

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-11-151**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Trevor Anderson
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Danielle Robinson.

HEARING DATE: August 1, 2013

ISSUE(S): Whether the Appellant's permanent impairment entitlement
with respect to her facial scar was properly assessed as
calculated.

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation
Act ('MPIC Act') and Division 13, Subdivision 1, Table 13.1
of Manitoba Regulation 41/94

**AICAC 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 July 22, 2009 [the Appellant] [text deleted] was travelling on a highway when, she reported, she saw an animal running across the highway and tried to avoid hitting it. As a result, her automobile swerved, she lost control and the automobile ended up in a ditch. The Appellant sustained facial lacerations which required 13 stitches starting at her left eyebrow, going across the top of her nose and onto her right eyelid. The Appellant was taken by ambulance to the [text deleted].

The Appellant was referred by [Appellant's Doctor] [text deleted] to [Appellant's Plastic Surgeon] of the [text deleted] Clinic. In an undated report to MPIC describing the operation procedure [Appellant's Plastic Surgeon] stated:

“Please find attached the proposed operation for [the Appellant]. The procedure will be staged using direct brow excision on the Left and structural fat grafts on the nasal bridge line scar to level the asymmetry. The scars themselves will require ErYAG resurfacing to correct the raised nature of the scars on the eyelid Rt and brow Lt. The outcome is expected to improve her appearance but no guarantees can be offered. These are not covered by MH as they are not symptomatic...”

In an undated report to MPIC [Appellant's Plastic Surgeon] described the surgery that would be required in respect of the Appellant's facial laceration:

“The above [text deleted] yo female presents with a trapdoor scar involving the frontal brow. This has resulted in a 4 mm height discrepancy in the eyebrow height. It was suggested that we treat this with BOTOX as surgery isn't very effective in lowering the scarred side due to skin contracture. The partial loss of sensation since the injury is explicable on the basis of scar formation within and around the intact supratrochlear and supraorbital nerves on the Lt. There isn't likely to be any improvement with surgery here either. The complaint she has of cold intolerance is also due to the loss of sensation and persisting causalgia in the area. The only treatment I can offer her that she is willing to accept is correction of the scars above her Rt eyebrow, which measure 4 cm in an oblique fashion and 2.8 cm transversely. The central portion is depressed as well. The use of structural fat grafts and resurfacing laser has been considered, and would be carried out at Ageless Cosmetic Clinic. If approved the costs would be forwarded to you before we proceed.”

The Appellant indicated to MPIC that she wished to proceed with the cosmetic surgery.

MPIC requested that the Appellant's facial scarring be assessed by [text deleted] (a rehabilitation and consulting service). [Rehab Service's Occupational Therapist], [text deleted] with [Rehabilitation and Consulting Service], conducted an assessment on November 4, 2010 in respect of the Appellant's facial injury which resulted from the motor vehicle accident and reported to MPIC:

“SCARRING**Body Area #1 - Face****(Photograph 1)**

There was a conspicuous, faulty (i.e. Class 3) scar which began above the medial aspect of the left eyebrow (i.e. left forehead), travelled across the bridge of the nose, and terminated within the right upper eyelid area. It had the following measurements:

Length: 6.1 cm Avg. Width: 0.73 cm Area: 4.45 cm²

Please Note: It appears that this scar has caused an alteration in form and symmetry to the face (i.e. the client’s right eyebrow appears slightly higher than the left eyebrow). Please refer to photograph 2.

SENSATION

During the assessment, [the Appellant] reported altered sensation to her forehead. Upon evaluation, [the Appellant’s] sharp/dull discrimination was intact; however it did appear that she had an area of hypersensitivity to her forehead. Please refer to photograph 3 for a general outline of this area.”

Case Manager’s Decision – December 6, 2010:

On December 6, 2010 the case manager wrote to the Appellant setting out her decision in respect of the permanent impairment payment to the Appellant. In this decision, the case manager stated:

“The Manitoba Public Insurance Corporation Act allows for an annual indexation of benefits. The indexed maximum for the date of your accident is \$136.160 (sic) and the minimum is \$680.

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 #
Facial Scarring- Class 3b Faulty	7	Division 13: Subdivision 1, Table 13.1	2
TOTAL	7		

Based on the information in your file, you qualify for a permanent impairment entitlement of \$9,531.20. A copy of the detailed calculation of your entitlement is attached (Appendix 3).

The assessment report of November 4, 2010 from [Rehabilitation and Consulting Service] indicates an impairment of sensation changes to your forehead and fingers. A review of the information on file does not support these injuries are a result of this accident. As such, there is no entitlement to an impairment payment for these injuries.

A cheque in the amount of \$9,531.20 will be forwarded to you under separate cover.”

Application for Review:

On February 10, 2011 the Appellant made an Application for Review of the case manager’s decision and stated:

“I am not satisfied with the amount of money I received for the scarring on my face. I am very dissatisfied that nothing can be done to correct the differences between my eyebrows other than being injected with toxins for the rest of my life (re:) [Appellant’s Plastic Surgeon’s] report. I am very dissatisfied with the expense I have incurred due to PTSD and although it cost me financially it does not compare how it has cost me emotionally especially [text deleted]. Your understanding and consideration would be appreciated.”

Internal Review Officer’s Decision – September 1, 2011:

On September 1, 2011 the Internal Review Officer issued his decision confirming that the permanent impairment award had been correctly assessed and calculated and dismissed the Appellant’s Application for Review. In his Reasons for Decision, the Internal Review Officer stated:

“At the hearing I took several photographs of the scar and advised I would be forwarding them to a Medical Consultant with MPI’s Health Care Services. I advised that the Consultant would be in a better position to determine if the Class 3 rating for your scar was in fact correct. I advised you that in order to attain a Class 4 award (which would result in a higher payment), the scar or impairment must be significant and would need to meet the criteria outlined in the Regulation which is a *conspicuous change that holds one’s attention*.

The Medical Consultant reviewed the photographs and [Rehab Service’s Occupational Therapist’s] PI Assessment Report and concurs the Class 3 award is appropriate. The

Consultant's opinion was the area of scarring was not significant enough to hold one's attention. I agree with the Consultant's opinion.

Based on the foregoing, the classification of your impairment for facial scarring was properly assessed and calculated. You received the maximum award available for that class of impairment. I am upholding the case manager's decision and dismissing your Application for Review."

Notice of Appeal:

On November 30, 2011 the Appellant filed a letter of appeal to the Commission and stated:

"1. The scarring on my face between my eyebrows and the difference in the asymmetry of my eyebrows does hold people's attention. I have to deal with people starring (sic) and comments for over 2 years now. Please view the pictures yourself and consider whether that would hold your attention.

2. I am still undergoing surgeries to my forehead and my next appointment is January 2, 2011."

On November 13, 2012 MPIC's legal counsel wrote to MPIC's supervisor of the Benefit Administration Unit and stated:

"In reviewing the documents in preparation for the AICAC hearing, I see that Health Care Services reviewed [the Appellant's] file and indicated that the scarring would qualify for a Class 3 impairment since it does not hold one's attention as required to be a Class 4 impairment. The consultant noted that the Appellant was scheduled for surgery to correct the asymmetry in her eyebrows and suggested that new photos and an assessment take place after the surgery to determine whether the impairment qualified as a Class 3 or 4 impairment.

According to a report on file, the surgery to correct the Appellant's asymmetrical eyebrows took place on September 30, 2011.

In accordance with the consultant's recommendation, kindly arrange for a new impairment assessment to take place, along with new photos. Once the assessment has taken place, the file will need to be referred to Health Care Services for their final opinion on what permanent impairments this Appellant is entitled to with respect to the facial laceration resulting from her motor vehicle accident.

[Rehabilitation and Consulting Service] was retained to conduct a permanent impairment assessment in respect of the Appellant's scarring to her face. [Rehab Service's Occupational

Therapist] reported to MPIC that she conducted an assessment on February 7, 2013 in respect of the Appellant and stated:

“SCARRING

Body Area #1 - Face

(Photographs 1-3)

Upon examination, and comparison to the previous assessment, this consultant noted that there was no change to the dimensions of the scar that begins above the medial aspect of the left eyebrow, travels across the bridge of the nose and terminates within the right upper eyelid area (refer to Photos 1 & 2). The scar continues to be classified as a faulty (i.e. Class 3) scar despite the plastic surgery that [the Appellant] had in the spring of 2012. [The Appellant] stated that she was very disappointed with the outcome of the plastic surgery.

Body Area #1 - Face (continued)

During the assessment, it was noted that the plastic surgery of 2012 resulted in a new scar (flat, Class 2) directly above the client’s left eyebrow (photo 3). It had the following measurements:

Length: 4.0 cm Width 0.1 cm Area: 0.40 cm²

COMMENTS

The appearance of the client’s eyebrows was also reviewed during the assessment on February 07, 2013. [The Appellant] reported that the plastic surgeon was able to raise the lateral portion of her left eyebrow; however he was not able to raise the medial portion of the eyebrow. Therefore she continues to have an alteration in form and symmetry to the face. Please refer to photographs 4 & 5.

[The Appellant] continues to report an area of hypersensitivity to her forehead. Please refer to photograph 6 for a current outline of this area.” (Underlining added)

MPIC’s legal counsel sent an interdepartmental memorandum to [MPIC’s Doctor], [text deleted], who had provided the initial review of the Appellant’s permanent impairment settlement, and indicated that since [MPIC’s Doctor’s] last review the Appellant had undergone plastic surgery, a new assessment had taken place following the surgery. As well, a report had been provided by [text deleted] Rehabilitation & Consulting Services dated February 11, 2013 to MPIC’s legal counsel who asked [MPIC’s Doctor] to review the report and comment on whether the Appellant was entitled any further permanent impairment awards.

In an interdepartmental memorandum dated March 1, 2013 [MPIC's Doctor] provided his review to MPIC's legal counsel and stated:

"I reviewed the patient's file in August of 2011 in relationship to her permanent impairment entitlement. The patient had sustained facial lacerations as a consequence of the event in question, and had been referred to a plastic surgeon. The plastic surgeon had documented asymmetry with respect to the patient's eyebrow height. The patient had facial scarring which was described as conspicuous and faulty. At that time, I noted that the assessor who had viewed the patient's face objectively, who took the photographs, selected the Class 3 facial impairment rating. I indicated in my medical opinion that the current impairment most appropriately would be Class 3.

I have reviewed the independent assessment regarding the patient's permanent impairment that you have noted in your referral. That report noted that the patient continued to manifest faulty scars, which were rated as Class 3 by the assessor. The patient noted an area of hypersensitivity to her face, described as a Grade 2 alteration in sensation in a zone consistent with the first branch of the trigeminal nerve. It would be on the patient's right side only. In reviewing the patient's updated photographs, I would continue to state that the most appropriate rating would be Class 3, where the patient has conspicuous change including both flat and faulty scars, involving more than two anatomic elements. The changes were rated as Class 3 by the assessor who viewed the patient objectively.

There would also be a new impairment entitlement for hypersensitivity to the facial area. There could be some neuropathic irritation of the trigeminal nerve. The VI of the trigeminal nerve qualifies for a 2% permanent impairment entitlement." (Underlining added)

MPIC prepared an impairment assessment report which stated:

ENTITLEMENT #1 (PREVIOUSLY PAID)

**Division 13: Subdivision 2, Table 13.3
Facial scarring/change in form and symmetry – Class 3**

Scarring – Class 3(b)

$$\text{Scar \#1} - 6.1\text{cm} \times 0.73\text{cm} = 4.45\text{cm}^2$$

$$\text{Scar \#2} - 4.0\text{cm} \times 0.1\text{cm} = 0.40\text{cm}^2$$

$$\text{Total scarring} = 4.85\text{cm}^2$$

$$\text{Entitlement} - 4.85\text{cm}^2 \times 2\% \text{ per cm}^2 = 9.7\%$$

Change in form and symmetry

Affecting 2 anatomical elements – 4%

Total scarring and change in form and symmetry = 13.7%*

***Maximum entitlement for Class 3 is 7%**

Percentage to be used for application of successive remainders = 7%

ENTITLEMENT #2

Division 2: Subdivision 3, Item 5 Trigeminal nerve impairment

(b) Facial hypoesthesia: VI, Class 2 – 2%

Percentage to be used for application of successive remainders = 2%

Calculation of total entitlement (successive remainders applies)

7:2 = 9%

9% x \$136,160 (max applicable for date of accident) = \$12,254.40
 \$12,254.40 – 9,531.20 (Previously Paid) = **\$2,723.20**

MPIC also prepared a Permanent Impairment Interest Reconciliation as follows:

Date of loss		22-Jul-09
Interest Calculated to:		15-Apr-13
Permanent Impairment Principal Amount	\$12,254.40	
Less: Amount Paid	\$ 9,531.20	
PI Amount Owing to Claimant		\$ 2,723.20
Interest Amount	\$ 221.81	
Interest Paid	-	
Interest Owing		\$ 221.81
Total PI Amount Owing to Claimant Including Interest		\$ 2,945.01

Case Manager's Decision – April 5, 2013:

MPIC's case manager issued a decision on April 5, 2013 in respect of a permanent impairment payment for injuries sustained by the Appellant. The case manager stated:

“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
Facial scarring/Change in form and symmetry – Class 3	7	Division 13: Subdivision 1, Table 13.3
Trigeminal nerve impairment	2	Division 2: Subdivision 3, Item 5(b)
Total	9%	

As you have more than one impairment, Manitoba Regulation 41/94, Section 5(1) stipulates that the impairment percentage value must be adjusted using Schedule B (successive remainders) to determine the total amount of the entitlement payable.

Applying successive remainders you are entitled to 9% of the maximum amount payable which equals \$12,254.40. A copy of the detailed calculation of your entitlement is attached.

As you have previously received a permanent impairment payment of \$9,531.20, this amount has been subtracted from your total entitlement.

A cheque in the amount of \$2,945.01 plus interest will be forwarded to you under separate cover.

Appeal:

The appeal hearing took place in [text deleted], Manitoba. The Appellant represented herself and Ms Robinson represented MPIC. The relevant sections of Regulation 41/94 in respect of facial disfigurement are set out in Division 13, Subdivision 1, Table 13.1 as follows:

Table 13.1 Evaluation of facial disfigurement Part 1

Classification According To Appearance	Alteration in Form and Symmetry	Scarring	Maximum Impairment Rating for the Class
Class 1 No impairment	Inconspicuous change	Inconspicuous	0%
Class 2 Very minor impairment	Inconspicuous change	Conspicuous	1% per cm ² 3%

Class 3 Minor impairment	Conspicuous change that		Conspicuous and		7%
	(a) affects one anatomical element	3%	(a) flat scar	1% per cm ²	
	(b) affects two anatomical elements	4%	(b) faulty scar	2% per cm ²	
	(c) affects more than two anatomical elements				7%
Class 4 Moderate impairment	Conspicuous change that holds one's attention and		Conspicuous and		15%
	(a) affects one anatomical element	10%	(a) flat scar	1% per cm ²	
	(b) affects two anatomical elements	12%	(b) faulty scar	3% per cm ²	
	(c) affects more than two anatomical elements	15%			

The Appellant testified at the hearing and stated that:

1. The scar began above the medial aspect of the Appellant's left eyebrow (i.e. left forehead), travelled across the bridge of her nose and terminated at the right upper eyelid area.
2. The scar had caused an alteration in form and symmetry to her face.
3. As a result of the facial scarring the Appellant's right eyebrow appeared slightly higher than the left eyebrow.
4. She agreed to surgery in respect of her eyebrow, however, the surgery did not correct the problem and there remained a significant difference in the height between the eyebrows.
5. As a result of the plastic surgery in 2012 there was a new scar directly above the Appellant's left eyebrow.
6. As a result of the combination of the three scars and the difference in height of her two eyebrows, there was not only a conspicuous change to her facial appearance, these

changes caused people to stare at her face and make comments about her facial disfigurement.

7. The payment she received from MPIC in respect of the permanent impairment to her face was inadequate.

Submissions:

The Appellant submitted that MPIC incorrectly assessed her facial disfiguration caused by the motor vehicle accident as a Class 3 rating. In her view the correct assessment should have been a Class 4 rating. The Appellant therefore requested the Commission allow the appeal to increase the rating from Class 3 to Class 4.

In her submission, MPIC's legal counsel relied on the assessments made by [Rehab Service's Occupational Therapist] and confirmed by [MPIC's Doctor]. On two occasions the occupational therapist examined the Appellant and concluded the Appellant's scarring was conspicuous and faulty and should be rated as a Class 3 permanent impairment in accordance with Regulation 41/94.

The Internal Review Officer's decision dated September 1, 2011 indicated that [MPIC's Doctor] had reviewed the photographs of the Appellant's face and confirmed that the Class 3 rating for the Appellant's scarring was appropriate. The Internal Review Officer stated:

"...The Consultant's opinion was the area of scarring was not significant enough to hold one's attention. I agree with the Consultant's opinion." (Underlining added)

MPIC's legal counsel submitted that:

1. The surgery to correct the asymmetry of the Appellant's eyebrows occurred on September 30, 2011.

2. In [Rehab Service's Occupational Therapist's] second assessment she reported that as a result of the plastic surgery a new scar (flat, Class 2) resulted above the Appellant's left eyebrow.
3. The Appellant reported that the plastic surgeon was able to raise the lateral portion of her left eyebrow, however, he was unable to raise the medial portion of the eyebrow.
4. Because the Appellant had undergone plastic surgery, an assessment should be taken following the surgery. MPIC's legal counsel requested that [MPIC's Doctor] review [Rehab Service's Occupational Therapist's] report and comment on whether the Appellant was entitled to any further permanent impairment awards.

[MPIC's Doctor] examined the new photographs of the Appellant's face and stated:

"...In reviewing the patient's updated photographs, I would continue to state that the most appropriate rating would be Class 3, where the patient has conspicuous change including both flat and faulty scars, involving more than two anatomic elements. The changes were rated as Class 3 by the assessor who viewed the patient objectively." (Underlining added)

MPIC's legal counsel therefore submitted that the Commission should accept the opinions of the occupational therapist and [MPIC's Doctor] and reject the Appellant's appeal.

Discussion:

The Commission notes that:

1. The two assessments made by [Rehab Service's Occupational Therapist] and the reports from [MPIC's Doctor] were based on the two scars on the Appellant's face being rated as Class 3, because the scars were faulty and conspicuous and did not hold one's attention.
2. In arriving at their assessment neither [Rehab Service's Occupational Therapist] nor [MPIC's Doctor] considered that as a result of the combination of the existing two scars and the new scar as a result of the surgery, together with the difference between the

height of the right and left eyebrows, the rating should have been increased from Class 3 to Class 4.

3. MPIC rejected the Appellant's request for an increase in the classification and relied on the assessments of [Rehab Service's Occupational Therapist] and [MPIC's Doctor].
4. [MPIC's Doctor] did not personally examine the Appellant's face and that his assessments are based entirely on the opinions of [Rehab Service's Occupational Therapist] and the photographs he obtained from MPIC's legal counsel.

The Commission also found that the Appellant was an impressive witness who testified in a clear and unequivocal fashion and accepts her testimony that as a result the three scars, together with the difference in height of the right and left eyebrows, other people observed the changes to the Appellant's face in respect of form and symmetry and they communicated these observations to her. The Commission accepts the Appellant's testimony that these facial disfigurements were conspicuous changes that would hold one's attention.

The Commission had an opportunity of personally examining the Appellant's face at a close range and examined the photographs that were relied upon by [MPIC's Doctor] when he arrived at his conclusion. The Commission concluded that there was a significant difference in the appearance of the Appellant's face in the photographs and the examination of the Appellant's face at close range. The photographs of the Appellant's face which were examined by [Rehab Service's Occupational Therapist] and [MPIC's Doctor] do not clearly demonstrate the degree of the facial disfigurement caused by the three scars together with the disparity in the height of her eyebrows. In the Commission's view, that as a result of our personal examination of the Appellant's face, we are satisfied that the combination of the Appellant's three facial scars

together with the disparity in the height of her eyebrows were not only faulty and conspicuous, but these disfigurements would hold one's attention.

Decision:

The Commission finds:

1. That in classifying the Appellant's disfigurements as Class 3 MPIC relied on the opinions of [Rehab Service's Occupational Therapist] and [MPIC's Doctor], which in the Commission's view were faulty and cannot be given any weight.
2. The Commission accepts the Appellant's testimony that as a result of the three scars to her face together with the difference in height between her right and left eyebrows, the rating should be increased from Class 3 to Class 4.
3. The Commission's visual examination of the Appellant's face corroborate her testimony and justifies an increase in the rating from Class 3 to Class 4.

For these reasons the Commission therefore finds that the Appellant has established on a balance of probabilities that these facial disfigurements constitute a conspicuous change in form and symmetry affecting more than two anatomical elements. The Commission determines that the Appellant is entitled to a 15% award under Class 4 pursuant to Manitoba Regulation 41/94, Division 13, Subdivision 1, Table 13.1 – Evaluation of facial disfigurement Part 1 – Class 4.

The Commission therefore varies the Benefit Administration Unit's decision dated April 5, 2013 of the Class 3 rating in respect of the facial scarring and the change in form and symmetry to the Appellant's face and substitutes a rating of Class 4. As a result, the Internal Review Officer's decision of September 1, 2011 is varied accordingly.

The Commission, however, does not vary MPIC's determination in respect of the trigeminal nerve impairment, which was granted a 2% award under Division 2: Subdivision 3, Item 5(b).

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

MEL MYERS, Q.C.

TREVOR ANDERSON

PAUL JOHNSTON