

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by R. M.
AICAC File No.: AC-06-43**

PANEL: Mr. Mel Myers, Q.C., Chairperson

APPEARANCES: The Appellant, R. M., appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

HEARING DATE: November 23, 2006

ISSUE(S): Entitlement to further permanent impairment benefits

RELEVANT SECTIONS: Section 127 of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Division 13: Subdivision 2, Table 13.3 of Manitoba Regulation 41/94 (as amended in 2000)

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

On June 17, 2004 R. M. (hereinafter referred to as the 'Appellant') was operating a bicycle when he was involved in a motor vehicle accident and sustained soft tissue injuries to his neck, left shoulder, abrasions to his right knee and a soft tissue injury to his right 3rd MCP joint (right knuckle). MPIC referred the Appellant to Mobile Therapy Services for an assessment of any deformity to the Appellant's right knuckle. Mr. Jim Caithness, physiotherapist with Mobile Therapy Services, provided a report to MPIC dated August 9, 2005 and stated:

Deformity

As can be seen in Photo 3, there is a very mild enlargement to the right 3rd MCP. This is only visible with close inspection and is minimally to not visible upon normal observation.

MPIC referred Mr. Cathness' assessment, together with a photograph of the Appellant's right knuckle, to Dr. Fougere, MPIC's medical consultant, and requested Dr. Fougere to advise:

1. Does the medical information support an alteration in form and symmetry of the right 3rd MCP?

In response, Dr. Fougere, on August 23, 2005, provided a written report to MPIC wherein she stated:

1. Right 3rd MCP: Based on photograph and written description, conspicuous change in form and symmetry is not supported.

On September 10, 2005 MPIC issued an Impairment Assessment in respect of the Appellant's right 3rd MCP joint and stated:

Assessment report indicates a minor change in form & symmetry to the right 3rd MCP joint. Per HCS review dated August 23, 2005, based on the photograph and written description, conspicuous change in form and symmetry is not supported. (underlining added)

Case Manager's Decision

On September 19, 2005 MPIC's case manager wrote to the Appellant and advised him:

You have indicated that you sustained an injury to your right third MCP joint (knuckle) resulting in a permanent impairment. Your entire medical file was reviewed by our Health Care Services Team on August 23, 2005. The medical information indicates that based on the photograph and written description, conspicuous change in form and symmetry is not supported. As such, there is no entitlement to an impairment payment for this injury.

The Appellant applied for a review of the case manager's decision on November 9, 2005. In this

application he stated:

. . . My right knuckle is still disfigured, I just would appreciate a re-assessment of this condition and review the decision.

Internal Review Officer's Decision

On January 4, 2006 the Internal Review Officer issued a written decision confirming the case manager's decision and rejected the Appellant's Application for Review. In this decision the case manager stated:

4. In your Application for Review, you wrote that your right knuckle is still disfigured and you would appreciate a re-assessment of your condition and a review of the decision. During the review, you had me examine the right knuckle and pointed out that it was enlarged and still disfigured.

The Internal Review Officer provided the following reason for confirming the case manager's decision not to provide a permanent impairment award for any disfigurement to the Appellant's right 3rd MCP joint (knuckle):

After being given the opportunity to look at your hand, I agree with Mr. Caithness' opinion that there is a very mild enlargement to the right third MCP which is only visible with close inspection, and is minimally to not visible upon normal observation. As you will recall, I had a difficult time seeing the impairment even though you moved your hand at various angles. In my opinion, the Permanent Impairment award was properly calculated and I am, therefore, confirming the case manager's decision of September 19, 2005 and dismissing your Application for Review.

The Appellant filed a Notice of Appeal dated April 4, 2006 and he stated that he still had a swollen knuckle on his right hand and it was quite visible.

Appeal

The Appellant appeared on his own behalf and Ms Pardip Nunrah appeared on behalf of MPIC.

The relevant provisions of the Act and Regulation are as follows:

Section 127 of the MPIC Act, which states:

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.

Division 13: Subdivision 2, Table 13.3 of Manitoba Regulation 41/94, which states:

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

Body Region	Alteration in Form and Symmetry		Scarring		Maximum Impairment Rating
...					
Wrists and Hands	Minor or moderate change	2%	Conspicuous	1.0%/cm ²	6%
	Severe change	6%			

Under the definition section in Division 13, the Regulation states:

In this Division

“alteration in form and symmetry” means 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.

“conspicuous” means a skin disfigurement that is readily discernable with the unaided eye.

There is no definition provided for minor, moderate or severe changes in Division 13 of Manitoba Regulation 41/94.

The dictionary definition for ‘minor’ as set out in the *Oxford Dictionary, Tenth Edition*, is:

minor • *adj* **1** having little importance, seriousness, or significance.

The *Webster's New World College Dictionary, Fourth Edition*, defines 'minor' as:

mi•nor (mi'nər) *adj.* . . . **1** *a*) lesser in size, amount, number, or extent *b*) lesser in importance or rank

In respect of the definition of 'moderate', the *Oxford Dictionary, Tenth Edition*, defines 'moderate' as:

moderate • *adj.* **1** average in amount, intensity, or degree.

The *Webster's New World College Dictionary, Fourth Edition*, defines 'moderate' as:

Mod-er-ate . . . *adj.* . . . **3** of average or medium quality, amount, scope, range, etc.

In respect of the word 'severe', the *Oxford Dictionary, Tenth Edition*, defines 'severe' as:

severe • *adj.* **1** . . . very great; intense.

The *Webster's New World College Dictionary, Fourth Edition*, defines 'severe' as:

se-vere . . . *adj.* . . . **3** serious or grievous [a *severe* wound]

Submissions

The Appellant submitted that his right knuckle was disfigured and although it was a minor disfigurement it was visible to the naked eye. He further stated that although the deformity to his right knuckle did not personally cause him any adverse effects, there was an alteration in form and symmetry to his right knuckle and, as a result, he was entitled to a permanent impairment award.

MPIC's legal counsel, on the other hand, submitted that the Internal Review Officer was correct

in concluding that there was a very mild enlargement to the right knuckle, which was only visible with close inspection and is not visible upon normal observation. As a result, MPIC's legal counsel submitted that there was no minor change in form and symmetry to the Appellant's right knuckle and, therefore, the Appellant was not entitled to a permanent impairment award pursuant to Section 127 of the Act and the provisions under Table 13.3 of Manitoba Regulation 41/94 relating to the alteration in form and symmetry of the Appellant's right knuckle.

Discussion

MPIC does not dispute the Appellant's assertion that there has been an alteration in form and symmetry to the Appellant's right knuckle. However, MPIC asserts that this alteration, which is not visible except on close inspection, does not constitute a minor change entitling the Appellant to an impairment award.

The Commission notes that the physiotherapist, Mr. Caithness, who examined the Appellant's hand, observed a very mild enlarged knuckle which was only visible with close inspection and was minimally to not visible upon normal observation. The Commission finds that Mr. Caithness did conclude that there was a minor change or alteration in form or symmetry of the Appellant's right knuckle which was visible on close inspection.

Dr. Fougere, in her response to MPIC's request for medical information to support an alteration in form and symmetry to the right knuckle, concluded that, based on the photograph and written description of the Appellant's right knuckle, there was no conspicuous change in form and symmetry. The Commission notes that in order for the Appellant to receive an impairment award in respect of his right knuckle, the alteration in form and symmetry, pursuant to Table 13.3, must be either a minor, moderate or severe change. The word 'conspicuous', as used in

Table 13.3, applies only to scarring in this Table. The Commission further notes that Dr. Fougere, in her report, did not comment whether there was a minor or moderate change to the Appellant's right knuckle as set out in Table 13.3. It is unfortunate that Dr. Fougere did not provide a complete response to MPIC's request for medical information.

The case manager, in the Impairment Assessment dated September 10, 2005, to her supervisor, described the change to the Appellant's right knuckle as “. . . *a minor change in form and symmetry to the right 3rd MCP joint.*”. However, the case manager, in a written decision to the Appellant dated September 19, 2005, after finding that there was a minor change to the Appellant's right knuckle, failed to grant an impairment award to the Appellant of two percent (2%) pursuant to Table 13.3. Instead, the case manager, on the grounds that the medical information, based on the photograph and written description, does not support a conspicuous change in form and symmetry, determined that the Appellant was not entitled to a permanent impairment award for this injury.

It should be noted that Table 13.3 requires the case manager, in respect of determining whether or not there is an impairment award in relation to the Appellant's right knuckle, to determine whether there was no change to his right knuckle, or whether the change was minor, moderate or severe. However, Table 13.3 does not permit the case manager to determine whether the change was conspicuous since that term applies only to an impairment rating in respect of scarring, and has no application to an impairment rating in respect of an alteration in form and symmetry. The Commission finds that the case manager, after determining that there was an alteration in form and symmetry of the Appellant's right knuckle, erred by failing to determine whether the alteration was of a minor, moderate or severe change pursuant to Table 13.3.

The Internal Review Officer, in her decision, agreed with the physiotherapist, Mr. Caithness, that there was a very mild enlargement to the right knuckle, which was only visible with close inspection and was minimally to not visible upon normal observation. However, the Internal Review Officer also agreed with the case manager's decision that the permanent impairment award was properly calculated and confirmed the case manager's decision. The Commission determined that upon finding that there was a mild enlargement to the Appellant's right knuckle, the Internal Review Officer was required to consider whether this change was a minor, moderate or severe change pursuant to Table 13.3 and she erred in failing to make this assessment.

Having regard to the dictionary definitions of 'minor', as meaning lesser in size, and/or having little importance or significance, the Commission finds that the physiotherapist's assessment of a very mild enlargement to the right knuckle, which is only visible with close inspection and is minimally to not visible upon normal observation, constitutes a minor change in form and symmetry of the Appellant's right knuckle pursuant to Table 13.3. The physiotherapist's assessment corroborates the Appellant's submission that the alteration to his right knuckle was minor in nature and visible to the naked eye.

The Commission therefore determines that the Internal Review Officer, having agreed with the physiotherapist's assessment that there was a minor change in form and symmetry to the Appellant's right knuckle which was visible upon close inspection, should have concluded that the Appellant was entitled to a permanent impairment award of two percent (2%), pursuant to Table 13.3, but she failed to do so.

For these reasons the Commission finds that the Appellant has established, on a balance of probabilities, that the alteration in form and symmetry to the Appellant's right knuckle was a

“minor” change pursuant to Table 13.3. As a result, the Appellant is entitled to an award of two percent (2%) as set out in Table 13.3, Division 13, Subdivision 2 of Manitoba Regulation 41/94.

The Commission therefore allows the Appellant’s appeal and rescinds the Internal Review decision dated January 4, 2006 in this respect.

Dated at Winnipeg this 7th day of December, 2006.

MEL MYERS, Q.C.