

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-11-163**

PANEL: Ms Laura Diamond, Chairperson
Ms Leona Barrett
Ms Mary Lynn Brooks

APPEARANCES: The Appellant, [the Appellant], appeared by telephone;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: June 12, 2014

ISSUE(S): Whether the Appellant's permanent impairment awards
were correctly assessed and calculated.

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 injured in a motor vehicle accident on November 11, 2002. He was diagnosed with a right subdural hematoma along with soft tissue injuries to his neck and back, and dental damage.

A dental consultant with MPIC's Health Care Services reviewed the Appellant's file and approved an impairment of .5% for a damaged tooth No. 36.

On May 26, 2010, a psychological consultant with MPIC's Health Care Services reviewed the medical information on the Appellant's file and provided rateable impairments due to sustaining a traumatic brain injury, which included:

Alteration of brain tissue severe	5%
Subdural hematoma	2%
Subarachnoid hemorrhage	5%

The medical consultant also confirmed that the Appellant was entitled to a 2% permanent impairment benefit as it related to a total loss of smell.

The Appellant's case manager provided him with a letter dated January 4, 2011, setting out the permanent impairment benefits for the above noted impairments. The Appellant filed an Application for Review of his case manager's decision, seeking further permanent impairment benefits.

An Internal Review Officer reviewed the Appellant's file and, on August 11, 2011, provided an Internal Review decision dismissing any further permanent impairment benefits and upholding the case manager's decision.

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

Evidence and Submission for the Appellant:

The Appellant took the position that he was entitled to further permanent impairment benefits for psychological injuries. It was his position that "his head was not right", that his memory was not

what it should be, that he had anger and attitude problems, including apathy, and that he should be entitled to further permanent impairment benefits in this regard.

The Appellant testified at the hearing into his appeal. He indicated that he had talked with psychiatrists about suicide, although he could not name and was not familiar with the doctors. He was having trouble getting a psychiatrist appointment now, because he does not have a vehicle or driver's licence. He would like to talk to a doctor about his problems.

The Appellant recalled the testing which had been performed by psychologists and neuropsychologists, but he explained that they were only testing him for his memory and no-one approached him about his other problems with attitude, anger management and apathy. He remembered being tested by a neuropsychologist, although he did not recall his name, as well as some treatment with [Appellant's Doctor #1].

The Appellant was self-represented at the appeal hearing, but his previous representative had taken the position that the Appellant suffered a severe brain injury in the motor vehicle accident and should be entitled to permanent impairment awards for the ongoing cognitive dysfunction he now suffers. It had been submitted that even the [Appellant's Psychologist], who had suggested the Appellant was possibly malingering, found that the Appellant exhibited difficulties with anger management and may have experienced symptoms of demoralization and depression due to losses associated with the motor vehicle accident.

The Appellant submitted that all he knew was that he was having problems with his head and difficulties with his memory.

The Appellant submitted that he should be entitled to further permanent impairment benefits as a result.

Evidence and Submission for MPIC:

Counsel for MPIC noted that through the appeal process, the Appellant had been awarded an additional 4% permanent impairment for loss of taste. Beyond that, he took the position that the Appellant was not entitled to any other further permanent impairment benefits. However, the panel inquired regarding a report provided by [Appellant's Otolaryngologist], dated May 29, 2003. [Appellant's Otolaryngologist] stated:

“He complained of a bump on the nose as well as problems breathing from the right nasal cavity. This is directly attributable to the motor vehicle accident.

My objective findings are a dorsal hump and a septal deviation to the right side.

I did not order any tests or investigations.

He would benefit from a septoplasty. I gave him my card and told him to contact my office. I have not at this time heard from him.

The permanent impairment as a result of the injury is the dorsal hump and the deviated nasal septum...”

Counsel for MPIC indicated that although the Appellant had been awarded a permanent impairment benefit for loss of smell, he was not aware as to whether the Appellant had been assessed by his case manager for a permanent impairment benefit due to the dorsal hump and deviated nasal septum, whether these impairments were permanent or whether they would give rise to a permanent impairment benefit. Counsel for MPIC indicated that such impairments were not covered by the Internal Review decision dated August 11, 2011, and undertook to go back to the Appellant's case manager and investigate the status of any permanent impairment benefit for a dorsal hump and deviated nasal septum.

Counsel also noted that the Appellant had previously been represented by a Claimant Adviser who had taken the position the Appellant should be reassessed by a neuropsychologist. However, the reports on the Appellant's file had established that a further assessment would be of no probative value in this case due to the pattern of invalid results which had arisen through the testing and assessment efforts of both [Appellant's Neuropsychologist], and of [Appellant's Psychologist].

[Appellant's Neuropsychologist] had examined the Appellant in the early stages following the motor vehicle accident and had provided reports dated June 4, 2003, November 7, 2003 and April 28, 2004. Although the Claimant Adviser wrote to [Appellant's Neuropsychologist] on November 12, 2013, requesting further information, [Appellant's Neuropsychologist] responded, by explaining the importance of the invalid results obtained from the Appellant. On December 9, 2013, [Appellant's Neuropsychologist] reported:

“...This means that the invalid results that I obtained from [the Appellant] in his last 3 assessments with me (November 7, 2003, April 28, 2004 and January 17, 2005 reports) were not “caused” by psychological injuries. Similarly, there were no psychological injuries that I am aware of which would explain the invalid results that are outlined in [Appellant's Psychologist's] report of April 25, 2008 that would cause or contribute to his invalid results. Validity tests are designed on the basis that the patient can choose whether to provide full effort with the assessment, or not. The fact that [the Appellant] generated invalid results over 4 different assessments, up to 5 years apart, with 2 different psychologists, suggest this was a consistent pattern. There can be extreme circumstances where invalid results need to be considered in that context, such as if an individual is in severe pain, or if they have not slept for 24 hours, but these exceptions would not apply in [the Appellant's] case. Both [Appellant's Psychologist] and I found [the Appellant] to be at or below chance levels on some tests. [Appellant's Psychologist] indicates as follows: “his performance was significantly below chance on this measure (i.e. below what one would obtain through random guessing alone), suggesting deliberate attempts to provide incorrect answers” (page 4 of her April 25, 2008 report).

[Appellant's Neuropsychologist] went on to explain that overall the evidence did not directly link the Appellant's anger to the motor vehicle accident as a clear and direct etiology and that any finding of malingering (as found by [Appellant's Doctor #2] or [Appellant's Psychologist])

was not a result of his injuries. Nor was there evidence that any substance abuse on the part of the Appellant was caused by the motor vehicle accident.

[Appellant's Neuropsychologist] indicated that neither he nor [Appellant's Psychologist] were able to confirm permanent cognitive impairments in light of the pattern of invalid results and that if results are invalid, typically no further attempts are made. He further noted that the Appellant had intermittently declined a number of services or suggestions throughout the several years spanning these reports, including four psychologists.

Accordingly, counsel for MPIC submitted that the Appellant had failed to establish, on a balance of probabilities, that he was entitled to a further permanent impairment benefit for psychological impairment. The decision of the Internal Review Officer dated August 11, 2011 should be upheld and the Appellant's appeal dismissed.

Discussion:

The MPIC Act provides:

Lump sum indemnity for permanent impairment

[127](#) 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 permanent impairment awards provided to him by MPIC were not correctly assessed and calculated.

The panel has reviewed the evidence on the Appellant's file, the testimony of the Appellant and the submissions of counsel for MPIC and the Appellant.

The medical reports on the Appellant's indexed file established that there was a lack of consistency and validity in the psychological and neuropsychological testing results of the Appellant. Although the Appellant had the opportunity to see several caregivers and evaluators, including [Appellant's Neuropsychologist] [Appellant's Doctor #1], [Appellant's Psychologist] and [Appellant's Doctor #3], none of these professionals, who all provided reports, were able to provide an opinion that the Appellant suffered from psychological injuries as a result of the motor vehicle accident.

While concerned regarding the Appellant's memory and cognitive difficulties, [Appellant's Doctor #1], in a report dated October 27, 2004, described a highly unusual situation where the Appellant demonstrated an inability to even recall that he had ever met him, after the passage of only seven days. He noted that he would have expected there to be considerable other cognitive difficulties and obvious functional problems in an individual with such a profound memory deficit and that it was unclear to him how he could be of assistance to the Appellant if he was unable to recall anything from one session to the next.

[Appellant's Doctor #1] noted in several reports that he was unable to state that there had been any significant progress with the Appellant.

[Appellant's Psychologist] provided independent neuropsychological assessments dated August 3, 2007 and April 25, 2008. She noted an atypical symptom profile not consistent with a typical traumatic brain injury, "his functional status has not been able to be accurately assessed since

June 2003 due to a significant overlay of poor test effort and/or symptom exaggeration on the part of [the Appellant].”

[Appellant’s Psychologist] concluded:

“In light of these test results, and given that [the Appellant] is seeking to obtain disability benefits and/or financial compensation related to his claimed deficits secondary to his MVA, the possibility of motivated symptom exaggeration must be considered. In review of the Slick, Iverson and Sherman, (1999) criteria for categorizing malingering, [the Appellant’s] current presentation could be categorized as probable malingering based on the degree of response bias noted in his neuropsychological test performance, the discrepancy between obtained test data and known patterns of brain dysfunction, and the discrepancy between obtained test data and [the Appellant’s] reported and observed degree of functional capacity.

While this does not necessarily preclude the presence of a bona fide degree of cognitive dysfunction secondary to traumatic brain injury, the extent of any cognitive dysfunction possibly present could not be validly or accurately assessed given the degree of symptom exaggeration apparent throughout the assessment. At best the current assessment suggests that [the Appellant] no longer appears to be exhibiting significant deficits in executive cognitive functioning, attention/concentration, language function, or visual-spatial ability...”

[Appellant’s Neuropsychologist] also reported several times, and with his final report, dated December 9, 2013, concluded that neither he nor [Appellant’s Psychologist] were able to confirm permanent cognitive impairments in light of the pattern of invalid results.

Accordingly, based upon all of the evidence, the panel agrees with counsel for MPIC that the Appellant has failed to establish, on a balance of probabilities, that he is entitled to a further permanent impairment award for psychological cognitive difficulties.

Accordingly, the Appellant’s appeal is dismissed and the Internal Review Officer’s decision of August 11, 2011 is hereby upheld. As indicated above, counsel for MPIC has undertaken to investigate the question of any possible permanent impairment award for a dorsal hump and

deviated nasal septum (in accordance with [Appellant's Otolaryngologist's] report dated May 29, 2003) with the Appellant's case manager. As such, any issue of a permanent impairment benefit regarding a dorsal hump or deviated nasal septum does not form part of this appeal decision and will be referred to MPIC through counsel's investigations and a new case management decision.

Dated at Winnipeg this 30th day of July, 2014.

LAURA DIAMOND

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MARY LYNN BROOKS