



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-73**

PANEL: Ms. Laura Diamond, Chairperson
The Honourable Mr. Wilfred De Graves
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms. Dianne Pemkowski.

HEARING DATE: January 6, 2005

ISSUE(S): Whether the Appellant is entitled to Personal Injury
Protection Plan ('PIPP') benefits (Income Replacement
Indemnity benefits)

RELEVANT SECTIONS: Section 81(1) of The Manitoba Public Insurance Corporation
Act ('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, [text deleted], was involved in a motor vehicle accident on July 1, 2001. His vehicle was rear-ended in the accident and he suffered from pain in his back and neck, as well as down his arm.

Prior to the accident, the Appellant was employed at [text deleted] as a truck driver. He has been employed there full-time since 1995.

Following the accident, the Appellant sought medical treatment and was off work and in receipt of Income Replacement Indemnity ('IRI') benefits from MPIC.

On June 3, 2002 the Appellant's IRI benefits were terminated, based on the case manager's view that his inability to work was not causally connected to the motor vehicle accident.

However, this decision was overturned by Internal Review on September 6, 2002. Based upon an opinion provided by [MPIC's doctor #1], Medical Consultant to MPIC's Health Care Services Team, dated July 25, 2002, that "temporally it would appear that a change in the Appellant's medical condition occurred following the motor vehicle accident", and that further investigation was required, IRI benefits were reinstated by an Internal Review Officer.

The Appellant returned to work at [text deleted] on September 10, 2002.

When the Appellant returned to [text deleted], he found that the company had contracted out the work that he had been doing as a truck driver. He was given alternate work on the assembly line, doing riveting. He testified that when he returned to work he was still having a good deal of pain and difficulties with his back, neck and arm. He took Tylenol 3 to try and alleviate the pain.

In approximately the spring of 2003 the Appellant was assigned to put air tanks in buses. This involved lifting above his head and overhead work. He found that he could not tighten the air lines enough as, due to his injuries, he lacked the strength to pull hard enough. He testified that as a result, some of the buses he worked on did not pass internal inspection at the plant.

He was then assigned to put together duct work and scaling underneath buses. Again, he found this task difficult due to the overhead work. He continued to take his medication, but finally found the work so difficult that he again sought medical assistance. He stopped working at [text deleted] in August of 2003, due to these difficulties.

The Appellant testified that although he consulted with a rehabilitation manager at [text deleted] who was attempting to find some lighter duties he could do, he had not been able to find another position there.

On November 12, 2004, the Appellant began working as a truck driver for a company called [text deleted]. He testified that he has been managing to do this work, although he still finds it difficult to do some of the duties. For example, he has difficulty chaining down loads with steel coils, as he does not have enough strength to get the chains tight. He is managing to do the work but still feels sore in his neck and right arm.

The Appellant is seeking IRI benefits from the date he stopped work at [text deleted], August 29, 2003, until the time he began employment with [text deleted] on November 12, 2004.

Internal Review Decision

On February 6, 2004 the Appellant's case manager wrote to the Appellant indicating that a review of the medical reports from his caregivers failed to show any causal relationship between the motor vehicle accident of July 1, 2001 and his present condition. The case manager indicated that the medical information documented a long history of pre-existing spinal condition that could account for his current neck symptoms.

On March 22, 2004, the decision of the case manager was upheld by an Internal Review Officer. The Internal Review Officer relied upon the opinion of [MPIC's doctor #2], Medical Consultant to MPIC's Health Care Services Team. [MPIC's doctor #2] noted that the Appellant had a lengthy history of neck problems prior to his car accident and that radiologic investigations had identified extensive degenerative changes in the Appellant's back and neck resulting in narrowing of the central canal, exiting foramen and lateral recesses at multiple levels. He cited the opinion of [text deleted], a neurologist, that it would be doubtful that the Appellant's condition would be related in any way to the motor vehicle accident. [MPIC's doctor #2] concluded that it was reasonable to conclude that [the Appellant] had pre-existing degenerative disc disease involving multiple levels prior to the incident in question. Although it was reasonable to conclude that his pre-existing neck condition had been adversely affected by the incident, he had recovered from these effects by May of 2002. The problem with which he presented on August 29, 2003 involving both shoulders, was more in keeping with an overuse tendinopathy and possible aggravation of pre-existing degenerative changes. Accordingly, it was [MPIC's doctor #2's] opinion that the symptoms he developed in August 2003 were not causally related to the July 1, 2001 motor vehicle incident.

The Internal Review Officer concluded that the Appellant's condition and symptomology, which started in August 2003 were not causally related to the motor vehicle accident.

It is from this decision of the Internal Review Officer which the Appellant has now appealed.

Medical History

[MPIC's doctor #2's] report of February 2, 2004 cites a ten (10) year history of neck injury prior to February 2000. Two or three years prior to that, he states, the Appellant had left-sided neck

problems with referral to the left upper extremity. X-rays taken on February 3, 2000 identified mildly to moderately advanced degenerative disc disease involving the cervical spine. In February 2000, he states, the Appellant sustained a neck injury as a result of a fall and for which he received a course of physiotherapy.

The Appellant testified that he did not have chronic neck or back problems prior to the accident. In the 1980's, when he was working for [text deleted], driving a truck, he slipped and fell backwards and was off work for approximately one year, and in receipt of Worker's Compensation Benefits. He then returned to work, and was working full-time at [text deleted] when he suffered another workplace accident in February 2000. He recovered from this accident and returned to work by April 19, 2000. He continued to work full-time until the motor vehicle accident.

Medical Treatment and Opinions

Following the accident, the Appellant sought care from his family physician, [Appellant's doctor]. He was also referred to a physiotherapist, [text deleted], for treatment.

[Appellant's doctor] diagnosed a WAD injury with limited range of motion and pain in both elbows, while [Appellant's [physiotherapist] diagnosed a C-Spine injury with soft tissue trauma and irritation of the facet joints, noting bilateral neck pain, lower back pain and pain in the arms.

The Appellant was also referred to [text deleted], a neurologist, who saw the Appellant on November 12, 2001. [Appellant's neurologist] diagnosed degenerative spinal arthropathy. He also noted a possibility of bilateral carpal tunnel syndrome, or, a possibility that the symptoms in his thumb and index finger were due to root lesions. He ordered an MRI scan, stating:

The MRI scan was done to exclude a possible congenital or pre existing condition spinal stenosis. It is doubtful that this would be related in any way to his accident. At the time he was seen, apart from these findings, there were no significant neurological signs or symptoms which could be related to his accident.

The MRI exam of January 28, 2002 found degenerative changes and a multi-level cervical spine stenosis, with cervical spondylosis resulting in multi-level intervertebral foraminal stenosis.

[Appellant's doctor] provided an opinion dated February 26, 2002 describing the findings of [Appellant's neurologist] and the MRI. At that point, [Appellant's doctor] stated:

. . . I am not sure if spinal stenosis is related to as a result of the MVA or if it was a pre-existing condition. . . .

The Appellant was also examined by [text deleted], a neurosurgeon. In a report dated May 6, 2002, he noted:

His MRI scan shows quite a dramatic spinal stenosis across multiple levels in the cervical spine. Most notably C4-5, C5-6, C6-7, with what would be congenitally short pedicles but quite marked degenerative change.

On June 18, 2002, [Appellant's doctor] provided another report. He stated:

He continues to have numbness in both hands. [Appellant's neurologist] mentioned that he may have CTS but [Appellant's neurosurgeon] does not agree with that diagnosis and believes that his numbness is from spinalstenosis affecting Ct6 region. His symptoms have been caused by the accident.

After he returned to work in September of 2002, the Appellant continued to see [Appellant's neurosurgeon], who noted that although he was still complaining of parasthesias in his hands in December of 2002. That had settled by June 4, 2003, when he was also essentially asymptomatic in terms of cervical spondylosis.

As noted above, the Appellant worked until August 29, 2003.

On November 11, 2003, [Appellant's doctor] provided a report in response to the case manager's query as to whether the Appellant's upper cervical pain had been aggravated due to overhead work. [Appellant's doctor] stated:

He was involved in accident on July 1, 2001 and was off until the fall off (sic) of 2002. An MRI scan was after the accident on January 28, 2002 which showed multilevel cervical stenosis. It showed that he had cervical spondylosis resulting in multi-level intervertebral foraminal stenosis. Obviously this condition started as a result of the accident. . . .

. . . My opinion is that cervical spondylosis and stenosis was seen on MRI done in January 28, 2002. This cervical spondylosis started as a result of MVA on July 1, 2001. He should not have been working this new job which involved more overhead work and his symptoms reoccurred. It has nothing to do with overhead work. It aggravated (sic) the pre existing condition of cervical spondylosis seen on MRI as a result of MVA on July 1, 2001. My opinion is MPIC is responsible for his present condition.

[Appellant's physiotherapist], the physiotherapist, provided her report on November 18, 2003.

She stated:

. . . According to my objective findings and history taken in assessing [the Appellant] following his most recent motor vehicle accident of July 1, 2001, it is my opinion that his most recent aggravation does relate to his motor vehicle accident. Prior to the aforementioned MVA he had no problems or complaints with any work activities, even those involving overhead duties. Following the MVA, even with discharge from physiotherapy treatment, he never did return to pre-accident state. This accident was a very high speed rearend collision in which he did not completely recover from, even considering that cervical spine degenerative changes are shown on x-ray and CT scan at this time. The symptoms experienced by [the Appellant] when reassessed on August 29, 2003, are very similar to those experienced at the time of his initial assessment on July 4, 2001. . . .

[MPIC's doctor #1] provided an Inter-Departmental Memorandum dated January 2, 2004 reviewing the changes in the Appellant's work duties since his return to work in 2002. His opinion was that:

. . . his present status would be a further flair up of his pre-existing condition caused by a change in work duties within a month of his going off work again.

[MPIC's doctor #2's] opinion of February 2, 2004, referred to above, concluded that the symptoms developed by the Appellant in August 2003 were not causally related to the July 1, 2001 motor vehicle incident, but rather caused by the overhead duties aggravating his pre-existing condition.

[Appellant's doctor] wrote again on May 4, 2004 reconfirming his opinion that the Appellant did not have any pre-existing condition regarding his neck or back that was aggravated by this accident. He stated:

. . . He did have a sore neck once many years ago, but not anything that is now affected.

He had no problems with any work related duties until this accident. He was able to do all duties required in his job including over the head lifting. He went for physiotherapy treatment, but did not find any lasting relief. The accident he was involved in was a high-speed collision from the backside of his vehicle and he has never recovered from it. He had normal degenerative changes in his spine that we all get at some point, but these were in no means a cause of him having any trouble doing his job.

On September 20, 2004, [Appellant's neurosurgeon] provided a report which attempted to provide an opinion as to whether or not the Appellant's problems related to the motor vehicle accident.

. . . In terms of establishing whether or not this is related to his motor vehicle accident is a very difficult problem particularly since cervical spondylosis is a ubiquitous issue in our population group and degenerative disc disease in his age group is extremely common. To attribute degenerative disc disease to a singular motor vehicle accident on its own is entirely inappropriately; (sic) however, this gentleman's symptoms were apparently precipitated entirely by the motor vehicle accident as he said he had very minor issues relating to cervical spine prior to the accident.

I think due consideration should be given to the temporal relationship between the accident and the development of this gentleman's symptomatology, (sic) but I am not in a position to categorically state the etiological factors that initiated this patient's symptoms.

A further review of the file was conducted by [MPIC's doctor #2] on November 2, 2004. He states:

I support [Appellant's neurosurgeon's] position in that it is not possible to determine the extent a singular motor vehicle incident could contribute to the diagnosed degenerative disc disease. In other words, had [the Appellant] not been involved in the motor vehicle incident, it is medically probable the degenerative changes involving the cervical spine as evident on the CT scan and MRI would have been present anyway.

Submissions

The Appellant acknowledged that the MRI and CT scans show that he has degenerative problems. However, he submitted that prior to the accident, these changes were completely asymptomatic, and that aside from a couple of workplace accidents, he did not have a chronic neck or back condition. Even following injuries incurred in the workplace, he returned to work and was working full time at the time of the motor vehicle accident.

It is the position of the Appellant that he suffered a severe trauma in a high speed rear end collision, and that this caused and accelerated the difficulties he had with his neck and back.

He pointed to [Appellant's neurosurgeon's] opinion that due consideration should be given to the temporal relationship of the accident to his difficulties, noting that since the accident, he cannot do the things that he used to do before. He does not have the same strength and he has pain and restricted movement. Before the accident he was able to perform all the work duties that he has had difficulty doing since the accident.

It is the Appellant's position that the effects of the accident prevented him from working prior to September 2002, and that the same effects and symptoms had caused him to stop working in August of 2003. He submitted that the difficulties he experienced in August 2003 were of the same nature he had been continuing to experience since the accident and, in his submission, they were connected to the accident.

Counsel for MPIC submitted that there was no consistent evidence that the Appellant's difficulties at work since August 2003 were related to the accident. He noted conflicts and inconsistencies between [Appellant's doctor's] initial report of February 26, 2002 (where he stated he was not sure whether the accident caused the Appellant's injuries) and his later reports where he emphatically opined that the motor vehicle accident was the cause of the Appellant's physical symptoms.

He also pointed to the opinion of [Appellant's neurologist] that it is doubtful that the Appellant's symptoms would be related in any way to the accident.

It was clear, he submitted, that the Appellant suffered from a pre-existing degenerative condition which was evident from the radiological information. He had extension problems and neck pain prior to the accident. He then recovered from the accident and returned to work. He worked for 11 months, and as such, it was clear he had returned to his pre-accident condition.

As a result, counsel for MPIC submitted that it was the overhead work which the Appellant was doing and the neck extension involved in that, that aggravated the Appellant's pre-existing degenerative condition. As such, his symptoms were not causally related to the accident.

Discussion

Section 81(1) of the MPIC Act provides:

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

The onus is on the Appellant to show that his inability to continue his full time employment has occurred as a result of the accident.

It is clear from the reports of [Appellant's doctor] and [Appellant's physiotherapist], and the medical documentation on the file, as well as the testimony of the Appellant, that although he returned to employment at [text deleted], the Appellant did not return to his pre-accident status. As well, the symptoms which he has complained of since August 2003, are the same symptoms for which he sought treatment immediately following the accident.

It is the finding of the Commission that the Appellant did not return to his pre-accident status, and that the difficulties he encountered in August of 2003 and following were a continuation of the symptoms he suffered following the accident.

MPIC submitted that the Appellant's symptoms are due to a pre-existing condition. Evidence was also submitted regarding workplace accidents prior to the motor vehicle incident. However, there is no evidence that the Appellant suffered from a chronic condition or complained of symptoms due to an existing chronic back or neck condition prior to the motor vehicle accident.

Rather, the evidence was that the Appellant was working full time before the February 2000 workplace accident and that he returned to work a few months afterwards. A compensable workplace accident and the scant evidence referred to by MPIC regarding history of a pinched nerve do not, in the view of the Commission, constitute evidence of symptoms from a pre-existing condition.

Accordingly, the Commission finds that there is no evidence of symptoms from a chronic degenerative condition that prevented the Appellant from working prior to the motor vehicle accident.

The Commission had the opportunity of observing the Appellant's testimony and found him to be credible. As well, his evidence was corroborated by the views of [Appellant's doctor] and [Appellant's physiotherapist], his caregivers, who had the opportunity to examine the Appellant and assess his credibility. [MPIC's doctor #1] and [MPIC's doctor #2] did not have this opportunity. [Appellant's neurologist] did examine the Appellant, but saw him only once, in November of 2001, while he was still receiving treatment and in receipt of IRI benefits following the accident. [Appellant's neurologist] did not see him prior to the motor vehicle accident or after November 2001, and has not examined him following his alleged relapse of August 2003.

While the Commission accepts that the Appellant possibly had a pre-existing degenerative condition prior to the accident, having regard to all of the evidence, it is the view of the Commission that this condition was largely asymptomatic. The symptoms and difficulties which prevented the Appellant from working in August of 2003 and following, were a continuation of the symptoms which were precipitated by and resulted from the motor vehicle accident of July 1, 2001.

The Commission, therefore, determines that the Appellant's inability to work from August 29, 2003 to November 12, 2004 was causally connected to the motor vehicle accident. The decision of MPIC's Internal Review Officer dated March 22, 2004 is therefore rescinded. The Appellant shall be entitled to IRI benefits from August 29, 2003 to November 12, 2004. Interest in accordance with Section 167 of the MPIC Act shall be added to that amount.

Dated at Winnipeg this 9th day of February, 2005.

LAURA DIAMOND

HONOURABLE WILFRED DE GRAVES

NEIL COHEN