

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-132**

PANEL: Ms Laura Diamond, Chairperson
Ms Leona Barrett
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], was represented by Ms Laurie Gordon of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.

HEARING DATE: December 1, 2009

ISSUE(S): Entitlement to Personal Injury Protection Plan Benefits ("PIPP") – Is the Appellant's injury to his lower back/symptom complaints causally related to the motor vehicle accident?

RELEVANT SECTIONS: Sections 70(1) and 71(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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 May 11, 2004 when his parked truck was struck from behind by another vehicle on the highway. He sustained injuries to his neck and lower back and was taken to hospital by ambulance. He was diagnosed with whiplash and attended, the following day, at his family doctor's office with reports of increased lower back pain and lumbar spasms.

The Appellant received physiotherapy treatment but remained symptomatic.

Following a review by [MPIC's Doctor], the Appellant's case manager wrote to him on February 2, 2006. He noted that the Appellant's soft tissue injuries affecting his neck had responded well to physiotherapy, chiropractic and medication treatment, however, his lower back complaints had not responded as well. The medical information reflected that the Appellant had a pre-existing history of degenerative change to the lumbar region and a pre-existing spondylolisthesis at the L4-5 vertebra level. Based on this review, MPIC would be unable to provide any PIPP benefits after February 2, 2006.

The Appellant sought an Internal Review of this decision. On May 26, 2006, an Internal Review Officer for MPIC reviewed the Appellant's file, focusing primarily on the reports of [MPIC's Doctor], as well as reports submitted by the Appellant from [Appellant's Neurosurgeon]. The Internal Review Officer relied upon [MPIC's Doctor's] conclusion that while sudden and traumatic impact of a motor vehicle accident would be the anticipated cause of neck and back pain, the likelihood of chronic aggravation of a pre-existing lower back symptom complaint or the likelihood of enhancement of moderately severe osteoarthritic degenerative changes would be unlikely. She concluded that the mechanism of injury from a rear-end impact would be unlikely to have a long-term impact on the protected lower back region. The Internal Review Officer agreed with [MPIC's Doctor] that while the motor vehicle accident likely resulted in an exacerbation of back symptoms, it was unlikely that it had enhanced the Appellant's degenerative arthritis or was the source of a chronic aggravation of back complaints. The case manager's decision was confirmed.

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, describing the motor vehicle accident and the treatment he received following the accident.

He indicated that prior to the motor vehicle accident; he had been active and working. He had not had back problems on a regular basis. He testified that periodically he had gone to see a chiropractor, as a result of having stepped wrong or slipped, working as he did with heavy equipment. He might have a kink out of place, attend a chiropractor for a few occasions and then be back on the job the next day. He never had to adjust his activities because of back problems, never had difficulty travelling or operating a motor vehicle and worked regularly (although sometimes on a seasonal basis demanded by the work), on heavy equipment, on good terrain and bad. He played baseball and hunted as well.

Counsel for the Appellant reviewed reports from the [Appellant's Doctor], physiotherapy reports, chiropractic reports and radiological scans. She noted that the medical evidence showed that the Appellant's neck problems began to subside by late October of 2004. However, his lower back problems persisted and a diagnosis of lumbar WAD II and mechanical low back pain appears fairly consistently throughout the course of the Appellant's claim. Even following physiotherapy, the Appellant's low back pain persisted bilaterally and muscle weakness persisted in his low back and pelvis. Following chiropractic treatment, his lumbar range of motion was still mildly to moderately reduced in all ranges and there was pain to palpitation at L1-L5 and perispinal musculature. Chiropractic examination showed a difference in his objective symptoms, including range of motion, prior to and after the motor vehicle accident.

Counsel for the Appellant reviewed reports from [Appellant's Doctor], dated September 1, 2005 and June 12, 2007. In September 2005, [Appellant's Doctor] stated:

“In my opinion, the MVA in May 2004, did not cause his back – or vascular pathology, but definitely (sic) was a trigger to cause all the chronic pain in his lower back...”

In June 2007, [Appellant's Doctor] explained that the Appellant had a pre-existing condition of degenerative back disease before the accident with only mild and short lived spells of back pain.

He had been fully functional and working full-time. He noted that

“The accident was a turning point and surely the sole trigger, ie. it played the substantial and significant role, of starting/causing his chronic severe back pain.”

In his view, the inflammation in facet joints caused by the motor vehicle accident resulted in chronic pain, muscle spasms and impinged nerves.

Counsel also reviewed reports from [Appellant's Neurosurgeon].

On January 31, 2006, [Appellant's Neurosurgeon] noted that the Appellant had experienced minor short lived low back pain in the past. The episodes were short lived and generally subsided either with some analgesics or anti-inflammatories or occasionally with some chiropractic manipulations. Now he opined that the Appellant's clinical presentation was suggestive of mechanical low back pain.

On April 12, 2006, [Appellant's Neurosurgeon] agreed that it was reasonable to assume that the patient was affected by severe degeneration of the lumbar spine. He indicated that the Appellant may have developed the reported pain upon experiencing a sudden acceleration and flexion of the lower back, such that the accident may have resulted in a deterioration of a pre-existing condition.

Counsel also reviewed a report from [Appellant's Orthopaedic Surgeon] dated May 25, 2009. [Appellant's Orthopaedic Surgeon] opined that the Appellant had a pre-existing condition without a lot of symptoms and then developed symptoms subsequent to his accident. He stated:

“There is no doubt that this gentleman had degenerative changes to the lumbar spine with some stenosis at L3-4 and a lytic spondylolisthesis at L4-5 as confirmed by CT scan. These changes, I suspect, preceded his car accident, therefore, being a pre-existing condition. The car accident could have aggravated or enhanced this condition to become symptomatic.”

Counsel for the Appellant also addressed the reports from [MPIC's Doctor], relied upon by MPIC. On May 11, 2006, [MPIC's Doctor] had opined that:

“While sudden and traumatic impact forces would be anticipated cause of neck and back pain as reported by the claimant, the likelihood of chronic aggravation of the claimant's pre-existing lower back symptom complaints or the likelihood of enhancement of his moderately severe osteoarthritic degenerative changes, in my opinion, is unlikely.”

It was [MPIC's Doctor's] opinion that the mechanism of injury in a rear-end impact would offer the claimant the “relative protection of the seat back” so that the lower back would not be the more vulnerable region.

Counsel for the Appellant submitted that [MPIC's Doctor] had not supported the finding regarding whether a particular type of mechanism of injury could cause a particular type of injury, with any literature. This was a broad statement that did not take into consideration a multitude of other factors that may have been involved from the age and type of the vehicle to the condition of the vehicle and seat, the health of the victim's back and how the victim was positioned in the vehicle. It also assumes that the Appellant's vehicle was hit directly from the rear and propelled in the same direction, when the Appellant, who was parked on the side of the road and hit by another vehicle as it drove by was hit somewhere in the rear-end of the vehicle, but not necessarily directly from behind.

[MPIC's Doctor] made a broad statement that the motor vehicle accident, while anticipated to have resulted in an exacerbation of back symptoms, was not likely to have enhanced the claimant's degenerative osteoarthritis. Counsel submitted that [MPIC's Doctor] did not fully explain how the Appellant could sustain "exacerbation" but not a "chronic aggravation" of his pre-existing condition from the motor vehicle accident. Indeed, the Appellant did experience a chronic, long standing aggravation of his condition which was not short lived.

In conclusion, counsel for the Appellant submitted that:

- Prior to the motor vehicle accident, the Appellant experienced only minor, short lived lower back problems.
- These problems never affected the Appellant's participation in his daily activities, his hobbies or his job.
- These problems never required long term treatment.
- As a result of the accident, the Appellant sustained injuries to his neck and lower back.
- With treatment, the Appellant's neck problems subsided, however, his back problems persisted.
- A diagnostic test revealed degenerative changes to the Appellant's back.
- As a result of the accident, these degenerative changes were aggravated, causing chronic mechanical low back pain.

Therefore, the Appellant requested that the Commission find that the Appellant's pre-existing degenerative condition was aggravated by the May 11, 2004 motor vehicle accident and that he should be entitled to continuing PIPP benefits as a result.

Evidence and Submission for MPIC:

Counsel for MPIC noted that although the Appellant had made application for compensation in regard to a sore neck and back, indicating that he had never had a similar injury and was not affected by a pre-existing condition, the medical evidence showed that this was not the case.

The Appellant's evidence disclosed that he had been a heavy equipment operator, but that, at the time of the accident, had only been employed for one month, back at work for a short period at a temporary seasonal job. He was not a completely healthy individual without health concerns prior to the motor vehicle accident. The medical evidence showed that he had suffered conditions involving the lumbar spine in the past.

Counsel identified two issues for the panel. Are the Appellant's lower back symptom complaints causally related to the motor vehicle accident? If they are, is the Appellant entitled to PIPP benefits in the circumstances?

Counsel submitted that the Appellant's back condition pre-existed the motor vehicle accident. She also submitted that his pain complaints are subjective, with no objective substantiation that they are related to any condition arising from the motor vehicle accident.

Counsel pointed to radiological evidence of degenerative changes showing that the Appellant suffered from a pre-existing lumbar spine condition. She reviewed medical records showing that he had treatment to his lower back prior to the motor vehicle accident. For example, the Appellant had six visits to a chiropractor in 2003, which was close in time, prior to the motor vehicle accident.

Counsel also questioned the thoroughness of [Appellant's Doctor's] chart notes which failed to mention back pain in the period from October 2002 to February 2004. He did not seem to be aware that the Appellant was seeing a chiropractor during that time, and so, these notes do not reflect an accurate representation of the medical condition of the Appellant prior to the motor vehicle accident. On the contrary, [MPIC's Doctor's] reports recognize chronic degenerative changes in the Appellant's back, with no evidence of disc protrusion or nerve root compression. She recognizes that the Appellant did not have a healthy lumbar spine prior to the motor vehicle accident and that the long standing degenerative changes shown are unlikely to be a result of the motor vehicle accident.

Therefore, counsel submitted that [Appellant's Doctor's] opinion should be given less weight than those of [MPIC's Doctor], because of [Appellant's Doctor's] failure to recognize the degenerative causes and past back problems.

Counsel also noted that the Appellant's [text deleted] factored into his condition and that this could not be tied to the motor vehicle accident.

Counsel submitted that the idea that the motor vehicle accident was the sole turning point or trigger in the Appellant's condition, was a very broad statement, not substantiated by the facts of the motor vehicle accident and ignoring the other possible triggers.

[MPIC's Doctor] reviewed [Appellant's Orthopaedic Surgeon's] report of November 2005, in her report of January 12, 2006, [MPIC's Doctor] noted:

“...The claimant’s family physician consulted [Appellant’s Orthopaedic Surgeon], and the claimant was seen by the specialist on or around November 1, 2005. As a result of his assessment of the claimant’s chronic back and leg complaints, the surgeon opined that the claimant had symptoms consistent with spinal claudication which could be coming from the vertebral slippage (“*the pars defect with the spondylolisthesis*”). The surgeon indicated that symptoms arising from degenerative spondylolisthesis could be addressed with epidural steroid injection indicating that the claimant’s noted spondylolisthesis obviously preceded the motor vehicle accident. He also noted that the claimant did not have leg symptoms that preceded the motor vehicle collision...”

[MPIC’s Doctor’s] opinion which followed indicated that:

“The medical documentation reflects that, as a result of the motor vehicle collision, the claimant suffered soft tissue injuries to his neck and lower back with symptomatic relief experienced as a result of neck complaints but not lower back complaints. He had a pre-existing history of degenerative changes to the lumbar region and pre-existing spondylolisthesis at L4-L5. These two pre-existing lumbar conditions, in my opinion, have been the most influencing factor relating to emerging symptoms of claudication, thought to be nerve related as opposed to vascular related, and adversely affecting symptom complaints involving his lower limbs.’

Counsel reviewed [Appellant’s Neurosurgeon’s] opinion of April 12, 2006 which recognized evidence of “a fairly severe degeneration of the osteoarthritic zygapophyseal joints at multiple levels”, with spondylolisthesis at L4-5. This severe degeneration, she submitted is unrelated to the motor vehicle accident. Further, [Appellant’s Neurosurgeon’s] assertion that the Appellant “may have developed the reported pain upon experiencing a sudden acceleration and flexion of the lower back” and that the accident “may have resulted in a deterioration of a pre-existing condition” does not contain language, she submitted, that satisfies the legal test for causation or lessens the weight of [MPIC’s Doctor’s] reports.

Counsel noted that there were no inconsistencies between [MPIC’s Doctor’s] various reports, which were detailed and gave clear consideration to all the relevant medical information. [MPIC’s Doctor] concluded that it was unlikely that a rear impact collision had caused chronic

aggravation of the claimant's pre-existing low back symptom complaints or enhanced his moderately severe osteoarthritic degenerative changes.

In recognizing that the collision, "while anticipated to result in exacerbation of back symptoms unlikely enhanced the claimant's degenerative osteoarthritis", [MPIC's Doctor] had clearly considered all relevant evidence and was in a position to make that conclusion.

Counsel submitted that there was no objective reliable evidence that the Appellant's lower back symptoms were causally related to the motor vehicle accident. The medical evidence supported the conclusion that he suffered a condition of the lumbar spine which was a pre-existing condition to the motor vehicle accident. As [MPIC's Doctor] notes, the objective evidence should be relied upon as well as the Appellant's limited work history and his history of seeing a chiropractor prior to the motor vehicle accident. As [MPIC's Doctor] notes, multiple factors influence the Appellant's symptom presentation, but the minor sprain suffered in the motor vehicle accident was not likely to have resulted in the Appellant's symptom disabilities to date. The Appellant had not met the onus, on a balance of probabilities, of establishing that his back problems were causally related to the motor vehicle accident and that he should be entitled to PIPP benefits.

Discussion:

The relevant sections of the MPIC Act provide:

Definitions

[70\(1\)](#) In this Part,

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused

(a) by the autonomous act of an animal that is part of the load, or

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile;

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

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.

The onus is on the Appellant to show, on a balance of probabilities, that the lower back symptom complaints which continue to affect him are a result of the motor vehicle accident.

The panel has reviewed the evidence of the Appellant at the hearing, as well as the medical reports on file and the submissions of counsel.

We have reviewed the evidence of [MPIC's Doctor], who took the position that while the sudden and traumatic impact force of the motor vehicle accident would be anticipated to cause the neck and back pain reported by the claimant after the accident, it is unlikely that the mechanism of a rear-end impact injury in a vehicle offering the relative protection of a seat back, would have caused a chronic aggravation of the Appellant's pre-existing lower back symptom complaints or enhanced his moderately severe osteoarthritic degenerative changes.

We have also reviewed evidence from [Appellant's Doctor], who stated, that a review of the Appellant's file showed no documentation of his complaints about back pain until immediately after his motor vehicle accident. He did note that his neurosurgeon had recorded comments of minor short lived lower back pain before the date of the accident which would resolve with analgesics or anti-inflammatories.

[Appellant's Doctor] also noted the degenerative and facet arthropathy evident on the Appellant's X-rays and CT scans and acknowledged that these indicate a process that took a long time to develop, concluding that the Appellant had a pre-existing asymptomatic condition of degenerative back disease before the accident. This resulted in only mild and short lived spells of back pain and the Appellant was fully functional and working full-time.

[Appellant's Doctor] stated:

“The accident was a turning point and surely the sole trigger, ie. it played the substantial and significant role, of starting/causing his chronic severe back pain.”

[Appellant's Orthopaedic Surgeon] provided an opinion on May 25, 2009. He described the Appellant's difficulties with his back and leg pain and noted that:

“...certainly he did have a pre-existing condition without a lot of symptoms related to these findings on his CT scan, but he developed symptoms subsequently to his accident.”

In [Appellant's Orthopaedic Surgeon's] view the degenerative changes in the Appellant's lumbar spine preceded the car accident and were a pre-existing condition and “the car accident could have aggravated or enhanced this condition to become symptomatic”.

[Appellant's Neurosurgeon] described the Appellant as "experiencing minor short-lived low back pain in the past" with episodes which were "short-lived and generally subside either with some analgesics or anti-inflammatories or occasionally with some chiropractic manipulations."

On April 12, 2006, [Appellant's Neurosurgeon] stated that:

"...It is reasonable to assume that the patient was affected by such severe degeneration of the lumbar spine. He may have developed the reported pain upon experiencing a sudden acceleration and flexion of the lower back. In other words, the accident may have resulted in a deterioration of a pre-existing condition."

The panel has reviewed the evidence of the Appellant at the hearing and compared it with the accounts reported by his caregivers. We found the Appellant to be a credible witness. He described a work history of heavy work on heavy equipment. He did not suffer from chronic back problems. He described temporary incidents where he suffered from back problems, often as a result of his work. However, these incidents quickly resolved following treatment with anti-inflammatories, analgesics, or a few visits to his chiropractor. This was confirmed by his chiropractor's report of December 20, 2004 which described two visits in April of 2003 and four visits in October and November of 2003 (October 28, November 3, November 7 and November 12) for back pain, following which he was discharged as essentially pain free and deemed recovered.

This is also consistent with the lack of incidents of back pain noted in [Appellant's Doctor's] chart notes. The panel is left with the impression of an active individual who was working, with no back complaints, aside from a few temporary incidents of back pain which were fully resolved by a few chiropractic treatments.

The panel finds that the Appellant did not have persistent back complaints prior to the motor vehicle accident. He had only intermittent and brief incidents of back pain, without chronic back pain, symptoms or complaints prior to the motor vehicle accident.

Subsequent to the motor vehicle accident, the medical evidence shows that the Appellant suffers from chronic low back pain. He did not suffer from this pain prior to the motor vehicle accident. Therefore, the panel finds that the motor vehicle accident has enhanced or exacerbated the Appellant's pre-existing degenerative, previously asymptomatic condition of his lumbar spine.

As a result, the panel finds that the Internal Review Officer erred in finding that the Appellant's persistent lower back complaints and symptoms were not caused by the motor vehicle accident. We find that the decision of the Internal Review Officer dated May 26, 2006 should be overturned and the Appellant's specific entitlement to further PIPP benefits should be returned to the case manager for determination.

Dated at Winnipeg this 25th day of January, 2010.

LAURA DIAMOND

LEONA BARRETT

LINDA NEWTON