

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-70**

PANEL: Ms Laura Diamond, Chairperson
Mr. Wilf DeGraves
Dr. Sharon Macdonald

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Dan Joannis of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: November 2, 2010

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits.

RELEVANT SECTIONS: Sections 70(1), 71(1) and 81(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 March 31, 2005 when the vehicle he was driving struck a stalled two-ton grain truck on the highway. After the collision he walked to a nearby farmhouse for help, partially carrying a [text deleted] year old boy. As a result of the motor vehicle accident he sustained soft tissue injuries affecting his left shoulder, right hand, laceration to his lower lip and forehead.

In addition to a painful and swollen right hand, the Appellant was diagnosed with adhesive capsulitis/impingement of the left shoulder and left pectoralis strain/contusion, as well as left cervical and upper back pain. He was treated with medication and physiotherapy.

The Appellant was treated by his family doctor, [Appellant's Doctor #1], and as a result of his reports of left upper limb symptoms and abnormal tingling and numbness he was referred to a neurologist. He reported numbness in his hands, cracking of his wrists and cramping of his hands, lower leg and left toes.

The Appellant saw [Appellant's Neurologist], who could not provide a diagnosis.

After a review by [MPIC's Doctor], the Appellant's case manager wrote to him on January 2, 2007 indicating that as the shoulder injury had responded well to physiotherapy and medication and a cause for the cramping and other symptoms had not been identified, MPIC was unable to provide any PIPP benefits to the Appellant after January 15, 2007.

The Appellant sought an Internal Review of this decision. On April 30, 2007, an Internal Review Officer for MPIC reviewed the medical reports on file and upheld the case manager's decision, concluding that the motor vehicle accident was not the cause of the Appellant's cramping. As the cramping was restricting the Appellant's ability to return to work and the cause of the cramping was not attributable to the motor vehicle accident, MPIC would no longer provide for Income Replacement ("IRI") benefits to the Appellant.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described his occupation as a farmer for 40 years, operating a farm which involved the care and custom feeding of approximately 600 cows. He operated the farm mostly on his own, with part-time hired help for calving, round-up and other busy times.

He described his physical condition before the motor vehicle accident as perfect. He had suffered a prior injury to his neck in a previous motor vehicle accident, resulting in surgery to fuse his neck. At that time he was off work for 1½ years, but then returned to work by the mid-1990's. He did not require any treatment to his neck or any medications, had no problems with his work on the farm and was still in good health at the time of the motor vehicle accident in 2005.

The Appellant described the motor vehicle accident, his injuries, and the aftermath. He went to the hospital for treatment, with pain in his whole body, a headache, swollen left hand, and cuts.

When the Appellant went home from the hospital he suffered from headaches and noticed cramping in the evening, especially on his left side. There were shooting pains in his leg and his whole hand would cramp up. This continued for a couple of months, although the Appellant assumed that it was going to get better. He took Aspirin and Tylenol and went to see his doctor. By then, both sides were causing him difficulties, although the left side was getting worse than the right. His toes would cramp and cross-up and he would have to walk it out. Sometimes he had to straighten cramps in one hand with the other hand. He described this as severe. At first he thought it would go away and did not report it to his doctor, but after a couple of weeks he

went to see his doctor who sent him to a neurologist. During that time he was unable to do any work on the farm.

After a couple of months he tried to go back to work, helping his son fix a fence by using a wire stretcher, for example. However, his hand started cramping and in the evening the cramping in his feet and hands got even worse.

The Appellant did continue to try to work a little, but went back to his doctor as the pain and cramping became worse. He still suffered from some pain in his neck and headaches, but the cramping was even worse.

He had to hire two workers to help him on the farm as he could not even deliver a calf. He had his workers do most of the work and was able to do about 20% to 30% of the work, doing only light duties.

He explained that due to the cramping in his hands and feet he was not able to return to work at his regular duties after the motor vehicle accident in March of 2005. He felt that his doctors believed it was due to the motor vehicle accident, but even after seeing the neurologist, he could not find out the diagnosis.

On cross-examination, the Appellant confirmed that the neurologist could not find compression of the spine onto his nerves and several diagnoses were ruled out. As well, no surgery was recommended.

Counsel for the Appellant identified the issue as the Appellant's entitlement to Personal Injury Protection Plan ("PIPP") benefits, particularly IRI benefits, after January 15, 2007.

The case manager's decision denying such benefits was based upon [MPIC's Doctor's] opinion that no cause for the cramping and difficulties had been identified. MPIC's position was not that the Appellant was not suffering from the symptoms or injuries, but rather that the etiology or cause had not been substantiated or medically established.

Counsel for the Appellant submitted that a definitive medical diagnosis was not necessary to establish causation in this case. Legal causation, he submitted, was not simply a medical causation issue.

Counsel submitted several decisions from the Commission and from the Supreme Court of Canada to establish that causation need not be determined on a scientifically precise basis in order for there to be a finding that the injuries were caused by the motor vehicle accident.

Counsel for the Appellant cited the Commission's decision in AC-97-20 as authority for the principle that causation is not always based upon exact scientific principles and one must apply experience, conventional wisdom and proof, based on a balance of probabilities. The decision noted that not all complaints reported by Appellants are always documented and a delay in complaint does not necessarily indicate the relationship between the trauma and the injury.

Counsel also referred to the Commission's decision in AC-01-42 where the Commission found it was not required to determine the sole cause of the accident with scientific precision but was entitled to make a judgement based on common sense, experience and on the evidence as to

whether the residual injury to the Appellant's right lower leg materially contributed to the injury to the left knee.

Counsel also referred to the decision of the Supreme Court of Canada in *Snell vs. Farrell*, [1990] 2 S.C.R. 311 where the Court acknowledged that the traditional approach to causation may have been applied too rigidly by the courts and that causation need not be determined by scientific precision. Although the legal or ultimate burden remains with the Plaintiff, in the absence of evidence to the contrary adduced by the Defendant, an inference of causation may be drawn although positive or scientific proof had not been adduced.

Counsel also referred to the Supreme Court decision in *Athey vs Leonati*, [1996] 3 S.C.R. 458 which referred to *Snell vs Farrell* (supra) and noted that causation need not be determined by scientific precision but was essentially a practical question of fact which can best be answered by ordinary common sense.

Counsel reviewed the Appellant's testimony that the cramping and other symptoms began the day after the motor vehicle accident. Although the Appellant assumed that they would go away with time and did not immediately report all of the symptoms to his doctor, he was not even trying to work at that time and so the symptoms were not as severe or noticeable to him.

The symptoms then became significantly worse when he tried to return to his farm work or do anything physical. Then the cramping would get worse and he would be unable to do the work. So, around that time, he reported the symptoms to his family doctor, [Appellant's Doctor #1].

[Appellant's Doctor #1] provided reports to the Commission. On February 18, 2010, [Appellant's Doctor #1] described the Appellant's symptoms and indicated that nothing else, besides the motor vehicle accident, would cause such localized spasms, except injury. [Appellant's Doctor #2] (another of the Appellant's physicians at the [text deleted]) confirmed it was difficult to reproduce such symptoms in an office setting, and counsel for the Appellant noted that at the time [Appellant's Neurologist's] evaluations were done, again in a clinical setting, the Appellant was not doing much activity at the time.

His most recent report, dated February 26, 2010 stated:

“Although, his twitching of left hand was reported on June 21, 2005, it seemed to me that it has been present since his MVA on March 31, 2005.

Unfortunately, timing a symptom onset is difficult; we assume in the absence of any provoking factor, that this was related to accident 21/2 previously. For example: cervical whiplash pain and neck stiffness may start after few weeks of the actual injury.

The type of injury of seat belt he had would cause fair stretching of his brachial plexus and it may take a while for onset of symptom.”

This is consistent with notes made by [Appellant's Doctor #1] which indicated that the Appellant reported right, then left sided hand symptoms to his doctor about two months after the accident. As the Appellant's testimony indicated, sometimes the left side was worse and sometimes the right. There were varying degrees of severity at various points in time on both sides. However, [MPIC's Doctor] did not have the opportunity to review these clinical records, resulting in her comment regarding a 6 month delay between the motor vehicle accident and the recording of the symptoms.

Counsel submitted that the Appellant's injuries and symptoms in his hands were directly caused by the motor vehicle accident or that the motor vehicle accident materially contributed to those

difficulties. The Appellant's health was good before the motor vehicle accident and he was able to do all of his duties on the farm. However, injuries in the motor vehicle accident prevented him from returning to work. He should be entitled to PIPP benefits, including IRI benefits as a result.

Evidence and Submission for MPIC:

Counsel for MPIC noted variability in the cramping symptoms in the Appellant's hands, and noted that none of this was reported until June of 2005. Although the Appellant testified that such symptoms appeared soon after the motor vehicle accident, reviewing the case manager's notes and the doctors' reports, there is no evidence that the Appellant mentioned these symptoms at that time.

Counsel noted that the Appellant's recollection in that regard was not particularly accurate, and there were gaps in his memory during his testimony.

Counsel also noted that the cause of the symptoms in the Appellant's hands had never been identified, although any neurological issue was ruled out by [Appellant's Neurologist] after performing objective testing. [Appellant's Neurologist] did not present the idea that the symptoms were motor vehicle accident related.

Counsel also pointed out there could be many non-neurological reasons for limb cramping, ranging from stroke, to diabetes, to reaction to medications. As [MPIC's Doctor] noted on December 28, 2006:

“As the etiology of the cramping has not been identified, a cause and effect relationship with the motor vehicle collision cannot be substantiated at this time. If additional medical information becomes available in this regard, it should be forwarded for review.

However, at this time, based on the information available, a cause and effect relationship has not been medically established.”

The Appellant relied upon reports from his physician, [Appellant’s Doctor #1], including handwritten notes provided on February 18, 2010. Counsel for MPIC submitted that these should be given little weight. The report itself is selective in describing the Appellant’s symptoms and talks only about his left side, without mentioning his right-sided symptoms. It focuses on a nerve injury to the Appellant’s shoulder that [Appellant’s Neurologist] had already ruled out. Then, out of the blue, counsel submitted, [Appellant’s Doctor #1] concludes that the symptoms must be a result of cervical stenosis aggravating the Appellant’s motor vehicle accident injuries. However, [Appellant’s Neurologist] had already ruled out compression of the spinal canal, noting that there was no nerve root compression. Counsel submitted that these conclusions of [Appellant’s Doctor #1] made no sense. Nor did his report of February 26, 2010 provide a conclusion based upon a balance of probabilities. That report postulated that the stretching of the Appellant’s brachial plexus was a possible cause, although [Appellant’s Neurologist] had also specifically ruled out a brachial plexus issue.

Counsel for MPIC submitted that the Commission was left with an Appellant who had not met the onus upon him of showing, on a balance of probabilities, that the Internal Review Decision was in error. He submitted that the Appellant had failed to show that the motor vehicle accident of March 2005 caused the cramping in the Appellant’s limbs and as such, the Internal Review Officer was correct in concluding that the Appellant was not entitled to further PIPP benefits in this regard. Counsel also noted that as the Appellant had now reached the age of [text deleted], it was not clear what, if any IRI benefits the Appellant would be entitled to in any event.

Discussion:

The MPIC Act provides:

Definitions

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

"**accident**" means any event in which bodily injury is caused by an automobile;
(« 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.

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 *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer was not correct and that he should be entitled to PIPP benefits. The issue which was addressed was whether the cramping and other symptoms in the Appellant's hands were caused by the motor vehicle accident.

The panel has reviewed the evidence documented on the Appellant's file, as well as the Appellant's testimony at the hearing, and the submissions of both counsel for the Appellant and for MPIC.

We find that the Appellant has met the onus of establishing, on a balance of probabilities, that the difficulties in his hands are related to the motor vehicle accident.

The panel has considered the Appellant's evidence of his fitness and ability to perform heavy work on his farm prior to the motor vehicle accident. He was fully capable of working and had no complaints of twitching, tingling, cramping or other symptoms in his hands.

Following the motor vehicle accident, there was a delay in the Appellant's reporting of these symptoms. Although the motor vehicle accident was in March, he did not report them until June. The Appellant testified that he noticed some symptoms, but was not fully working yet, and was hoping that the symptoms would just go away with self-treatment.

Although there was some vagueness in the Appellant's recollection of the precise timelines of his symptoms, his evidence was fundamentally believable on this point.

Counsel for MPIC relied upon [Appellant's Neurologist's] finding that there was no objective clinical evidence which would provide an explanation of causation.

The panel has concluded that neither the Appellant nor MPIC has proved scientifically or exactly what the cause of the Appellant's symptoms is. However, as counsel for the Appellant has

noted, a definitive scientific answer is not required before the Commission can find that the Appellant's symptoms are connected to the motor vehicle accident.

The Appellant's regular doctor, [Appellant's Doctor #1], had the opportunity to follow the Appellant, who he has known for a long period of time. He had the opportunity to examine and treat him and was in a good position to assess the Appellant's reliability and credibility over a long period of time. As a result, the panel has relied upon the Appellant's reports of the temporal appearance of his symptoms and [Appellant's Doctor #1's] opinion that the injuries and symptoms in the Appellant's hands are connected to the motor vehicle accident injuries he suffered. Therefore the panel finds that the Appellant has met the onus upon him, on a balance of probabilities, of establishing a causal connection between his injuries and the motor vehicle accident.

As a result, the panel upholds the appeal of the Appellant. The decision of the Internal Review Officer dated April 30, 2007 will be varied accordingly. The Appellant shall be entitled to PIPP benefits, with interest. The Appellant's file will be referred back to his case manager for calculation of any IRI or other benefits which may be owing to him. The panel will reserve jurisdiction in the event that the parties are unable to agree upon the benefits owing to the Appellant as a result of our decision.

Dated at Winnipeg this 13th day of December, 2010.

LAURA DIAMOND

WILF DEGRAVES

DR. SHARON MACDONALD