

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-11-164

PANEL: Ms Yvonne Tavares, Chairperson
Ms Janet Frohlich
Mr. Neil Margolis

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

HEARING DATE: May 2, 2013

ISSUE(S): 1. Entitlement to further permanent impairment benefits;
2. Entitlement to lump sum student indemnity.

RELEVANT SECTIONS: Sections 87, 88 and 127 of The Manitoba Public Insurance
Corporation Act ('MPIC Act')

**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

The Appellant, [text deleted], was involved in a car-pedestrian accident on October 26, 2006. He was hit by a vehicle on his left side while crossing the street. As a result of the accident, the Appellant sustained numerous fractures of the left humerus. Due to the bodily injuries which the Appellant sustained in the motor vehicle accident, he became entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act.

The Appellant is appealing the Internal Review Decision dated October 6, 2011, regarding the following issues:

1. whether the Appellant is entitled to additional permanent impairment benefits for deformity relating to his left elbow and arm injury;
2. whether the Appellant is entitled to a lump sum student indemnity.

At the outset of the appeal hearing it was agreed by the Appellant and counsel for MPIC that the appeal hearing would not consider the permanent impairment benefits for left shoulder range of motion and left elbow range of motion. A further evaluation of [the Appellant's] left elbow and shoulder range of motion was to be carried out in order to determine if [the Appellant's] range of motion had deteriorated since the permanent impairment evaluation performed on July 29, 2009. If [the Appellant] did not agree with that assessment, he would have the opportunity to seek an internal review and appeal to the Commission if required.

1. **Entitlement to Additional Permanent Impairment Benefits**

Section 127 of the MPIC Act provides that:

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.

Schedule A of Manitoba Regulation 41/94 sets out the entitlement for each type of permanent impairment as a percentage of the total amount available.

Section 129(2) of the MPIC Act provides that:

Impairment not listed on schedule

[129\(2\)](#) The corporation shall determine a percentage for any permanent impairment that is not listed in the prescribed schedule, using the schedule as a guideline.

The Internal Review decision of October 6, 2011, confirmed the case manager's decision of July 29, 2009. The case manager's decision of July 29, 2009 determined a permanent impairment benefit of 27% as follows:

Impairment	Percentage
Left elbow/forearm fracture	1
Left shoulder range of motion	11
Left elbow range of motion	9
Left arm/elbow scarring	4
Left forearm scarring	5
TOTAL	27%

The impairment benefits which were greater than 5% were combined using the Table of Successive Remainders, to determine the total permanent impairment benefit of 27%. The award of 27% was then multiplied by \$128,056.00, being the maximum amount available to compensate impairment for 2006. This resulted in a benefit of \$34,575.12 payable to the Appellant.

The Internal Review Officer found that the Appellant had been awarded the maximum permanent impairment payable for his injuries. His impairment benefits were paid on the basis of the classification of a "severe change" in form and symmetry which is the highest degree of impairment for a change in form and symmetry. Therefore, the Internal Review Officer found there was no further entitlement to permanent impairment benefits and confirmed the case manager's decision dated July 29, 2009.

At the appeal hearing, the Appellant submitted that he was entitled to an award for disfigurement in addition to the award of 4% for scarring of his left arm and elbow. The Appellant argued that

according to Black's Law Dictionary, a disfigurement is "an impairment or injury to the appearance of a person". He submits that this definition of disfigurement is different than that found in Manitoba Regulation 41/94. Additionally, the Appellant argues that the change to his left arm is more than a disfigurement and he should receive an additional payment pursuant to ss. 129(2) of the MPIC Act. Accordingly, the Appellant contends that he is entitled to a further payment because his disfigurement is different from that which falls within the definition set out in the applicable Regulation. Furthermore, the Appellant maintains that his disfigurement affects his quality of life, as he is self-conscious about his appearance. The Appellant therefore submits that he is entitled to a further award for disfigurement in addition to that which has already been awarded for left arm/elbow scarring.

At the appeal hearing, counsel for MPIC submitted that the Appellant has received the maximum entitlement for a change in form and symmetry and scarring to the left arm. Counsel for MPIC argues that pursuant to Division 13, Subdivision 2, Item 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 the maximum impairment percentage prescribed for that part of the body. Counsel for MPIC maintains that the Appellant has been awarded the maximum permanent impairment payable for his injuries. He is not entitled to a further separate payment for disfigurement in accordance with Item 1.3. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated October 6, 2011 should be confirmed.

Upon a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant is not entitled to a further permanent impairment benefit for

disfigurement of his left arm/elbow. The evidence before the Commission indicated that a change in form and symmetry of the left elbow and arm and left arm/elbow scarring was sustained by the Appellant in the motor vehicle accident. Pursuant to Manitoba Regulation 41/94, Part 2, Division 13, Subdivision 2, Item 1.3, where there are both alterations in form and symmetry and scarring, the higher of the two percentages obtained under either heading is awarded, up to the maximum impairment percentage prescribed for that part of the body. As the Appellant sustained both scarring and changes in form and symmetry to his left arm/elbow, the greater of the two awards applies, or 4%. This is maximum impairment percentage prescribed for that part of the body. The Commission finds that the deformity to the Appellant's arm falls within the definition of "alteration in form and symmetry" set out in the Regulation. Accordingly, the Commission finds that the Appellant has received the maximum entitlement. The Commission has no discretion to change the impairment award set out in the Schedule of Permanent Impairments and therefore the permanent impairment benefit of 4% is confirmed.

2. Entitlement to a Lump Sum Student Indemnity

At the time of the accident, the Appellant was employed part-time as a [text deleted] and he was receiving regular employment insurance benefits. A letter dated July 12, 2006 from [text deleted] confirmed that the Appellant had applied for the [text deleted] Program. A subsequent letter from [text deleted] dated July 28, 2006 confirmed that in order to enter the program, it was necessary for the Appellant to meet the English Language Proficiency Requirements for the Canadian Language Benchmark with an 8 in all areas. A further letter dated September 20, 2006 confirmed that the Appellant received a number of scores that did not meet the benchmark requirement of 8.

In a decision dated October 28, 2009, MPIC's case manager found that the Appellant was classified as a part-time earner at the time of the motor vehicle accident. Further, the case manager found that at the time of the motor vehicle accident, since the Appellant was deemed an English as a Second Language applicant, he was enrolled in short-term prerequisite courses to meet the requirement for the Canadian Language Benchmark. As such, he was not considered a full-time student for the purposes of PIPP. As a result, the Appellant was not entitled to a lump sum payment for the reported interruption in his education program at [text deleted]. The case manager based his decision on the fact that the Appellant did not meet the definition of "student" as defined under the MPIC Act.

The Appellant sought an Internal Review decision of that decision. In a decision dated October 6, 2011, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the Appellant had not attained the status of a student as that term is defined in the MPIC Act at the date of the accident. The Internal Review Officer determined that it is the status as of the date of the accident that is determinative of the issue and therefore he was unable to conclude that the Appellant was entitled to a student lump sum indemnity due to his finding that the Appellant was not a student at the time of the accident.

The Appellant has appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to a student lump sum indemnity.

At the appeal hearing, the Appellant confirmed that, at the date of the accident, he was employed part-time as a [text deleted] with [text deleted], plus he was receiving regular employment

insurance benefits. However, the Appellant maintains that it was his intention to pursue additional schooling in Canada and to attend [text deleted] and pursue the [text deleted] program. The Appellant contends that due to the injuries he sustained in the motor vehicle accident, his studies were interrupted and he was unable to pursue his educational program as he had originally planned. He maintains that his program of studies was delayed due to the injuries which he sustained in the motor vehicle accident and he feels he should be compensated for that delay. The Appellant submits that if not for the motor vehicle accident, he would have graduated from the program three years earlier.

Counsel for MPIC submits that the Appellant was not a student at the time of the motor vehicle accident. He was not admitted into a course of studies until 2009. Counsel for MPIC maintains that the test is whether the Appellant was admitted into a program of studies at the date of the motor vehicle accident. He contends that the Appellant does not meet the criteria set out in the MPIC Act, as he was not a student at the date of the motor vehicle accident. Therefore, his appeal should be dismissed and the Internal Review decision of October 6, 2011 should be confirmed.

Relevant Legislation:

Section 70(1) of the MPIC Act sets out the following definition:

Definitions

[70\(1\)](#) In this Part,

"student" means a victim who is 16 years of age or older and attending a secondary or post-secondary educational institution on a full-time basis at the time of the accident;

Section 87(1) of the MPIC Act sets out the following definition:

Interpretation of sections 87 to 92

87(1) For the purpose of sections 87 to 92 (students),

"**current studies**" means studies that are part of a program of studies at the secondary level or post-secondary level that, at the time of the accident, the student has admission to begin or continue at an educational institution;

Section 88(1) of the MPIC Act provides as follows:

Student entitled to fixed indemnity

88(1) A student is entitled to an indemnity for the time that he or she is unable because of the accident to begin or to continue his or her current studies, and the entitlement ceases on the day that is scheduled, at the time of the accident, for the completion of the current studies.

Upon a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant is not entitled to a lump sum student indemnity pursuant to Section 88(1) of the MPIC Act.

It is clear from the evidence before the Commission, that the Appellant was a part-time earner, employed part-time as a [text deleted] at the time of the motor vehicle accident, in addition to receiving regular employment insurance benefits. In order to qualify for the lump sum indemnity, the Appellant must meet the definition of "student" set out pursuant to Section 70(1) of the MPIC Act. At the time of the motor vehicle accident, the Appellant was not attending a secondary or post-secondary educational institution on a full-time basis. Accordingly the Commission finds that the Appellant did not meet the definition of "student" set out in Section 70(1) of the MPIC Act at the time of the accident. It is the Appellant's status as of the date of

the accident that is determinative of the issue. As a result, the Commission finds that the Appellant is not entitled to the lump sum student indemnity. Accordingly, the Appellant's appeal is dismissed and the Internal Review decision dated October 6, 2011 is confirmed.

Dated at Winnipeg this 20th day of June, 2013.

YVONNE TAVARES

JANET FROHLICH

NEIL MARGOLIS