

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-139**

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Mr. Charles T. Birt, Q.C.
Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC')
represented by Mr. Tom Strutt ;
the Appellant, [text deleted], appeared on his own behalf

HEARING DATE: February 23rd, 2000

ISSUE(S): (a) Whether 'damage to head of femur' includes artificial femur;
(b) interest on award - from what date calculated?

RELEVANT SECTIONS: Sections 127, 129(1),163, 171, 197.1 and 202 of the MPIC Act ('the Act') and Sections 2, 5(1), 6 and 12(c) of Schedule A to Manitoba Regulation No. 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], as a pedestrian crossing [text deleted] on January 6th, 1998, was struck and injured by a motor vehicle.

Prior to that accident, [the Appellant] had undergone surgery for severe degenerative arthrosis of both hip joints and each hip had been replaced. It is his right hip that is, in part, the subject of the present appeal. After the replacement of his right hip in May of 1989, [the Appellant] sustained a fracture through the right distal femur in December 1989 which was treated with open reduction and internal fixation. The plate and screws were eventually surgically removed. [the Appellant] had been having some discomfort in both hips and his surgeon, [text deleted], thought that the prostheses in both hip joints were loose. Surgery was apparently considered but, since [the Appellant] seemed to be doing reasonably well, was never actually carried out.

As a result of his car/pedestrian accident on January 6th, 1998, [the Appellant] sustained a severely comminuted fracture at the uppermost part of his right proximal femur through the previous prosthesis. The prosthesis itself was not broken but was displaced because of the fracture. After waiting a few days for the swelling to settle down, an open reduction and internal fixation with revision of the right hip prosthesis was carried out on January 12th, 1998 with a long stem prosthesis. There were no intra nor post-operative complications.

That surgery resulted in a shortening of [the Appellant's] right lower limb by approximately 20 millimetres, for which [the Appellant] has been compensated to the extent allowed by the Regulation. [the Appellant] lost about 80 degrees of movement in the right hip joint, for which he has also been compensated. Neither of these two latter awards is currently disputed.

HIP REPLACEMENT - NATURAL HIP VERSUS PROSTHESIS

Under Section 202 of the Act, subject to the approval of the Lieutenant Governor in Council, MPIC is authorized to make regulations

- (k) respecting the establishment of a schedule of permanent impairments, including
 - (i) the attribution of a percentage of impairment to each permanent impairment,
 - (ii) the determination of an additional percentage of impairment where the permanent impairment affects symmetrical organs,
 - (iii) the determination of an additional percentage of impairment where the permanent impairment affects an impairment that the victim had before the accident, and
 - (iv) the reduction of the percentages attributed to permanent impairments for victims who have more than one permanent impairment;

Sections 127 and 129(1) of the Act read as follows:

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.

(By Section 165(3) of the Act, those figures are adjusted by reference to the Manitoba Consumer Price Index.)

Evaluation of permanent impairment under schedule

129(1) The corporation shall evaluate a permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairment.

Manitoba Regulation No. 41/94, which is the Regulation contemplated by Sections 202(k) and 127 of the Act, was registered on February 10th, 1994. Section 12(c) of that Regulation provides for an award for "damage to the head of the femur, with replacement by a femoral prosthesis,

including any shortening of the lower limb"; that award is 10% of the maximum which, as a result of the indexing factor, had risen from \$100,000.00 to \$106,429.00 by the date of [the Appellant's] accident. [The Appellant] has already been paid an award of 3% as a result of the shortening of his leg (pursuant to Section 11(p) of that same Regulation) but maintains that he should have been awarded a full 10% for the injury described above.

The position of MPIC may be simply stated this way: Section 12(c) of the Regulation does indeed provide for an award of 10% for damage to the head of the femur, but [the Appellant] did not have a head of his right femur; rather, he had a femoral prosthesis, which was replaced.

To quote a memorandum prepared by [text deleted], a medical consultant to MPIC's Claims Services Department of January 12th, 2000,

The Impairment Manual refers to hip dysfunction.....and does not recognize replacement of a pre-existing prosthesis. The claimant's pre-existing right femoral prosthesis was providing him with acceptable function of the right hip. As a result of the motor vehicle collision, it was necessary to replace the right femoral prosthesis in an attempt to restore his right hip function. Replacement of a patient's own femur with a prosthesis entails major surgery with associated risks. In the case of replacement of a prosthesis, the nature of the surgery and the risks involved are of a lesser degree. Thus it is recommended that the claimant not be compensated for replacement of his right femoral prosthesis. His diminished function (decreased range of motion) is a separate issue, and has been recognized for compensation.

It is unfortunate that [MPIC's doctor] writes of the comparative risks associated with replacement of a patient's own femur and those related to the replacement of a femoral prosthesis, since that statement (in addition to being incorrect in the first place) and the flurry of denials and documentation that it provoked are quite irrelevant to the issue which, simply put, is whether an artificial femur ("femoral prosthesis") is included within the meaning of the word

"femur" in Section 12(c) of the Regulation and is, therefore, to be treated in exactly the same way.

The Appellant, for his part, advances several arguments in support of his position.

Firstly, he submits that the stance adopted by MPIC is discriminatory and infringes his rights both under the Charter of Rights and Freedoms and under the Manitoba Human Rights Code, both in the context of his age and his disability. This Commission has decided, in earlier cases, that we have no jurisdiction to deal with challenges under the Charter. Our jurisdiction to decide questions arising under the Human Rights Code is, perhaps, less questionable but, in any event, we do not find it necessary to decide that point. In our view, the position adopted by MPIC in the context does not amount to discrimination in the sense contemplated by either of those statutes. The Human Rights code prohibits discrimination upon the basis of **disability**; the Manitoba Public Insurance Corporation Act spells out certain benefits resulting from a permanent **impairment**, where that impairment is caused by, or by the use of, a motor vehicle.

The American Medical Association Guides to the Evaluation of Permanent Impairment, 4th edition, define "impairment" "as the loss of, the loss of use of, or a derangement of any body part, system or function"; "disability" is defined as "an alteration of an individual's capacity to meet personal, social or occupational demands, or to meet statutory or regulatory requirements".

[The Appellant] also submits that, since the Regulations do not distinguish between an artificial femur and a natural one, the provisions of Section 12(c) of the Regulation should be given the

broader, inclusive interpretation. He adds the comment that, if the position of MPIC is the correct one, the result is tantamount to saying "If you are going to hit a pedestrian, make sure that he is already injured and equipped with an artificial joint so that MPIC will not have to compensate him".

[MPIC's doctor] suggests that a claim under Section 12(c) should be disallowed because the femoral replacement was not a "native" body part, to which [the Appellant] responds that, following that rationale to its logical conclusion, the family of a heart transplant recipient who died from heart failure in a motor vehicle accident would not be able to claim any benefits. That may be true in the context of a permanent impairment award but, of course, a claim for death benefits would then arise.

In our respectful view, it is in any event unnecessary to extend the perimeters of the argument to these lengths. What the Act and Regulations contemplate is an award for an impairment. The question that we must ask ourselves, therefore, is whether [the Appellant's] motor vehicle accident either created a new impairment or worsened an existing impairment since, in either of those events, he is entitled to the award set out in Section 12(c). Each such case must be governed by its own facts. For example, if a victim were equipped with an artificial hand prior to his accident and, as a result of that accident, the hand itself were shattered and had to be replaced with an identical prosthesis then, absent any injury to that victim's natural body, we would express the view that there was no consequent impairment: the last state of that victim would be no worse than the first.

However, in [the Appellant's] case we find that there was, indeed, an additional impairment resulting from the damage to the uppermost part of his natural femur and the loss, and need to replace, his artificial femur. The National Institute of Arthritis and Musculoskeletal and Skin Diseases, a part of the National Institutes of Health, in a publication headed "Questions and Answers About Hip Replacement" describes hip replacement surgery this way:

The hip joint is located where the upper end of the femur meets the acetabulum. The femur, or thigh bone, looks like a long stem with a ball on the end. The acetabulum is a socket or cup-like structure in the pelvis, or hip bone. This "ball and socket" arrangement allows a wide range of motion, including sitting, standing, walking and other daily activities.

During hip replacement, the surgeon removes the diseased bone tissue and cartilage from the hip joint. The healthy parts of the hip are left intact. Then the surgeon replaces the head of the femur (the ball) and the acetabulum (the socket) with new, artificial parts.

The replacement of an existing, artificial hip joint is known as "revision surgery". The article briefly cited above goes on to say that

Revision surgery is more difficult than first-time hip replacement surgery, and **the outcome is generally not as good**, so it is important to explore all available options before having additional surgery.

A news release issued by the American Academy of Orthopaedic Surgeons on August 12th, 1996 reports that orthopaedic surgeons at the University of North Carolina School of Medicine reviewed clinical and radiographic records of 490 patients (606 hips) to determine contributing factors to dislocation of an artificial hip. The overall dislocation rate was 5.6% (34 hips). According to Dr. Paul F. Lachiewicz, Associate Professor of Orthopaedics at that institution, **"The presence of a previous hip replacement is a significant factor for dislocation.**

Dislocation occurred more frequently after revision arthroplasty - 8.9% - than after primary total hip arthroplasty - 4.2%.

We find, upon the basis of the foregoing literature, that [the Appellant] has indeed sustained an impairment greater than that which prevailed prior to his motor vehicle accident. This finding is further supported by the fact that the new artificial femur with which he was equipped was of the long stem variety; his post-accident surgery did not leave him in the same condition and with the same kind of hip joint that he had had before his accident. We see no reason, given the facts in this particular case, to distinguish between a 'native' femur and a man-made one.

In summary, then, we find that the proper interpretation of this statute and Regulations allows no distinction between natural and artificial body parts. The first question to be asked is whether the motor vehicle accident resulted in an "impairment". If that question can be answered in the affirmative, then one must look to the schedule to the Regulation in order to ascertain the amount of the award applicable to that impairment.

As a result, we find that [the Appellant] was entitled to an award of 10%, rather than the 3% that he has been given, and his total impairment award must be recalculated accordingly, subject always to the successive remainders called for by Section 5(1) and Schedule B of Regulation 41/94 and to the enhancement factor referred to in Sections 2 and 6 of that Regulation.

THE INTEREST FACTOR

The only other issue with which we are asked to deal in [the Appellant's] case relates to interest payable pursuant to Section 163 of the Act, which reads as follows:

Successful applicant is entitled to interest

163 Where a person's application for a review or appeal is successful, the corporation shall pay interest to the person on any indemnity or expense to which the person is found to have been entitled before the review or appeal, at the prejudgment rate of interest determined under Section 79 of The Court of Queen's Bench Act, computed from the day on which the person was entitled to the indemnity or expense.

MPIC's Internal Review Officer, in his decision letter of October 18th, 1999, after finding that [the Appellant] was entitled to a larger permanent impairment award than had first been paid, went on to say:

Because the available medical information did not support an additional award until the recent report was received from [Appellant's surgeon] less than a week ago, I do not feel that an award of interest pursuant to Section 163 of the Act.....is appropriate.

Counsel for the Corporation refers us, firstly, to Section 171 of the Act, which reads as follows:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

Claims corporation may reconsider before application for review or appeal

171(2) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if

- (a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or
- (b) the decision contains an error in writing or calculation, or any other clerical error.

He submits that, by virtue of the language of Section 171(1), the Internal Review Officer had withheld interest because the relevant information had only become available about one week before his decision to increase the award, and that the Appellant had, therefore, not become "entitled to the indemnity or expense" until that date. (We note, in passing, that although Section 163 of the Act speaks of 'any indemnity or expense' we interpret that to mean, in essence, any money to which a victim is entitled to payment from MPIC, including an award for permanent indemnity. To rule otherwise would be to create a gross inequity. The new Lexicon Webster's Dictionary of the English language, 1992 edition, defines indemnity as "insurance or protection against loss or injury.....compensation for a loss or injury sustained.....").

Counsel for the corporation also refers us to Section 197.1 added by amendment to the statute on March 1st, 1999. That section reads as follows:

Interest where benefit not paid within 30 days after entitlement established

197.1 Where the corporation fails to pay an indemnity, a retirement income or an expense to a person entitled to compensation under this Part within 30 days after the day on which the person's entitlement to the benefit is determined, the corporation shall pay to the person interest on the amount of the indemnity or expense at the prejudgement rate of interest prescribed under Section 79 of the Court of Queen's Bench Act, computed from the day on which the person became entitled to the benefit.

He submits that, since [the Appellant's] entitlement had only been determined about one week before the Internal Review Officer's decision, this section, also, limits the recovery of interest to that brief time span.

We respectfully disagree with both those submissions. Firstly, it is clear that the addition of Section 197.1 was intended to correct the pre-existing inequity, whereby a claimant who was

successful before the Internal Review Officer or this Commission could claim interest on monies to which he had been found entitled, whereas a claimant whose right to payment had been acknowledged and who, therefore, found it unnecessary to launch an appeal, could be kept waiting for his or her money for a very long time without being entitled to any interest. The result of the amendment is that claimants who succeed on appeal and claimants who, without the need for an appeal, are kept waiting more than 30 days for their money, are equally entitled to interest on the funds thus withheld.

We do not accept the argument that, under Section 163, interest should only be calculated from the date when the corporation first became aware with some certainty of a claimant's entitlement to money. Such an interpretation would mean, for example, that if the corporation through oversight or an excessive volume of claims omitted to make the proper inquiries, or if (as is often the case) several months elapse between the date when an inquiry is directed to a medical practitioner and the date when that practitioner responds, the victim of the accident is again victimized by the resultant delay. [The Appellant's] claim is a perfect example of this. The relevant chronology is as follows:

- January 6th, 1998 - Date of loss.
- June 30th, 1998 - [Appellant's surgeon] estimates the amount by which [the Appellant's] right leg has been shortened as a result of his accident, but says "I would probably wait for about a year or so before assessing the permanent impairment".
- September 4th, 1998 - [the Appellant's] Case Manager at MPIC writes to [Appellant's surgeon], seeking an up-to-date assessment, opinion and prognosis.
- November 27th, 1998 (over 2 ½ months later) - [Appellant's surgeon] responds.

- December 7th, 1998 - MPIC's Case Manager refers [Appellant's surgeon's] letter to MPIC's medical services team for confirmation of impairment award.
- February 17th, 1999 (2 ½ months later) - the medical team responds with confirmation.
- February 18th, 1999 - MPIC's Case Manager writes to [the Appellant], to confirm an award of

Leg length discrepancy	3%
Loss of hip flexion	2%
Loss of hip abduction	<u>3%</u>
Total	8%

$$8\% \times \$106,429.00 = \$8,514.32$$

- March 19th, 1999 - [the Appellant] files an application for review of his injury claim decision. This is followed by some soul-searching on the part of MPIC, questioning whether [the Appellant] should be paid interest "because of our delay". As a result, on March 22nd, 1999, [the Appellant] is sent \$96.57 representing interest which, for some unexplained reason, is calculated from December 7th, 1998 to February 18th, 1999.
- May 18th, 1999 - After holding a hearing on May 14th, MPIC's Internal Review Officer writes to [Appellant's surgeon] seeking some additional information and, incidentally, reminding [Appellant's surgeon] that Section 147 of the Act requires that a report be provided within six days. This is followed by reminders dated June 25th and July 21st.
- August 4th, 1999 - A letter responding to the IRO appears to have been typed under this date, but it was not received by MPIC until October 12th, and only after a further reminder from the Internal Review Officer to [Appellant's surgeon] on September 30th.
- October 18th, 1999 - The Internal Review Officer finds [the Appellant] entitled to an additional 2%, based upon [Appellant's surgeon's] most recent report.
- November 1st, 1999 - [the Appellant] files a Notice of Appeal and, after reviewing some

additional information provided by [text deleted], physiotherapist, MPIC's medical services team recommend, on January 12th, 2000, an additional 1.98% award for the diminished range of motion of [the Appellant's] right hip.

- February 23rd, 2000 - This Commission finds [the Appellant] entitled to a permanent impairment award of 10%, less the 3% he had already been awarded for the shortening of his right leg, all as noted earlier in these Reasons.

The purpose of the foregoing chronology is not so much to express criticism of the numerous delays that have been incurred in the processing of [the Appellant's] claim, although some of those delays certainly invite criticism. Our purpose is to point out that, if we accept the submission of counsel for the Corporation, we should only be allowing interest on the 2% awarded by the Internal Review Officer from October 18th, 1999, upon the additional 1.98% recommended by MPIC's medical services team from January 6th, 2000 (the date of the physiotherapist's report to MPIC) and upon the additional amount to which we have found [the Appellant] entitled from the date of our Decision.

It may well be true that the full extent of [the Appellant's] permanent impairments had not been determined until more recent dates, and then only in the several stages noted above, but in our view his entitlement stems from the date of his accident. That is when the impairment was created and that, therefore, is the base date of his entitlement.

In sum, therefore, we find [the Appellant's] entitlement to a permanent impairment is as follows:

Damage to the head (*i.e. the uppermost part*) of the femur,
with replacement by a femoral prosthesis, including any

shortening of the lower limb:	10.0%
Restriction of hip flexion	4.2%
Restriction of hip abduction	2.7%
Restriction of external rotation	1.3%
Restriction of internal rotation	1.3%
Restriction of extension	2.0%
Restriction of adduction	<u>1.0%</u>
Total	22.5%

The foregoing award will be increased by the appropriate enhancement factor and will be subject to the principle of successive remainders, pursuant to Sections 2, 5 and 6 of Manitoba Regulation No. 41/94, the Table of successive remainders being found at Schedule B to that Regulation.

Interest at the statutory rate is, therefore, to be calculated

- (i) on the entire resultant sum (\$X) from January 7th, 1998 to February 18th, 1999, both inclusive;
- (ii) on the sum of \$X minus \$8,610.89 (that is, the \$8,514.32 paid on February 18th plus the \$96.57 paid on March 22nd) from February 19th, 1999 to October 18th, 1999, both inclusive; and
- (iii) on the sum of \$X minus \$10,739.47 (that is, the \$8,610.89 referred to in (ii) above, plus the \$2,128.58 awarded by the Internal Review Officer) from October 19th, 1999 to the date of actual payment to [the Appellant].

The matter is therefore referred back to MPIC's Claims Department for the appropriate calculations of the enhancement factor, successive remainders and interest.

Dated at Winnipeg this 1st day of March, 2000.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED