

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-136**

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Mr. Charles T. Birt, Q.C.
Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC')
represented by Ms Joan McKelvey;
the Appellant, [text deleted], appeared on his own behalf.

HEARING DATE: May 31st, 1999

ISSUE(S): Quantum of permanent impairment award.

RELEVANT SECTIONS: Sections 127 to 130, both inclusive, of the MPIC Act ('the Act') and Schedule A to Manitoba Regulation 41/94

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

REASONS FOR DECISION

[The Appellant] was the victim of a motor vehicle accident that occurred on June 15th, 1996. He sustained a comminuted fracture of the left calcaneus and an undisplaced fracture of the distal tibia. He was attended by [text deleted], an orthopaedic surgeon in [text deleted], who reported that a CT Scan demonstrated severe comminution of the calcaneal fracture with marked deformity of the posterior tibial calcaneal joint space.

[The Appellant] was treated with the closed reduction of the calcaneal fracture and the insertion of a calcaneal pin; he was discharged from hospital on June 20th, 1996. The pin was subsequently removed, a cast was applied and, later, [the Appellant] was given a range of motion walking boot. He was weaned off crutches and referred to physiotherapy.

At the time of his accident, [the Appellant] was employed as an electrical technician by [text deleted]; the nature of his work required a great deal of physical activity, including much walking over uneven ground, gravel and, at other times, over concrete and other hard surfaces.

[Appellant's orthopaedic surgeon] further reported that

There will be permanent impairment from this injury, with permanent widening of the hindfoot, loss of inversion and eversion, making walking on uneven ground uncomfortable and difficult, some lack of dorsi flexion and plantar flexion and some degree of pain with weight bearing. There is a potential for requiring a subtalar fusion should these symptoms become severe. Special work boots are required to allow for improved fitting with his change in hindfoot shape, as well as to provide an insole to accommodate his hindfoot pain, and a rocker bottom sole to assist in ambulation, given the stiffness of his hindfoot.

[the Appellant] received various forms of physical therapy, including chiropractic, massage, physiotherapy and occupational therapy. Indeed, he continues to attend for chiropractic treatments on a "as needed" basis, for which MPIC continues to pay.

The insurer's Claims Department initially awarded [the Appellant] a total impairment benefit under Sections 127 and 129(1) of the MPIC Act which, calculated as 6% of what was, in 1996, the maximum of \$104,138.00, gave him an award of \$6,248.28. That 6% was broken down as follows (the references are to section numbers of Schedule A to Manitoba Regulation No. 41/94, copies of the relevant portions being annexed hereto and intended to form part of these Reasons):

Section 17(a)(ii) Restriction of Movement - tibiotarsal	1%
Section 17(a)(ii) Restriction of Movement - subastragal	2%
Section 17(a)(ii) Restriction of Movement mediotarsal	1%
Section 17(c) Chronic instability of the ankle	1.5%
Section 17(d) Alteration of the calcaneum	<u>0.5%</u>
	6.%

The foregoing decision, rendered on February 25th, 1998, was confirmed by MPIC's Internal Review Officer on August 11th, 1998, giving rise to an appeal to this Commission by way of a letter of appeal dated September 28th, 1998.

Counsel for MPIC, upon receiving the appeal material, referred the question of permanent impairment benefits to [text deleted], medical consultant to its Claims Services Department.

[MPIC's doctor's] report and recommendations may be summarized this way:

- restricted left ankle motion (Part 1; Division 1; Subdivision 2; Item 17(a)(ii)) -
 - minimal restriction of motion at the tibiotarsal joint (Section 129(1) of the Act) gives rise to a benefit of 1%;
 - restriction at the sub-talar (subastragal) joint; gives a 2% award and mediotarsal restriction a further 1% - the two latter figures being the maximum allowed under the Regulation.

The permanent impairment award for restricted ankle motion would therefore be 4%;

- first metatarsal phalangeal joint restriction - although this impairment is not listed in the MPIC Schedule of permanent impairments, [the Appellant's] occupational therapist has reported a mild restriction of this joint and, in consequence, [MPIC's doctor] felt an award of 0.5% would be appropriate;
- chronic instability of the ankle (Part 1; Division 2; Subdivision 2; Item 17(c)) - although this was not reported by any of [the Appellant's] other caregivers, his occupational therapist had reported this chronic instability and [MPIC's doctor] recommended an award of 1.5%;
- custom fitted shoe (Part 1; Division 1; Subdivision 2, Item 17(d)) - the fracture of [the Appellant's] calcaneus required the use of an orthotic shoe, entitling him to an additional award of 0.5%;

- nerve injury (Part 1; Division 2; Subdivision 4; Item 14, Table 4) - altered sensation over the calcaneal branch of the left foot, categorized as Class 2 (decreased sensation) is equivalent to the loss of sensation of one of the plantar branches, giving rise to an award of a further 0.5%. (Class 1 is normal sensation, Class 3 reflects no sensation.)
- disfigurement (Part 2; Division 3; Table 17) - from the information reflected on the file, [MPIC's doctor] concluded that [the Appellant's] right foot had sustained a change in form and symmetry, including a widened hind foot and clawing of the toes. He was not able to ascribe any permanent award for scarring, since there were no measurements of any scarring and the surface area of any such scar could not, therefore, be determined. He noted that the scarring would have to have a surface area greater than 2 square cm² for the award to be greater than that suggested for change in form and symmetry. Since the description available was, in [MPIC's doctor's] view, consistent with a minor to moderate change, he proposed an award of 2%. Total recommended 9%.

Following receipt of the foregoing report and recommendations from [MPIC's doctor], counsel for MPIC arranged for a further 3% increase award to be forwarded to [the Appellant], although it is not clear whether that additional award was accompanied by the interest to which [the Appellant] was entitled. Being still dissatisfied with the total amount of his permanent impairment award, [the Appellant] appealed to this Commission.

In the course of his testimony, [the Appellant] pointed out that the injury to his left foot and ankle affected a weight-bearing joint. He was experiencing difficulty in going downstairs, particularly at his right knee which had to take more strain because, as he puts it, "I am essentially going down to the next step on the heel of my left foot rather than on the ball of the foot". This leads to constant irritation of his right knee. His impairment limits his upward mobility at [text deleted], although his employer has done its best to accommodate him by moving him into a more sedentary job, at least for the time being. Normally, however, he would be on his feet for up to eight hours a day, most of that time on concrete, whereas if he is required to be upright for more than about an hour now he very rapidly feels the effects in his ankle and his lower back. His normal job requires working either on concrete or on switchyards which are

covered with coarse crushed limestone, making for an uneven walking surface. He is no longer able to go for a walk for any distance, can no longer go hunting in the bush nor do many of the other outdoor activities to which he had been accustomed.

This will not be the first time that this Commission has questioned the adequacy of the awards for permanent impairment set out in the statute and Regulations, but this is a matter beyond our control, being purely a question of policy qualified by premium income. We are unable to find anything in the Act or Regulations that would allow us to increase any of the awards recommended by [MPIC's doctor] and adopted by counsel for the corporation. Therefore, since we cannot find that MPIC's final decision was in error, we are obliged to dismiss [the Appellant's] appeal.

If, as a result of the injuries sustained by [the Appellant] in his motor vehicle accident, his employment becomes endangered or he is need of retraining, or if he requires further therapy as a result of that accident, it is fair to say that his file at MPIC is never finally closed. The only criterion is that any claim for further benefits must have its origins in the motor vehicle accident.

Dated at Winnipeg this 1st day of June, 1999.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED