Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-13-125

PANEL:	**Ms Nikki Kagan, Chairperson** **Ms Susan Sookram** **Mr. Brian Hunt**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; The Appellant was assisted by Interpreter [text deleted]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATES:	**March 21, 2018** **November 26, 2018**
ISSUE(S):	**Whether the Appellant is entitled to Permanent Impairment benefits for intervertebral disc changes and psychiatric condition.**
RELEVANT SECTIONS:	**Section 127(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Division 1, Subdivision 3, Section 4(a)(iii) and Division 11, Class 5 of Manitoba Regulation 41/94.**

Reasons For Decision

Background:

The Appellant was injured in a motor vehicle accident (MVA) on April 27, 2007 when he was a pedestrian struck by a motor vehicle. As a result of the MVA, the Appellant sustained numerous injuries including a fractured right patella, fractured right pelvis, multiple contusions and lacerations, and soft tissue injuries to his neck and back. He was hospitalized for approximately two months. Upon discharge from hospital, he continued with treatment and he received MPIC funded Personal Care Assistance (PCA) and Income Replacement Indemnity (IRI) benefits.

In a previous decision dated May 2, 2011, the Commission found that the Appellant was not entitled to benefits subsequent to June 19, 2008 being the date that MPIC determined that the Appellant had provided false information.

In the case at hand, the Internal Review Decision dated October 18, 2013 stated the following:

> … The Internal Review decision was clear that the application of s. 160 had the effect of terminating your entitlement to all PIPP benefits. AICAC's decision dated May 2, 2011, upheld the Internal Review decision terminating all PIPP benefits for knowingly providing false information.
>
> After the decision was made to end your entitlement to PIPP benefits on June 19, 2008, MPI had no obligation to pay you any further benefits. While the AICAC decision did not specifically refer to ending entitlement to permanent impairment benefits, it didn't have to. The decision was clear. It applied to all PIPP benefits, including permanent impairment benefits. To allow you to seek individual benefits not specifically enumerated in the AICAC decision would be absurd and an abuse of process.
>
> This review also finds that your entitlement to permanent impairment benefits, if any, had not crystallized as of June 19, 2008. Permanent impairment awards are only issued once MPI determines that any impairment of function is, in fact, permanent. In this case, MPI had made no such finding prior to June 18, 2008. Your lack of credibility tainted your relationship with MPI to such an extent that it would have been unable to have any confidence in such a finding after June 18, 2008.
>
> Your entitlement to a permanent impairment award was directly affected by the false and inaccurate information which you provided to MPI. As MPI could not rely on you to provide accurate information, its ability to assess whether you suffered from a permanent impairment was prejudiced. The case managers and AICAC properly held that by providing false and inaccurate information, you forfeited your PIPP benefits, including any entitlement to a permanent impairment indemnity, under section 160…

It is from this Internal Review Decision that the Appellant now appeals.

The Appellant's permanent impairment assessments were assessed by MPIC and determined to be as follows:

ENTITLEMENT # 1 (Previously Paid)
Division 1: Subdivision 2, Item 1.2 (d)
Lower Limb

Fracture right inferior public ramus – 1%
Percentage to be used for application of successive remainders = 1%

ENTITLEMENT # 2 (Previously Paid)
Division 1: Subdivision 2, Item 1.2 (d)
Lower Limb

Fracture of the right superior pubic ramus – 1 %
Percentage to be used for application of successive remainders = 1%

ENTITLEMENT # 3 (Previously Paid)
Division 1: Subdivision 2, Item 1.2 (b)
Lower Limb

Fracture of the right sacral ala – 2%
Percentage to be used for application of successive remainders = 2%

ENTITLEMENT # 4 (Previously Paid)
Division 1: Subdivision 3, Item 4 (d)
The Spine

Fracture of the right traverse process at L3 – 0.5%
Percentage to be used for application of successive remainders = 1%

ENTITLEMENT # 5 (Previously Paid)
Division 1: Subdivision 2, Item 3.2 (c)
Lower Limb

Fracture of the right patella with open reduction and internal fixation – 2%
Percentage to be used for application of successive remainders = 2%

ENTITLEMENT # 6 (Previously Paid)
Division 1: Subdivision 2, Item 3.4 (c)
Lower Limb

Post traumatic patella femoral pain syndrome – 1 %
Percentage to be used for application of successive remainders = 1%

ENTITLEMENT # 7 (Previously Paid)
Division 1: Subdivision 2, Item 3.2 (c)
Fractures
Fracture or dislocation of the patella resulting in quadriceps atrophy – 2%
Percentage to be used for application of successive remainders = 2%

ENTITLEMENT # 8
Division 1: Subdivision 2, Item 2.4 (b)
Range of motion loss to the hip

(ii) (B) internal-external rotation – 31 to 60 – 3%
(iii) (B) abduction-adduction – 15 to 45 – 3%
Percentage to be used for application of successive remainders = 6%

ENTITLEMENT # 9
Division 13: Subdivision 2, Table 13.3
Scarring

Right elbow/arm – 15.28 cm^2 x 0.5% = 7.64% (Maximum 4%)
Percentage to be used for application of successive remainders = 4%

ENTITLEMENT # 10
Division 13: Subdivision 2, Table 13.3
Scarring

Trunk – 0.8 cm^2 x 0.5% = 0.4%
Percentage to be used for application of successive remainders = 0%

ENTITLEMENT # 11
Division 13: Subdivision 2, Table 13.3
Scarring

Right lower limb – 11.55 cm^2 x 1% = 11.55% (Maximum 8%)
Percentage to be used for application of successive remainders = 8%

ENTITLEMENT # 12
Division 1: Subdivision 2, Item 2.3 (c)
Musculotendinous disruption

Thigh muscular atrophy of 2 cm or more, as measured 15 cm above the superior pole of the patella, including any resulting muscle weakness – 2%
Percentage to be used for application of successive remainders = 2%

ENTITLEMENT # 13
Division 2, Subdivision 4, Table 2.3
Peripheral Nerves
Lower Limbs, Inguinal region, Ilioinguinal nerve, Sensory impairment grade 2 – 2%
Percentage to be used for application of successive remainders = 2%

ENTITLEMENT # 14
Section 129(2)
Pudendal Nerve

Lower Limbs, Sensory impairment grade 2 – 2%
Percentage to be used for application of successive remainders = 2%

Calculation of total entitlement (successive remainders applies)
8:6 = 14:4 = 17:2 = 19:2 = 21:2 = 23:2 = 25:2 = 27:2 = 28:1 = 29:1 = 30:1 = 31:1 = **32%**

32% x $130,489 (max applicable for date of accident) = $41,756.48 – $40,451.59(previously paid) = $1,304.89

Comments:
The entitlements are based on the medical information in file, a review with Health Care Services and an assessment report from Mobile Therapy, dated August 5, 2016.

Based on September 1, 2016 HCS review – No entitlement to PI for Psych

Right knee within normal limits – no entitlement

Mobile Therapy's assessment report indicates a mild or moderate change in form & symmetry of the right knee (classed as right lower limb) which would allow for a 3% entitlement as per Division 13: Subdivision 2, Table 13.3. However, since the scarring entitlement for the right lower limb is 8% as noted above, the form & symmetry entitlement would not apply in accordance with Division 13, Subdivision 2, Item 1.3 (copy attached – only the highest percentage is paid when there is both scarring and change in form & symmetry).

On February 26, 2018, the Commission received correspondence from counsel for MPIC stating the following:

> I have been reviewing this matter and met with our permanent impairment staff. They advised that based on [MPIC's physiotherapist]'s report of August 5, 2016 where knee extension measurements were -5° (with normal at 0°), the claimant would be entitled to a permanent impairment of 4% under Division I, subdivision 2, 3.5 (c) (ii).
>
> Accordingly, we are prepared to add this to the permanent impairment award calculation. The entire permanent impairment would need to be re-calculated as Successive Remainders applies, but I assume the claimant will now withdraw this specific issue from the appeal. The appeal should just be for entitlement to an award for the invertebral disc and entitlement to an award for psychological injury…

On March 8, 2018, MPIC forwarded correspondence to the Appellant advising of an additional award of 4% for impairment to his right knee range as stated above.

Preliminary Matters:

The Appellant was unrepresented at the hearing but he was assisted by an interpreter [text deleted].

At the hearing, counsel for MPIC advised the Commission that MPIC was no longer taking the position that the application of Section 160 had the effect of terminating the Appellant's permanent impairment benefits.

At the commencement of the hearing on March 21, 2018, several procedural matters were addressed:

1. The Appellant questioned the calculations of the successive remainders as set out in the correspondence from MPIC dated March 8, 2018. The successive remainders calculation was explained to the Appellant and the Appellant then confirmed that he was satisfied with the award and he would be withdrawing his appeal with respect to his right knee range of motion.

2. Counsel for MPIC provided the Commission and the Appellant with a report from MPIC's Health Care Services (HCS) dated March 16, 2018 regarding the issue of the Appellant's intervertebral disc changes. This was the Appellant's first opportunity to review the said report. The Appellant stated that he wished to review this report with his physician. Given that the report was provided at such a late date and the Appellant wished to review the report with his physician, it was agreed that the hearing regarding this issue would be adjourned to a later date and the hearing of March 21, 2018 proceed with regard to the issue of psychological conditions only.

3. Accordingly, evidence and submissions were heard on March 21, 2018. The hearing of March 21, 2018 was then adjourned until November 26, 2018. At that time, the Commission heard submissions regarding the Appellant's disc condition and also had the benefit of hearing updated evidence from the Appellant regarding his psychological condition.

Issue #1

Whether the Appellant is entitled to a permanent impairment award for his psychological condition.

Evidence and Submission of the Appellant:

Division 11 of Regulation 41/94 sets out several classes of psychological impairment ranging from one to five**,** with one being the most serious permanent impairment and five being the least serious**.** Although not specifically cited by the Appellant, it appears that he was seeking entitlement to a permanent impairment pursuant to the least serious classification, specifically, Class 5, which reads as follows:

> Division 11: Cognitive Functions
>
> Class 5
>
> A psychiatric condition, syndrome or phenomenon that causes an impairment in activities of daily living, social functioning, or sense of well being sufficient to require regular medication, psychiatric intervention or both on an occasional basis (less than once per month). 5%

The Appellant provided evidence and candidly replied to questions from the panel.

The Appellant stated that although he has not taken any medication for the last year and a half, he was previously taking 60 mg of Paxil. He stated that he prefers to treat his condition by praying

and meditating. He stated that at the date of the hearing he was not working. He experiences nightmares and flashbacks of the accident and that once he has a nightmare he cannot fall back to sleep. He stated that this occurs approximately once a week.

The Appellant testified that he talks to his family doctor regularly and continues to challenge himself to resume normal activities such as shopping. He confirmed that he attended school in 2017 taking a course of Applied Accounting and he did well in the program. Although this is a one-year program, due to his condition, he was able to extend the program into a two-year program. He passed the program and he is doing volunteer work at the [text deleted] approximately twice a week.

The Appellant referred the panel to the medical reports on file in support of his claim. In particular, the Appellant referred to the report of [text deleted], psychologist, which states that the Appellant is diagnosed with a "Post Traumatic Stress Disorder – Chronic" and "Major Depressive Disorder - Single Episode, Severe Without Psychotic Symptoms".

Further, the report of [text deled], psychiatrist, dated August 5, 2009, states that the Appellant is suffering from "Post Traumatic Stress Disorder, chronic" and "Major Depressive Disorder, severe". Further, [text deleted]**,** a psychology resident, in a report dated December 8, 2009, states that [the Appellant's] symptoms "are consistent with a DSM-IV diagnosis of Post Traumatic Stress Disorder (chronic), the symptoms of which are severe, and a comorbid diagnosis of a Major Depressive Episode (chronic) of moderate severity".

The Appellant submitted that the evidence establishes that he suffers from a permanent psychological impairment as a result of the MVA.

At the hearing on November 26, 2018 the Appellant provided further evidence that he continues to work with his employment counsellors, preparing a resume and looking for employment. He sees his medical doctor approximately once a month, but he does not see a psychiatrist. Although the Appellant was on a wait list to see a psychiatrist, he never did receive the referral and he took no steps to follow up about the referral.

He stated that he spends his days going out with his girlfriend, shopping, cooking, cleaning and visiting family. Although he acknowledged that he does have nightmares, these are being managed by meditation. He is not taking medication. His evidence is that he now leaves the house more frequently, he completed his accounting course and he drives a car.

Evidence and Submission of MPIC:

MPIC submitted that for a psychological impairment to be compensable the impairment must be considered permanent. A long lasting impairment does not mean it is a permanent impairment.

Counsel for MPIC referred to the numerous reports previously referred to by the Appellant referencing the Appellant's diagnosis of chronic Post Traumatic Stress Disorder (PTSD).

MPIC argued that there is no evidence that symptom reduction could not be possible. MPIC referred to the report of [psych therapist] wherein he stated that the Appellant may benefit from cognitive behavior therapy and argued that this means that symptom reduction is possible. For the Appellant's psychological condition to be permanent there is a requirement that he has to be at maximum improvement. MPIC argued that the evidence does not state that the Appellant is at maximum improvement.

MPIC raised the question whether “chronic” means “permanent”. MPIC argued that there is too much missing information between the years 2012 to 2018 to satisfy the Appellant’s onus to show that his condition is permanent.

MPIC argued that the Appellant’s credibility is a factor in the determination of psychological impairment. A diagnosis of psychological impairment is based upon symptoms presented and described by the Appellant. Given the previous finding in the Commission’s decision of May 2, 2011 when the Commission found that the Appellant did not provide accurate information, MPIC questioned whether the Appellant is accurately describing his symptoms and whether his subjective description of his symptoms is credible.

The position of MPIC is that although there is evidence that the Appellant suffered a psychological impairment, there is no evidence that the Appellant’s condition will not improve over time. Thus, the Appellant has not met the onus that the psychological impairment is a permanent impairment.

Discussion:

The panel considered whether or not the Appellant met the onus of establishing a permanent impairment pursuant to Division 11, Class 5. Specifically, the Appellant had the burden of proving:

> A psychiatric condition, syndrome or phenomenon that, including adverse effects of medication, impairs the person's ability to perform the activities of daily living, ability to function socially or sense of well-being, to such an extent that he or she requires regular medication, psychiatric intervention or both on an occasional basis (less than once per month).

The Commission addressed the reports referencing the Appellant’s condition as “chronic”.

Chronic is defined in the Oxford dictionary as "(of an illness) persisting for a long time or constantly recurring". Occurring for a long time or reoccurring is not the same as being permanent. The evidence does not support the finding that the Appellant is going to suffer from a psychiatric impairment that was caused by the MVA for the rest of his life.

The panel carefully reviewed the evidence on the Appellant's indexed file to note the frequency of psychiatric care required by the Appellant. The evidence does not establish that the Appellant requires psychiatric care or that he requires regular medication, psychiatric intervention or both on an occasional basis (less than once a month). The evidence of the Appellant is that he no longer takes medication. There is no evidence that the Appellant continues to take part in cognitive behavioral therapy. The Appellant testified that he has regular follow-ups with his family doctor. However, in spite of 12 medical reports on file from his family doctor, there is no reference in any of these reports that the family doctor is providing psychological treatment to the Appellant.

The evidence of [Appellant's psychologist] in her report dated April 25, 2012 refers to the Appellant making improvements.

The Commission finds that the additional evidence provided by the Appellant at the November 26, 2018, hearing supports the finding that the Appellant's condition is in fact improving.

<u>Disposition</u>:

The Commission finds that the Appellant has failed to show that he suffers from a psychiatric condition which is permanent in nature. Therefore he is not entitled to a permanent impairment benefit as defined in Division 11, Class 5.

Issue #2

Whether the Appellant is entitled to a permanent impairment benefit in respect of intervertebral disc changes.

Submission for the Appellant:

The Appellant is claiming a permanent impairment award for intervertebral disc changes. It would seem that the Appellant is relying upon Division 1, Subdivision 3, Section 4(a) of the schedule of permanent impairments relating to intervertebral disc changes, specifically:

> **4. Other spinal impairments**
>
> (a) post-traumatic alteration of an intervertebral disc (e.g. disc herniation, internal disc disruption, disc space infection, discectomy) including any range of motion restriction or radiographic instability, per spinal segment:
>
> > (i) with associated myelopathy: (see Division 2 Subdivision 3)
> > (ii) with associated radiculopathy: (see Division 2 Subdivision 4)
> > (iii) without associated myelopathy or radiculopathy 3%

The Appellant relied upon the evidence of his family physician, [text deleted]. [Appellant's family physician] provided numerous reports and each report states that the Appellant suffered from post-traumatic alterations of the intervertebral discs without associated myelopathy or radiculopathy as a result of the MVA. [Appellant's family physician] confirms in his reports that the post-traumatic alteration of the intervertebral discs were due to the Appellant's accident of April 27, 2007 and further, that the Appellant reached maximum medical improvement and has a permanent impairment.

In support of his finding that the Appellant's injury was caused by the accident, [Appellant's family physician]'s report of February 21, 2018 stated:

> I have taken the liberty of attaching an MRI of the C spine (dated April 9th, 2016) showing no signs of Degen. Disc Disease or spurring, arthropathy or other signs of

> degeneration, which would be expected if the both the cervical and lumbar spine fairly simultaneously if this was due to an arthritic disease or ageing…

He further stated that:

> I also still believe that these Degenerative Changes in [the Appellant]'s young age can only be explained on the basis of a post-traumatic basis similar to [the Appellant]'s pedestrian / car accident of 2007…

[Appellant's family physician]'s opinion is that if the Appellant were to have degenerative disc disease due to arthritic disease it would be found on both the cervical and lumbar spine simultaneously. [Appellant's family physician] concludes that the degenerative changes in the Appellant's spine at such a young age can only be explained because of a post-traumatic injury resulting from the MVA of 2007.

In his report of April 18, 2018, [Appellant's family physician] referred to an x-ray of the Appellant's lumbar spine taken August 25, 2003 prior to the accident. This x-ray shows well-maintained vertebral bodies and disc spaces clearly stating no bone or disc abnormality. Then, post MVA the Appellant suddenly showed degenerative changes and diffusely prominent disc at L4L5 and minimally at L5S1.

[Appellant's family physician] stated that "this(sic) disc changes could not logically have occurred without internal disruption mostly likely having occurred during the accident".

The Appellant testified that prior to the accident, although he had previous back pain from playing soccer, this did not prohibit him from taking part in his normal activities. He had no previous disc problems, no arthritis, and he did not take medication for pain. He never attended for physiotherapy and he continued his employment at [text deleted].

Although he is now volunteering at the [text deleted] for approximately five hours per day, during the course of the day, he must walk around and stretch from time to time. Further, when he returns home from work, he rests and applies a heating pad to his back daily. He no longer plays soccer and he no longer goes to the gym.

The Appellant argued that we must accept the opinion of [Appellant's family physician] because [Appellant's family physician] had the opportunity to examine the Appellant on a regular basis. [Appellant's family physician] had the benefit of meeting with the Appellant and was aware of the Appellant's medical history.

The Appellant argued that the legislation refers to "disc herniation" by way of example only, but this is not a necessary criteria for a finding of a permanent post-traumatic alteration of an intervertebral disc.

Submission for MPIC:

MPIC relied upon the Health Care Services medical consultant opinion dated September 3, 2015 which stated:

> Regarding a PI rating related to Division 1, Subdivision 3, Item 4(a); post-traumatic alteration of an intervertebral disc without associated myelopathy or radiculopathy; as per the previous September 16, 2014 PI review there has been no radiological documentation of lumbar spine disc pathology on the CT scan that would entitle [the Appellant] to a PI rating. The post-traumatic alteration of an intervertebral disc is defined under Division 1, Subdivision 3 Item 4(a) as disc herniation, internal disc disruption, disc space infection, discectomy. The CT documented diffusely prominent disc at L4-5 and minimally prominent disc at L5-S1, with no evidence of herniation at either level, would therefore not be considered a ratable impairment.
>
> Furthermore, the current MPI Schedule of Permanent Impairments does not provide PI ratings for degenerative changes of the spine...

MPIC further relied upon the Health Care Services medical consultant opinion of March 16, 2018 which stated:

> The July 7, 2009 CT scan documented a diffusely prominent disc at L4-5 and minimally prominent disc at L5-S1. The radiologist reported that there was no evidence of herniation at either level. Therefore the claimant did not sustain post-traumatic alteration of an intervertebral disc at the lumbar spine defined under Division 1, Subdivision 3, Item 4(a) as disc herniation, internal disc disruption, disc space infection or discectomy. It follows that there is no ratable permanent impairment at L4-L5 or L5-S1 levels of lumbosacral spine. Furthermore, the current MPI Schedule of Permanent Impairments does not provide PI ratings for degenerative changes of the spine…

Discussion:

The onus is on the Appellant to show that on a balance of probabilities, he suffered from a condition caused by the MVA that entitles him to a permanent impairment award.

The Appellant is seeking a permanent impairment award under Division 1, Subdivision 3, Section 4(a) (iii):

> **4. Other spinal impairments**
> (a) post-traumatic alteration of an intervertebral disc (e.g. disc herniation, internal disc disruption, disc space infection, discectomy) including any range of motion restriction or radiographic instability, per spinal segment:
>
> …
> (iii) without associated myelopathy or radiculopathy
>
> …

The panel has carefully reviewed the evidence and submissions of the Appellant and MPIC.

The Appellant relied upon the evidence of [Appellant's family physician]. The Appellant has been a patient of [Appellant's family physician] since approximately 2012. [Appellant's family physician] has specific knowledge with regard to the Appellant's medical conditions.

[Appellant's family physician] relied upon the x-ray of the lumbar spine taken in August 25, 2003 prior to the MVA and compares same to the scans and x-rays submitted post MVA. He relied upon the CT scan of the Appellant's cervical spine and compares same to CT scan of Appellant's lumbar spine. [Appellant's family physician] is of the view that the disc changes could not logically occurred without internal disruption most likely having occurred during the accident.

The panel accepts [Appellant's family physician]'s opinion that if the Appellant were to have degeneration as a result of ageing, he would have had disc degeneration to the cervical spine as well as the L4, L5, S1 spine.

The panel accepts that the Appellant, through this evidence, has met the onus of showing that the most probable explanation for the alteration of his disc is that it was caused by the MVA.

The Commission has given less weight to the report of the Health Care Services consultant of September 3, 2015. We do not agree that the legislation requires a finding of a disc herniation to support a ratable impairment.

The Commission finds that as long as there is evidence of post-traumatic alteration of an intervertebral disc in this case there is no requirement for disc herniation.

The legislation specifically states "(e.g. disc herniation, internal disc disruption, disc space infection, discectomy)". These conditions are cited as examples only.

Section 14 of The Interpretation Act, C.C.S.M. c. I80 states:

> **Reference aids**
>
> 14 Tables of contents, headings, notes, historical references, overviews, examples and other readers' aids are included in an Act or regulation for convenience of reference only and do not form part of it.

The Oxford Dictionary defines e.g. as “for example”.

Counsel for MPIC questioned the reference to “herniation” and whether or not these examples were an exhaustive list or whether these were just the most common examples. The panel finds that these were intended as examples only and are not prerequisites for a finding of a post-traumatic alteration of an intervertebral disc.

Counsel for MPIC further submitted that even if herniation is not a requirement, there must be post-traumatic alteration of an intervertebral disc. The panel finds that there is evidence of a post-traumatic alteration of an intervertebral disc, in particular the reports of [Appellant’s family physician] dated January 4, 2017, February 21, 2018 and April 18, 2018 support this finding.

Disposition:

The onus is on the Appellant to show that there is a post-traumatic alteration of an intervertebral disc. The panel agrees that the Appellant has met this onus, on a balance of probabilities, and that he is entitled to a Permanent Impairment Award for the post-traumatic alteration of an intervertebral disc.

The Appellant’s appeal regarding his disc alteration is allowed.

The Appellant shall therefore be entitled to a permanent impairment award in this regard. The matter is hereby referred back to MPIC's case manager to determine the amount owing to him.

The Commission shall retain jurisdiction in this matter and if the parties are unable to agree on the amount of specific amount owing, either party may refer this issue back to the Commission for final determination.

Dated at Winnipeg this 12th day of July, 2019.

NIKKI KAGAN

SUSAN SOOKRAM

BRIAN HUNT