

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by A.H.  
AICAC File No.: AC-05-186**

**PANEL:** Ms Laura Diamond, Chairperson  
Dr. Patrick Doyle  
Ms Wendy Sol

**APPEARANCES:** The Appellant, A.H., was represented by her mother, E.H.,  
via teleconference;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Ms Pardip Nunrha.

**HEARING DATE:** October 11, 2006

**ISSUE(S):** Entitlement to further permanent impairment benefits

**RELEVANT SECTIONS:** Section 127 of The Manitoba Public Insurance Corporation  
Act ('Act'), and 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**

The Appellant, A.H., was injured in a motor vehicle accident on August 20, 2003. The medical documentation indicates that the Appellant suffered a comminuted compressed fracture of the calcaneus and a comminuted distal radial epiphysial fracture with angulation of 20 degrees.

At the time of the accident the Appellant was [text deleted] years old. She commenced grade [text deleted] in September 2003.

In addition to treatment, the Appellant became entitled to permanent impairment benefits as a result of the accident. At the request of MPIC, a permanent impairment assessment report was completed by Stephanie Jordan, an Occupational Therapist with NRCS Inc. on October 15, 2004. The report included an assessment of the range of motion of the Appellant's left ankle as well as photographs comparing her left and right ankles. The report also set out measurements of the Appellant's lower extremities, noted that she wears orthotics to assist with the comfort level and stability of her ankle and that she reported pain in her left foot increasing with prolonged standing and walking.

The NRCS Inc. report of October 15, 2004 was forwarded to Dr. Fougere, Medical Consultant with MPIC's Health Care Services Team, who prepared a report dated November 24, 2004. Following receipt of this report, the Appellant's case manager calculated a permanent impairment award and set this out in a decision letter dated January 17, 2005. The total amount of permanent impairment payments set out in the case manager's letter, based on a total impairment award of eleven (11%) percent, was \$13,209. They provided the following entitlements:

Left forearm fracture **5%** Division 1: Subdivision 1, Item 2.2(b)i

Left lower limb fracture **1%** Division 1: Subdivision 2, Item 4.2(f)

Left lower limb range of motion **2%** Division 1: Subdivision 2, Item 4.5(b)ii

Left lower limb deformity **3%** Division 13: Subdivision 2, Table 13.3

**TOTAL: 11%**

The Appellant sought Internal Review of the case manager's decision. Among other issues, the Appellant raised concerns regarding the lack of award for her left leg length discrepancy of 1.5 cm and for permanent use of orthotics required because of injuries sustained to her left heel.

The Internal Review Officer assigned to her file, Dianne Pemkowski, noted, in her Internal Review decision of August 30, 2005 that, with respect to the Appellant's request for payment for a 1.5 cm leg length discrepancy, “. . . *I could find no evidence on your file that such a discrepancy exists and that it is a result of the motor vehicle accident.*”

However, following research conducted with the Appellant's physiotherapist, physician and orthopaedic specialist regarding the orthotics issue, Ms Pemkowski found that the Appellant was entitled to a further total of 1% permanent impairment for her ankle foot orthosis and custom orthotics, according to Manitoba Regulation 41/94. She confirmed all other permanent impairment assessments made by the case manager.

It is from this decision of the Internal Review Officer that the Appellant has now appealed. A hearing into her appeal was conducted on October 11, 2004.

### **Permanent Impairment Awards**

#### **1. Reduction in Dorsiflexion**

At the commencement of the appeal hearing, counsel for MPIC indicated that MPIC conceded that a further permanent impairment award of 3% should issue to the Appellant. This represents a permanent impairment benefit for a demonstrated reduction in dorsiflexion (measured to be 10%) measured by Dr. Jeff Engel on July 5, 2006. In a Memorandum dated September 1, 2006, Dr. Fougere noted:

Since the October 13, 2004 impairment assessment, according to the measurements obtained by Dr. Engel on July 5, 2006, the claimant has demonstrated a reduction in dorsiflexion (measured to be 10') which would entitle her to an award of **3%** as per 4.5, b, ii, A, page 329. This is the maximum award for limited tibiotalar dorsiflexion loss of movement in the absence of arthrodesis (surgical fusion) of the tibiotalar joint.

Accordingly, counsel for MPIC now concedes that the Appellant is entitled to an award of 3% for the range of motion restriction of tibiotalar dorsiflexion. Accordingly, the decision of the Internal Review Officer, dated August 30, 2005, is, therefore, varied.

By virtue of Section 163 of the MPIC Act, the Appellant is entitled to interest on this additional award of 3%, “computed from the day on which the person was entitled to the indemnity or expense”.

It should be noted however, that the evidence on file established that at the time of the Appellant’s impairment assessment in October of 2004, the Appellant’s dorsiflexion range of motion was 20%, which did not warrant a permanent impairment award at that time. Therefore, notwithstanding the Commission’s previous decisions in *J.P. (AC-01-17)* and *G.B. (AC-99-139)*, we find the Appellant’s entitlement to interest arises, not from the date of the motor vehicle accident, but rather from the date upon which Dr. Engel measured and first ascertained the existence of this impairment. Accordingly, the Appellant is entitled to interest on the additional 3% award for reduction in dorsiflexion from July 5, 2006.

## **2. Leg Length Discrepancy**

At the hearing, the panel heard evidence from the Appellant, as well as from Dr. Fougere. The Appellant testified that one of her legs is longer than the other, and that the occupational therapist measured a 1.5 cm discrepancy between her two legs. It was her belief that one side being shorter than the other causes that side to cramp up a lot. As a result of it, she feels “weird pulls” in her thigh when walking that were never there before. Although she admitted that no medical personnel had ever told her that she has problems with her back due to her leg length discrepancy, they had indicated it was possible, although there was no way of proving it.

Dr. Fougere testified that leg length discrepancies are not uncommon in the population, and that a leg length discrepancy of up to 2 cm is not considered significant, such that a caregiver would feel the need to correct or address it. The Appellant's leg length discrepancy was within normal range in the general population and would not normally be seen to cause problems. Further, she could not necessarily relate the discrepancy to the accident.

Having reviewed the documentary and oral evidence in this matter, the panel is of the view that the Appellant has failed to establish, on a balance of probabilities, that the motor vehicle accident caused a leg length discrepancy which would result in a permanent impairment award pursuant to Manitoba Regulation 41/94 of the MPIC Act. The panel is of the view that there is no medical evidence that this discrepancy, which is within normal range for the general population, was caused by the motor vehicle accident or has had an effect upon the Appellant. Accordingly, the decision of the Internal Review Officer which did not award a permanent impairment benefit for leg length discrepancy is confirmed on this issue.

### **3. Change in form and symmetry**

Pursuant to Division 13, Subdivision 2, Table 13.3 of Regulation 41/94, the Appellant was assessed a 3% permanent impairment award for left lower limb deformity.

**Table 13.3: Evaluation Of Disfigurement For Other Parts Of The Body**

<b>Body Region</b>	<b>Alteration in Form and Symmetry</b>	<b>Scarring</b>	<b>Maximum Impairment Rating</b>
...			
Lower limbs	Minor or moderate change	3%	...
	Severe change	8%	

The Appellant gave evidence and submitted that she should be entitled to a higher impairment award on the basis of her left leg deformity. She gave evidence in regard to both the appearance and the feel and texture of her left foot and ankle. She noted that the photographs on the file, although they are accurate, do not provide a complete picture of the deformity. According to the Appellant, the ankle bone on that side feels different from the one on the other side. There are bumps in the texture. She pointed out that the ankle appears fat with the heel pushed up and a big bone sticking out on the side of the ankle. As a result of this deformity, as well as the orthotics which it requires her to wear, she testified that the only shoes she is able to wear are heavy running shoes or winter boots that can accommodate an orthotic. She cannot wear high heels, flip flops or sandals.

It was her position that this leg deformity is more than minor or moderate, and that she should be entitled to a higher permanent impairment award on this basis.

Dr. Fougere testified that the Appellant's deformity falls into the mild to moderate category and could at the most, attract a permanent impairment award of 3%. Due to the localized nature of the deformity, involving as it did only the ankle and lower portion of the leg, the deformity could not be considered "severe".

Counsel for MPIC pointed out that the Commission should be constrained by the legislation. The Appellant's deformity was not severe, she submitted, and therefore, must fall within the minor to moderate classification; there is no provision within the legislation for an award higher than 3% and lower than 8% for deformities falling in the moderate to severe range.

Division 13, Subdivision 2(1.1) provides that:

1.1 Where there is impairment only by alteration in form and symmetry, the degree of impairment is calculated and the percentage of disfigurement prescribed for that part of the body is awarded (see Table 13.3)

Division 13, Section 1, defines “alteration in form and symmetry” as

. . . a skin disfigurement that results in a change in tissue bulk, consistency, length or texture. It does not refer to the presence of a scar.

The panel is of the view that the Appellant has suffered a significant change in the tissue, bulk, consistency, length or texture of her left foot and ankle. We have viewed the photographs and heard the evidence of the Appellant. Dr. Fougere did not have the opportunity to examine the Appellant, but in her assessment of the disfigurement, relied solely on photographs. She testified that the disfigurement was mild or moderate, and that this was her subjective opinion, based upon the photographs and her experience as a physician.

The panel on the other hand, has had the benefit of listening to the Appellant describe the disfigurement and its effect upon her.

The panel finds that the Appellant’s leg deformity is more than mild to moderate. The Appellant’s testimony was that as a young woman she would ordinarily wish to wear flip flops, sandals and high heels. However, as a result of her injuries, she is only able to wear running shoes or heavy winter boots that would accommodate her orthotics. As a result of our review of the evidence on file and the Appellant’s description of the disfigurement and its effects upon her, we find this to be more than a moderate deformity.

MPIC has awarded the Appellant a permanent impairment benefit of 3% in the “mild to moderate change” category. There is no provision in the regulations for a rating falling between 3% and 8% in this category. Based on the evidence, we therefore believe that the appropriate permanent impairment award for this disfigurement falls within the “severe change” category for lower limbs under Table 13.3. Accordingly, the Commission finds that the decision of the Internal Review Officer on the issue of a 3% permanent impairment award for the Appellant’s lower limb disfigurement should be rescinded and a permanent impairment award of 8% be substituted therefore.

Pursuant to Section 163 of the MPIC Act, interest on the additional amount is payable from the date of the motor vehicle accident.

In summary, the panel finds that:

1. The Appellant is entitled to an additional award of 3% for range of motion restriction of tibiotalar dorsiflexion. The decision of the Internal Review Officer is therefore varied accordingly. We also find that the Appellant is entitled to interest on this amount from the date the impairment was measured, on July 5, 2006.
2. The decision of the Internal Review Officer which denied the Appellant a permanent impairment award for leg length discrepancy is hereby confirmed.
3. The Appellant is entitled to a permanent impairment award of 8% for a “severe change” lower limb disfigurement. The Internal Review Officer’s award of 3% for a “mild to moderate change” disfigurement is rescinded and the foregoing substituted therefore.

The Appellant is entitled to interest on this additional amount from the date of the motor vehicle accident.

Dated at Winnipeg this 30<sup>th</sup> day of October, 2006.

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**LAURA DIAMOND**

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**DR. PATRICK DOYLE**

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**WENDY SOL**