: 1 to 3% Severe change: 6%	Conspicuous Impairment: 0.5%/cm ²
	The maximum percentage of disfigurement for the trunk (front and back) is 12%	

The appeal hearing took place on September 7, 2004 and Mr. Reuben Potash represented the Appellant while Mr. Terry Kumka represented MPIC.

In support of his position, Mr. Potash referred the Commission to his letter to the case manager dated October 14, 2003 which stated:

Re: [C.N.]
Application for Review of Injury Claim Decision

Thank you for your decision of October 1st, 2003. Could you please forward those benefits you believe are payable pursuant to your decision to my office as soon as possible.

With respect to the decision, the one point with which I disagree is the setting of the maximum payable under Table 17 at 6%. I am enclosing a copy of Table 17 which indicates that the maximum percentage of disfigurement for the trunk front and back is 12%. As [C.N.] has suffered impairment both to the front and back of her trunk, she is entitled to a maximum percentage of 12%. The total change of form and symmetry and scarring taken together far exceeds 12% and therefore [C.N.] is entitled to a further 6% pursuant to Table 17.

The case manager had rejected this submission and, as a result thereof, the Appellant sought an application for an internal review and subsequently appealed to this Commission.

In his submission to the Commission, the Appellant's legal counsel submitted that:

1. the language set out in Table 17 in respect of the trunk clearly indicates that the disfigurement to the trunk, whether by scarring or whether by change in form and symmetry, clearly establishes that the maximum percentage is 12%.
2. the total impairment percentages for the trunk region (front and back) exceeds 12%.
3. as a result, the maximum impairment award in respect to the trunk region (front and back) is 12%.
4. Dr. MacKay erred when he stated in his Inter-Departmental Memorandum to MPIC, dated August 19, 2003, that the Appellant was entitled to a 6% benefit as it relates to

the scarring of the trunk and “This would represent the maximum impairment benefit for this region of the body”.

MPIC’s legal counsel submitted that the language set out in Table 17 in respect to the trunk clearly indicated that:

1. scarring to the front and the back of the trunk were to be measured separately in determining the maximum percentage.
2. the maximum percentage for scarring to the front of the trunk was 6% and the maximum percentage of scarring to the back of the trunk was 6%.
3. notwithstanding that the scarring to the Appellant’s front trunk region exceeded 6%, the Appellant’s impairment entitlement for the trunk was limited to 6% (maximum for the front portion of the trunk) and 3% for the change in form and symmetry to the back portion of the trunk.

During the course of his submission the Appellant’s legal counsel submitted that the measurement of the scarring to both the front and back portions of the trunk exceeded 12%. MPIC’s legal counsel was unable to confirm or reject that submission at that time. At the conclusion of the oral hearing the proceedings were adjourned pending the decision of the Commission. During the course of the Commission’s deliberations the Commission wrote to MPIC’s legal counsel requesting that he advise the Commission and the Appellant’s legal counsel whether or not the measurement of the surface area of the scarring to both the front and back of the Appellant’s trunk did or did not exceed 12%. MPIC’s legal counsel, in a letter to the Commission dated October 15, 2004, confirmed that the total impairment percentages for the trunk region (front and back) would exceed 12%. A copy of this letter was provided to the Appellant’s legal counsel who advised the Commission that he agreed with MPIC’s legal

counsel's comment.

Discussion

The Commission agrees with the submission made by MPIC's legal counsel that the front and back of the trunk are to be treated as separate parts of the body and that the maximum percentage that can be awarded for impairment:

- (a) for the front portion of the trunk scarring is 6%;
- (b) for the back portion of the trunk scarring is 6%; and
- (c) for the scarring to both the front and back portions of the trunk together is 12%.

An examination of the language in Table 17 of Manitoba Regulation 41/94 supports MPIC's position in this respect.

In respect of the neck, Table 17 states:

Neck	Minor or moderate change: 1 to 5%	Conspicuous Impairment: 1%/cm ²
	Severe change: 8%	
	The maximum percentage of disfigurement for the neck is 8%	

The Commission finds that this provision:

1. describes the neck as a single organ and, unlike the provision dealing with the trunk, does not refer to the front and back of the neck.
2. indicates that the scarring to the neck is not determined by measuring the front and back of the neck separately but by measuring the scarring of the entire neck as a single organ.

The Commission, however, finds that in respect of the trunk in Table 17, this provision does make a distinction between the front and back of the trunk in determining the maximum percentage of disfigurement.

The Commission further determines that the Appellant's position is inconsistent with paragraph 3 of Schedule A, Division 3, Table 17 of Manitoba Regulation 41/94 which states:

3. Where there are both changes in the form and symmetry and scarring, the higher percentage obtained under either heading is awarded, without exceeding the maximum percentage prescribed for that part of the body, according to Table 17.

This provision describes the method of determining the maximum percentage of an impairment award in respect of "that part of the body" as set out in Table 17. The words "that part of the body" in paragraph 3 are stated in the singular tense and not in the plural tense. However, under Table 17 the maximum percentage of disfigurement refers to the trunk in the plural sense as follows:

- a. the word "trunk" is found under the heading Parts of the Body.
- b. describes both the front and back of the trunk together as having a maximum percentage of 12%.

The Commission therefore finds that the language in paragraph 3 is consistent with the interpretation submitted by MPIC's legal counsel.

The Commission further notes that a basic principle of statutory interpretation is that meaning must be given to all words in this provision. MPIC's interpretation in respect of its interpretation of Table 17 in respect to the trunk gives meaning to both the words "(front and back)" as set out

in this provision while the Appellant's interpretation does not.

Upon a review of the entire provision as a whole, the Commission finds that the interpretation suggested by counsel for the Appellant would lead to an illogical result.

Division 3 – Disfigurement of Other Parts of the Body provides as follows:

1. Where there is impairment only by changes in form and symmetry, the degree of impairment is calculated and the percentage of disfigurement prescribed for that part of the body is awarded, according to Table 17.
2. Where there is impairment only by scarring, the surface area of the scar is measured and the percentage prescribed per cm² is awarded, without exceeding the maximum percentage prescribed for that part of the body, according to Table 17.
3. Where there are both changes in the form and symmetry and scarring, the higher percentage obtained under either heading is awarded, without exceeding the maximum percentage prescribed for that part of the body, according to Table 17.

If the Schedule were interpreted as counsel for the Appellant suggests, a victim who sustained scarring to the front of the trunk (and was awarded a permanent impairment benefit of 12%) would obtain the same award as an individual who sustained both a severe deformity and scarring to both the front and back of the trunk (since that award would also be limited to 12%). This result is contrary to the general intent of the scheme established by the Schedule, whereby greater permanent impairment benefits are awarded for more serious injuries.

Accordingly, the Commission finds that the intent of Table 17 is to limit the maximum award for the front of the trunk to 6%.

The Commission does not find the language set out in Table 17 is ambiguous in that the language of this provision supports two reasonable interpretations. In the Commission's view,

the only reasonable interpretation is that advanced by MPIC's legal counsel.

In the alternative, if the Commission is incorrect and the language set out in Table 17 in respect of the trunk is ambiguous, then the Commission finds that, for the reasons set out herein, the most reasonable interpretation of Table 17 in respect of the trunk is MPIC's interpretation.

The Commission therefore determines that MPIC was correct in finding that the Appellant was entitled to a permanent impairment award of 6% for the front portion of the Appellant's trunk and 3% for the back portion of the Appellant's trunk.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated October 1, 2003 is hereby confirmed.

Dated at Winnipeg this 25th day of October, 2004.

MEL MYERS, Q.C.

BARBARA MILLER

PAUL JOHNSTON