



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]

AICAC File No.: AC-98-13

PANEL: Ms. Yvonne Tavares, Chairperson
Ms. Barbara Miller
Mr. Guy Joubert

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's representative]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Tom Strutt.

HEARING DATES: January 29 & 30, 2003 and February 21, 2003.

ISSUE(S): Whether the Appellant's low back problems, subsequent disc herniations and chronic pain syndrome were causally connected to the motor vehicle accident.

RELEVANT SECTIONS: Sections 70(1) and 71(1) of The Manitoba Public Insurance Corporation Act (the "MPIC 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 Appellant was involved in a motor vehicle accident ("MVA") on May 23, 1995. According to the Application for Compensation completed by the Appellant, as a result of the MVA, she sustained injuries to her neck, mid-back, headaches, nausea and burn marks on her chest from the seat belt. After the accident, she attended the emergency department at the [hospital], where she

was examined and discharged. She subsequently followed up with her own family physician, [text deleted], with respect to these complaints and was referred for physiotherapy treatment to treat her injuries.

[Appellant's doctor's] Initial Report regarding her examination of the Appellant on May 25, 1995, indicates her diagnosis as "*neck strain, neck pain and headache from occipital to frontal area*". In a subsequent report, dated June 9, 1995, [Appellant's doctor] indicates her diagnosis as neck pain and headache – migraine type, and left shoulder pain.

At the time of the MVA, the Appellant was employed as a homemaker/companion. Due to the injuries which she sustained in the MVA, the Appellant was unable to return to her employment and remained off duties while she recovered. As a result, the Appellant became entitled to income replacement indemnity ("IRI") benefits.

A further Progress Report from [Appellant's doctor], regarding her examination of the Appellant on July 5, 1995, recorded that "*neck and shoulder no more pain – full motion*". She also notes that the Appellant was ready to work from July 1, 1995. However, she specifies that the Appellant was off work from July 5, 1995 because of a kidney condition. As a result of the doctor's report, MPIC discontinued IRI benefits for the Appellant as of June 27, 1995, since the injuries from the MVA were no longer preventing her return to work.

The Appellant progressed with her physiotherapy treatments and was subsequently discharged from physiotherapy care on August 11, 1995. In a report dated December 5, 1995, the physiotherapist comments with regard to the Appellant's treatment that:

Client was initially assessed on June 2, 1995. She presented with complaints of haeadache (*sic*), neck and upper back pain. On examination she was found to have decreased flexion and extension range of motion. Compression of her cervical spine increased her pain. She had severe suboccipital muscle spasm. Also of significance, she had a very severe head forward posture. Her neurological scan was negetive (*sic*).

Treatment consisted of ultrasound, muscle stimulation, ice and posture re-education for the first two weeks. We had tried to begin an exercise program but this was not tolerated very well. These were resumed and we added rythmic (*sic*) stabilizations for the neck as well as gentle manual traction. Her exercises included those of: upper body ergometer, latt pulldowns, pec deck and rhomboid exercises, bicep curls and tricep pulldowns.

The client progressed very nicely over the subsequent six weeks of treatment and was discharged on August 11, 1995.

A subsequent Progress Report, respecting an examination of the Appellant on September 13, 1995, was provided to MPIC by [Appellant's doctor]. In this Progress Report, [Appellant's doctor] diagnosed the Appellant with low back pain and noted that the Appellant had difficulty walking because of this pain. [Appellant's doctor] also noted that the pain appeared at the end of May and had a gradual onset. She advised that the results of a CT scan of the Appellant showed 2 disc herniations at L4/L5 and L5/S1.

The Appellant subsequently contacted MPIC and requested additional Personal Injury Protection Plan ("PIPP") benefits on the basis that her lower back complaints, and particularly the disc herniations, resulted from the MVA of May 23, 1995.

Upon referral from [Appellant's doctor], the Appellant attended the [text deleted] for an assessment of her back. In a report dated October 6, 1995, the physiotherapist at the [text deleted] reported that:

CURRENT COMPLAINTS: [The Appellant] complains of bilateral low back pain and left leg pain. She reports that this has been present since May 17, 1995, when she noticed an increase and left leg pain. She was in a car accident May 23, 1995. She apparently got whiplash from this injury and her right low back pain increasing around August 1995 with the left sided low back pain increased quite quickly after the accident.

[The Appellant] now reports the neck symptoms are better. She went for physiotherapy approximately for three and a half months. This helped.

....

PHYSIOTHERAPY ASSESSMENT: Discogenic low back pain with no nerve root irritation.

The Appellant was provided with an exercise program and back education regarding the nature and cause of her symptoms along with general back care to help prevent future episodes from occurring.

In a follow-up report to MPIC dated October 10, 1995, [Appellant's doctor] reported the following:

During the MVA she sustained an injury to her neck and lower back. However, her main symptoms at that time were neck pain and increased frequency migraine headaches. She also had pain in her lower back, at the beginning only on the left side, which, I suspected, had a kidney origin.

She then became gradually more symptomatic with back pain, which radiated into her left leg. This was a completely new pain which she had never had before her MVA. The pain was increasing upon coughing and sneezing, and she was unable to work because of it.

On examination she had some tenderness on her lumbosacral area. Her reflexes were present and symmetrical, however, sensation was diminished at the L5 level on the left side. The CT Scan showed the central and postero-lateral disc protrusion on the levels, L4-L5 and L5-S1.

Upon receipt of this additional information, the file was referred to [text deleted], Medical Coordinator of MPIC's Claim Services Department, for review. In his Inter-Departmental Memorandum, dated November 1, 1995, [MPIC's doctor] comments as follows:

Based on the information on file, there is no evidence to support that this patient's low back and leg pain are related to her motor vehicle accident of May 23, 1995.

RATIONALE:

The following information is supportive to the above conclusion:

1. The claimant's application for compensation dated May 31, 1995, lists her injuries sustained at the time of the accident as "neck, mid-back, headaches, nausea, burn marks on chest from seatbelts". There is no mention of any low back or leg complaint.
2. The Manitoba Public Insurance doctor's reports completed by [Appellant's doctor], based on examinations on May 25, 1995, June 9, 1995 and July 5, 1995, all note pain complaints in the neck and shoulder girdle. There is no mention of any low back or leg pain in any of these reports. In fact, on the July 5, 1995 report, it is stated that the claimant is ready to go back to work as of July 1, 1995, but was prevented from returning to work on July 5th because of "her kidney condition". The doctor's progress report of September 13, 1995 is the first that documents any low back pain and states that in retrospect "the pain appeared in the end of May and had a gradual onset".
3. The correspondence from that [text deleted] dated October 6, 1995, states that "[the Appellant] complains about lateral low back and left leg pain. She reports that this has been present since **May 17, 1995**, when she noticed an increase in left leg pain." This suggests that the complaint of low back pain clearly preceded the motor vehicle accident of May 23, 1995. Furthermore, notwithstanding the complaint of low back pain, it was not significant enough for the claimant to mention on her form nor significant enough to prevent her from being declared fit to return to work on July 1, 1995.

RECOMMENDATIONS:

Unless evidence can be brought that clearly shows that this claimant had physical findings consistent with her CT picture of L4-5 and L5-S1 disc herniations immediately after the motor vehicle accident, then a cause and effect relationship cannot be

demonstrated between the motor vehicle accident of May 23, 1995 and the low back and left leg pain.

[Appellant's doctor] provided a further letter dated November 30, 1995, in support of the Appellant's claim. In this letter, [Appellant's doctor] notes that:

[The Appellant] (*sic*) has been under my care since March 1994. She had an MVA in May 23, 1995. During the MVA she sustained an injury to her neck and lower back. However, her main symptoms at that time were neck pain and increased frequency migraine headaches. She also had pain in her lower back. She then became gradually more symptomatic with back pain, which radiated into her left leg. The pain was increasing upon coughing and sneezing, and she was unable to work because of it. On examination she had severe tenderness on her lumbosacral area. Her reflexes were present and symmetrical, however (*sic*), sensation was diminished at the L5 level on the left side. The CT Scan showed the central and postero-lateral disc protrusion on the levels, L4-L5 and L5-S1. She has had consultation with an orthopedic surgeon [text deleted] as she is a suitable candidate for surgical treatment. She will have a CT – Myelogram on December 04, 1995, and then plans for surgical treatment will be made.

With the continuation of her symptoms, the Appellant had been referred by the [text deleted] to [text deleted], an orthopedic surgeon, for review and assessment. In a report to MPIC, dated April 2, 1996, [Appellant's orthopedic surgeon] noted the following:

[The Appellant] continues to evidence chronic lumbar back pain and left leg pain. Despite the left leg pain, there is no specific measurable root entrapment or nerve root irritation. She appears to be developing chronic pain syndrome. It was suggested to [Appellant's doctor] that [the Appellant] be seen by a physical medicine specialist to decide whether modalities such as spray and stretch or trigger point injections might help her ongoing chronic pain. When last seen March 27, 1996, there was no indication for any surgical invasive treatment or other specific orthopedic treatment.

[The Appellant] has sustained a musculoligamentous strain to her back as a result of the motor vehicle accident May 23, 1995. Initially there was suggestion of significant disc herniations and left-sided sciatica. This has not been reconfirmed by the CT myelogram in December 1995. At present she appears to have more mechanical lumbar back pain without evidence of disc herniation causing nerve root entrapment. Because of the chronicity of her pain, she also appears to be developing chronic pain syndrome.

There is no information or data that suggests she has a pre-existing lumbar or cervical condition. To date her treatment has not been successful in creating comfort and function. Her prognosis on that basis remains guarded. With her ongoing mechanical

lumbar back pain and musculoligamentous strain and chronic pain syndrome, she would not be able to resume her previous work activities.

In light of [Appellant's orthopedic surgeon's] medical report, the file was once again referred to [MPIC's doctor], for review and comment. In his Inter-Departmental Memorandum, dated June 18, 1996, [MPIC's doctor] concluded that:

Causation

This report in no way changes the facts on file with respect to establishing a relationship between the motor vehicle accident of May 23, 1995 and her low back and leg pain. Furthermore, it is still unknown whether there was any pre-existing low back condition as was implied by the claimant's history to [text deleted] stating that her onset of symptoms began May 17, 1995.

It would seem that whatever event led to the left-sided leg and calf pain was associated with the radiographic abnormality seen on CT at L4-5.

This seems to have occurred some time in July of 1995 and the time course for this is not consistent with that which could be attributed to the motor vehicle accident of May 23, 1995.

Furthermore, I note the physiotherapist's clinical report dated December 5, 1995 addressed to [text deleted]. It would seem that if the claimant had any significant low back pain and a lumbar shift with positive signs of root tension, a trained physiotherapist would have noted this, even if it wasn't the region that was being treated. Furthermore, it is unlikely that treatment would not have been recommended for this area if it was a significant problem at the time.

In summary then, it does not appear that there is any new information which would establish a causal relationship between the motor vehicle accident of May 23, 1995 and the patient's complaint of low back and leg pain.

MPIC's case manager subsequently wrote to the Appellant by letter dated June 28, 1996 and advised the Appellant, through her solicitor, that [Appellant's orthopedic surgeon's] report of April 2, 1996 did not establish a relationship between the motor vehicle accident of May 23,

1995, and her low back and leg pain. As a result, MPIC did not accept the Appellant's claim for any further benefits. The Appellant sought an internal review of that decision.

MPIC subsequently wrote to [Appellant's orthopedic surgeon] providing some additional information and requesting a further opinion as to whether or not the Appellant had sustained a musculoligamentous strain to her lower back as a result of the MVA of May 23, 1995. In a letter dated December 16, 1996, [Appellant's orthopedic surgeon] responded that:

[The Appellant's] motor vehicle accident was May 23, 1995. She stated she was not bothered by back or leg pain prior to this.

However you have uncovered an emergency record from [hospital] dated May 17, 1995. This was approximately a week prior to her described accident. The record indicates that [the Appellant] had been complaining of left lower back pain for years. She even went on to describe worsening of the symptomatology radiating into her left foot and groin area for the past several weeks. Diagnosis was one of pylonephritis and chronic back pain NYD. However this woman apparently had no urinary symptomatology at that time. It is unusual for kidney or bladder disease to cause radiating pain down into a foot. Physical findings were not suggestive of a kidney bladder condition.

You have also supplied information that there were no complaints recorded of back pain or left leg pain in medical documentation in May, June or July of 1995.

When I saw her on October 17, 1995 she stated that within a two week period of time she experienced lower lumbar back pain. This information is different to what you have revealed.

It would also potentially change what the cause of this woman's ongoing back and left leg symptomatology is. There is evidence of ongoing pre-existing lumbar degenerative disc disease with some intermittent left nerve root irritation prior to the accident. There is no immediate documented history that this condition has been enhanced or accelerated after the accident. If it was on the basis of worsening of lumbar disc disease or nerve root entrapment one would have anticipated much more symptomatic complaints and probable findings in the immediate post-injury state, i.e. within the first couple of weeks. If something did not appear until much later, the probability would be that it would be related more to an underlying pre-existing condition than to the traumatic event of May 23, 1995. A diagnosis of musculoligamentous strain to the lumbar (*sic*) spine would be more in keeping with described symptoms rather than a diagnosis of deep structural change, increased lumbar disc injury and/or disc herniation causing left nerve root irritation.

A narrative report was also obtained from the emergency room physician, [text deleted], who attended upon the Appellant on her visit to the [hospital] Emergency Room on May 17, 1995. In his narrative report dated June 12, 1997, explaining the emergency room report which had been provided earlier, [Appellant's ER doctor] notes that:

As you are aware, [the Appellant] presented to the [hospital] Emergency Department on May 17th, 1995. At that time, she complained of left lower back pain which had been going on for the past year and had been worse for the last two weeks. She stated it was sharp and occurred in the left flank radiating to the left inguinal region and then on to the left foot. She did not complain of nausea or vomiting. She did not complain of any trouble passing urine. She denied a history of trauma.

....

A diagnosis of 1) urinary tract infection, possibly pyelonephritis (kidney infection), 2) chronic back pain NYD, was made.

[The Appellant] was given a prescription for antibiotics as well as Indocid, an anti-inflammatory and pain-killer.

The triage note prepared by the nurses makes no mention of any motor vehicle accident. It reads: "Entrance complaint – back pain. History – two weeks of increasing chronic back pain, left greater than right, and down left leg (previously ruled out renal involvement). Yesterday increased pain with no relief with Voltarin or Tylenol. No dysuria. Past medical history – back pain x 1 year. Seen doctor without any diagnosis."

The Appellant's file was once again referred to [MPIC's doctor] for his review and comment on whether the Appellant's low back pain was related to the MVA of May 23, 1995. In his Inter-Departmental Memorandum, dated October 14, 1997, [MPIC's doctor] concludes that:

CONCLUSIONS:

Therefore, in consideration of all the above, including the new information provided and with a reasonable degree of medical certainty, there is insufficient information to establish a cause and effect relationship between this claimant's low back pain (and/or subsequent disc herniation seen on CT) and the motor vehicle accident of May 23, 1995.

In a decision dated November 6, 1997, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the decision of the case manager. The Internal Review Officer based her decision on [MPIC's doctor's] opinion and the medical information on file. She found that any symptoms, which the Appellant had subsequent to the termination of her IRI on June 27, 1995, regarding her lower back, were not related to the MVA.

The Appellant has now appealed to this Commission. The issue which requires determination in the Appellant's appeal is whether or not the injuries which prevented her from holding employment, were caused by the MVA of May 23, 1995. It was agreed at the outset of the hearing that the Commission's decision with respect to this matter would be limited to the issue of whether or not causation had been established. If the Commission found that causation had in fact been established, the matter would be referred back to MPIC's case manager for a determination of the applicable benefits for this Appellant.

Counsel for the Appellant submits that the Appellant's lower back problems and her disc herniations were caused by the MVA of May 23, 1995. Consequently, he contends that the Appellant is entitled to PIPP benefits. In support of his position, counsel for the Appellant relies on the testimony of the Appellant and on the testimony of her treating family physician, [text deleted], who he submits is in the best position to opine about the cause of the Appellant's back problems, since she was treating the Appellant throughout the relevant time.

In her testimony before the Commission, the Appellant testified that she had no back problems prior to the MVA. She had been employed on a steady basis and participated in various

recreational activities prior to the MVA. She had no difficulty standing, sitting, walking, working, ascending or descending stairs prior to the MVA.

According to her testimony at the hearing, approximately 2 to 2 ½ weeks after the MVA, she developed low back pain. At the time of the MVA, she was also suffering from a urinary tract infection, which could possibly have been a kidney infection. This possible kidney infection did cause her to have left lumbar back pain and initially she thought her back pain was attributable to this possible kidney infection. She had had numerous urinary tract infections/bladder infections/kidney infections over the previous years and assumed that the low back pain was attributable to these conditions.

However, she explained at the hearing, that the low back pain progressively got worse, to the point where she could no longer sit or stand. The pain was also different from the pain she associated with the left side kidney pain. By September of 1995, the pain was very severe and [Appellant's doctor] referred her for a CT scan, which resulted in the diagnosis of the disc herniations. The Appellant denied that she had any previous episodes of pain radiating down her left leg, especially as reported in the [hospital] Emergency Room Record of May 17, 1995. She maintains that she never had back problems prior to the MVA, that her low back problems commenced shortly after the MVA, and she directly relates those problems to the MVA of May 23, 1995.

The Commission also heard oral testimony from [text deleted], the Appellant's family physician. The Appellant had been her patient since March 30, 1994. [Appellant's doctor] testified that

prior to the accident of May 23, 1995, the Appellant's complaints of left lumbar pain were attributable to kidney problems. According to her records, the Appellant had never complained of low back problems otherwise.

[Appellant's doctor] explained that there was no mention of low back pain in her clinical notes and in her reports to MPIC until August 25, 1995, because initially she thought the Appellant's complaints were due to the possible kidney infection and not the MVA. It wasn't until the Appellant presented with pain radiating down her left leg that [Appellant's doctor] referred her for the CT scan, which confirmed the existence of the disc herniations.

[Appellant's doctor] connected the Appellant's disc herniations to the MVA, because in her opinion a disc prolapse or protrusion was not necessarily an acute injury and could be characterized by a gradual onset of pain, as was the case with the Appellant. Therefore, in [Appellant's doctor's] opinion, the MVA was the cause of the Appellant's herniated discs, on the basis of her symptomatology and her history.

Counsel for the Appellant also relies on the testimony of the two lay witnesses, [text deleted] and [text deleted], to confirm that the Appellant never complained of chronic low back problems prior to the MVA. Counsel for the Appellant contends that any reference in the Appellant's medical history, to back pain prior to the MVA, was with respect to the left lumbar area near the left kidney, and was related to a possible kidney infection. He asks that the Commission disregard the [hospital] Emergency Room Report dated May 17, 1995, which noted that the Appellant was seen on that day with complaints of pain down the left leg. He referred to the

Appellant's testimony which denied any such report of pain, but rather explained that she reported pain down the left flank side to the groin area, but specifically not down the left leg. He also refers to [Appellant's doctor's] clinical note of May 19, 1995, which makes no mention of pain radiating down the left leg in support of his position that the [hospital] Emergency Room Report is inaccurate. Counsel for the Appellant therefore concludes that any indication that the Appellant had pre-existing back problems was incorrect.

Counsel for the Appellant argues that after the MVA, the Appellant experienced a new pain – related to her central lower back which developed into a significant disc herniation. He maintains that the treating physician, [text deleted], verifies the Appellant's version of events; they both felt that the Appellant's initial complaints were related to her ongoing kidney problems. Only when those problems were ruled out and the Appellant's condition continued to deteriorate did they change their focus to the low back complaints. Counsel for the Appellant contends that [Appellant's doctor] is in the best position to formulate an opinion respecting the Appellant's condition, yet her opinions had no credibility with MPIC. Additionally, he argued that the opinions of [text deleted], MPIC's Medical Consultant, are biased and should not be accepted as he did not have the benefit of directly examining the Appellant in order to formulate a proper basis for his findings and conclusions.

With respect to the report and opinions expressed by [Appellant's orthopedic surgeon], counsel for the Appellant submits that [Appellant's orthopedic surgeon's] initial report dated April 2, 1996 should be preferred to his later report of December 16, 1996. He notes that [Appellant's orthopedic surgeon's] initial report was based on the Appellant's self-reported history, whereas

his second report was based on incorrect factual information provided by MPIC. Of particular significance, he comments that the Appellant reported to [Appellant's orthopedic surgeon] that she started to suffer with back pain within two weeks of the MVA, which is consistent with her testimony to that effect.

Counsel for the Appellant submits that the Appellant is a credible witness and that her version of events correlating the development of her lower back problems to the accident should be accepted. Based on her medical history and the clinical notes from [Appellant's doctor], she had no complaints of low back pain prior to the MVA, the MVA was of significant severity so as to cause substantial injury, and her back problems commenced shortly after the MVA. As a result, counsel for the Appellant insists that, on the balance of probabilities, the Appellant's injuries are related to the MVA.

Alternatively, counsel for the Appellant submits that if the Appellant had a pre-existing low back condition, the MVA aggravated that condition and materially contributed to the Appellant's subsequent disc herniations. He maintains that the back condition was primarily asymptomatic prior to the MVA, as the Appellant had few, if any, complaints, and it wasn't until the accident that the low back problems really developed. Counsel for the Appellant suggests that the law that needs to be applied, where there is more than 1 contributing factor, is set out in *Athey v. Leonati* {1996} 3 SCR 458. He notes, in a letter to the Commission dated November 21, 2002, the following:

In that case (*Athey v. Leonati*), it was held that as long as there is a cause of an injury above de minimus if is causation of the final result. In other words, it was held that a series of accidents, while only contributing 25% to a disability, was a cause. The test to be applied in our case is whether [the Appellant's] injuries including her low back pain,

subsequent disc herniations and chronic pain syndrome were a contributing factor to her disability above de minimus. Causation is not an all or nothing proposition and therefore the tests applied by the MPI employees or consultants are not according to the law.

Counsel for the Appellant also relies on the decision of this Commission in *[text deleted]*, AICAC File No. AC-00-145, where the Commission held that:

The Commission finds that in order for the Appellant to establish an accident under Section 70(1) of the Act, the Appellant must establish, on a balance of probabilities, that the motor vehicle accident directly caused the bodily injuries in question or materially contributed to the bodily injuries in question.

In a written submission to the Commission dated March 6, 2003, counsel for the Appellant maintains that:

The issue in our case deals with causation as contemplated by Section 70(1) of the Act, that is the definition of accident and bodily injury contemplates causation. It seems this issue has already been decided in the *[text deleted]* case (AC-00-145) and which supports our position that the Commission can look to the legal principles in the common law to define legal terms set out in the legislation. If different definitions are allowed in different circumstances, you have a system that is unworkable. Words have their ordinary meaning and are treated by the public, the legislators and the Courts in the same fashion. Mr. Strutt, is attempting to say that the Commission should use different meanings for a word under this legislation which is contrary to common sense and is not consistent with previous Commission decisions. His arguments are convoluted and make no sense. If it is the intent of the legislation to do that, they would have used express language to that effect.

The legislation is not a complete or exhaustive Code as Mr. Strutt alleges and McMillan did not say this. The words used were "comprehensive" or "all-encompassing insurance scheme". In any event, McMillan dealt with the no fault features of this legislation, that is there is no longer a requirement to prove whether the other driver is or is not at fault. There is still under this legislation a requirement to show that the bodily injury was caused by an accident, regardless of fault. This is no different than a tort claim where fault is admitted and yet causation from injuries is put in issue. In fact, in Athey, fault for the motor vehicle accidents was admitted and the case went ahead dealing with defining causation arising from a series of motor vehicle accidents. This is exactly our case.

Accordingly, counsel for the Appellant contends that the MVA either directly caused or materially contributed to the bodily injuries in question, and as such the Appellant has established that she is entitled to benefits under the PIPP.

Counsel for the Appellant also submits that the Appellant developed a chronic pain syndrome as a result of the injuries which she sustained in the MVA, which prevented her from returning to the workplace. He cites the reports of [Appellant's orthopedic surgeon] dated April 2, 1996, and [MPIC's doctor] dated October 14, 1997, in support of this conclusion. In his report, [Appellant's orthopedic surgeon] noted that "*Because of the chronicity of her pain, she also appears to be developing chronic pain syndrome.*" In his report, [MPIC's doctor] commented that "*Notwithstanding the above, it is now more than two years since the alleged onset of this claimant's low back pain. This is now well beyond the period during which this condition should have resolved completely. The fact that she continues to claim work incapacity would appear to be based more on a chronic pain syndrome presentation rather than to ongoing root tension, weakness, sensory loss or other neurologic abnormality*". Counsel for the Appellant concludes that the Appellant would therefore be entitled to PIPP benefits on the basis of the chronic pain syndrome which she developed from the injuries sustained in the motor vehicle accident of May 23, 1995.

Counsel for MPIC submits that the Appellant has failed to establish, on a balance of probabilities, that her low back injuries were related to the motor vehicle accident of May 23, 1995. He contends that the Appellant sustained an injury to her neck as a result of the accident, once the neck complaint resolved, she was cleared to return to work and her entitlement to PIPP

benefits ended. Counsel for MPIC insists that there is no evidence that the Appellant sustained a low back injury in the MVA of May 23, 1995. Accordingly, there is no entitlement to PIPP benefits arising from this injury.

In support of this position, counsel for MPIC refers to the documentary evidence filed with the Commission and the oral testimony received at the hearing, which he submits demonstrates the lack of a causal connection between the accident and the Appellant's low back complaints. Specifically, counsel for MPIC notes the following:

- The [hospital] Emergency Room Record from the Appellant's visit after the motor vehicle accident on May 23, 1995, contained no reference to back complaints, but rather noted that there was good range of motion of the back and that the back was not tender.
- There was no mention of back complaints in the Application for Compensation filled out by the Appellant.
- [Appellant's doctor's] clinical notes contained no mention of lower back pain until August 25, 1995. Her notes report left lumbar area pain for eight months prior to the accident and note the same pain for three months after the motor vehicle accident.
- [Appellant's doctor's] medical report of May 25, 1995, respecting the Appellant's first visit after the MVA, makes no mention of back injury.
- [Appellant's doctor's] medical report of June 9, 1995 contains no reference to lumbar pain.
- According to [Appellant's doctor's] progress report of July 5, 1995, the MVA related disability ended on July 1, 1995.

- The physiotherapy report from [text deleted] Physiotherapy noted that the claimant progressed nicely and was discharged on August 11, 1995. The physiotherapist made no mention of low back problems.
- On cross examination, [Appellant's doctor] admitted that the Appellant first became more symptomatic with low back pain, on the left side radiating to the left leg, at the end of August 1995 and the first complaint of pain on the right side wasn't until September 11, 1995;
- The first indication in [Appellant's doctor's] notes of radicular pain is August 25, 1995.
- Radiating pain down the left leg was recorded in the [hospital] Emergency Room Record of May 17, 1995, by both the triage nurse and the attending physician. It's most improbable that there would be two separate records in the emergency room report of pain, that were slightly different, but that were both wrong.
- The reference in the report from the [text deleted] dated October 6, 1995, which noted complaints of left leg pain since May 17, 1995.
- The Appellant's medical history indicated numerous visits to various physicians for a variety of complaints. The intermittent low back pain had been documented for four years prior to the MVA, yet the Appellant attributed all of those pre-accident complaints to kidney infections.
- The Appellant was a poor historian throughout her testimony and she conveniently related her low back problems to the MVA.

Counsel for MPIC concludes that there is simply no evidence that the Appellant's low back problems and disc herniations were caused by the MVA, because she did have problems prior to the accident and her complaints of low back pain did not present for three months after the

accident. Counsel for MPIC refers to the testimony of the doctors who testified at the hearing. He notes that [MPIC's doctor] testified that if deep structures, such as an intervertebral disc, had been injured in an accident, you would expect pain within a few days. [Appellant's orthopedic surgeon] testified that you would expect pain within a two-week timeframe from the date of the accident. Lastly, [Appellant's doctor] testified that one would expect muscular pain right away, the radicular pain could have a gradual onset, from two to four weeks. On the basis of the chronology of events after the motor vehicle accident, counsel for MPIC submits that the Appellant's low back was not injured in the accident, since her complaints of low back pain did not commence until a significant time had elapsed.

Counsel for MPIC maintains that if the Appellant did not injure her lower back in the accident, then it is not a tenable position that the chronic pain syndrome was causally connected to the MVA. Further, he argues that there is a lack of psychiatric or psychological evidence diagnosing a chronic pain syndrome and connecting it to the MVA.

Lastly, counsel for MPIC maintains that the MVA had no effect on the Appellant's pre-existing low back condition. He argues that the Appellant had a symptomatic L3/L4 disc problem before the MVA (as opposed to a kidney infection) and a symptomatic L5/S1 disc problem before the MVA (as evidenced by the visit to the [hospital] Emergency Room on May 17, 1995). Her symptoms and complaints with respect to her low back were the same before the MVA, as after, according to [Appellant's doctor's] clinical notes. The first clear evidence of a neurological sign respecting a possible disc herniation wasn't until August 25, 1995, as documented by

[Appellant's doctor]. Prior to that, clinical findings did not exist. Therefore, counsel for MPIC concludes that the MVA made no difference to the Appellant's condition.

Counsel for MPIC submits that since the car accident was not a direct cause of the Appellant's low back problems, and made no difference to the Appellant's lower back, then it did not materially contribute to her condition at all. He maintains that the Appellant's low back condition existed irregardless of the MVA and consequently any consideration of contribution by the MVA to the Appellant's condition is unfounded.

In a written submission to the Commission dated February 24, 2003, counsel for the Appellant submits that the principles enunciated in the case of *Athey v. Leonati* [1996] 3 SCR 458, which were relied upon by the Commission in its decision in the [text deleted], *supra*, and tort law in general, have no application to questions of entitlement to benefits under the PIPP. Specifically counsel maintains that:

With respect, it is very clear that the tort system has been replaced in this Province. For instance, the *restitutio in integrum* principle has been replaced by PIPP coverage, which may or may not fully compensate the claimant's loss. Some interpret *Athey* as holding that there is a right to compensation in tort where someone's negligent act has not been the true reason for a loss, and not even truly necessary for the loss to occur, but merely present peripherally as a "material cause" of the loss. If that is an accurate reading of *Athey*, then we submit that this right has been replaced by PIPP as well. In fact, making the point in that way perhaps highlights just how foreign this analysis is to PIPP.

...

The no-fault nature of PIPP is a very important point in our submission. The principles the tort system uses in assessing causation are all based on considerations of fault and cannot be divorced from considerations of fault. The overriding tort principle is that the loss should fall on the guilty party and not on the innocent one. This can be easily illustrated from *Athey* itself. At paragraph 12, for instance, "it has long been established that a *defendant* is *liable* for any injuries caused or contributed to by his or her *negligence*. If the *defendant's conduct* is found to be a cause of the injury, the presence

of other non-tortious contributing causes does not reduce the extent of the *defendant's liability*.” There is more of the same at paragraphs 14, 15, and 17, and elsewhere in the judgment. We respectfully submit that none of this has anything to do with assessing the extent of the coverage offered by an insurer, which is not in any sense a tortfeasor, and which is operating within a no-fault system.

...

As indicated above, *McMillan* lays down that the tort system has been replaced. Tort principles no longer apply. In fact, the Court of Appeal expressly, and repeatedly, makes the point in *McMillan* that tort principles have no place in interpreting the meaning of phrases such as “caused by” under PIPP. This brief has already mentioned a number of examples. One more will suffice. As already noted, Kroft, J.A. points out that the motions court judge had fallen into error by applying tort concepts to PIPP. At paragraph 128, he observes that “the meaning of ‘*caused by*’ necessarily takes on a different, though still important, meaning once the traditional considerations of fault and negligence are made irrelevant.” At paragraph 138, Kroft, J.A. goes on to say his interpretation “rests on plain, everyday usage of the English language and on what I think is simple logic. Where injury is connected to the use of a motor vehicle, any tort action is barred. To repeat, *the motions court judge's real error was not in applying too strict an interpretation but was in failing to fully appreciate that negligence and its proximate relationship to the event are no longer factors for consideration.*”

Counsel for MPIC therefore submits that "material cause" inquiries are of no assistance at all to the Commission in carrying out its mandate to determine whether or not a particular claim is within the coverage provided by the MPIC Act.

Disposition:

The provisions of the MPIC Act respecting entitlement to IRI benefits, entitlement to permanent impairment benefits, entitlement to reimbursement of treatment expenses and medication costs are all premised on the basis that a causal connection exists between the MVA and a subsequent claim for those benefits.

Section 71(1) of the MPIC Act provides that:

Application of Part 2

71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

Section 70(1) of the MPIC Act provides the following definitions:

Definitions

70(1) In this Part,

"accident" means any event in which bodily injury is caused by an automobile;

"bodily injury" means any physical or mental injury, including permanent physical or mental impairment and death; and

"victim" means a person who suffers bodily injury in an accident.

It therefore follows that, in the case at hand, the Appellant must demonstrate, on a balance of probabilities, that she sustained a bodily injury in the accident of May 23, 1995 to establish a claim to PIPP benefits.

At the hearing of this matter, counsel for the Appellant submitted that the onus of proof had shifted to MPIC in this case. He relies on his written submission to the Commission dated November 21, 2002 wherein he noted that:

In this case, we are also of the view that the onus has shifted to MPI to show that [the Appellant] is not disabled within the meaning of the policy, pursuant to the law as set out in:

1. *Penney v. Manitoba Public Insurance Corp.* (1992) 77 Man.R.(2d) 184 (Man.Q.B.);
2. *Penney v. Manitoba Public Insurance Corp.* (1992) 81 Man.R.(2d) 145 (Man.C.A.);

In *Penney* at the Queen's Bench level, Mr. Justice Lockwood on the issue of onus stated at paragraph 25:

“In the present case I accept the submission of counsel for the plaintiff that onus of proof has shifted to the defendant for three reasons:

1. The plaintiff has met the primary burden of showing, on a balance of probabilities, that he is totally disabled within the meaning of the regulation.
2. The defendant admits in its pleadings that the plaintiff was disabled from the date of the accident to on or about July 26, 1985. During that period the defendant paid to the plaintiff total disability benefits under the regulation.
3. Where such payments are made under a disability insurance policy and then discontinued on the alleged basis that the insured is not (sic) longer entitled to them, the onus is on the insurer to prove that the insured is not disabled within the meaning of the policy.”

The Court of Appeal in *Penney* reaffirmed the decision in so far as onus is concerned, the Court stated at paragraph II:

“As well, the suggested wording more clearly identifies that the burden is upon the corporation to establish that the plaintiff is no longer totally or partially disabled.”

In our case, [the Appellant] has satisfied the primary burden of showing that she met the terms of the statute and that she was unable to continue or hold the employment she held at the time of the accident (“total disability”) and therefore, entitled to an income replacement indemnity. MPI accepted her claim and paid her I.R.I. (“Income Replacement Indemnity”). MPI paid her from the date of the accident, May 23, 1995 (with a 1 week waiting period) until June 27, 1995 when she was cut off by MPI. She attempted to work but was unable to. MPI put causation in issue and refused to pay any further benefits. In those circumstances, on the authority of *Penney*, the onus is on MPI to establish she is no longer totally disabled.

Furthermore, in terms of the proof required to establish causation, the law that needs to be applied is that set out in *Snell v. Farrell* {1990} 2 S.C.R. 311, a Supreme Court of Canada decision. In that case, the Court held that the onus to disprove causation shifts in certain cases. That is our case [the Appellant] does not have to prove positively causation but MPI has the onus to disprove causation. If their evidence falls short, then the onus is not met.

We do not accept the position advanced on behalf of the Appellant that the onus of proof has shifted to MPIC. It is the Appellant who is challenging the decision of the Internal Review Officer dated November 6, 1997. Generally, whoever asserts a proposition bears the burden of

proving it. The Appellant is asserting that she sustained a bodily injury in the motor vehicle accident of May 23, 1995. It is therefore incumbent upon her to establish that fact, on a balance of probabilities. The necessary information required to prove her case would be within her knowledge.

We also find that the *Penney* case, referred to by the Appellant, is of no relevance to the present case. Without addressing the differences in the MPIC Act which may render the *Penney* case immaterial, we find that the present case was not a situation where benefits were discontinued on the basis that the insured was no longer entitled to them. In the case at hand, the Appellant was not in receipt of benefits when her claim was denied.

Initially after the accident, the Appellant presented with complaints relating to a cervical strain, an injury to her mid-back and headaches. These injuries were found to be related to the motor vehicle accident and the Appellant's claim for PIPP benefits was accepted. The Appellant's complaints were treated and resolved and her claim for PIPP benefits was effectively closed.

The Appellant then presented in September 1995 with low back pain and subsequent disc herniation (as seen on the CT scan). Her claim for PIPP benefits arising from this injury was denied by MPIC, as there was an insufficient basis to relate the low back pain to the motor vehicle accident of May 23, 1995. Consequently, the Appellant's subsequent claim for PIPP benefits, relating to her low back condition, was never accepted by MPIC. Therefore, the Appellant's case does not come within the reasoning set out in *Penney*, since benefits were not discontinued on the basis that the insured was no longer entitled to them.

After careful review of all of the evidence, both oral and documentary, we find that the Appellant has not established, on the balance of probabilities, that her low back problems were related to the motor vehicle accident of May 23, 1995. We find that the totality of the evidence establishes that, after the MVA, the Appellant's low back problems first became a concern near the end of August 1995. We base our finding on the following factors:

- The documentary evidence, consisting of the various medical reports on the file, do not corroborate the Appellant's testimony that she started complaining of a central low back pain shortly after the accident. There were simply no complaints of that kind reported by the Appellant, either to her caregivers or to MPIC.
- Despite several attendances post-accident with [Appellant's doctor], there was no mention of pain radiating to the left leg and calf until August 25, 1995. All of the complaints prior to that attendance, noted by [Appellant's doctor], relate to left lumbar pain, which were the same as the Appellant's presenting complaints prior to the MVA.
- The Appellant was quite clear in her testimony that the low back pain was a new and different pain. Since the complaints being presented by the Appellant to [Appellant's doctor] throughout June, July, and most of August 1995 still related to left lower quadrant pain, we find that these complaints did not relate to a new and different pain in the Appellant's central lower back, since there was no differentiation made by either the Appellant or [Appellant's doctor].
- The physiotherapist report dated December 5, 1995 which noted that the Appellant had progressed nicely during the course of her treatment and was discharged on August 11, 1995.

We accept that if the claimant had any significant low back pain and a lumber shift, with difficulty walking, a trained physiotherapist would have noticed this, even if it wasn't the region that was being treated.

Based on our finding that the Appellant's low back pain likely started at the end of August 1995, there is an insufficient temporal relationship to establish a cause and effect relationship between the motor vehicle accident of May 23, 1995 and the Appellant's low back condition. The testimony of [Appellant's orthopedic surgeon], [MPIC's doctor] and [Appellant's doctor] established that complaints of low back pain would be expected within a month, in order to relate a disc herniation to a traumatic event. As a result, we find that the motor vehicle accident of May 23, 1995 did not cause the Appellant's low back problems and possible disc herniations.

We also find, that if the Appellant had a pre-existing back condition, this condition was not altered by the accident of May 23, 1995. The lack of any documented central low back complaints between the date of the accident and late August 1995, lead us to the conclusion that the MVA was not a contributing factor to the Appellant's low back problems. Further, having reached the conclusion that the MVA did not play a role in the Appellant's low back problems, and noting that the Appellant's initial complaints relating to her neck and headaches were treated and resolved, we find that the Appellant has failed to establish that any chronic pain syndrome which she may have developed was causally connected to the MVA.

As a result, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date November 6, 1997.

Dated at Winnipeg this 5th day of June, 2003.

YVONNE TAVARES

GUY JOUBERT

BARBARA MILLER