

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-18-033**

PANEL: Ms Nikki Kagan, Chairperson
Mr. Brian Hunt
Ms Linda Newton

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

HEARING DATE: July 12, 2019

ISSUE(S): Whether the Appellant's permanent impairment benefit was correctly calculated.

RELEVANT SECTIONS: Division 13, Subdivision 2, Table 13.3 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

Background:

The Appellant, [text deleted], was operating a rented moped while on vacation in [state] on January 26, 2016 when she collided with a broken signpost on the side of the road and sustained injuries to both of her legs and to her left foot. As a result of her injuries, the Appellant developed scarring to her left foot, left leg and right leg.

The Appellant sought a permanent impairment benefit. In a decision dated November 6, 2017 the case manager determined that the Appellant was entitled to the following permanent impairment benefit:

This letter will confirm that you are entitled to a permanent impairment payment in the amount of \$19,561.75 as a result of the injuries you sustained in the above noted accident.

...

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#
Left Leg and Foot Scarring	5	Division 13: Subdivision 2, Table 13.3	4
Right Leg Scarring	8	Division 13: Subdivision 2, Table 13.3	4

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 13% of the maximum amount payable, which equals \$19,561.75 plus interest. A copy of the detailed calculation of your entitlement is attached.

A cheque in the amount of \$19,992.51 will be forwarded to you under separate cover.

The Appellant filed an application for review of the case manager's decision. The decision was considered by the Internal Review Officer.

The Internal Review Officer issued a decision letter dated January 5, 2018 that provided as follows:

Section 127 of the *Act* provides a Lump Sum Indemnity for permanent impairments. In 1994, the maximum indemnity was \$100,000.00. Sections 164 through 167 of the *Act* provide a formula for indexing this amount. At the time you were injured, the maximum amount had increased to \$150,475.00.

Manitoba Regulation 41/94 (as amended by 41/2000) sets out the amount to be awarded for particular types of permanent impairments. The Regulation expresses the amount available for each type of permanent impairment as a percentage of the maximum indemnity.

Permanent Impairments awarded are based upon objective impairments specifically listed in the Schedule, and entitlement is based solely on the medical information on your file. Permanent Impairment awards are not intended to be compensation for what used to be called “pain, suffering, and loss of amenities.” This type of compensation is not available.

We discussed the PI calculation process in detail at your hearing and I explained how any calculation was governed by the legislation. I have reviewed the medical information on file and can confirm that the PI calculation for your file has been accurately completed as directed by the medical evidence and legislation. While I can appreciate your opinion that the associated ratings are inadequate for what you suffered, the fact remains that the PI ratings are defined in the legislation as listed.

I am satisfied that the case manager correctly determined your PI payment as outlined in the decision letter. As such, I am upholding the case manager’s, decision of November 6, 2017 and dismissing your Application.

It is from this decision that the Appellant appeals.

Issue:

The issue which required determination on appeal was whether or not the Appellant’s permanent impairment benefits were calculated correctly, and in particular, the permanent impairment benefit regarding her right leg.

Preliminary Matters:

A case conference hearing was held on May 10th 2019. At that time, the Appellant advised that she will be providing additional photos of the scar to her right leg. The Appellant was encouraged to submit the photos at the earliest opportunity to allow counsel for MPIC sufficient time for review by Health Care Services.

These photos were not provided by the Appellant.

Decision:

For the reasons set out below, the panel finds that the permanent impairment benefit for the injury to the Appellant's right leg was properly calculated.

Submission and Evidence of the Appellant:

The Appellant was self represented at the hearing. The Appellant referred to the report from [rehabilitation center] dated July 27, 2017, which described the Appellant's scarring to her right leg as follows:

Right Leg Scars

- 4) Size: $2.2 \times 6.3 = 13.86 \text{ cm}^2$
 Location: 27 cm superior medial epicondyle of the femur
 Description: Faulty conspicuous scar, road rash in approx. 98% of the area measured, white with some darker than skin tone areas, smooth, flat.
- 5) Size: $26.4 \times .6 = 15.84 \text{ cm}^2$
 Location: 18 cm superior medial epicondyle of the femur
 Description: Faulty conspicuous scar, white, shiny, rigid, raised and depressed in areas, adhered to surrounding tissue.
- 6) Size $52 \times .1 \times .1 = .52 \text{ cm}^2$
 Location: border of scar 5
 Description: flat conspicuous scar, suture marks, white, smooth, level with surrounding tissue

The hearing was confined to the Appellant's permanent impairment award calculation for the scar to her right leg, and in particular, the scars described above in number 4, 5 and 6.

Relevant Legislation:

Division 13, Subdivision 2 of the Manitoba Regulation 41/94 provides as follows:

Subdivision 2: Disfigurement Of Other Parts Of The Body

1. Impairment rating procedure for disfigurement of other parts of the body

1.1 Where there is impairment only by alteration in form and symmetry, the degree of impairment is calculated and the percentage of disfigurement prescribed for that part of the body is awarded (see Table 13.3).

1.2 Where there is impairment only by scarring, the surface area of the scar is measured and the impairment percentage prescribed per cm² is awarded, up to the maximum impairment percentage prescribed for that part of the body (see Table 13.3).

1.3 Where there are both alterations in the form and symmetry and scarring, the higher of the two percentages obtained under either heading is awarded, without exceeding up to the maximum impairment percentage prescribed for that part of the body (see Table 13.3).

1.4 The maximum impairment per region is listed in the last column of Table 13.3. Where a body region has two sides (right/left or front/back) the maximum impairment % listed in the table is to be considered the maximum per side.

1.5 For the purposes of rating disfigurement for other parts of the body, the body regions may be defined as follows:

- (a) scalp and skull – Beginning at the hairline in front and following the hairline around the side to the back;
- (b) neck – The skin overlying C1-C7 posteriorly and the cricoid cartilage to the sternal notch anteriorly;
- (c) arms, shoulders and elbow – Extending from the acromion process and axillary folds to the olecranon process and cubital fossa. The scapulae, supraspinous fossa and supraclavicular fossa are considered as part of the trunk for the purposes of rating of disfigurement;
- (d) forearms - Beginning at the distal aspect of the elbow (as defined above) and extending to the wrist crease;
- (e) wrists and hands - Beginning at the wrist crease and extending distally to the fingertips;
- (f) trunk – This region includes both the suprascapular and supraclavicular fossae. It extends distally to the inguinal ligaments (anteriorly) and the iliac crests (posteriorly);

- (g) lower Limbs – Begins at the distal aspect of the trunk (as defined above) and extends distally to the tips of the toes. Note that the buttock is considered to be part of the lower limb and not the trunk.

Table 13.3: Evaluation Of Disfigurement For Other Parts Of The Body

Body Region	Alteration in Form and Symmetry	Scarring		Maximum Impairment Rating
Lower limbs	Minor or moderate change	3%	Conspicuous	1.0%/cm ²
	Severe change	8%		

The Appellant referred to Table 13.3 and in particular where it is stated 1.0%/cm². The Appellant argued that 8% is to be the impairment rating per 1.0 cm². She submitted that the scar on her right leg is 30 cm², and as such, the payout amount is to be 8% multiplied by 30.

The Appellant referred the panel to Subdivision 2, Section 1.4. The Appellant argued that a leg has a front and a back and therefore 8% is to be the maximum impairment for each the front of the leg and the back of the leg.

The Appellant relied upon Section 1.4 where it is stated “Where a body region has two sides (right/left or front/back) the maximum impairment % listed in the Table is to be considered the maximum per side.”

The Appellant submitted that the scar is a long scar that starts at the back of her leg and wraps around to the front of her leg. Therefore, she should receive the maximum impairment amount of 8% for the scar on the front of her leg and a further 8% as the maximum impairment for the scar on the back of the leg.

The Appellant submitted that the legislation was interpreted incorrectly in calculation of her permanent impairment award for reasons stated above.

Submission and Evidence of the MPIC:

Counsel for MPIC submitted that Section 1.2 clearly sets out the manner in which Table 13.3 is to be interpreted. Section 1.2 states:

Where there is impairment only by scarring, the surface area of the scar is measured and the impairment percentage prescribed per cm² is awarded, up to the maximum impairment percentage prescribed for that part of the body (see Table 13.3).

MPIC submitted that Section 1.2 clearly states that the range of the impairment rating for scar to the lower limb is from 3% to 8% with the maximum being 8%. The legislation states that the compensation is to be 1% per cm² but there is a maximum of 8%. MPIC submitted that the legislation clearly refers to the maximum of 8% for the entire scar, and not per 1 cm² of the scar.

In determining whether a leg has a front and a back, counsel submitted that we are to consider the definition of lower limb in the legislation. The leg is described as a “region” and both legs are within a single region.

Section 1.5(g) states “lower limbs – begins at the distal aspect of the trunk (as defined above) and extends distally to the tips of the toes. Note that the buttock is considered to be part of the lower limb and not the trunk.”

Further, Section 1.4 states “where a body region has two sides (right/left or front/back) the maximum impairment % listed in the Table is to be considered the maximum per side.”

Counsel for MPIC argued that the legislation refers to right and left or front and back. He stated that because we obviously have a right leg and a left leg, the legislation could not have intended that we also consider a front and a back.

Counsel further argued that there is no basis for additionally splitting the leg into a front and a back. If we were to do that, a leg would have a front, back, right, and left for total impairment for scarring of 32% for the lower limb. He referred the panel to Section 4 that provides a maximum impairment benefit of 24% for a complete amputation of a leg. He stated that it would be unreasonable that compensation for scarring would be 32% whereas compensation for a complete amputation of a lower limb is only 24%. The only logical interpretation is that a leg does not have two sides.

Therefore, counsel submitted that the legislation was correctly interpreted and the permanent impairment award was properly calculated

Discussion:

The onus is on the Appellant to show, on a balance of probabilities that she should be entitled to a greater permanent impairment benefit for her leg scarring.

The panel reviewed the wording of Subdivision 2, Section 1.2 and 1.3 and Table 13.3. The panel acknowledges that Table 13.3 could be more clearly set out and recognizes that it could be misinterpreted by a layperson in particular. However, upon reading Section 1.2, together with the Table, the meaning of the legislation is clear that the maximum impairment award for a scar is 8% and not 8% per 1 cm² of scar.

The Appellant took the position that a leg has a front and back therefore she is entitled to the maximum compensation of 8% for the scar to the front of her leg and 8% for the scar to the back of her leg. The panel determined that a leg may in fact have a front and a back but the relevant consideration is whether or not a leg has a front and back for the purposes of this legislation.

The panel was not presented with case law to assist in the interpretation of the legislation.

The panel carefully reviewed the photograph of the Appellant's scar as set out at Tab 15 of the indexed file. This is the only photograph of the scar provided in evidence. The panel determined that the scar does not appear to extend over the back of the leg and over the front of the leg. The scar appears to end as it nears the front of the leg.

The panel reviewed the [rehabilitation center report] of July 27, 2017 wherein it is stated that the location of the scar is "superior medial."

The occupational therapist has not described the location of the scar as covering the back of the Appellant's leg and the front of the Appellant's leg.

Also of note is the Primary Health Care Report dated May 15, 2017 wherein the clinical diagnosis is described as "inner thigh laceration 24 cm long". The location of the scar is not described to be on the front and the back of the Appellant's leg.

The panel finds that the evidence does not establish that the Appellant's scar is located both on the front and on the back of her leg.

Based upon the evidence, the panel does not need to consider the Appellant's interpretation of the legislation.

The panel finds that even if the legislation intended to provide maximum impairment of 8% for a scar to the front of the leg, and 8% maximum impairment for a scar to the back of the leg, the Appellant would not be entitled to the maximum impairment for both the front and the back because we have found that the scar is not located on the front and on the back of the Appellant's leg.

Disposition:

For the aforesaid reasons, the panel finds that the Appellant's permanent impairment benefit were correctly calculated. Accordingly, the Internal Review Decision dated January 5, 2018 is confirmed and the Appellant's appeal is dismissed.

Dated at Winnipeg this 27th day of September, 2019.

NIKKI KAGAN

BRIAN HUNT

LINDA NEWTON