

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-08-134**

**PANEL:** Ms Laura Diamond, Chairperson  
Mr. Neil Cohen  
Ms Sandra Oakley

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

**HEARING DATE:** March 4, 2010

**ISSUE(S):** Whether the Appellant is entitled to a Permanent  
Impairment benefit

**RELEVANT SECTIONS:** Section 127 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 January 10, 2003. He received physiotherapy treatment benefits.

As a result of inability to work beginning in May of 2004, the Appellant sought Income Replacement Indemnity ("IRI") benefits from MPIC.

On February 26, 2008, the Appeal Commission, following a hearing into the issue of the Appellant's entitlement to IRI benefits, found that the Appellant was unable to work as a result

of injuries from the motor vehicle accident. The Commission found that the Appellant had met the onus upon him of showing, on a balance of probabilities, that his continuing neck pain symptoms were related to the motor vehicle accident and preventing him from working at his occupation. The Commission held that the Appellant should be entitled to IRI benefits from May 2004 to April 2005.

In its Reasons for Decision, the panel reviewed the evidence from [Appellant's Rehab Specialist], a specialist in physical medicine and rehabilitation, who saw the Appellant on May 29, 2007. The panel noted:

“[Appellant's Rehab Specialist], a specialist in physical medicine and rehabilitation, saw the Appellant on May 29, 2007 and reviewed the results of a cervical/thoracic MRI. The MRI demonstrated a central and right C6-7 disc herniation. When asked for his opinion regarding the role of the motor vehicle accident with the Appellant's neck pain, [Appellant's Rehab Specialist] stated:

*He asked regarding my opinion on the role of a motor vehicle collision that occurred approximately 4 years ago. In terms of the disc herniation I advised him not it was possible that the collision resulted in the disc herniation, but at this point in time I cannot be more definitive. Regarding his “mechanical” neck pain, he describes an appropriate temporal relationship with onset of symptoms immediately following the motor vehicle collision. Based on the history provided to me he did not have any similar neck symptoms prior to the collision and these symptoms have been persistent. His symptoms and physical findings would be consistent with a chronic whiplash associated disorder (WAD) grade 2. Based on the history provided to me, on a balance of probabilities the motor vehicle collision played a significant role in these symptoms. At this point in time his symptoms have been stable and in terms of prognosis I would expect much the same.*

Both [Appellant's Doctor], and [Appellant's Rehab Specialist], had the opportunity to examine the Appellant and assess his credibility. [Appellant's Rehab Specialist] had the added benefit of reviewing an MRI scan of the Appellant's neck. Both were of the view that the Appellant's neck pain stemmed from the motor vehicle accident, with [Appellant's Rehab Specialist] stating that it was possible that the disc herniation was a result of the motor vehicle accident and that on the balance of probabilities, the motor vehicle collision played a significant role in the Appellant's symptoms.”

On June 27, 2008, the Appellant's case manager wrote to him denying his application for a Permanent Impairment benefit for injury to his neck. The case manager stated:

“You stated that you sustained an injury to your neck which resulted in a central and right C6-7 disc herniation. The assessment report dated May 30, 2007 from [Appellant’s Rehab Specialist] indicates it was not possible that the above noted collision resulted in the disc herniation. [Appellant’s Rehab Specialist] provided an amendment to the report of the same date indicating it was possible, but at this point in time, could not be more definitive.

A review of your file was conducted in consultation with our Health Care Services Consultant. The available information on file does not establish a cause/effect relationship based on the balance of probabilities, that this injury is a result of the above noted motor vehicle accident. Therefore there is no entitlement to an impairment payment for this injury.”

The Appellant sought an Internal Review of the case manager’s decision. On October 29, 2008, an Internal Review Officer for MPIC addressed the following question:

“Is your C6-7 disc herniation caused by the motor vehicle accident of January 10, 2003, and if so, are you entitled to a permanent impairment benefit?”

The Internal Review Officer concluded that the Appellant’s neck problems were due to degenerative changes and that, on a balance of probabilities, his disc herniation was not related to the 2003 motor vehicle accident. Therefore, the case manager’s decision that the Appellant was not entitled to a Permanent Impairment payment for his C6-7 disc herniation was upheld by the Internal Review Officer.

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 regarding his condition prior to the motor vehicle accident. He indicated that he had no neck pain at that time. He was a workaholic, at the top of his game, but the motor vehicle accident had changed his life. He submitted that since the motor vehicle accident, his doctor had noted continuous documentation of visits with complaints about neck pain. He indicated that sitting down at a desk and looking down in a forward flexed position brought

about exacerbations of his neck pain. He tried to work for years, but just could not do it anymore and was currently on IRI benefits. He noted that work exacerbated symptoms which had been caused by the motor vehicle accident.

The Appellant pointed to reports from his physiotherapist, [Appellant's Neurologist], [Appellant's Rehab Specialist], and [Appellant's Doctor]. [Appellant's Doctor's] notes showed repeated references to neck pain following the motor vehicle accident. A report of July 28, 2008 indicated:

“[The Appellant] has sustained a cervical disc herniation at C6-C7. He also had disc protrusions at T4-T5 and T6-T7. He has secondary myofascial pain.

I believe these are a direct result of his January 10, 2003, motor vehicle accident. My opinion is based on the fact since I started treating him on June 13, 2000, he had no complaints of neck pain and he started to complain of neck pain immediately following the accident. He has complained of neck pain consistently and persistently since then. Unfortunately, C.T. scan which initially showed his disc herniation was only performed in July of 2008, due to his persistent complaints. As far as I am aware there are no pre-existing conditions that are causing or contributing to his current status, as regards to his neck pain.”

[Appellant's Doctor] also reported on January 23, 2007, that the Appellant has chronic neck pain with right foraminal C6-C7 disc herniation.

The Appellant indicated that X-rays of his neck taken in 1994 showed no indication of disc problems in his neck.

[Appellant's Rehab Specialist] reported on May 30, 2007. He provided a further report to [Appellant's Doctor] on January 4, 2010. He indicated that little had changed since he last saw the Appellant in 2007. He referred to the Appellant's continuing neck pain with global limitation of cervical motion. He indicated:

“I did see your April 27, 2009 letter regarding [the Appellant] and I agree with your comments. I am not optimistic that he would be able to maintain full time employment at this time due to his neck pain. He is unable to maintain a static neck position. He would need to be able to change positions frequently, as needed. His tolerance for full time work is limited due to his pain.”

The Appellant also noted reports, including [Appellant’s Neurologist’s] report, showing numbness and tingling in his fingers which had been going on since soon after the motor vehicle accident. He believed that the temporal relationship between the onset of these symptoms and the motor vehicle accident, the consistent reporting of neck issues to his caregivers and the MRI which showed the disc herniation in his neck, established that the C6-C7 disc herniation was caused by the motor vehicle accident.

**Evidence and Submission for MPIC:**

MPIC submitted reports from its Health Care Consultant, [MPIC’s Doctor]. [MPIC’s Doctor] also testified at the hearing into the Appellant’s appeal.

[MPIC’s Doctor] reviewed the mechanism of injury in the motor vehicle accident, indicating that the Appellant had not been subjected to such a significant level of trauma in an unsupported position that a disc abnormality could result from the incident in question. He described the Appellant’s injuries as more in keeping with muscle strain, consistent with a rear end collision of this type.

[MPIC’s Doctor] noted that disc changes such as those found on the Appellant’s MRI, could be the result of degeneration, occurring with the passage of time as individuals get older. Herniated discs can be asymptomatic. It is often difficult to relate diagnostic findings years after the motor vehicle accident to the incident. The stress of life and the development of the Appellant’s

symptoms from time to time, as opposed to steady progress from the point in time of the motor vehicle accident, also contributed to his view that the motor vehicle accident did not cause the Appellant's disc herniation.

He indicated that he disagrees with [Appellant's Doctor's] opinion which, in his view, was not based on any strong objective medical evidence to support it. [Appellant's Rehab Specialist's] opinion indicated that it was possible that the herniation was a result of the motor vehicle accident, but, the test required under the MPIC Act, is that the motor vehicle accident be a probable cause of the injury.

[MPIC's Doctor] noted that the Appellant had improved with the passage of time, with treatment, and was doing very well in the middle portion of 2003. At that time, there was no indication that the Appellant had a disc problem; rather, he seemed to be suffering from non-specific mechanical neck pain. [Appellant's Doctor's] opinion did not seem to take this into account.

[MPIC's Doctor] also indicated that the Appellant's X-rays, taken long before the motor vehicle accident, were not of assistance in this case. These tests had been undergone too long before the motor vehicle accident to assist in speculating that any changes on films of the area had occurred as a result of a trauma.

Counsel for MPIC submitted that [MPIC's Doctor's] comments highlighted the issue of continuity of symptoms and the Appellant's improvement over time. A review of the reports on file showed that there were times when the Appellant had full range of motion in his neck. Counsel also referred to the nature of the motor vehicle accident and the Appellant's clinical

presentation, with symptoms he described as not very severe, immediately following the accident. As [MPIC's Doctor] noted, it is not uncommon to find disc protrusions in the general public, and many are asymptomatic. [Appellant's Neurologist] did not provide an opinion as to whether the herniation was caused by the motor vehicle accident, and [Appellant's Rehab Specialist] only noted that it was possible. He did not say that it was probable, which is the test which must be applied in this appeal.

Counsel relied on [MPIC's Doctor's] reports. He indicated, on August 29, 2008 that it was not medically probable that the disc change as noted on the diagnostic test performed sometime subsequent to the incident in question were a by-product of the incident.

Again on July 27, 2009, [MPIC's Doctor] noted:

“If [Appellant's Doctor] had provided medical information outlining examinations performed shortly after the incident in question indicating [the Appellant] had a significant loss of cervical range of motion, the presence of referred pain to the upper extremity, and possibly the presence of neurologic findings involving the upper extremities, then it would be reasonable to conclude that [the Appellant's] symptoms could have been a byproduct of a disc abnormality that was not initially diagnosed. Since this information could not be extracted from the clinical notes submitted to the file, it is my opinion it is not medically probable [the Appellant's] clinical presentation following the incident in question was a result of a cervical disc abnormality.”

### **Discussion:**

Section 127 of the MPIC Act provides:

#### **Lump sum indemnity for permanent impairment**

[127](#) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

The onus is on the Appellant to show that the injury in question, a C6-7 disc herniation is, on a balance of probabilities, a result of the motor vehicle accident.

The panel has reviewed the evidence on the Appellant's indexed file, as well as the evidence of the Appellant and [MPIC's Doctor] and the submissions of the Appellant and counsel for MPIC.

We have reviewed the report of [Appellant's Neurologist], dated August 17, 2006, which noted at that time that the CT scan showed foraminal C6-7 disc herniation. [Appellant's Neurologist] wondered whether this might have anything to do with compression of the seventh or eighth cervical nerve roots, which could give the Appellant numbness in the hands. However, a later MRI showed no nerve root compression.

[Appellant's Doctor] was firmly of the view that the Appellant's disc herniation was caused by the motor vehicle accident, although he did note, on July 28, 2008, that it was unfortunate that the MRI had not been conducted until 2008.

The Commission's decision of February 2008 found that the Appellant's reports of his symptoms were consistent with [Appellant's Rehab Specialist's] finding of a chronic whiplash.

At the hearing into this appeal, the Appellant again gave clear and consistent evidence that he suffers from neck symptoms which prevent him from doing his work due to this chronic whiplash associated disorder (Grade II) and resulting from the motor vehicle accident.

The question is whether the C6-7 disc herniation is the cause of these symptoms and whether the herniation was caused by the motor vehicle accident.



The panel is of the view that it is very difficult to know whether this herniation was caused by the motor vehicle accident, due to the lack of radiological investigation at the relevant times. X-rays taken in 1994, compared with a CT scan of July 1, 2006 and later MRI do not give a very good picture of the status of the Appellant's disc herniation just before the motor vehicle accident, or after the motor vehicle accident in 2003 or in 2004, which are the important relevant time frames.

The panel finds that there is a lack of objective data and evidence establishing that the Appellant's symptoms are caused by the herniation and that the herniation was caused by the motor vehicle accident. [MPIC's Doctor] provided an opinion and evidence that the Appellant's symptoms were not caused by the disc herniation, because there was no evidence of nerve root compression.

In regard to whether the disc herniation is causing the Appellant's cervical neck pain, the only connection to show that it could be causing the pain is the fact that the herniation and the symptoms coexist. There is a lack of evidence to establish that the two are causally linked.

There is a lack of objective medical evidence and an absence of consistent clinical findings to support the Appellant's contention that his symptoms are caused by the C6-7 disc herniation or that the herniation was caused by the motor vehicle accident. Based on very little objective evidence, the Appellant has asked us to come to a particular conclusion, but the panel finds that it is equally possible that other factors unrelated to the motor vehicle accident may have caused the herniation. This fails to meet the onus upon the Appellant to show, on a balance of probabilities, that he has suffered a permanent impairment caused by the motor vehicle accident.

Although the Appellant's credible evidence was consistent with that at the previous Commission hearing, and the panel finds that the Appellant continues to suffer from symptoms as a result of his chronic whiplash associated disorder condition, resulting from the motor vehicle accident and preventing him from working at his job, the evidence is insufficient to establish on a balance of probabilities that his symptoms are caused by the disc herniation or that the herniation was caused by the motor vehicle accident.

While all of the medical reports on file acknowledge the *possibility* that the herniation was caused by the motor vehicle accident, the panel finds the Appellant has failed to establish that the disc herniation, *on a balance of probabilities*, results from the motor vehicle accident and has resulted in a permanent impairment injury. There is insufficient objective or clinical evidence to persuade the panel to alter the decision of the Internal Review Officer on this point.

Accordingly, the decision of the Internal Review Officer dated October 29, 2008 is hereby confirmed. The Appellant's appeal is dismissed.

Dated at Winnipeg this 20<sup>th</sup> day of April, 2010.

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**LAURA DIAMOND**

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**NEIL COHEN**

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**SANDRA OAKLEY**