

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-16-019**

PANEL: **Ms Laura Diamond, Chairperson
Ms Nikki Kagan
Dr. Arnold Kapitz**

APPEARANCES: **The Appellant, [the Appellant], appeared on his own behalf by teleconference;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**

HEARING DATE: **March 15, 2017**

ISSUE(S): **Entitlement to a permanent impairment benefit regarding an injury to his right third finger.**

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

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 involved in a motor vehicle accident (MVA) on November 20, 2013. He was driving on a rural road and struck a steel cattle gate.

The Appellant sought a permanent impairment entitlement award from MPIC for an injury to his right hand third finger.

On June 30, 2015, a case manager with MPIC's Benefit Administration Unit (BAU) advised the Appellant that there was a lack of objective documentation of a significant right hand/finger injury occurring at the time of the MVA. The absence of medical treatment or follow-up indicated that any contusion/sprain of the right third finger PIP joint was relatively mild. The case manager concluded that it was medically probable that recent documented swelling, tenderness and range of motion loss in that finger was related to the natural progression of a documented pre-existing degenerative change and that the Appellant was not, therefore, entitled to a permanent impairment entitlement award.

The Appellant sought Internal Review of the case manager's decision and, on December 17, 2015, an Internal Review Officer for MPIC upheld the BAU case manager's decision. The Internal Review Officer reviewed medical information from the Appellant's general practitioner, [text deleted], who noted the Appellant's complaint of pain in his right third digit and that the finger was contused. He referred him for an x-ray to rule out a fracture. The x-ray did not show a fracture, but the radiologist noticed some degenerative changes around the proximal right third interphalangeal joint space, with no significant soft tissue swelling or acute bony abnormality identified. He indicated that the findings may relate to old trauma.

The Internal Review Officer noted that the injury was diagnosed as a contusion and that degenerative changes are not rateable impairments. Although he accepted that the Appellant had initially hurt his finger on the car steering wheel and cattle fence, the Internal Review Officer found that swelling, tenderness and decreased range of motion of the finger were not noted or diagnosed by [Appellant's doctor] until long after the motor vehicle accident. The Internal Review Officer concurred with a report from MPIC's medical consultant stating that it was medically probable that the more recent documented swelling, tenderness and decrease in range

of motion in the affected area was due to the radiographically documented pre-existing degenerative changes referenced in the x-ray report. The decision of the BAU case manager was upheld.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

The issue for the Commission was whether the Appellant suffered an injury to his finger in the MVA which entitled him to a permanent impairment award. Having reviewed the documentary evidence on the Appellant's indexed file as well as hearing the testimony of the Appellant and the submissions of the Appellant and counsel for MPIC, the panel has concluded that the Appellant has met the onus upon him to show, on a balance of probabilities, that he did suffer a permanent impairment injury to his finger as a result of the MVA.

Evidence and Submission for the Appellant:

The Appellant relied upon medical reports in the indexed file, particularly reports from his general practitioner, [Appellant's doctor], and letters written in 2015 from his former counsel to MPIC.

The Appellant also testified, via teleconference, at the hearing into his appeal. He described the MVA, which occurred when he hit a cattle gate during a snow storm. He felt his finger pop as he tried to steer the car and may have further injured his finger when he tried to pull the gate off of his car after the collision.

He explained that he had other old injuries from a previous motor vehicle accident and was taking medication for those. Following the MVA, he went home to take that medication. His

finger was quite swollen and crooked. He waited for the swelling to go down, thinking his finger would be alright. When the swelling did not go down and the finger was still painful and crooked, he attended to his family doctor, [Appellant's doctor], who sent him for an x-ray of his hand. He explained that his hand was fine before the MVA, that he was able to do physical work with no problems from his finger. Now, after the MVA, he does not have the power of his hand and he has a "different" finger.

The Appellant explained that he sees his doctor frequently for renewal of his prescriptions, etc. and that he mentioned the finger to his doctor on some of those occasions. He confirmed that he had a history of physical work as a dairy farmer, and while he might get bruises and things, his finger was always fine until the MVA. He had never injured his finger while playing sports.

The Appellant submitted that he needs and uses his hands and fingers every day and believes that it is absolutely false that the problems with his finger are caused by degenerative changes. He explained that he was in a panic during the MVA and grabbing the steering wheel hard, which is when he thinks he hurt his finger. Something popped out of position, followed by swelling and crookedness. The Appellant referred to a letter written by his former counsel and dated November 12, 2015 which requested a permanent impairment award under Division 1, Subdivision 1 of Regulation 41/94, regarding the upper limb of the musculoskeletal system. The letter stated:

This permanent impairment award is covered under Division 1, Subdivision 1, the upper limb of the musculoskeletal system. There are various permanent impairment awards in this division for fractures, musculotendinous and ligamentous injuries. Paragraph 3.5 b (g) outlines the permanent impairment award for loss of range of motion of the PIP joint. If there is no movement, the award is 1% and if there is less than 66° movement, the award is .5%. There is nothing in this paragraph or subdivision that says that an individual is only entitled to a permanent impairment award for a particular type of injury. We would submit that the permanent impairment table clearly applies to any injury suffered by an individual in an MVA. There can indeed be a variety of injuries

that result in loss of range of motion but there is nothing in the Act that only entitled an individual to a permanent impairment award for loss of range of motion for a particular type of injury.

The Appellant estimated that he had probably lost approximately 50% of the range of motion in that finger as compared to the same finger on the other hand and that he should be entitled to a permanent impairment award in that regard.

Submission for MPIC:

Counsel for MPIC confirmed that the Appellant's initial injuries were caused by the motor vehicle accident. He reviewed medical reports on the Appellant's file which established that [Appellant's doctor] had diagnosed a contusion/sprain two months after the MVA. Reports on the file supported the Appellant's explanation that he had waited for the swelling to go down before he sought an x-ray, a couple of months following the MVA.

However, counsel relied upon the x-ray report dated January 14, 2014 which noted:

Provisional Diagnosis:

FINGERS, RIGHT

There are some degenerative changes noted about the proximal right 3rd interphalangeal joint space. No significant soft tissue swelling is identified. The findings may relate to old trauma. No acute bony abnormality is identified.

Note: xray was taken approx 2 months after injury, after the swelling had gone away.

Counsel reviewed [Appellant's doctor's] letter dated May 25, 2015, which indicated that the Appellant was seen for complaints of his finger joint pain and swelling on January 14 and January 27, 2014 as well as February 4, March 11 and April 29, 2015. Counsel submitted that there had been a lack of treatment and follow-up for a long period after the MVA, followed up by these visits to the doctor. There is no medical information on file regarding the condition of

the finger during that interim period. Although the Appellant complained of pain in the same spot where the degenerative changes were found, counsel submitted that this does not meet the onus upon the Appellant of showing that the pain was caused by the MVA. The most likely or plausible explanation is that the degenerative changes noted in the x-ray are causing the problems with the Appellant's finger. Reference in the x-ray report to the possibility of an old trauma could also explain the problem.

This was supported, he argued, by an opinion from the Health Care Services medical consultant dated June 22, 2015 which reviewed the medical documentation on file and concluded:

It is medically probable that the more recently documented swelling, tenderness and decreased range of motion at the right 3rd finger PIP joint is related to the natural progression of the radiographically documented pre-existing degenerative changes at [the Appellant's] right 3rd finger PIP joint, reported to possibly be related to an old trauma.

In my opinion, a PI rating is not warranted related to [the Appellant's] November 20, 2013 contusion/sprain of his right 3rd finger PIP joint.

Although the Appellant may have initially suffered pain and injury to his finger in the MVA, this condition had long since abated and any deformity, pain and radiographic change could be attributed to a pre-existing condition and degenerative change.

Counsel also submitted that the Internal Review decision focused on the lack of a causal connection between the MVA and the Appellant's finger condition. He noted that even if the Commission disagrees with the conclusions of the Internal Review Officer, no measurements have been provided or analysed in order to arrive at the appropriate permanent impairment entitlement benefit under the regulations. Accordingly, should the Commission uphold the appeal, the matter would have to go back to the case manager for a permanent impairment

assessment which would include measurement of any injury and/or loss of range of motion and a consideration of the regulations.

In summary, counsel submitted that the Appellant's appeal should be dismissed and the decision of the Internal Review Officer upheld.

DISCUSSION:

The MPIC Act provides:

Lump sum indemnity for permanent impairment

127(1) 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 onus is on the Appellant to show, on a balance of probabilities, that the MVA caused a permanent injury to his finger. The panel has reviewed the documentary evidence on the Appellant's indexed file, the testimony of the Appellant and the submissions of the Appellant and counsel for MPIC.

The panel found the Appellant to be a credible witness. His description of the MVA and mechanism of injury to his finger was believable and plausible. He described feeling his finger pop while attempting to steer away from the MVA and acknowledged that it may have been further injured when he tried to lift the cattle gate off his car. He described feeling pain, but not being particularly concerned about that as he waited for the swelling in his finger to go down. Then, in January of 2014, approximately two months after the incident, he became concerned that the swelling had still not gone down. The Appellant saw his doctor to investigate. He was

sent for an x-ray which showed some degenerative changes. The report included the suggestion that this was possibly related to an old trauma. However, the Appellant denied any previous trauma to his finger in spite of a history of continuous physical labour which would have caused him to notice a prior injury to his finger.

Counsel for MPIC submitted that the most plausible explanation, given the degenerative changes, the suggestion of a possible old trauma, and the lack of attention paid to the Appellant's finger between January 2014 and January 2015, was that the pain and symptoms in that finger were caused by the degenerative changes. He submitted that the symptoms from the MVA were acute at the time, caused by contusion after the MVA, but then abated sometime in 2014.

The panel does not agree. We find the Appellant's evidence regarding a lack of old trauma or previous injury to be credible. We also find his description of the MVA and the feeling of his finger popping while steering to be credible. We accept his evidence that he felt pain in his finger following the MVA but waited for the swelling to go down. He was not concerned about it until two months later when it was still swollen, as well as crooked, and he decided to consult with his doctor, since the injury was not getting better.

There is no evidence before us that the Appellant had any problems with his finger prior to the MVA or that this injury ever resolved, aside from some reduction in the swelling, since the MVA. The Appellant's evidence is supported by the reports of [Appellant's doctor], his caregiver at the time.

[Appellant's doctor] provided reports that support the Appellant's contention that the injury to his finger occurred in the MVA. [Appellant's doctor] reported that the Appellant did not

complain of any problems with his finger prior to the MVA and that he waited until the swelling subsided before seeking treatment and investigation, which resulted in the x-ray of January 2014.

[the Appellant] did not experience any untoward symptoms of his right third finger prior to his accident of November 20, 2013. [the Appellant] jammed his finger into a cattle fence, and suffered pain in his PIP (Proximal Interphalangeal Joint) joint.

Examination revealed swelling and reduced range of motion (ROM) in his PIP of his right third finger. An X-ray was done showing “some degenerative changes”, with “no significant tissue swelling”. The X-ray was taken January 14, 2015, several weeks after the injury of November 20, 2013, allowing time for the bulk of the soft tissue swelling to subside, certainly enough to be within the acceptable range to be defined as in the “no significant” category. Clinical comparison to the left hand, and to the other fingers on the right hand would have demonstrated continued fullness around the third right PIP.

It is of some significance that no other joint was remarked on in terms of degenerative changes. One isolated joint showing a degenerative (read damaged) joint in the absence of other joints on the same hand suggest one acute injury as opposed to chronic degenerative changes from repetitive use, which would be understood to result in similar changes to a number of joints on the same hand.

The panel finds the Appellant’s submission that he has suffered a permanent injury to his finger caused by the MVA to be more plausible than the explanation of MPIC, which took the position that he had suffered a temporary injury whose symptoms abated by the end of January 2014. We find that the Appellant’s symptoms had not abated and do in fact continue. While the Appellant’s complaints of pain may have abated, we accept his evidence that the finger continues to be crooked, with some decreased range of motion and that his grip strength has been affected.

Accordingly, the Commission finds that the MVA resulted in a permanent injury to the Appellant’s finger and he is entitled to a permanent impairment award under the regulations.

However, we agree with the comments of counsel for MPIC that further investigation is required by the Appellant’s case manager to assess and determine the scope of this injury and the amount of the permanent impairment award which should be assessed as a result.

The Commission will allow the Appellant's appeal from the decision of the Internal Review Officer dated December 17, 2015. We refer the matter back to the Appellant's case manager for assessment of the deformity, range of motion and grip strength suffered by the Appellant in regard to this finger injury and to issue an award for a permanent impairment benefit in this regard. The Commission will retain jurisdiction in the event that the parties are unable to agree to the amount of compensation owing to the Appellant as a result.

Dated at Winnipeg this 2nd day of May, 2017.

LAURA DIAMOND

NIKKI KAGAN

DR. ARNOLD KAPITZ