



## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by C.N.B.  
AICAC File No.: AC-03-184**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
The Honourable Mr. Armand Dureault  
Mr. Bill Joyce

**APPEARANCES:** The Appellant, C.N.B., was represented by Mr. Reuben Potash;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

**HEARING DATE:** September 9, 2004

**ISSUE(S):** Adequacy of impairment award in respect of scarring to right lower limb

**RELEVANT SECTIONS:** Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 41/94, Division 3, Sub-paragraph 2, Table 17

**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.B. (hereinafter referred to as the "Appellant") was involved in a motor vehicle accident on October 20, 1999 and sustained serious injuries to his right leg which required surgery, physiotherapy and occupational therapy. These injuries caused several permanent impairments which were assessed by Dr. Shrom, Medical Consultant with MPIC's Health Care Services Team. In an Inter-Departmental Memorandum to the case manager, dated December 27, 2002, Dr. Shrom determined, in accordance with Manitoba Regulation 41/94, Table 17, that the Appellant was entitled to the following permanent impairment benefits:

Right Knee	2.8%
Right Ankle	4.15%
Right Lower Limb Scarring	8.00%
Trunk Scarring	1.26%
Total	16.21%

Dr. Shrom further stated in her Inter-Departmental Memorandum:

The Manitoba Public Insurance Schedule designates impairment at the level of the lower limb at a rate of 1% per cm<sup>2</sup>, to a maximum of 8% per lower limb. The combined areas of the noted individual scars relating to the right lower limb well exceed the maximum cicatricial impairment maximum. As such, an impairment benefit of 8% applies with respect to right lower limb scarring. The disfigurement noted with respect to scarring over the anterior aspect of the right lower leg is included in the maximum percentage prescribed for the right lower limb, as per Division 3; 3 of the Manitoba Public Insurance Impairment Schedule.

On January 13, 2003 the case manager wrote to the Appellant and adopting Dr. Shrom's medical opinion advised the Appellant that MPIC had determined that he was entitled to an impairment award of 16.21%.

### **Internal Review Decision**

On February 24, 2003 the Appellant made an Application for Review of the case manager's decision.

The Internal Review hearing took place on September 29, 2003 and the Appellant was represented by his legal counsel, Mr. Reuben Potash. On November 14, 2003 the Internal Review Officer wrote to the Appellant's legal counsel, Mr. Reuben Potash, and advised him that she had confirmed the case manager's decision dated January 13, 2003 and was rejecting the Appellant's request for an increase in the permanent impairment award to the Appellant's right leg. The Internal Review Officer further stated:

In a report dated December 27, 2002, Dr. Shrom of Manitoba Public Insurance's Health Care Services Team noted that you suffered from multiple right lower limb scars including right ankle scarring, right interior lower leg scarring, right interior knee scarring and interior right thigh scarring. Dr. Shrom indicated that the combined areas of the noted individual scars relating to the right lower limb exceed the maximum cicatricial impairment maximum. Dr. Shrom concluded that you would be entitled to the maximum impairment rating of 8% with respect to right lower limb scarring.

Table 17 of Manitoba Regulation 41/94 R contains the impairment ratings to which claimants are entitled in relation to scarring to the lower limbs. Table 17 provides that a claimant is entitled to a 1% impairment rating per centimeter squared of scarring to the lower limbs. Your representative noted that in the Regulation it is written "the maximum percentage of disfigurement for the lower limbs is 16%". On this basis, your representative argued that you would be entitled to an impairment rating of 16% rather than 8% for scarring to your right lower limb.

The Manitoba Automobile Injury Compensation Appeal Commission addressed the issue of scarring to the lower limb in *re L.H.C.* [1998] M.A.I.C.A.C.D. No. 15. In that case, the claimant had an 11 cm dark blue scar on her left knee, a scar on her ankle measuring 1 centimeter long and another scar on her ankle measuring 5 centimeters long. The Commission wrote:

"the Regulations under The Manitoba Public Insurance Corporation Act provide a maximum award for scarring to any one lower limb of 8% of the maximum which, at the time of [L.H.C.'s] accident, was \$100,000.00. Since the scars referred to above covered approximately 13 square centimeters, [L.H.C.] was entitled to the maximum award, namely \$8,000.00."

I adopt the Commission's interpretation with respect to the maximum impairment rating for scarring to the lower limbs and as a result I find that I must uphold your Case Manager's decision regarding same.

### Appeal

The Appellant filed a Notice of Appeal on November 27, 2003 asserting there was a failure to pay a maximum of 16% for scarring and deformity of his right lower limb.

The relevant provisions of the Act and Regulations in respect of this appeal 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.

#### **Manitoba Regulation 41/94**

### DIVISION 3

#### DISFIGUREMENT OF OTHER PARTS OF THE BODY

2. Where there is impairment only by scarring, the surface area of the scar is measured and the percentage prescribed per cm<sup>2</sup> is awarded, without exceeding the maximum percentage prescribed for that part of the body, according to Table 17.

**TABLE 17**  
**(Items 2 and 3 in Division 3)**

#### EVALUATION OF IMPAIRMENTS TO OTHER PARTS OF THE BODY

Parts of the body	Change of form and symmetry	Cicatricial impairment
Lower limbs	Minor or moderate change: 1 to 4%  Severe change: 8%  The maximum percentage of disfigurement for the lower limbs is 16%	Conspicuous Impairment: 1%/cm <sup>2</sup>

The appeal hearing took place on September 9, 2004. The Appellant was represented by Mr. Reuben Potash and Mr. Mark O'Neill was MPIC's legal counsel. Both legal counsel in their submissions to the Appeal Commission agreed that the scarring to the Appellant's right lower leg exceeded the maximum cicatricial impairment of 16%. The Appellant's legal counsel submitted that the Appellant was entitled to the maximum award of 16%, while MPIC's legal counsel argued that the Appellant was entitled to the 8% as determined by MPIC.

The Appellant's legal counsel submitted that:

1. MPIC erred in limiting the maximum percentage of disfigurement to the right lower limb to 8% when Table 17 provided a maximum percentage for this disfigurement of 16%.

2. Table 17 did not provide a maximum award for scarring to either lower limb of 8% of the maximum, but clearly stated that the maximum percentage of disfigurement for the lower limbs was 16%.
3. pursuant to paragraph 2 under Division 3 in the Regulation, MPIC is required to measure the surface area of the scar and the percentage prescribed per cm<sup>2</sup> is awarded, up to a maximum of 16%, in accordance with Table 17. Since the measurement of the scarring to the surface area of the Appellant's right lower leg exceeded 16%, then the Appellant was entitled to an impairment benefit in the amount of 16%.

The Appellant's legal counsel, in his oral argument to the Commission, submitted that the language in respect of lower limbs as set out in Table 17 was ambiguous and therefore the legal principle of contra proferentum applied to the interpretation of this provision.

In reply MPIC's legal counsel submitted that:

1. the language of Table 17 in respect of lower limbs did not support the interpretation submitted by the Appellant's legal counsel.
2. an examination of the language in Table 17 indicated that since the maximum percentage of disfigurement for scarring for both lower limbs was stated as 16%, then it can reasonably be inferred that the maximum percentage of disfigurement for scarring to each of the lower limbs had to be 8%.
3. a claimant was entitled to a maximum of 16% for scarring if there existed scarring on each limb, at a minimum of 8% or more.
4. since the Appellant had suffered scarring in excess of 16% to his right lower limb

only, then in accordance with Table 17 he was only entitled to a maximum impairment award of 8%.

MPIC's legal counsel submitted that:

1. the legal maxim contra proferentum did not apply to assist in the interpretation of the MPIC Act.
2. in interpreting the legislation the Commission is required to provide a large and liberal interpretation having regard to the attainment of the objects of the legislation.

At the conclusion of the oral submissions, the Commission requested both counsel to provide written submissions in respect of their legal arguments relating to the maxim of contra proferentum.

On September 14, 2004 the Appellant's legal counsel wrote to the Commission enclosing a copy of page 232 of the text on disability insurance by Richard Hayles and stated:

Clearly, Professor Hayles does not restrict the application of the maximum of contra proferentem to exclusion clauses in insurance policies only. Rather, he states as follows:

"If there is an ambiguity in terms of the policy, it is construed against the insurance company, which usually determines the contents of the policy. Ambiguity exists where the contract language will support two interpretations, both of which are reasonable. Rather than apply the interpretation that is most reasonable or the one most consistent with other provisions of the policy or the underlying purpose of the insurance, the court will apply the interpretation most favourable to the insured."

MPIC's legal counsel in response wrote to the Commission on September 14, 2004:

We received Mr. Potash's letter of September 14, 2004 and the excerpt from Professor Hayles. Mr. Potash did not quote the last sentence in the section under Contra

Proferentem, which says: "Neither *contra proferentem* nor strict construction are applicable where the words in question are inserted into the policy by statute." The case on which Professor Hayles relies for that assertion is *Goodwin v. Insurance Corporation of British Columbia* (1993), 18 C.C.L.I. (2d) 104, a decision of the British Columbia Supreme Court. I have enclosed a copy of that decision with this letter.

The decision contains a neat analysis of the use of the *contra proferentem* principle and the basis for using it. That basis is that the "author" of a document will be held to a strict interpretation of it. In this case, neither of the parties to this hearing were the authors of the statute. It was created by a legislature duly elected by citizens of Manitoba. On page 7 of the case, Justice Drost, quoting *Squire v. Insurance Corporation of British Columbia*, a decision of the British Columbia Court of Appeal, notes as follows: ". . . the contra proferentem rule has no application to the statutory terms of a contract of insurance. . . As counsel for the appellant put it, the underlying rationale of the rule has no application when neither party can choose the language of the contract between them."

In reply to MPIC's legal counsel's submission, the Appellant's legal counsel wrote a further letter to the Commission dated September 28, 2004 wherein he asserted that if the principle of contra preferentum does not apply to the MPIC Act there is a body of case law which suggests that where there is ambiguity in legislation which purports to curtail certain rights it is to be construed liberally and in the favour of the affected person. The Appellant's legal counsel, in this letter, enclosed a copy of pages 394 to 407 inclusive from the text Sullivan and Driedger on the Construction of Statutes 4<sup>th</sup> edition Butterworths.

### **Discussion**

In respect of the legal submissions relating to the principle of contra preferentum the Commission agrees with MPIC's position that this principle has no application to the MPIC Act. The Commission further agrees with the submission of both counsel that in interpreting the legislation the Commission is required to comply with Section 6 of the Interpretation Act of Manitoba which states:

#### **Rule of liberal interpretation**

6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

The Commission agrees with the submission by MPIC's legal counsel in respect of the interpretation and application of Table 17 and rejects the submission of the Appellant's legal counsel in this respect.

The Commission notes that paragraph 2 of Division 3 states:

2. Where there is impairment only by scarring, the surface area of the scar is measured and the percentage prescribed per cm<sup>2</sup> is awarded, without exceeding the maximum percentage prescribed for that part of the body, according to Table 17. (underlining added)

This provision describes the method to determine the maximum percentage of an impairment benefit "for that part of the body" as set out in Table 17. The reference to "that part of the body" in paragraph 2 is described in the singular tense and not in the plural sense. The Commission therefore determines that the instruction as set out in paragraph numbered 2 describes the method of determining the maximum percentage in respect of each lower limb separately and not the two limbs jointly.

The Commission further notes that the maximum percentage of disfigurement in Table 17 is described in the plural tense rather than in the singular tense as follows:

The maximum percentage of disfigurement for the lower limbs is 16%.

The language of this provision indicates that this legislation intended the maximum percentage for both lower limbs jointly, rather than individually, could be no more than 16%. It is therefore reasonable to infer that this legislation intended that the maximum percentage in respect of each lower limb would be 8% and not 16%.

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 cm<sup>2</sup> 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 a single leg (and was awarded a permanent impairment benefit of 16%) would obtain the same award as an individual who sustained both a severe deformity and scarring to both limbs (since that award would also be limited to 16%). 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 each lower limb to 8%.

The Commission determines that there is no ambiguity in respect of Table 17 in respect of lower limbs having regard to the language used in determining the maximum percentage of disfigurement for the lower limbs. The Commission finds that the only reasonable interpretation of this provision is the position asserted by MPIC's legal counsel.

The Commission further finds that if it is in error and there is ambiguity in Table 17 in respect of determining the maximum percentage of disfigurement of the lower limbs, then the Commission determines, having regard to the reasons set out herein, that the most reasonable interpretation is the interpretation asserted by MPIC's legal counsel.

In conclusion, the Commission, for the reasons outlined herein, rejects the Appellant's interpretation of Table 17 and finds that MPIC correctly interpreted this provision when determining that the Appellant was entitled to an impairment award in respect of 8% to his right lower limb.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated November 14, 2003 is, hereby, confirmed.

Dated at Winnipeg this 25<sup>th</sup> day of October, 2004.

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**MEL MYERS, Q.C.**

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**HONOURABLE ARMAND DUREAULT**

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**BILL JOYCE**