

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-120**

PANEL: Ms Laura Diamond, Chairperson
Ms Diane Beresford
Dr. Patrick Doyle

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

HEARING DATE: December 5, 2007

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits
including:
- IRI from September 10, 2003 to December 10, 2003
- Funding for medical expenses for the time the Appellant
was seeing [Appellant's Doctor]

RELEVANT SECTIONS: Sections 81(1) and 136(1)(a) of The Manitoba Public
Insurance Corporation Act ('MPIC Act') and Section 5 of
Manitoba Regulation 40/94

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

Reasons For Decision

The Appellant was injured in a motor vehicle accident on November 5, 2002. As a result of injuries suffered in the accident, the Appellant was in receipt of Personal Injury Protection Plan ('PIPP') benefits, including Income Replacement Indemnity ('IRI') benefits for his inability to work at his job as a [text deleted].

The Appellant returned to work, doing modified duties for his employer, on a graduated return to work basis. However, when he returned to his full time employment, with modified duties, his case manager terminated his IRI benefits.

The Appellant sought an Internal Review of this decision, and an Internal Review Officer found, on July 29, 2003, that since the Appellant's pay had not changed, he was still a full time [text deleted] (with a fifteen (15) pound weight restriction) and not entitled to further IRI benefits.

The Appellant sought to appeal this Internal Review decision. However, at the hearing of his appeals on December 5, 2007, he indicated that he wished to withdraw his appeal regarding the Internal Review decision of June 29, 2003. Counsel for MPIC did not object to this request. Accordingly, the Appellant's appeal from the Internal Review decision of June 29, 2003 is hereby withdrawn and dismissed.

Following the Appellant's return to work, he was unable to work for a further period, from September 10, 2003 to December 10, 2003. This was a result of the diagnosis and treatment of a tumor in the Appellant's spine, called a [text deleted]. The Appellant sought IRI benefits for this period, as well as funding for medical expenses while he was seeking treatment. The Appellant's case manager took the position that there was no conclusive evidence to establish that the Appellant's symptoms from the [tumor], in early July of 2003, and subsequent surgery of October 3, 2003 was a result of the motor vehicle accident of November 5, 2002.

The Appellant sought Internal Review of this decision. On June 1, 2004, an Internal Review Officer for MPIC reviewed the medical evidence on the file. He indicated that it was the opinion of the Appellant's surgeon, [text deleted], and of [text deleted], a rehabilitation specialist, that the

[tumor] and the related numbness and weakness was not caused by the motor vehicle accident. He also found that the Appellant's general practitioner, [Appellant's Doctor] had not related the condition to the motor vehicle accident. Accordingly, he upheld the decision of the case manager that the Appellant's symptoms were not caused or aggravated by the motor vehicle accident and further PIPP benefits were denied. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident of November 5, 2002, stating that he had been in very good health prior to the accident. The accident occurred while he was stopped in traffic, and when he heard a sound, he turned his head to the right, just before his vehicle was hit from behind and pushed about three (3) to five (5) feet forward.

He described going to work that day, following the accident, and the onset of his symptoms after that. He suffered from neck pain, headache, nausea and low back pain. He was treated by a chiropractor and was off work for two (2) weeks.

The Appellant participated in a graduated return to work program, until he was working full time, although at sedentary, light duties. After work he would come home and rest, and use ice packs.

At some point after Christmas, he described trying to shovel snow and feeling that he had aggravated his neck and shoulder. He continued to obtain chiropractic treatment, but continued to have occasional headaches.

He testified that his condition continued to deteriorate until April, when he could only do modified duties at work.

He described feeling pressure in between his shoulder blades, quite soon after the accident, which continued to increase.

The Appellant testified that, by June, the shoulder pressure and headaches were very difficult.

In July, he developed difficulty with his balance, and trouble walking.

The Appellant had consulted his general practitioner, [Appellant's Doctor], who did some testing, and also referred him to [Appellant's Neurologist]. [Appellant's Neurologist] ordered an MRI.

Following receipt of the MRI results, his general practitioner told him that there was something on his spine, and that he should not work anymore. He was referred [Appellant's Neurosurgeon].

On October 3, 2003, [Appellant's Neurosurgeon] operated to remove the [tumor].

The Appellant testified that he saw [Appellant's Neurosurgeon] before the surgery, the day of the surgery, post-surgery and recovery, and during the week he was in hospital following surgery, on a daily basis.

His neck discomfort, headaches and pressure between the shoulder blades improved following his surgery.

The Appellant submitted that MPIC had relied too heavily on the reports of [Appellant's Neurosurgeon] in this matter.

The Appellant submitted that in his letter dated December 21, 2006, [Appellant's Neurosurgeon] stated that if there had been "significant damage done to a [tumor] following an accident, the Appellant probably would have been rendered paraplegic right at the moment of the accident". The Appellant submitted that the fact that [Appellant's Neurosurgeon] implied that significant damage could occur to a [tumor] would seemingly imply that less significant damage could also occur to an existing [tumor].

In the Appellant's view, [Appellant's Neurosurgeon] had been almost hostile to this appeal process and the idea that the [tumor] was caused or aggravated by the motor vehicle accident. He submitted that although it was hard for the Appellant to accept that he had the [tumor] since birth, as a congenital defect, since he had no symptoms from it before the accident, he found it even more difficult to accept that the accident had not aggravated the [tumor].

In particular, the Appellant pointed to a report from [Appellant's Neurologist], dated July 18, 2005, where [Appellant's Neurologist] recognized that, although the lesion in the Appellant's spinal cord was congenital and pre-existing, it had been asymptomatic prior to the motor vehicle accident. He noted:

With regards to the accident, it is my understanding that he had no problems prior to the accident. It is also recognized that the lesion that he had in his spinal cord is congenital but it may have been traumatized as a result of the injury, causing bleeding and his

subsequent neurologic problems.

...

Putting it differently, this gentleman had a preexisting lesion in his spinal cord which was asymptomatic. Following the car accident the lesion became symptomatic in that it may have resulted in a small hemorrhage which caused neurologic dysfunction. Following surgery he has been improving but at this point he is still not back to normal.

The Appellant submitted that [Appellant's Neurologist], a well qualified neurologist, had provided the most credible opinion in recognizing the possibility that the accident had caused a small bleed and aggravation of the [tumor], causing his symptoms and necessitating his surgery.

MPIC's Submission

Counsel for MPIC submitted that the symptoms connected with the Appellant's [tumor] were new symptoms which only began to appear in June or July of 2003. For the most part, these consisted of numbness on his right side. These were not reported immediately following the motor vehicle accident.

Counsel for MPIC relied primarily upon the reports of [Appellant's Neurosurgeon]. He indicated that it was unusual for a doctor to be so clear in an opinion regarding causation, and that [Appellant's Neurosurgeon] could not have been any more clear regarding his opinion in these reports.

He reviewed [Appellant's Neurosurgeon's] first report dated October 30, 2003. [Appellant's Neurosurgeon] stated:

... there was no connection whatsoever between this man's accident and his requirement for surgery.

Again, on November 27, 2003, [Appellant's Neurosurgeon] stated:

. . . This man's medical condition has nothing to do with any accident of November 2002.

Following these reports, another letter was written to [Appellant's Neurosurgeon] by [Claimant Adviser Officer] of the Claimant Adviser Officer (sic). [Claimant Adviser Officer] noted previous medical information stating that the [tumor] was congenital, but queried whether the symptoms could have been aggravated by the motor vehicle accident. She asked:

While we recognize the [tumor] is congenital, [the Appellant] says he was asymptomatic prior to the mva. He suffered a whiplash injury and a mid thoracic back injury. He says those symptoms came on immediately following the mva and gradually worsened over time; as he continued to work as a [text deleted] after the mva; until the neurological symptoms sent him to visit his doctor.

Is it possible, or even probable, the previously asymptomatic [tumor], became traumatized from the mva, causing the progression of events as they occurred; specifically the symptoms, the confirmation of diagnosis and surgical interventions? Please provide the reasons for your opinion in order that we may understand more fully.

[Appellant's Neurosurgeon] replied on December 21, 2006:

This letter is in reply to yours regarding [the Appellant]. There is no known connection between trauma and [tumor]. Had there been any significant damage done to a [tumor] following an accident, he probably would have been rendered paraplegic right at the moment of the accident. There is absolutely nothing in our literature that connects [tumor] with trauma.

Counsel for MPIC submitted that not only is [Appellant's Neurosurgeon] a clearly distinguished neurosurgeon with thirty-five (35) years of experience and a substantial body of research to his credit, but [Appellant's Neurosurgeon] also saw the Appellant several times as his caregiver. He saw him before the surgery, as well as after it, and on a regular basis during the following week, while the Appellant was recovering. He also operated on the Appellant's [tumor]. Accordingly, the panel should give great weight to his evidence in this case.

Counsel for MPIC also reviewed the opinion of [Appellant's Rehabilitation Specialist], who also

treated the Appellant. In a report dated February 23, 2004, [Appellant's Rehabilitation Specialist] also stated:

I can not see how [the Appellant's] C5-6 [tumor] and secondary [text deleted] is causally related to the November 5, 2002 rear-end collision or subsequent chiropractic manipulations.

The reasons for this are as follows:

- A. [Tumor] like this is typically a congenital malformation with gradual expansion over time.
- B. The temporal dispersion from collision to onset of myelopathy suggests that the intra-[tumor] bleeding and subsequent expansion, the cause of his cord compression was not due to bleeding post-collision.
- C. Interscapular aching and discomfort symptom complex noted from November 5, 2002 to late June 2003 is non-specific and was improving in the spring of 2003 until subsequent deterioration.

The only possible causal link would be theoretical and attributed to manipulation therapy post-collision. However, at least by history obtained to date, no clear temporal link between neck manipulation, and subsequent myelopathy has been established, i.e. there has not been neck manipulations in the week before onset of myelopathy, at least by recall.

No further reports from [Appellant's Rehabilitation Specialist] indicated that the accident was related to the Appellant's symptoms. As well, the Appellant's general practitioner, [Appellant's Doctor], who saw the Appellant when his symptoms were at their worst, in June and July of 2003 and following, stated, on January 27, 2004, that she was unable to provide an opinion whether the Appellant's symptoms are related to the motor vehicle accident or aggravated by it, referring the Appellant's case manager to [Appellant's Rehabilitation Specialist] for this information.

Even [Appellant's Neurologist's] report, it was submitted by counsel for MPIC, was unable to describe the connection between the motor vehicle accident and an aggravation of the Appellant's symptoms beyond the realm of "possible", opining only that the lesion "may have been traumatized" as a result of the injury. This does not meet the standard of balance of

“probability”, required by the MPIC Act.

Counsel for MPIC submitted that the evidence was overwhelming that the Appellant’s difficulties were the result of a congenital [tumor], and that the motor vehicle accident did not cause his symptoms or the requirement for the surgery. Accordingly, the decision of the Internal Review Officer should be upheld.

Discussion

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.

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Manitoba Regulation 40/94:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;
- (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The onus is on the Appellant to show, on a balance of probabilities, that his symptoms and resulting surgery were a result of the motor vehicle accident of November 5, 2002.

The panel has reviewed the evidence of the Appellant, as well as the material on file, paying close attention to the medical reports and opinions from the Appellant's caregivers.

We found the Appellant to be a credible witness and noted his description of experiencing symptoms between his shoulder blades almost immediately following the accident. Although the Appellant ostensibly did not have significant damage afflicted to his [tumor], he did have symptoms referable to the lower cervical cord area immediately following the accident which were noted to be at the C5-C6 level by his attending chiropractor, shortly after the accident of November 5, 2002.

According to the Appellant's testimony, these symptoms remained almost continually present following the accident. When [Appellant's Doctor] took over his care from his chiropractor, she referred the Appellant to [Appellant's Neurologist]. Following his examination of the Appellant on August 12, 2003, [Appellant's Neurologist] not only ordered an urgent MRI of the lower cervical area, but was sufficiently concerned to advise the Appellant to immediately seek care at a hospital emergency if his symptoms should increase in the interim.

Once the MRI was performed, it showed a lesion in the spinal cord at the area targeted. As a result, the Appellant was referred to [Appellant's Neurosurgeon], who successfully removed a [tumor] on October 3, 2003.

The panel paid careful attention to [Appellant's Neurologist's] report of July 18, 2005 where he

recognized that the lesion in the Appellant's spinal cord was congenital, but noted that "it may have been traumatized as a result of the injury, causing bleeding and his subsequent neurologic problems".

Essentially, the evidence of the Appellant was that constant symptoms of lower cervical cord irritation were experienced by him following the accident. These had not been present, according to his testimony, prior to the accident. The panel recognizes that it may be possible, as [Appellant's Neurologist] suggests, that the [tumor] was subjected to sufficient irritation as a result of the motor vehicle accident to be described as causal of the symptoms that the Appellant then went on to experience, ultimately requiring surgery. However, the onus is on the Appellant to establish, on a balance of probabilities, that the accident caused his symptoms and the need for surgery.

In this regard, counsel for MPIC has relied upon the evidence of [Appellant's Neurosurgeon]. In three (3) reports, [Appellant's Neurosurgeon] provided a concise, but clear and unequivocal opinion that there was no connection between the trauma of the motor vehicle accident and the Appellant's [tumor].

Had the panel been limited to [Appellant's Neurosurgeon's] reports from 2003, which were quite succinct in rejecting any connection between the Appellant's accident and his requirement for surgery, the Commission may have queried whether [Appellant's Neurosurgeon] had given due consideration to the question of whether the motor vehicle accident had perhaps traumatized the pre-existing lesion in the Appellant's spinal cord, causing bleeding and subsequent neurological problems.

However, this possibility was carefully described for [Appellant's Neurosurgeon] in [Claimant Adviser Officer's] letter of December 11, 2006, yet soundly and clearly rejected by [Appellant's Neurosurgeon] in his response of December 21, 2006.

As a result, having regard to [Appellant's Neurosurgeon's] strong opinion that there was no connection between the Appellant's condition and the motor vehicle accident, the panel is not in a position to accord greater weight to a suggestion by [Appellant's Neurologist] that it is possible that the motor vehicle accident may have caused the Appellant's symptoms. The Appellant's testimony and history of symptoms appearing immediately following the accident, could be seen as consistent with this suggestion.

However, as the neurosurgeon who examined and treated the Appellant and operated on the lesion, the firm opinion of [Appellant's Neurosurgeon] must be given greater weight by the Commission. The evidence of [Appellant's Rehabilitation Specialist] supports this view that the Appellant's symptoms were not caused by the motor vehicle accident. The panel is therefore constrained by the definite opinion of these caregivers.

Accordingly, having weighed all the evidence, we find that the Appellant has failed to establish, on a balance of probabilities, that his [tumor] and the symptoms arising from it, were caused by the motor vehicle accident. Accordingly, the Appellant is not entitled to IRI or Personal Injury Protection Plan benefits for the period when he was not able to work as a result of his condition and recovery from surgery.

The decision of the Internal Review Officer dated June 1, 2004 is accordingly confirmed and the Appellant's appeal dismissed.

Dated at Winnipeg this 16th day of January, 2008.

LAURA DIAMOND

DIANE BERESFORD

DR. PATRICK DOYLE