

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *M.I. v. Saskatchewan Government Insurance,*
2007 SKAIA 089
Date: 20070802
File: 048 of 2006

BETWEEN

M.I., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
M.I., Applicant
Dale Brown, for the Respondent

Before: **Jeff Scott, Chair**
Beverly Cleveland, Commission Member
Jean MacKay, Commission Member

**THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL AND HEALTH
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND
OTHER IDENTIFYING INFORMATION.**

Heard at Regina, Saskatchewan
June 14, 2007

DECISION

[1] The Appellant, M.I., appeals a decision by Saskatchewan Government Insurance (SGI) dated February 2, 2006, concerning her further entitlement to permanent impairment benefits under Part VIII of *The Automobile Accident Insurance Act*, c. A-35, R.S.S. 1978, as amended (the “Act”). The Appellant disagrees with SGI’s decision there is no appreciable change to the scar of her right upper leg caused by the removal of the surgical pin.

PRELIMINARY DISCUSSIONS

[2] In her application for appeal to this Commission however, the Appellant lists the following items as being in issue:

1. scarring on upper right leg;
2. pain in left foot and back, posture not what it was before the accident; continuing to limp;¹
3. right leg length and circumference differences;²
4. day care for her oldest daughter after the accident;
5. home care (living assistance benefits);³

[3] After a brief discussion, Counsel for SGI submitted SGI would pay the Appellant benefits for: (a) child care for two children and travel for doctor appointments on April 27, 2006 and June 7, 2007 from [the First Nation] to [town] and return; (b) travel and supper for attendance at physical therapy twice in March 2005 after IM nail removal from [town] to [town] to the First Nation.

[4] The Appellant also identified other issues that may have been reported to and/or anecdotally noted by the physical therapist but not brought to the attention of SGI. These issues included such things as: posture, LAB’s (eg. standing while doing dishes), insoles, child-care for her older daughter following the accident, IRB while at physiotherapy in March 2005 and psychological concerns. It was suggested, and the Appellant agreed, to

¹ No previous decision letter(s)

² No previous decision letter(s)

³ The Appellant agreed this was no longer an issue

itemize all of her concerns in a letter to SGI and request a meeting with her personal injury representative to review the list. Counsel for SGI agreed he would contact the PIR to ensure these matters were followed up.

[5] By agreement of the parties, we accept jurisdiction and will hear evidence in this appeal on the following issues:

1. scarring as a result of the pin removal from the upper right thigh;
2. right leg length and circumference differences.

JURISDICTION

[6] This Commission derives its jurisdiction to hear and consider appeals from section 191 of *The Automobile Accident Insurance Act*:

191(1) A claimant may appeal a decision of the insurer pursuant to this Part to either the Court of Queen's Bench or the appeal commission within the later of:

(a) 90 days after the date of the insurer's written decision; and

(b) if a claimant has requested mediation pursuant to section 190, 60 days after the date [of] the mediator's written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[7] This section sets out the time frames within which appeal may be brought before this Commission. Barring an express agreement between the parties to alter the limitation period⁴ or exceptional circumstances, the Commission is without jurisdiction to consider appeals brought outside these time frames.⁵ In this case, SGI's written decision was dated February 2, 2006 concerning scarring caused by the pin removal and the Appellant's appeal was filed on May 3, being the ninetieth day and within the time period set out in subs. 191(1)(a) above, and is properly before us.

[8] Although it does not appear the leg length and circumference measurements, were pursuant to any decision letter, there was evidence provided to SGI at its request and by the

⁴ *The Limitations Act*, C. L-16.1, S.S., 2004, as amended by S.S., 2007, c.28; section 21

⁵ *Mintzler v. Saskatchewan Government Insurance* 2001 SKCA 54 (CanLII)

Appellant in this regard and counsel accepts they are properly before us. Accordingly, we accept jurisdiction with regard to these items to be considered by us as part of the within appeal.

FACTS AND FINDINGS

[9] The Appellant was injured on October 13, 2001 when the vehicle in which she was an unbelted front-seat passenger lost control, rolled over, and she was thrown from the vehicle. She was initially taken by ambulance to [the local] hospital where she was stabilized and then transferred to Royal University Hospital in Saskatoon. She sustained a fracture of the right femur that was treated surgically by a locked intramedullary nailing of the right femur on October 14.

[10] The Appellant remained at RUH for one week and was released home with a walker. She started home physiotherapy treatments on November 21 and on site therapy treatments at [town] on January 17, 2002. She was reviewed by the orthopedic surgeon on January 22, 2002 who reported that x-rays were excellent showing the nailed femur in good position. He noted that she was walking, partial weight bearing with crutches.

[11] On February 21, 2002, the Appellant was assessed at STAR Rehab. The assessment team comprised of a family physician, chiropractor and physiotherapist diagnosed the following as being injury related:

1. Fractured right femur;
2. Mechanical low back pain;
3. Patellofemoral syndrome right knee (a direct result of the fracture);
4. Left Achilles tendonitis.

[12] As a result of the assessment, it was felt that the Appellant had not sufficiently recovered to return to work at the present time and that 10-12 weeks secondary level rehabilitation was recommended with a graduated return to work plan started at week eight in her rehabilitation program.

[13] In April 2002, the Appellant had the locking screws removed from the nail which was slightly distracting the fracture. The orthopedic surgeon felt that by removing the

screws it would allow the bone to come into perfect contact. In June 2002, the surgeon reported to the Appellant's family doctor that she should be able to return to work by about September 2002. He noted she was doing very well, full weight bearing with a cane and had excellent range of motion of the knee and hip. The orthopedic surgeon expected rapid (bone) union within about two months.

[14] In August 2002, the orthopedic surgeon again reviewed the Appellant. He reported to her family doctor that he was pleased with her progress and that she was progressing very nicely now. He noted that since the last x-ray in June, the fracture site was throwing down quite a bit more new bone. He expected that the nail would be removed in one or two years.

[15] On November 13, 2002, Andrea Zary, occupational therapist, for Innovative Rehabilitation Consultants (IRC) provided her summary of scar and range of motion measurements. In addition, Ms. Zary reported circumferential measurements as follows:

	<u>Right</u>	<u>Left</u>
Knee held straight	36.4 cm	36.4 cm
10 cm below knee	34.4 cm	34.5 cm
10 cm above knee	42.6 cm	43.2 cm

[16] Ms. Zary noted that range of motion measurements were obtained for the right knee and hip using a goniometer and all ROM appeared within functional and normal limits. She visually assessed the ROM for the ankle and saw no discrepancy between right and left ankles.

[17] Based on Ms. Zary's measurements, Dr. Howlett, medical consultant for SGI completed a permanent impairment assessment and concluded the Appellant was entitled to a total body permanent impairment of 14.3% for scarring based on 1% (whole body impairment) per cm². The final list of impairments calculated by Dr. Howlett was:

- | | | |
|----|--|-------|
| a) | Permanent impairment for scarring right lower limb | 13.5% |
| b) | Permanent impairment for scarring of right forearm | 0.5% |
| c) | Permanent impairment for scarring of left hand | 0.3% |

[18] On January 6, 2003, SGI advised the Appellant by letter that her injury resulted in a 14.3% whole body permanent impairment which entitled her to a benefit of \$19,815.65.⁶

[19] On March 8, 2005, the Appellant had the IM nail removed from the femur. The orthopedic surgeon reported the bone was solidly healed in excellent position and the Appellant had very good hip and knee movement. He reported that she could now resume all normal activities, physiotherapy and work at any time.

[20] On November 21, 2005, Lynne Salamon, occupational therapist, for IRC provided scar photos and measurements for the Appellant following removal of the IM nail in March. On January 24, 2006, Dr. Howlett advised SGI that he has reviewed the re-measurements and descriptions of the right upper leg scarring. He stated there was no appreciable change in the surface area of that scar and accordingly, no additional permanent impairment benefit payable.

[21] SGI advised the Appellant of its decision above by letter dated February 2, 2006 and is the decision letter giving rise to the within appeal.

[22] On April 27, 2006, the Appellant's family doctor⁷ measured the new scar to her right upper leg following the pin removal and indicated it was of varying widths: 2.5 cm long x 2 mm wide and 3.5 long x 4 mm wide.

[23] Subsequently on October 13, 2006, Melanie Eikel, occupational therapist, for IRC attended the Appellant's home to complete an assessment of personal and home care needs following the removal of the femoral pin and measure the Appellant's leg lengths to determine if there is a discrepancy between the length of the right and left legs.

[24] Respecting the latter measurements, she reported they were taken with the Appellant in supine position. Prior to measuring the Appellant did two bridges, lifting her hips from the floor, as per protocol. Measurements were taken from the anterior superior iliac spine to

⁶ Maximum benefit for PI in 2001 \$138,571; the amount paid was subject to an amount owing of \$3,425.00 such that the actual amount paid was \$16,390.65

⁷ it appears this measurement was completed by Dr. Meiring

the medial malleolus of the right and left side. Both left and right leg lengths were measured at 84 cms.

[25] On June 7, 2007, the Appellant's family doctor⁸ measured the scarring to her right upper thigh and measured her right and left legs. In a brief note, he reported as follows:

Scar: right upper leg, hip area lat⁹

Length 7 x 0.5 cm

Raised 2mm

Discoloration: pink

<u>Leg lengths</u>		<u>Circumference</u>
L. leg	91 cms	43 cm
R leg	89 cm	42.5 cm

PERMANENT IMPAIRMENT BENEFITS¹⁰

[26] The only issue we are asked to decide is whether the Appellant's permanent impairment benefit for scarring to her right upper thigh following the IM nail removal in March 2005; and leg length and circumferences measurements were calculated correctly.

[27] The permanent impairment benefit is an attempt – admittedly and necessarily imperfect - to quantify a person's permanent loss of function, impairment or deformity resulting from a motor vehicle accident. It does not take into account the nature of the person's work or his or her salary. It does not take into account the person's interests or lifestyle. Instead, the PIB is an objective measure of the percentage of the body that is effectively no longer useable, has lost function or is permanently damaged in other ways.

⁸ Although his note is written on letterhead indicating Dr. Verster, the signature appears to be Dr. Meiring (see paragraph 17 and note 19 above)

⁹ We assume this word to be "lateral"

¹⁰ See generally: *T.O. v. Saskatchewan*, 2007 SKAIA 025; *O.W. v. Saskatchewan Government Insurance*, 2006 SKAIA 092

[28] Let's consider, for example, a person whose leg was broken in a vehicle accident. However horrid the break, if it is set and heals to normal, there is no permanent impairment benefit available because the person is, in fact, not permanently impaired. The person was impaired through his recovery. The injury may have caused the person to miss months of work and may have prevented him from participating in numerous activities at home. But the impairment was not permanent; he eventually became, one might say "as good as new". There may have been other benefits paid throughout his recovery period but there will not be compensation by way of a payment for permanent impairment.

[29] On the other hand, if the broken leg does not heal properly and the person is permanently unable to fully bend or extend his leg and if he walks with a limp, he will receive a permanent impairment benefit for that permanent consequence. The amount of the benefit is determined by reference to a schedule in *The Personal Injury Benefit Regulations*.

[30] The amount our hypothetical person will receive is the same as what any other person with the same permanent damage to his leg will receive. It doesn't matter that one was a mail delivery person who can no longer walk his route, while another worked at a desk job. It does not matter that one was a marathon runner, while the other was a spectator. For the same permanent impairment, they will receive the same amount of permanent impairment benefit.

[31] The reason for this is that the PIB is an attempt to assess the person's loss in relation to whole body function. The premise is that lost income and increased expenses are compensated through other benefits. The PIB offers a lump sum *in addition* to those benefits. It is a measure of the loss of the body's capacity to do all things or, in effect, to function as a human body was intended to function. In appropriate cases, it also compensates an insured for the disfigurement of his or her body. As such, the schedules deem that certain permanent impairment or deformities result in a specified percentage of lost whole body capacity. The loss of that capacity for two people who suffer an identical injury is the same for each of them, regardless of their hobbies, occupations or earnings, if any.

[32] With that background, we turn to consider the Appellant's appeal.

[33] The *PIBR*, Appendix B, Part 2, Division 3 state that:

Where there are both changes in the form and symmetry and scarring, the higher percentage obtained under either heading is awarded, without exceeding the maximum percentage prescribed for that part of the body, according to Table 17.¹¹

[34] Scarring is defined in Part 2 as:

Cicatricial impairment" (scarring) means any qualitative or quantitative change in the skin including flat and faulty scars;

"flat scar" means a scar that is almost linear, at the same level as the adjoining tissue and almost the same colour, causing no contraction or distortion of neighbouring structures;

"faulty scar" means a scar that is misaligned, irregular, depressed, deeply adhering, pigmented, scaly, retractile, keloidal or hypertrophic.

Right Lower Limb

[35] When Dr. Howlett measured the scar for her right lower limb in December 2002 he determined the higher percentage would be obtained using (conspicuous) scarring at 1 .0% per cm². That calculation resulted in a PIB of 13.5% and we agree with that determination.

[36] The Appellant's subsequent surgery in 2005 to remove the IM nail produced another scar at the same surgical site as had been previously assessed by Dr. Howlett. When Dr. Howlett reviewed the re-measurements and photographs done by Ms. Salamon he concluded there was no appreciable change in the surface area of the scar and therefore no change in the PIB previously awarded. With respect to Dr. Howlett, we think, however, that his comments were made respecting the measurement for cicatricial impairment (scarring) and not with regard to change in form and symmetry.

[37] We have reviewed the photographs taken by Ms. Zary in 2002 compared to those taken by Ms. Salamon in 2006¹² respecting the scarring to the right upper thigh and are

¹¹ The maximum percentage of disfigurement for the lower limb is 16%

¹² As well the measurements by Dr. Meiring in April 2006 are similar to Ms. Salamon's measurements.

satisfied that the second surgery resulted in a distinct scar. Having so concluded, how then should the PIB be calculated according to Table 17?

[38] Table 17 provides the maximum percentage for disfigurement for the lower limb is 16% regardless of whether it is calculated based on change in form and symmetry or scarring (1% per cm²). As indicated above, Dr. Howlett used scarring (that is, cicatirical impairment) as providing the Appellant with the greatest award for a PIB resulting from the initial surgery. We think it is open to us, in so far as we have found a distinct scar resulted from the 2006 surgery, to award a PIB for change in form and symmetry.

[39] SGI submits, and we agree, the maximum amount set out in Table 17 is 16% for total benefit payable for scarring to the lower limb resulting from this accident. In other words, regardless of our finding the 2006 surgery resulted in a distinct scar, the maximum percentage of disfigurement is 16%; and not, up to 16% for the scarring from the initial surgery and a further maximum of up to 16% for the scarring from the 2006 surgery.

[40] Calculation of PIB using change in form and symmetry is a range and that range is capped at 16% as indicated above. Having regard to all of the evidence, we are satisfied that the Appellant is entitled to the maximum amount of 16% and resulting in an increased of 2.5% whole body impairment for scarring to her right upper thigh.

IV scarring to hand

[41] Ms. Salamon measured a small scar (0.2 to 0.3 cm x 0.1 to 0.2 cm wide) on the dorsum of the Appellant's hand that likely was the insertion site of the IV needle when the IM nail was removed. She said the scar was quite red at the time of the assessment but it would probably resolve to become a small white scar over time.

[42] In 2002, Ms. Zary measured a small scar to the Appellant's left hand attributed to an IV; Dr. Howlett included this measurement in his calculation of PIB previously and awarded 0.3%. The Appellant testified that she was unsure if the scar measured by Ms. Salamon was a new scar or not. Although it is likely that the Appellant sustained a second "poke" from an IV needle in 2006, there is insufficient evidence for us to conclude this was, in fact, a

new or distinct scar from that which was previously measured and a PIB paid. Accordingly, we find no PIB is payable for this measurement by Ms. Salamon.

Leg length and circumferential measurements

[43] The Appellant's oral evidence is that her right leg is now shorter and thinner compared to her left leg. Several measurements were taken respecting these measurements but there was a discrepancy, in particular, for the leg length measurements.

Circumferential measurements

[44] In 2002, Ms. Zary did circumferential measurements. Her measurement at 10 cm above the knee in the right and left legs are 42.6 and 43.2 cms, respectively. In 2007, Dr. Verster also noted circumferential measurements of right and left legs of 42.5 and 43 cms, respectively. Dr. Verster does not report at where on the legs he made his measurements but they are nearly identical to those identified by Ms. Zary's at 10 cm above the knee. Ms. Zary did not measure leg lengths.

Leg Lengths

[45] In 2006, Ms. Eikel reported the Appellant's right and left legs were each measured at 84 cm. In addition to her report, Ms. Eikel testified as to the protocol used for measuring leg length. At the hearing, Counsel filed copies of the protocol¹³ that Ms. Eikel used.

[46] In 2007, Dr. Verster measured the Appellant's right and left leg lengths at 91 and 89 cms, respectively. It seems obvious to us that Dr. Verster used a different location than from where Ms. Eikel took her measurements, but clearly, there is a difference in their findings.

[47] Although Dr. Verster did not testify, we have no reason to disregard his measurements in favour of those taken by Ms. Eikel; or alternatively to prefer Ms. Eikel's measurements.

¹³ From the textbook: *Orthopedic Physical Assessment*, third edition

[48] We are unable to resolve the different measurements. In these circumstances, we think the leg length and circumferential measurements should be re-done by an independent person who has expertise in these types of measurements and is mutually agreeable to both the Appellant and SGI. In the event, the Appellant or SGI disagrees with the results of the independent measurements, we shall retain jurisdiction, and the matter can be brought back on an expedited basis to this hearing panel for a final decision without the need to file an appeal.

CONCLUSION

[49] SGI is ordered to pay to the Appellant an additional 2.5% whole body impairment for scarring to her right lower limb; and

[50] SGI shall arrange for leg length and circumferential measurements to be re-done by an independent person with expertise in this area and on whom both can mutually agree.

[51] In the event that either party disagrees with the measurements above, the matter may be referred back to this hearing panel on an expedited basis for a final decision and without the need to file another appeal.

COSTS

[52] As the Appellant has been partially successful in her appeal, she is entitled to her reasonable expenses, including meals and travel to attend the hearing, at the prescribed rates. She is also entitled to a refund of her appeal fee.

Dated at Regina, Saskatchewan, on August 2, 2007.

Jeff Scott, Chair

Beverly Cleveland, Commission Member

Jean MacKay, Commission Member