Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File Nos. AC-15-092, AC-15-147

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Brian Hunt** **Dr. Sharon Macdonald**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Ashley Korsunsky.**
HEARING DATE:	**August 17, 2017**
ISSUE(S):	**1. Whether the Appellant's permanent impairment benefit was properly calculated.** **2. Entitlement to funding for spinal surgery and associated treatment.**
RELEVANT SECTIONS:	**Section 127 and 136 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 41/94 and Section 5 of Manitoba Regulation 40/94.**

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 was injured in a motor vehicle accident (MVA) on March 4, 2010. He had suffered prior injuries in numerous previous MVAs as well as in a workplace incident.

On March 4, 2010, the Appellant sustained soft tissue injuries to his neck and back and complained of left leg pain. In a decision of this Commission dated July 17, 2014, the

Commission ordered that the Appellant was entitled to a permanent impairment benefit for an L5 nerve impairment.

Following assessment by a physiotherapist to determine the extent of the impairment, the Appellant was awarded a grade 2 sensory impairment defect in the L5 spinal nerve. This award was upheld by an Internal Review Officer for MPIC on December 3, 2014. The Appellant filed a Notice of Appeal with the Commission.

MPIC continued to investigate and a case manager's decision issued on January 10, 2017, awarded him a further 2% impairment benefit for a grade 4.5 motor impairment affecting the L5 spinal nerve, for a total permanent impairment award to 3%. It is from this award that the Appellant now appeals.

As well, the Appellant sought funding for spinal surgery and associated treatment from MPIC. After advising MPIC that he wished to receive funding for back surgery in [text deleted], his case manager provided him with a decision, dated February 25, 2015, indicating that the injury for which he sought surgery was not connected to the motor vehicle accident, and it was not medically probable that the spinal surgery was recommended for his condition or would assist in addressing his back pain. Further, the surgical procedure being proposed by the specialists in [text deleted] could be performed by specialists in Manitoba. The case manager's decision denied coverage for the requested surgical procedure. This was upheld by an Internal Review Officer for MPIC on March 20, 2015. The Appellant has appealed from this Internal Review decision to the Commission.

ISSUES:

Accordingly, the issues before the Commission are whether the Appellant's permanent impairment benefit of 3% was properly calculated and whether the Appellant is entitled to funding for spinal surgery and associated treatment.

The panel, having reviewed the documentary evidence on the Appellant's indexed file, as well as the Appellant's testimony and the submissions of the Appellant and counsel for MPIC has concluded that the Appellant's permanent impairment benefit was properly calculated and that he is not entitled to funding for spinal surgery and associated treatment. Accordingly, the Internal Review decisions dated December 3, 2014 (as amended by the case management decision of January 10, 2017) and the Internal Review decision of March 20, 2015 have been upheld by the Commission.

EVIDENCE AND SUBMISSION FOR THE APPELLANT:

At the outset of the hearing, the Appellant explained that subsequent to filing his appeal, he had been in consultation with an orthopaedic surgeon in Manitoba, [Appellant's orthopaedic surgeon #1]. [Appellant's orthopaedic surgeon #1] had undertaken an MRI investigation and discussed options for treatment with the Appellant. According to the Appellant, he and [Appellant's orthopaedic surgeon #1] discussed the possibility of having a spinal fusion in the future. The Appellant indicated that he has now agreed with [Appellant's orthopaedic surgeon #1] that the disc replacement surgery proposed in [text deleted] may not be his best option, and that he may benefit more from fusion surgery, which he would agree to undergo if [Appellant's orthopaedic surgeon #1] was prepared to perform it.

The Appellant explained that he had previously had concerns about having back surgery in Manitoba, due to a metal allergy, but in his discussions with [Appellant's orthopaedic surgeon #1] he had discovered that it would be possible to use titanium instead of metal and he was feeling more comfortable about surgery in Manitoba. Therefore, at the appeal hearing, his priority was to pursue a permanent impairment award. Unless things change when he sees [Appellant's orthopaedic surgeon #1], he explained, he would no longer be pursuing the issue of surgery in [text deleted]. However, if he did not have surgery in Manitoba, then he wishes to travel to [text deleted] for surgery and agreed that the Commission should decide whether he was entitled to this surgery under the MPIC Act and Regulations.

The Appellant described the difficulties he is having with his back and leg.

He testified that he goes for physiotherapy, athletic therapy and massage treatments and has been prescribed Gabapentin for pain. Still, he suffers from pain on a daily basis. He described having trouble getting up in the morning and using the bathroom facilities. He sits on heat for about an hour so that his body is "movable". From there, the harder he works, the easier it gets. He does the exercise stretches that have been prescribed for him to loosen him up so he does not feel so tight.

The Appellant explained, however, that nothing stays in place. His back shifts and sometimes one leg measures longer than the other. He was suffering from numbness in his leg which went away for awhile, but now has come back. His hip buckles out and his big toe and lower part of the leg is numb. He gets tired of doing all this on a daily basis and would like to have it fixed with fusion surgery if possible. He explained that the idea to have surgery in [text deleted] was introduced to him by a relative who had undergone such surgery and experienced positive

results. This is why the Appellant had wanted to try it. He obtained a cost estimate for the proposed treatment plan from the [text deleted] surgeons following a consultation with them in [text deleted], which he provided for his indexed file.

On cross-examination, the Appellant agreed that various doctors and orthopaedic specialists, such as [Appellant's doctor], [Appellant's orthopaedic surgeon #2] and [Appellant's orthopaedic surgeon #3] had examined or assessed the Appellant and were not of the opinion that he was a candidate for surgery. The physical therapist, [Appellant's physical therapist] was of the same opinion.

More recently, he saw [Appellant's orthopaedic surgeon #4] who had not recommended surgery, but rather recommended that the Appellant go for facet block injections. The Appellant indicated that he was not willing to have injections with long needles, which he did not believe would benefit him. The Appellant agreed that no one had referred him to the [text deleted] surgeons, whom he met with in a hotel in [text deleted] for a consultation, resulting in the estimate for the cost of the surgery in [text deleted] .

The Appellant also agreed that he had since met with [Appellant's orthopaedic surgeon #1] and that both of them had agreed that disc replacement surgery was not the best direction for him. The Appellant continues to seek treatment from [Appellant's orthopaedic surgeon #1] with the hope that he may be a candidate for fusion surgery performed by [Appellant's orthopaedic surgeon #1] in Manitoba. His next appointment to see [Appellant's orthopaedic surgeon #1] would be September 21, 2017.

The Appellant provided a written submission which set out his position regarding his permanent impairment entitlement and regarding the issue of back surgery. The Appellant submitted:

> I am appealing your decision for the Personal Permanent Impairment amount awarded to me. I believe that it does not adequately represent the daily difficulties that I must face with my day to day activities as a result of my back pain.
>
> I do not believe that how the 3 % amount has been determined was ever really fully explained to me. I believe that it does not truly represent the amount of pain that my back pain creates to interfere with my daily activities. I must regularly get Massage, Athletic and Physical therapies to be able to try to manage my pain and mobility. I must also perform a daily exercise program to help manage pain and keep my mobility from getting worse.
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> My back injuries have caused my spine to degenerate and now I have a curvature in my lower back that needs surgery to stabilize it from getting worse. My left leg numbness has returned and my leg pain is worsening. My spine curve is also worsening. I have now decided to go ahead with the surgery that [Appellant's orthopaedic surgeon #1] has recommended.
>
> All I am asking is that MPI continues to provide assistance and treatment coverage for my ongoing back issues, including after surgery. I believe that my impairment award should be reviewed and increased because my back problems need surgery. I believe that 25 % impairment better reflects my current stats as it relates to my function and worsening spinal condition. I am open to discussing any counteroffers.
>
> I would appreciate clarification of how my impairment award was determined. I appreciate your consideration for my concerns.

EVIDENCE AND SUBMISSIONS FOR MPIC:

Counsel for MPIC relied on several reports in the Appellant's indexed file and addressed both the Appellant's claim for entitlement to a permanent impairment award and for funding for back surgery.

Permanent Impairment

Counsel explained that as a result of the Commission's decision of July 7, 2014, which found that the Appellant had sustained an L5 radiculopathy as a result of the MVA, the Appellant's impairment was assessed by a physiotherapist. Assessments of the impact on his strength and

sensation, conducted four years after the 2010 MVA, showed that upon examination the Appellant was able to detect a light touch stimulus but felt mildly numb. The therapist rated this as a probable grade 2 sensory impairment, which was consistent with a finding by [Appellant's orthopaedic surgeon #4] in a January 28, 2014 report of a mild radiculopathy in terms of sensory changes, but no weakness.

MPIC's Health Care Services team conducted a review and provided a report on September 29, 2014 which found mild, possibly grade 2 sensory changes, but found that the information did not confirm motor impairment. This resulted in a 1% permanent impairment award, pursuant to Regulation 41/00, Division 2, Subdivision 4, Table 2.1.

Subsequent to this report, the Appellant attended at the Spine Assessment Clinic, and an assessment was performed by [text deleted], physiotherapist. Her myotomal testing demonstrated a 4+ out of 5 strength range and a decreased sensation to light touch in certain areas. Her motor exam was also positive for a very subtle weakness at the L5-S1 nerve roots when compared to the right.

MPIC's Health Care Services team reviewed this assessment and provided a report dated June 16, 2016 which determined that the Appellant should be entitled to a 2% permanent impairment according to Division 2, Subdivision 4, Table 2.1 in regards to a 4.5 grade motor impairment. Counsel for MPIC explained that a rating for a grade 5 motor impairment (no loss of motor function and an absence of weakness) would result in a 0% award under the Regulation. The Appellant's subtle weakness entitled him to some award, but would not qualify for him for a full grade 4 award of 4% under the regulations. Accordingly, since the Appellant did not meet the

minimum criteria for grading at grade 4, he was awarded a 2% award, representing a midway grade between grade 5 (no loss of motor function) and grade 4.

Counsel submitted that this award of 2% for motor impairment and 1% for sensory impairment in regard to the L5 spinal nerve was appropriate and consistent, having regard to the Appellant's reports from [Appellant's orthopaedic surgeon #1] and [Appellant's neurologist]. [Appellant's orthopaedic surgeon #1] indicated, in a report dated May 4, 2017, that the Appellant presented without a focal motor deficit. [Appellant's neurologist] had reported on December 11, 2013 that the Appellant showed mild weakness and numbness in the L5 distribution, which was consistent with the findings of [independent physical therapist], [Appellant's physiotherapist] and [Appellant's orthopaedic surgeon #4].

Counsel noted that a lump sum permanent impairment indemnity benefit under the Act and Regulations was to be awarded in accordance with the legislation and based on objective medical evidence. It was not an award for pain and suffering. Further, the Appellant bears the onus of establishing on a balance of probabilities that the permanent impairment award was incorrectly assessed and calculated and he has provided no evidence in support of his position. The Appellant feels that the award is not enough and cited a level of 25% impairment. That amount is not supported by the legislation or based on the objective medical evidence on file. There is nothing to suggest that the amounts awarded were incorrect or that the assessments were done incorrectly. Accordingly, counsel submitted that the Appellant's appeal regarding permanent impairment benefits should be dismissed.

<u>Spinal Surgery:</u>

Counsel for MPIC noted that the test for entitlement to funding the Appellant's spinal surgery can be broken down into three parts, which the Appellant bears the onus of establishing on a balance of probabilities. These three tests are:

1. Causation – the Appellant must establish that the particular injury is causally related to his motor vehicle accident.
2. The surgery being proposed is medically required.
3. The proposed surgery is not available in Manitoba.

On the issue of causation, counsel referred to Section 136 of the MPIC Act and submitted that there is no medical evidence to support that the proposed surgery in [text deleted] is related to injuries sustained in the motor vehicle accident. The information on file from the [text deleted] surgeons provides only a diagnosis and quotation for costs. There is no indication what in particular the surgery will address and how this is related to the motor vehicle accident. The proposed treatment plan is for an artificial disc replacement but the quotation does not talk about radiculopathy. It makes reference to degeneration of the C4, C5 and C6 level, but there is no medical evidence on the file relating any such degeneration to the motor vehicle accident and the Appellant clearly suffered from pre-existing neck issues prior to the motor vehicle accident.

Even if the Commission were to accept a causal connection, the Appellant would still need to show that the proposed surgery is medically required in treating a MVA related condition. Overall, the Appellant's file indicates that the idea to seek such surgery came from the Appellant and was not recommended by any of his health care practitioners. He has seen various orthopedic surgeons in Manitoba who have not recommended surgery for him. There are no reports on the Appellant's indexed file from a health care provider which indicate that they are in

support of the Appellant undergoing surgery or that surgery is medically required or recommended. For the most part, in fact, these professionals are opposed to surgery at this time and have recommended therapeutic treatment. In this regard, counsel for MPIC referred to reports from [Appellant's orthopaedic surgeon #2], [Appellant's physical therapist], [Appellant's orthopaedic surgeon #4], [Appellant's orthopaedic surgeon #3] and [Appellant's orthopaedic surgeon #1], and also found support in assessment reports from the physiotherapist, [text deleted] and from a third party chiropractic examination by [independent chiropractor]. MPIC's Health Care Services team conducted numerous reviews. None of the objective findings or opinions supports a conclusion that the Appellant's condition has deteriorated to the extent that spinal surgery would be medically required. None of those experts have recommended this surgery. Further, reports on file examined published evidence regarding poor functional outcomes for such surgery in the lower back area, confirming that it is not medically probable that his back pain would benefit from the surgery.

Nor has the Appellant provided any information to demonstrate that the surgery he is seeking is not available in Manitoba or elsewhere in Canada. Counsel submitted that the Appellant is certainly free to make his own decision to seek treatment in [text deleted], however, this should not be at the expense of MPIC. Manitoba Health is the primary payer for medical care for the Appellant and that obligation has not been displaced as a result of any injuries caused by a MVA. There are times when MPIC pays for treatment where an emergency arises and requires treatment as a result of a MVA outside of the Province. Specialized treatment which is causally related and required as a result of a MVA, but which cannot be provided in Manitoba may also be required. However, this is not an emergency situation. There is no evidence that the type of surgery that the Appellant is seeking in [text deleted] cannot be provided in Manitoba. In fact,

there is positive evidence on the indexed file that the surgical procedures proposed could be provided in Manitoba.

Counsel also referred to two previous Manitoba decisions, one of the Manitoba Court of Appeal in *Harder v. MPIC,* 2012 MBCA 101 and the Commission's decision in AC-09-029. These cases confirm that Manitoba Health is the primary payer for insured medical expenses:

> In *Harder (supra)* the Court stated:
> 17. ...MPIC argues that, while the existing system recognizes that certain situations may arise where out-of-province expenses will be covered by MPIC, they will be the exception. These situations include coverage for emergencies, for non-Manitoba residents or for a specialized treatment not offered in the province. MPIC says that to accept the appellant's position would be to allow motor vehicle accident claimants to effectively bypass the provincial health care system (the principal payer) and saddle the costs on MPIC (the secondary payer).
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> 18. I agree with MPIC.
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> 19. The principal reason the Commission dismissed the appellant's appeal was that it rejected his argument that ss. 136(1) and 5 be given a literal interpretation. The Commission made clear that it is Manitoba Health which has the primary obligation to cover insured medical expenses, not MPIC. Moreover, it held that that obligation "is not displaced in the event of a bodily injury caused by a motor vehicle" (at para. 15). ...

The Commission, while considering a request for payment for disc replacement with titanium invertebral disc in [text deleted], in AC-09-029, reiterated the finding that:

> ... we find that Manitoba Health is the primary funding body for insured medical services for Manitobans and that obligation does not transfer to MPIC when the injuries are caused by a motor vehicle accident. ...

Therefore, counsel for MPIC submitted that the Appellant's appeal requesting funding for back surgery should be denied.

DECISION:

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.

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

(b) the purchase of prostheses or orthopedic devices;

(c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;

(d) such other expenses as may be prescribed by regulation.

Manitoba Regulation 40/94 provides:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

(a) when care is medically required and is dispensed in the province by a physician, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant;
(b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

Manitoba Regulation 41/94 provides:

> **Division 2: Central and Peripheral Nervous System**
> **Subdivision 4: Peripheral Nervous System**
> Motor impairment or sensory impairment is determined under Tables 2.1, 2.2 and 2.3 and the following grading systems:
> Motor impairment:
> (a) grade 5: no loss of motor function and absence of weakness;
> (b) grade 4: weakness against strong resistance, including any muscular atrophy; under
>
> Sensory impairment:
> (a) grade 1: no sensory impairment;
> (b) grade 2: hypesthesia including dysesthesia, paresthesia and hyperesthesia (altered sensation);
> (c) grade 3: anesthesia including pain (loss of sensation).
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> Table 2.1: Nerve Roots

Impaired Structure	**Motor impairment grades**						**Sensory impairment grades**		
	5	**4**	**3**	**2**	**1**	**0**	**1**	**2**	**3**
Lower Limb: L-5	N/a	4%	7.5%	11%	15%	15%	n/a	1%	2%
S-1	N/a	2%	4%	6%	8%	8%	N/A	1%	2%

The onus is on the Appellant to show on a balance of probabilities that he should be entitled to funding for spinal surgery in [text deleted] and that he should be entitled to a permanent impairment award of greater than 3% for an L-5 nerve impairment. In this regard, the panel has reviewed and considered the documentary evidence in the Appellant's indexed file, the testimony of the Appellant and the submissions of the Appellant and counsel for MPIC.

<u>Surgery</u>

The Appellant must show that the injury was caused by the MVA, that the surgery is medically required as a result of this injury and that the proposed surgery is not available in Manitoba.

The panel did not find it necessary to determine whether the spinal surgery in [text deleted] proposed by the Appellant is causally connected to injuries sustained in the MVA. There is very little evidence on the Appellant's indexed file before us in regard to the issue of what the surgery might address and its connection to the MVA. However, the evidence on the indexed file is very clear that the proposed surgery is not medically *required* at this time and, in fact, the evidence on record indicates that it is not medically *recommended* at this time, by any of the Manitoba consulting surgeons or specialists who have assessed the Appellant. This includes the most recent report of [Appellant's orthopaedic surgeon #1], dated May 4, 2017, which indicates:

> ... [the Appellant] and I discussed a number of his multiple surgeries and difficulties that he has had with rejection of what sounds like stainless steel plates. He expressed numerous concerns related to the potential for disc arthroplasty in his lower lumbar spine as he has been assessed by a [text deleted] team of surgeons, who have recommended disc arthroplasty for his quite significant lumbar spondylosis and degenerative scoliosis.
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> I discussed at considerable length of the following with [the Appellant] today, I indicated to him that I felt that the degenerative changes in the cervical were modest and as they do not appear to be conferring a substantial amount of disability, I certainly did not recommend any surgical interventions for his neck.
>
> As far as his lumbar spine goes, I showed him the most recent MRI demonstrating 30-degree scoliosis largely present because of asymmetric disc collapse centred around the L4-L5 disc. There is certainly central and lateral recess spinal stenosis in this area that would account for [the Appellant's] symptoms.
>
> Overall, we agreed that [the Appellant] was functioning reasonably well although he certainly has to exert considerable efforts through physical medicine techniques to achieve this level of function. I have reviewed the risks associated with a deformity correction, decompression and instrumented fusion with [the Appellant]. He agreed that certainly at the current time that surgery was not the best direction for him to move in. ...

Further, there is no evidence on the file that this proposed disc surgery is not available in Manitoba or in Canada. In fact, evidence from MPIC's Health Care Services team indicates that indeed such treatment is available from surgeons in Manitoba. Other possible surgery such as deformity correction, decompression and instrumented fusion may also be available in the

province and the Appellant has now indicated that he would prefer that [Appellant's orthopaedic surgeon #1] himself perform these (if that is his final recommendation for treatment).

Accordingly, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that he is entitled to funding from MPIC for the proposed surgery in [text deleted] and accordingly, his appeal in this regard is hereby dismissed.

Permanent Impairment

The panel has reviewed MPIC's calculation and assessments in regard to the rateable impairment for the injury to the Appellant's L-5 nerve. Our review was made more difficult by an apparent minor error in the decision on permanent impairment payment provided by the case manager and dated January 10, 2017:

> 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**
Left lower limb change in sensation	**2**	**Division 2: Subdivision 4, Table 2.1**
Left lower limb change in sensation	**1**	**Division 2: Subdivision 4, Table 2.1**
TOTAL	**3**	

However, the apparent duplication of the focus on "change in sensation" set out therein was later clarified in a request from counsel for MPIC to MPIC's Health Care Services medical consultant on June 6, 2017, and Health Care Services' response dated June 19, 2017. This document clarified the award to the Appellant of a 1% permanent impairment award for sensory impairment and a 2% permanent impairment award for motor impairment.

In regard to the 1% permanent impairment rating for a grade 2 sensory loss, the Appellant has provided no evidence to show that either a 2% award for grade 3 (anesthesia (including pain) loss of sensation) or a higher award of 25% as suggested by the Appellant, is a more appropriate award. There is no evidence to show that the Internal Review decision upholding a 1% permanent impairment for sensory loss in this regard is not correct.

In regard to the 2% award for loss of motor function, the panel did have questions for counsel for MPIC regarding the calculation of this permanent impairment, which was not fully explained by the most recent Health Care Services opinion of January 19, 2017. The case manager's decision of January 10, 2017 also failed to explain just how MPIC arrived at the 2%. The Internal Review decision dated December 3, 2014, was issued prior to the case manager's amended award.

Counsel for MPIC, however, fully explained the calculation, indicating that as there had been a slight loss of motor function detected, a grade 5 impairment of 0% was not appropriate, but the Appellant did not qualify for the threshold grade 4 impairment rating of 4%. Accordingly, a midway point between grade 4 and 5 of 4.5 was arrived at, relying primarily on the assessment performed by the physiotherapist, [text deleted]:

> **Motor Exam**
> Myotomal tests were also performed from C2 to T1. This patient demonstrated 5/5 power for all segments tested except for the left C8, which 4/5 strength (query secondary to previous surgical interventions in this region). The right C8 and T1 myotomal tests were not performed, secondary to amputation on the right forearm. Myotomal tests were also performed from L2 to S1. This patient demonstrated 5/5 power for all segments tested, except for the left L5 and S1 myotomes, which demonstrated 4+/5 strength.
>
> **Sensory Exam**
> This patient demonstrated decreased sensation to light touch over the left lateral thigh, lateral shin, and dorsum of the foot. All other area reproduced normal sensation to light touch. There is no evidence of hyperalgesia or allodynia that was noted.

This evidence, along with the other evidence derived from therapy reports and assessment and from [Appellant's neurologist's] assessment was listed by the Health Care Services opinion dated June 24, 2016. The panel finds that this evidence provides a reasonable basis for the calculation:

> Regarding motor impairment, there were multiple examinations performed following the March 4, 2010 MVA that documented a normal left L5 motor examination, when the claimant was on balance at maximal medical improvement from the accident.
>
> 1. A Chiropractic Track II Report dated January 31, 2011 reports grade 5/5 muscle strength of the lower extremities.
> 2. An Initial Therapy Report dated June 28, 2011 documented a normal neurological examination.
> 3. A Subsequent Therapy Report dated September 6, 2011 which indicated gluteal maximum weakness but no L5 weakness.
> 4. A Subsequent Therapy Report dated October 18, 2011 which indicated gluteal maximum weakness but no L5 weakness.
> 5. A physiotherapy narrative report dated March 16, 2012 which reported no true obvious neurological weakening seemed apparent.
>
> The first reporting of decreased motor strength at the left L5 myotome was in a report from [Appellant's neurologist], neurologist, dated September 10, 2012. Weakness and wasting was noted of the left EDB (extensor digitorum brevis) and it was reported that the claimant could barely stand independently on his left toes. This finding was documented 2.5 years following the accident in question. Furthermore, the information obtained dated October 23, 2015 which revealed grade 4.5/5 muscle strength testing of the left L5 and S1 myotomes, reflects [the Appellant's] clinical status 5.5 years following the March 4, 2010 MVA.

The panel finds that this evidence supports the conclusion that the Appellant should be entitled to a permanent impairment rating based upon a 4.5 out of 5 grade for motor impairment. The Appellant has failed to provide any testimony or expert evidence regarding his symptoms of muscle weakness which might contradict this assessment and calculation.

Therefore, the panel finds that the Appellant has failed in the onus upon him to show, on a balance of probabilities, that the permanent impairment award of 2% for motor and 1% for

sensory impairment was in error. Accordingly, the Commission will uphold the decision of the Internal Review Officer dated December 3, 2014 (as amended by the case manager's decision of January 10, 2017) for a permanent impairment award of 3% regarding the L5 nerve impairment.

Accordingly, the Internal Review decisions of December 3, 2014 (as amended) and March 20, 2015 are upheld and the Appellant's appeals are hereby dismissed.

Dated at Winnipeg this 11th day of September, 2017.

LAURA DIAMOND

BRIAN HUNT

DR. SHARON MACDONALD