

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-09-119**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Ms Janet Frohlich

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Ken Kaltornyk of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: January 8, 2013

ISSUE(S): Entitlement to permanent impairment benefits.

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Schedule A of 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 [text deleted] was involved in a motor vehicle accident on July 7, 2004, when he was a cyclist who was struck by a Winnipeg city transit bus. As a result of the injuries which he sustained in that accident, the Appellant sustained permanent 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 June 23, 2009 with respect to the permanent impairment benefits determined by MPIC.

On January 29, 2009, MPIC's case manager issued a decision setting out the Appellant's permanent impairment entitlement arising from the injuries which the Appellant sustained in the

motor vehicle accident of July 7, 2004. In that decision, the case manager determined the following:

The following is a list of your injuries that are rated as permanent impairments with the corresponding percentage entitlement as outlined in Schedule A:

| INJURY/IMPAIRMENT | % | APPLICABLE SECTION | APPENDIX # |
|---|------------|--|-------------------|
| Alteration of brain tissue – minor concussion | 0.5 | Division 2: Subdivision 1, item 1.1(a) | 2 |
| TOTAL | 0.5 | | |

The Appellant disagreed with the case manager's decision and sought an Internal Review of that decision. The Internal Review Officer, in a decision dated June 23, 2009, dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the permanent impairment benefit paid to the Appellant was correctly assessed. Additionally, the Internal Review Officer found that there was no medical evidence to support that the Appellant was entitled to any further permanent impairment award. Accordingly, the case manager's decision of January 29, 2009 was confirmed.

The Appellant has now appealed that Internal Review Decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to additional permanent impairment benefits arising from the motor vehicle accident of July 7, 2004.

Appellant's Submission:

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant is of the opinion that he sustained nerve damage to his left side and back due to the accident of July 7, 2004. The Claimant Adviser submits that the medical evidence does not establish that there was nerve damage sustained by the Appellant as a result of the accident of July 7, 2004. However, the

Claimant Adviser relies upon the report of [the Appellant's Doctor] dated January 31, 2011, wherein [the Appellant's Doctor] noted that:

Obviously the accident did him no good. It is very plausible and I would support the proposition that [the Appellant] did suffer an acceleration and/or enhancement of his pre-existing lumbar disc problems as a result of the July 7, 2004 accident, especially with the jarring the bus would have caused to his spine and low back upon being knocked down.

Based upon [the Appellant's Doctor's] opinion that the Appellant suffered an acceleration or enhancement of his pre-existing lumbar disc disease, the claimant adviser argues that the Appellant is entitled to a permanent impairment benefit pursuant to Division 1, Subdivision 3, Item 4(a)(iii) - Other Spinal Impairments of 3%.

MPIC's Submission:

Counsel for MPIC submits that no further permanent impairment benefit is awardable to the Appellant. Counsel for MPIC argues that there was no mention of back pain immediately following the motor vehicle accident. She claims that it wasn't until approximately 4½ years following the motor vehicle accident that the Appellant contacted MPIC seeking a permanent impairment award for back pain. Counsel for MPIC argues that the opinion from [the Appellant's Doctor] is insufficient to meet the onus of proof required in the circumstances. Accordingly, counsel for MPIC submits that the Appellant has not met the onus of establishing that his back pain was enhanced as a result of the accident of July 7, 2004. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision of June 23, 2009 should be confirmed.

Decision:

Upon a careful review of all of the medical, paramedical, and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the claimant

adviser and of counsel for MPIC, the Commission finds that the Appellant has not established an entitlement to any additional permanent impairment benefits arising from the motor vehicle accident of July 7, 2004.

Reasons for Decision:

Upon a consideration of the totality of the evidence before it, the Commission finds that the Appellant has not established, on a balance of probabilities, that he is entitled to a further permanent impairment benefit relating to his back or lumbar disc disease. Having reviewed all of the medical information on the Appellant's file, the Commission finds that there is insufficient medical evidence establishing an entitlement to additional permanent impairment benefits relating to an enhancement of the Appellant's pre-existing lumbar disc disease. We find that [the Appellant's Doctor's] report of January 31, 2011, is insufficient to establish that the Appellant suffered an acceleration and/or enhancement of his pre-existing lumbar disc problems as a result of the July 7, 2004 motor vehicle accident. At most, [the Appellant's Doctor] opines that it is plausible that the Appellant sustained such an injury. The Commission finds that this opinion is insufficient to meet the standard of proof required in the circumstances. As a result, the Commission finds that the permanent impairment benefit set out in the case manager's decision of January 29, 2009 is correctly assessed. Accordingly, the Appellant's appeal is dismissed and the Internal Review decision dated June 23, 2009 is confirmed.

Dated at Winnipeg this 4th day of February, 2013.

YVONNE TAVARES

NEIL COHEN

JANET FROHLICH