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## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by D.L.**  
**AICAC File No.: AC-03-34**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Mr. Les Marks  
Ms. Barbara Miller

**PARTIES:** The Appellant, D.L.;  
Manitoba Public Insurance Corporation ('MPIC'),  
represented by Mr. Dean Scaletta.

**HEARING DATE:** August 4, 2005

**ISSUE(S):** Entitlement to further Permanent Impairment benefits.

**RELEVANT SECTIONS:** Section 127 of the Manitoba Public Insurance Corporation  
(‘MPIC Act’) Act and Schedule A of 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

D.L. (hereinafter referred to as the Appellant) was involved in a motor vehicle accident on October 15, 1997 and suffered several motor vehicle accident injuries which were described in his Application for Compensation as a fracture of the left fibula and dislocated left elbow.

MPIC requested Mr. Brad Bobrowich to assess the Appellant to determine any permanent impairment to the Appellant’s left ankle.

On September 2, 1998, Mr. Bobrowich provided a report to MPIC wherein he estimated the Appellant's levels of impairment at 4% which was broken down in the following categories:

Restriction of ankle movement = 2%  
 Instability of ankle = 1%  
 Patellofemoral syndrome = 1%

MPIC referred this impairment rating to Dr. Neil Craton, Medical Director, MPIC's Health Care Services, for his comments in respect of this rating. Dr. Craton, in an Inter-departmental Memorandum to the case manager, dated February 8, 2001, stated:

**REASON FOR REFERRAL**

I have been asked to comment on this gentleman's impairment rating. This patient sustained a fracture dislocation. It has healed in an uncomplicated fashion. He also sustained a fracture of the left tibia which has been complicated by patellofemoral pain, and ankle and subtalar range of motion limitation.

The most recent documentation is from September 2, 1998. It documents this patient has subtalar ankle range of motion impairment. The subtalar range of motion impairment would be for 2% from page 28; 17(a)(ii)(B). There would be a 1% range of motion award for the ankle where there is only minimum tibiotarsal range of motion restriction.

This patient is also entitled to a 1% award for patellofemoral pain syndrome. This would entitle the patient to a 4% impairment award.

On November 25, 2002, the case manager wrote to the Appellant and advised him that he'd been awarded a 4% permanent award which was broken down as follows:

Subtalar Ankle range of motion	2%
Ankle Tibiotarsal range of motion restriction	1%
Patellofemoral pain syndrome	<u>1%</u>
Total	4%

**Internal Review Officer's Decision**

The Appellant filed an Application for Review of the case manager's decision and the Internal Review hearing took place on January 14, 2003. The Internal Review Officer, in a written decision, dated February 4, 2003, stated that:

1. he had reviewed all of the relevant medical reports as well as Dr. Craton's Inter-departmental Memorandum of February 8, 2001, and Dr. Glacken's report dated November 2, 2002.
2. he noted that Dr. Craton, after reviewing Dr. Glacken's report, had concluded that, in his opinion, there was insufficient evidence on file to indicate the Appellant was entitled to an increase in his permanent impairment award.
3. "As indicated above, your file was returned to Dr. Craton for further response in light of Dr. Glacken's report of November 2, 2002. As a result of that referral, Dr. Craton provided his Inter-Departmental Memorandum of January 27, 2003. In that report Dr. Craton, having revisited your file concluded:

"In my opinion, there is insufficient evidence on file to indicate that this patient is entitled to further permanent impairment benefits. A probable diagnosis, which is a probable consequence of the collision in question, has not been identified. The information on file does not indicate that the identified leg length discrepancy is a probable consequence of the collision in question. I see no investigations that need to be performed at this time."

The medical information in your file does not establish that you are entitled to any further permanent impairment benefits by reasons of any injuries arising out of your motor vehicle accident. Dr. Glacken's report is not helpful given that he acknowledges that he is unaware of the circumstances of the accident or what tests or examinations were done at the time or thereafter. Given that Dr. Craton had the opportunity to review your entire file on two occasions, I am affirming this assessment of your permanent impairment entitlement by upholding Mr. Ramsdale's decision letter of November 25, 2002 and dismissing your Application for Review."

The Internal Review Officer, relying on Dr. Craton's medical opinion, dismissed the Appellant's Application for Review and confirmed the case manager's decision.

### **Appeal**

The Appellant filed a Notice of Appeal on July 2, 2003. The Commission set the date of the appeal hearing for August 4, 2005, and arranged for the Appellant to be served with the Notice of Hearing on April 28, 2005.

The Commission convened the appeal hearing on August 4, 2005, and Mr. Dean Scaletta attended the hearing representing MPIC. However, the Appellant was not present at 9:30 a.m. and as a result the Commission recessed the hearing until 10:00 a.m. The Commission requested an officer of the Commission to contact the Appellant at his residence and the officer

subsequently advised the Commission that she was unsuccessful in attempting to reach the Appellant by telephone at his residence. The Commission hearing was reconvened at 10:00 a.m. on August 4, 2005 and the Appellant was not present at the appeal hearing at that time.

The Commission requested Ms. Laura Gowerluk, the Commission's Director of Appeals, to testify as to whether or not the Appellant had received a notice of the appeal hearing for August 4, 2005 at 9:30 a.m. in the morning. Ms. Gowerluk testified, under oath, that the Commission had arranged for a personal service of the Notice of Appeal Hearing on the Appellant and that James Strolcic, Process Server, had personally served the Appellant this notice on April 28, 2005 at 9:41 a.m.

Ms. Gowerluk in her testimony identified the following documents

1. the Affidavit of Heidi Plenert, Secretary to the Chief Commissioner at the Automobile Injury Compensation Appeal Commission, which had attached thereto as Exhibit "A" ; the Notice of Hearing dated April 22, 2005;
2. the Affidavit of service of James Strilcic which indicated he had personally served the Appellant with a Notice of Hearing, dated April 22, 2005 on April 28, 2005 at 9:41 a.m.

The Commission entered these documents as Exhibit "1" in the appeal hearing.

Ms. Gowerluk further testified that:

1. on July 22, 2005 she had been contacted by Appellant's sister who requested the Commission to appoint someone to represent the Appellant, and that Ms. Gowerluk had advised the Appellant's sister that the Commission did not provide such representation and provided her with the telephone number of the Claimant Adviser Office.
2. she advised the Appellant's sister that if the Appellant was seeking an adjournment of the appeal hearing that the Commission must receive a written request with reasons for the adjournment well before the date of the appeal hearing
3. upon receipt of such a written request the Commission would then determine whether or not the appeal hearing would proceed.

4. the Appellant did not make an application to the Commission to adjourn the proceedings and that the Commission had not received any notice from the Claimant Advisers Office that they were representing the Appellant in these proceedings.

The Commission, after examining these documents, was satisfied that the Appellant was personally served with a Notice of Appeal Hearing on April 28, 2005 by Mr. Strilcic and that this notice indicated that the appeal hearing would take place at the Commission office, 301-428 Portage Avenue, Winnipeg, Manitoba on August 4, 2005 at 9:30 a.m.

At the conclusion of the evidence by Ms. Gowerluk the Commission decided to proceed with the hearing in this matter. MPIC's legal counsel:

1. submitted both a verbal and written argument in support of MPIC's position that the appeal should be dismissed and the Internal Review Officer's decision confirmed.
2. reviewed the medical evidence which had been filed with the Commission and submitted that the Internal Review Officer was justified in relying on Dr. Craton's assessment as to the amount of the impairment award and that as a result there was no error on the part of the Internal Review Officer and dismissing the Appellant's Application for Review.
3. submitted the Appellant had failed to establish on a balance of probabilities that the Appellant was entitled to an increase in the amount of the impairment award and he requested the Commission confirm the Internal Review Officer's decision and dismiss the appeal.

At the conclusion of Mr. Scaletta's submission, the hearing was adjourned.

### **Decision**

The Commission has reviewed all the medical evidence on file, reviewed the provisions of Section 127 of the Act and Schedule A of Manitoba Regulation 41/94, considered the report of Dr. Glacken and the reports of Dr. Craton and the submission of MPIC's legal counsel. The Commission determines that:

1. the Internal Review Officer did not misinterpret the provisions of Section 127 of the Act or Schedule A of Manitoba Regulation 41/94 in arriving at his decision.
2. the Internal Review Officer, in his decision, was correct in adopting the medical opinion of Dr. Craton in confirming the case manager's decision and dismissing the Application for Review.

3. there is no medical information on file which would justify an increase in the assessment award as set out in the Internal Review Officer's decision.

The Commission therefore finds that the Appellant has failed to establish on a balance of probabilities that he was entitled to an increase in the permanent impairment assessment award. As a result the Commission dismisses the Appellant's appeal and confirms the Internal Review Officer's decision dated February 4, 2003.

Dated at Winnipeg this 17<sup>th</sup> day of August, 2005.

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**MEL MYERS**

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**LES MARKS**

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**BARBARA MILLER**