

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by R.H.
AICAC File No.: AC-05-226**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Ms Jean Moor

APPEARANCES: The Appellant, R.H., was represented by Ms Gisele Champagne;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Diane Pemkowski.

HEARING DATE: December 15, 2008

ISSUE(S): Entitlement to additional permanent impairment benefits

RELEVANT SECTIONS: Sections 127 and 129 of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Section 2 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

The Appellant was involved in a motor vehicle accident on January 20, 2000. As a result of the injuries which he suffered in that accident, the Appellant sustained permanent physical impairments which, pursuant to Section 127 of the MPIC Act, entitle him to a lump sum indemnity in accordance with the Regulations to the MPIC Act. The Appellant is appealing the Internal Review Decision dated September 28, 2005 with regard to the permanent impairment benefits as determined by MPIC.

Section 127 of the MPIC Act provides that:

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.

The Regulations set out the amount available for each type of permanent impairment as a percentage of the total amount available.

The Internal Review Decision dated September 28, 2005, confirmed the case manager's decision of June 24, 2004. The Internal Review Decision of September 28, 2005 determined a permanent impairment benefit of 6.26% as follows:

INJURY/IMPAIRMENT	PERCENTAGE
Eight degree deficit of right versus left knee flexion	0.6%
Right medial ankle scarring	0.63%
Right anterior knee scarring	4.03%
Change in form and symmetry of the right leg relative to the left leg	1%
TOTAL	6.26%

At the appeal hearing, counsel for the Appellant raised concerns with respect to the Appellant's entitlement to permanent impairment benefits for the following:

1. right ankle mobility, including plantar flexion and left eversion;
2. leg length discrepancy;
3. change to form and symmetry of the lower leg;
4. deficit of right versus left knee flexion;
5. scarring of the right ankle and the right knee; and
6. knee instability.

1. Right Ankle Mobility, including Plantar Flexion And Left Eversion

The Internal Review Decision determined that there was no rateable impairment of the right versus left ankle mobility, including plantar flexion and left eversion. The Internal Review Officer based her decision upon the Inter-departmental Memorandum dated September 25, 2003 from Dr. M. Cosman, medical consultant to MPIC's Health Care Services team. Dr. Cosman found that the difference in the range of motion between the right ankle and left ankle was so minor as to fall within measuring error and therefore was not a rateable impairment.

Counsel for the Appellant submitted that there was a measureable difference in the mobility of the left ankle versus the right ankle and even though it may be minor, the difference did qualify as a rateable impairment. Counsel for the Appellant also submits that the Appellant is entitled to an award of 1.5% pursuant to Category 17(c) of Division 1, Subdivision 2 of the Schedule of Permanent Impairments for chronic instability of the ankle. Counsel for the Appellant argues that the Appellant's restricted ankle mobility includes instability of the ankle.

Upon a careful review of all of the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that:

1. the difference of 5° of left ankle tibiotarsal mobility versus right ankle tibiotarsal mobility is within measuring error and therefore is not rateable;
2. the difference of 2° of combined right ankle inversion/eversion versus the combined result of left ankle inversion/eversion is within measuring error and therefore there is no rateable impairment of right ankle inversion/eversion mobility;

3. there is no evidence of chronic instability of the ankle and therefore there is no permanent impairment benefit applicable in this regard.

2. Leg Length Discrepancy

The Internal Review Decision of September 28, 2005 determined that there is no rateable impairment for leg length discrepancy of one centimetre or less, as per Category 11(p)(vii) of Division 1, Subdivision 2 of the Permanent Impairment Schedule.

Counsel for the Appellant submits that the leg length discrepancy of 1cm as measured by Stephanie Roberecki, physiotherapist, is likely flawed. She argues that the Appellant's leg length discrepancy is likely greater than one centimetre due to measureable error and therefore he would be entitled to an impairment benefit of 1.5% pursuant to Category 11(p)(vii) of Division 1, Subdivision 2 of the Permanent Impairment Schedule for a shortening of the leg by more than 1cm but less than 2.5cm.

Upon careful review of all of the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that the current evidence before it establishes a leg length discrepancy of one centimetre. Pursuant to Category 11(p)(vii) of Division 1, Subdivision 2 of the Schedule of Permanent Impairments, there is no rateable impairment for leg length discrepancy of one centimetre or less.

3. Change to Form and Symmetry of the Lower Leg

The Internal Review Decision confirmed the case manager's decision of June 24, 2004 which awarded an impairment benefit of one percent (1%) for a relatively minor change in form and

symmetry of the lower leg due to a thickened region over the right mid-anterior leg versus the left.

Counsel for the Appellant argues that the callus, or the thickened region over the right mid-anterior leg versus the left is a prominent change to form and symmetry of the lower limbs and therefore should qualify for a higher percentage. Counsel for the Appellant also submits that the callus is a scar and not just a change in form and symmetry of the lower leg.

Upon a careful review of all the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that the thickened region over the right mid-anterior leg versus the left is barely noticeable and therefore qualifies as a minor change in form and symmetry of the lower limb and an appropriate rating is one percent (1%) for a minor change in form and symmetry pursuant to Table 17 of Division 3 of the Schedule of Permanent Impairments.

4. Deficit of Right versus Left Knee Flexion

The Internal Review Decision of September 28, 2005 confirmed the Appellant's entitlement to a permanent impairment award of 0.6% for an eight degree deficit of right versus left knee flexion as per Category 14(b)(ii)(C) of Division 1, Subdivision 2 of the Schedule of Permanent Impairments.

Counsel for the Appellant argues that the award of 0.6% is too low and does not take into account the Appellant's inability to kneel or squat. She argues that an award of 1.5% is more appropriate in the circumstances.

Upon a careful review of all the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that the rating of 0.6% for the eight degree deficit of right versus left knee flexion was appropriately calculated in accordance with Category 14(b)(ii)(C) of Division 1, Subdivision 2 of the Schedule of Permanent Impairments. We find that the formula used for determining the applicable percentage and the calculations are correct and therefore the impairment award is appropriate.

5. Scarring of the Right Ankle and Right Knee

The Internal Review Decision of September 28, 2005 found that the scar labelled as #3 to R.H.'s right leg on the right medial knee was described as inconspicuous, implying that it was not apparent on ordinary observation. The Internal Review Decision therefore confirmed that no impairment rating applied to an inconspicuous white flat scar.

Counsel for the Appellant argued that the scar at the right medial knee was not inconspicuous. She submitted that the scar was visible and should be compensated at one percent (1%).

Upon a careful review of all of the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that there is no rateable impairment for an inconspicuous scar. Since the scar at the right medial knee was described as an inconspicuous white flat scar it would not attract a permanent impairment award pursuant to Table 17 of Division 3 of the Schedule of Permanent Impairments.

6. Knee Instability

The Internal Review Decision of September 28, 2005 confirmed the case manager's decision of June 24, 2004 with respect to the applicable permanent impairment benefits for the Appellant. The case manager's decision of June 24, 2004 adopted the report of Dr. M. Cosman, medical consultant to MPIC's Health Care Services team and determined that there was no permanent impairment benefit applicable for knee instability. In the Inter-departmental Memorandum dated September 25, 2003 prepared by Dr. M. Cosman, medical consultant to MPIC's Health Care Services team, Dr. Cosman determined the following with regard to knee instability:

5. **Regarding knee instability**, it has been customary to apply a rating for same when i) there is a definable condition at the knee for which instability might be anticipated and ii) there have been clinical findings indicative of knee instability. On review of the submitted medical information on file, there has been no indication of structural pathology at the knee for which instability would be anticipated nor has there been medical reference to instability of the knee. Rather, in a September 4, 2001 report from the treating orthopedic surgeon, representing over one and one-half years after the motor vehicle accident, it was noted that there was no ligamentous instability (at the right knee). In light of the above, there is no indication of a ratable instability of the right knee.

Counsel for the Appellant submits that the Appellant does qualify for an award for knee instability because when he bends down and squats, he is unable to get up due to the instability of his knee. She also submits that the scar on the Appellant's knee interferes with his kneeling function and contributes to instability of his knee.

Counsel for MPIC relies on the report of Dr. David Lyttle dated September 4, 2001, wherein Dr. Lyttle advises that: "... There is no ligamentous instability." referring to the right knee. Counsel for MPIC also relies upon the Inter-departmental memorandum dated September 25, 2003 from Dr. M. Cosman where he indicated that there had been no medical reference to instability of the knee on the Appellant's file. Accordingly, counsel for MPIC submits that there is no rateable impairment for instability of the right knee, as there is no evidence of knee instability.

Upon a careful review of all of the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that there is no evidence of a ligamentous instability of the Appellant's right knee. As a result, the Appellant does not qualify for an award pursuant to Category 14(d)(iii) of Division 1, Subdivision 2 of the Schedule of Permanent Impairments for minor instability of the knee. We find that any interference with the Appellant's kneeling function or ability to squat does not equate to an instability of the knee.

Lastly, this will confirm that at the appeal hearing the Appellant testified regarding a bump on his right ankle. It was agreed at the hearing that the Appellant could take that matter to his case manager in order to determine whether the bump on his right ankle would qualify for a permanent impairment award for a change in form and symmetry of the ankle.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated September 28, 2005 is confirmed.

Dated at Winnipeg this 4th day of March, 2009

Ms. Yvonne Tavares

Mr. Neil Cohen

Ms. Jean Moor