Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-95-10

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **[Text deleted], the Appellant, represented by [Appellant's representative]**
HEARING DATE:	**December 18th and December 19th, 1995**
ISSUE:	**1. Causation - Burden of proof -** *Post hoc ergo propter hoc* ? **2. Entitlement as a full-time earner to I.R.I.;**
RELEVANT SECTIONS:	**81(1)(a), of the M.P.I.C. Act**

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 FACTS:

[The Appellant], an experienced painter and decorator, was employed on a full-time basis by [text deleted]. On April 7th, 1994, then aged [text deleted], he was involved in a motor vehicle accident. [The Appellant] was travelling easterly across an intersection, driving his

[text deleted] van, when it was struck on the driver's side, just behind the door, by a second vehicle that was headed south. That initial impact sent his van across the remainder of the intersection, where the right front corner of the [Appellant's] van ran into the left front quadrant of a third vehicle that was standing at the south-east corner of the intersection. The second collision caused the van to spin slightly to its left, at which point it was again hit by the offending, second vehicle, this time on the van's left front corner. In the course of those three collisions, [the Appellant], who was wearing his seat-belt, had his head, neck and torso forcibly thrown from side to side three times in quick succession and, at some point in the course of the accident, hit his head on the window of his van. He was also moved forward in his seat to the point where he cut his leg on the ashtray on the dash of the van. Following the accident, [the Appellant] had to use the left side of his body, from his knee to hip, to force the door open so he could assist his wife who was experiencing severe chest pains.

The severity of the collisions may be gauged, at least in some measure, from the extent of the damage to the [Appellant's] vehicle, estimated at $7,000.00 (more than the actual cash value of the van), and of the damage to the second car of $4,500.00.

Immediately following the accident, [the Appellant] attended at the Emergency Department of the [hospital #1], complaining of pain in his neck and left thigh and a cut in his right leg. He underwent a cervical spinal x-ray, was advised to take some Tylenol or A.S.A. tablets and was discharged. On the next day, April 8th, 1994, [the Appellant] visited his family physician, [text deleted], primarily for his neck pain; [Appellant's doctor], in his testimony, recalled that the Appellant had complained of lower back pain about one week later, but that this was not the initial focus of his attention which, rather, had been concentrated upon the paracervical area. [Appellant's doctor's] evidence is dealt with in greater detail later in these reasons.

[The Appellant] testified that, prior to the accident, he considered himself to have been in excellent health and to have had a hard-working, active life. This self-appraisal was corroborated by the written, lay opinions of his former employer, of his brother-in-law and co-worker, and by one of his neighbours. More significantly, the state of his pre-accident health was also supported by his family physician, [text deleted], who, while confirming that [the Appellant] had experienced intermittent, mild problems with the lower back in 1982, 1983, 1985 and 1987, testified that neither he nor [the Appellant] had felt them, at the time, to be significant, in that they were not debilitating enough to warrant extensive treatment, follow-up nor absences from work. The Appellant had had no apparent cause to visit his physician for seven years prior to the accident.

[The Appellant] was absent from work for a period of some eight days immediately following the accident. He then returned to work, although it was noted by the Appellant and his fellow employees that he was not able to carry out the full duties of his employment due to the pain that he appeared to be suffering as a result of the accident. On July 19th, attempting to get out of bed, [the Appellant] found himself unable to stand; he missed three days of work. Thereafter, he was frequently obliged to take time off work due to lower back pain; the amount, quality and speed of his work suffered and he had to invoke the aid of others for some of its more demanding aspects. Following discussions with his employer, and to the latter's obvious regret, the Appellant was laid off at the end of August due to his inability to perform his appointed tasks at the same level of efficiency as had been the case prior to his accident.

M.P.I.C.'s records indicate that [the Appellant] was paid Income Replacement Indemnity for the following periods:

(i) from April 15th (i.e. immediately following the expiry of the statutory, seven-day waiting

period) to April 17th, the day before he first returned to work.

(ii) from July 20th, following the incident when he was unable to stand when attempting to leave his bed, until July 22nd, when he again returned to work; and

(iii) from the termination of his employment on October 12th, 1994, to December 21st, when M.P.I.C discontinued his I.R.I. payments pending its receipt of further medical evidence.

Subsequently, the corporation has made that discontinuance a permanent one; its decision has been confirmed by M.P.I.C.'s internal review officer, from whose decision [the Appellant] now appeals.

MEDICAL EVIDENCE:

The Commission has heard substantial evidence from three well-qualified medical practitioners and, as well, has the written opinion of a fourth. While we do not believe that a useful purpose would be served by a detailed analysis of their testimony, their conclusions may be summarized (despite the obvious risk of over-simplification) as follows:

(a) [Text deleted], an experienced general practitioner and [the Appellant's] family physician for at least twelve years, gave evidence of the earlier, non-debilitating, lower back problems referred to above, and testified that it was on [the Appellant's] second visit on April 15th, 1994, eight days after the accident, that his patient first complained of lower back pain as well as tenderness and pain in the paracervical region. [Appellant's doctor] noted from his records that the lower back problems **continued** (the word has some significance, being confirmatory of the earlier

complaint of April 15th) through May of 1994, despite the application of analgesic and muscle-relaxing drugs, becoming severe by mid-July and August, to a point when,on October 11th, [Appellant's doctor] referred [the Appellant] to [Appellant's orthopaedic specialist #1], whose reports are dealt with below. [Appellant's doctor] noted that, by February of 1995, [the Appellant] had been referred to the [text deleted] Clinic at the [hospital #2], where he obtained moderate relief, but was still suffering chronic lower back syndrome with persistent element of sciatica spreading from the lower back through the buttock and the right leg. [Appellant's doctor] expressed a clear and firm opinion that [the Appellant] had been perfectly healthy prior to the accident in question ('healthy', that is, in the sense of being asymptomatic) and that his current disability, specifically relating to sciatica and disc herniation, is related to the motor vehicle accident of April 7th, 1994.

(b) [Text deleted], a specialist in orthopaedic medicine and surgery for some twenty-eight years, to whom [the Appellant] had been referred by [Appellant's doctor], also voiced the opinion that the April 1994 accident, and the injury resulting from it, were at least partly responsible for [the Appellant's] continued back problem and disability. He expressed the view that the Appellant did have a pre-existent degenerative disc disease in his lumbar spine, and that the accident caused symptoms in the Appellant's lower back which suggested that the accident was responsible for initiating and aggravating [the Appellant's] lower back pain and for causing his disability. [Appellant's orthopaedic specialist #1] noted that the Appellant had experienced some bad pain at the end of September of 1994,

when he bent over to pick up something from the floor and had difficulty in straightening himself up, but [Appellant's orthopaedic specialist #1] expressed the view that it was unlikely that that one episode of simple bending at the end of September was the cause for the Appellant's disc protrusion and nerve root irritation. [Appellant's orthopaedic specialist #1's]earlier diagnosis of a probable disc protrusion and bulge at L4-5 had been confirmed by the evidence of x-rays, a CT scan and a myelogram. While acknowledging that it was extremely difficult for him to know exactly when the disc protrusion started, [Appellant's orthopaedic specialist #1] testified that either vertical loading or tortional force could cause a tearing that would, in turn, result in a disc protrusion; tortional loading of the kind undoubtedly experienced by [the Appellant] in the accident was much more likely than vertical loading to have caused the tearing and protrusion suffered by [the Appellant]. Similarly, a collision from the side was more likely than a rear-end or front-end collision to cause lower back problems. [Appellant's orthopaedic specialist #1] also testified that if, as appeared to be the case, [the Appellant] had had lower back problems as far back as 1982, that might well have signified the early stage of disc herniation, which is usually a result of progressive degeneration of the disc and is a slow process. If you start with an unhealthy disc, said [Appellant's orthopaedic specialist #1], even comparatively minor occurrences such as sneezing, lifting something or even a simple cough, never mind the trauma of a major automobile accident, can (but will not necessarily) cause an eventual disc herniation. [Appellant's orthopaedic specialist #1] ended his testimony by repeating his opinion that, on a strong balance of probabilities, the motor vehicle

accident was at least partly responsible for and was the proximate cause of [the Appellant's] disc protrusion and continuing pain.

(c) [Text deleted] is also an experienced orthopaedic surgeon, by whom [the Appellant] was seen over a period from January 13th to March 21st of 1995. It was [Appellant's orthopaedic specialist #2] who referred [the Appellant] to the [text deleted] Clinic. [Appellant's orthopaedic specialist #2] was not called to give oral testimony; we simply have his reporting letter to M.P.I.C. of March 23rd, 1995. While [Appellant's orthopaedic specialist #2's] examinations and treatment of [the Appellant] are, therefore, removed at some distance in time from the date of [the Appellant's] accident, he obviously saw no reason to disbelieve the Appellant's statement that he had no apparent back problems of consequence until the motor vehicle accident in April of 1994 and says "I have accepted that he (i.e. [the Appellant]) is disabled for his work as a painter as a result of his accident to this time."

(d) [Text deleted] is also medical coordinator for M.P.I.C. He, also, presents impressive credentials. In his opinion, [the Appellant] probably does have a lateral disc herniation on the right side. It would be normal in such cases, he testified, that the patient would have back pain, some restricted range of motion, some tendency to limp, and that the diagnosis would be confirmed by applying a straight leg raising test. [MPIC's doctor] noted that [Appellant's doctor's] records did indicate some of those factors, although there was no mention of leg pain until September 29th. [MPIC's doctor] acknowledged that a low back pain stemming

from disc herniation does not always or necessarily radiate to the leg. [MPIC's doctor] said that he had seen no earlier report, other than [Appellant's doctor's] note of May 16th, 1994, to persuade him of the existence of disc protrusion. He had been unaware of [Appellant's doctor's] opinion that, prior to the motor vehicle accident, [the Appellant] was in excellent health, nor (because it was unrecorded in [Appellant's doctor's] clinical notes) of the fact that the Appellant had complained of lower back pain as early as April 15th, 1994. [MPIC's doctor] said that, in any event, the absence of symptoms does not by any means indicate an absence of disfunction. Symptoms and disfunction, he testified, do not correlate. It was quite possible that the Appellant could have had a herniated disc that caused no disfunction at all and that his pain or disfunction could have been caused by something else altogether. [MPIC's doctor] also noted that [Appellant's doctor's] report of August 1991 suggested a low grade sciatica - a problem normally stemming from lower back problems rather than from the buttock. In other words, said [MPIC's doctor], there was probably some compromise of [the Appellant's] lower back condition before the motor vehicle accident - an opinion shared by all of the other medical experts whose views were made known to us. [MPIC's doctor's] further opinion was that, when [the Appellant] had bent over to pick something from his floor in September of 1994, with resultant difficulty in straightening himself up, that event was much more likely to have caused the herniation and disc protrusion, with its consequent disability, than the traumas inflicted upon [the Appellant's] lumbar spine by the motor vehicle accident. He points out that, in his view, the cervical spine would have borne the brunt of the

> motor vehicle impact, and that if [the Appellant's] neck had healed within a reasonable time it would be logical to assume that his lower back would have healed even faster. That, of course, takes no account of the fact that the affected portion of [the Appellant's] lower back appears to have been in an already weakened or degenerative condition at the time of the accident, whereas there is no evidence of degeneration of the upper, or cervical spine.

THE LAW:

It is always difficult, sometimes bordering on the impossible, for a lay tribunal to select the correct opinion between divergent sets of expert, medical views. However, we are of the view that it is unnecessary for us to engage in that process: the medical evidence was generally consistent, the only significant point upon which the opinion of [MPIC's doctor] differed from those of his professional colleagues being the date when the disc herniation most probably occurred. No one was able to give us a conclusive opinion on that point, and we are therefore left to form our own views upon a balance of probabilities.

The only real issue before us is whether the motor vehicle accident of April 7th, 1994 was the cause or a material, contributing cause of the lumbar disc protrusion that gave rise to the continuing pain and disability from which [the Appellant] obviously suffers.

We would emphasize, at the outset, that we do not adopt the concept that is sometimes embodied in the latin maxim *post hoc, ergo propter hoc*, which is to say "after this (incident), therefore because of it". That reasoning can produce a fallacy, without either the presence of some other, supporting evidence or, at the very least, the absence of any other possible

and rational cause. The onus is still upon the claimant to establish, upon a balance of probabilities, that the accident was a cause of the disability complained of.

In the now leading case of Snell v. Farrell, [1990] 2 S.C.R. 311, the Supreme Court of Canada lessened the standard of proof that a plaintiff must meet in order to establish causation. In that case Sopinka, J. stated, at page 328,

> "Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in Alphacell Ltd. v. Woodward [1972] 2 A.E.R. 475, at page 490: "...Essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory".

Sopinka, J. went on to say (at page 330):

> "...The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced....It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law."

Sopinka, J. also quoted with approval the comment of Brennan, J. of the United States Supreme Court in Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959), at pages 109-10:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, nor by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into

consideration.

In the present appeal of [the Appellant], the members of this panel are in the same position as a civil jury, being the triers of fact, in which capacity we make the following findings:

1. [The Appellant] had no significant **symptoms** of lumbar spinal pain, nor any of cervical spinal pain, within approximately four years prior to his motor vehicle accident; however, there is a strong probability that, in the years leading up to the accident, there was some early **disfunction** of one or more parts of his lumbar spine, although not of enough significance to impair his ability to work and his full enjoyment of life;
2. the first notable symptoms of lower back pain appeared about eight days following that accident;
3. the first major symptoms of that lower back pain appear on or about July 22nd, 1994;
4. the bending episode occurred on or about the 28th of September 1994, and the discomfort that followed that event was probably a symptom of an ongoing, worsening lumbar disc deterioration and protrusion;
5. the Appellant's work history and his forthright dealings with M.P.I.C. indicate that he is a conscientious worker, not given to lying back on his oars nor to avoiding work when it is available and when he is fit to do it; his pain is genuine, physical in origin and not an outcropping of malingering nor due to what is known to the medical profession as 'hysterical conversion'.
6. on a strong balance of probabilities, [the Appellant's] ultimate lumbar disc

herniation and protrusion were a result of the motor vehicle accident of April 7th, 1994.

In her closing argument, counsel for M.P.I.C. submitted that [the Appellant's] present condition constituted a relapse, placing an onus upon the Appellant to show that the relapse was directly related to the original, automobile accident. With deference, we do not accept that his condition was, in fact, a relapse. That word implies a disability, followed by a remission of some discernible time, followed by a re-emergence of the early condition. In our view, the evidence points to a continued and worsening condition of [the Appellant's] lower back problem stemming from the date of the accident and continuing up to the present time. True, there is no evidence of pain radiating into [the Appellant's] leg until September of 1994, but that is consistent with all of the medical evidence of a gradually deteriorating condition.

DISPOSITION:

The decision of the Internal Review Officer of June 30th, 1995 is, therefore, rescinded, and [the Appellant's] entitlement to income replacement from December 22nd, 1994 is reinstated.

If the parties are unable to agree upon the quantum of I.R.I., we shall remain seized of this matter so that, upon the application of either party, we can resolve that question also.

Dated at Winnipeg this 5th day of January, 1996.

J.F. REEH TAYLOR, Q.C.	**CHARLES T. BIRT, Q. C.**	**LILA GOODSPEED.**