

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-138**

PANEL: Ms Laura Diamond, Chairperson
Ms Mary Lynn Brooks
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by Ms Darlene Hnatynshyn of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: January 17, 2011

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

RELEVANT SECTIONS: Sections 70(1), 117(1), 117(3), and 136(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 August 17, 2002. He sustained various soft tissue injuries for which he attended at the hospital and sought chiropractic care. In addition to other injuries, he complained of right shoulder pain.

On October 13, 2005, the Appellant had surgery to repair a right rotator cuff injury. Although he sought Personal Injury Protection Plan ("PIPP") benefits as a result of the right shoulder rotator cuff tear, the Appellant's case manager wrote to him on January 10, 2006 indicating that based

on a review by MPIC's Health Care Services Team, on a balance of probabilities, the Appellant's right shoulder rotator cuff tear was not causally related to the motor vehicle accident. The Appellant sought an Internal Review of this decision.

On July 5, 2006 an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer found that the Appellant had a pre-existing condition, with similar symptoms of shoulder stiffness and pain before the motor vehicle accident and that the mechanism of collision (frontal impact) did not precipitate the Appellant's right shoulder rotator cuff tear. Therefore, the Appellant's rotator cuff surgery was not necessitated by the motor vehicle accident.

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 August 17, 2002 and explained that his body slipped under the shoulder part of the seat belt harness, causing him to strike his shoulder and neck on the steering wheel and dashboard. The accident occurred very close to [Hospital] and he was transported there immediately after the accident. He believed he was in some sort of shock but told the physicians that he had pain all over his body, particularly in his lower back. He also recalled pain in his neck and shoulder.

The Appellant explained that in the one to three months prior to the motor vehicle accident, he had attended at his chiropractor, [Appellant's Chiropractor #1], with symptoms of shoulder pain and stiffness. He was having difficulty with pain upon moving that joint through range of motion. However, the Appellant described this as something like bursitis, which would come

and go and which he was not particularly concerned about. However, after the motor vehicle accident his shoulder condition deteriorated.

Prior to the motor vehicle accident, the Appellant had started a new job which gave him health benefits and his son had suggested that he see a chiropractor for adjustments and help with some minor issues. These involved morning stiffness in both his shoulder and his neck which he attributed to side sleeping. However within days after the motor vehicle accident, it became apparent that this shoulder pain was now becoming a constant "24/7" irritation. It was there all the time. This was different from the problem he had been treating prior to the motor vehicle accident.

After the motor vehicle accident, the Appellant received further treatment with [Appellant's Chiropractor #1]. After a few months both agreed that his shoulder was not getting better, and depending upon his activities, was sometimes worse. [Appellant's Chiropractor #1] suggested that he see a colleague with a different approach, [Appellant's Chiropractor #2]. The Appellant saw [Appellant's Chiropractor #2] two to three times a week for a while. After a few visits, involving shoulder manipulations, there was some relief, but the Appellant testified that two or three hours later the pain would come back at a more intense level.

In early December 2002 the Appellant relocated to (text deleted). When he first moved there, he did not have a regular doctor and had some other, more urgent, medical problems which he needed to deal with. In March or April, when it became apparent that his health was not getting any better, he sought further chiropractic treatment for his shoulder.

An X-Ray failed to reveal any broken bones so the Appellant was urged to have an orthopaedic specialist look at his shoulder.

At this time, the Appellant was also employed as a sub-contractor for a [text deleted] in (text deleted). He also did some work on the sales floor. When he worked to open and close the store, he had to carry two to three trays loaded with heavy [text deleted]. He had significant difficulty with this task.

He continued on with chiropractic treatment, to the extent that his insurance plan at work would cover. He received cortisone injections from his family doctor, which gave him relief for a few hours, and seemed more to numb the area for awhile without any lasting effect.

Finally, in March of 2005 he was examined by [Appellant's Orthopaedic Surgeon]. He was diagnosed with a right rotator cuff tear which required a surgical repair.

After surgery, the Appellant improved, but did not completely regain full range of motion. After a few months, he was able to perform the activities of daily living, with the exception of cleaning up high. He had previously enjoyed golf, but was never really able to play that again. He estimated that within three to four months following surgery his shoulder was back to approximately 80% of full movement.

The Appellant explained that the only traumatic injury he had to his right shoulder was that of the motor vehicle accident. Prior to that he had mild aches and pains, which he described as bursitis symptoms, and were completely different from the pain he felt following the motor vehicle accident.

The Appellant submitted reports from [Appellant's Orthopaedic Surgeon], who operated to repair the Appellant's rotator cuff tear.

[Appellant's Orthopaedic Surgeon's] first two reports described the diagnosis of a tear of the right rotator cuff and the surgical repair and physiotherapy which resulted.

In a report dated March 6, 2006, [Appellant's Orthopaedic Surgeon] noted that the Appellant had:

“...been involved in a motor vehicle accident in August 2002 and his shoulder pain became evident soon after this accident. It is therefore felt that the shoulder pain is related to the accident. To my knowledge he has not had shoulder problems prior to that event.”

In a report dated March 27, 2006, [Appellant's Orthopaedic Surgeon] stated that the Appellant:

“...had sustained a tear of rotator cuff, which I believe resulted from the motor vehicle accident. I am unaware of any previous injury to his shoulder...”

In a subsequent report dated September 20, 2009, [Appellant's Orthopaedic Surgeon] stated that the Appellant:

“...had not had any shoulder symptoms prior to the accident and he had noticed the onset of the pain the shoulder about 2 days later. He also had sustained injuries to the neck and the back, which may have masked the shoulder pain initially. The diagnosis of the tear of rotator cuff was evident on the pre-operative X-ray of the shoulder demonstrating decrease in the subacromial space, which is indicative of a tear of rotator cuff. I was not aware of any investigations done prior to his accident to demonstrate an existence of a tear.

While it is impossible to state accurately if the accident had caused the tear of the rotator cuff, it is my opinion that in balance of probabilities the accident contributed most significantly in the development of pain from the rotator cuff tear and the subsequent requirement of surgical treatment.”

Counsel for the Appellant did not dispute that the Appellant experienced some shoulder symptoms prior to the motor vehicle accident. However, she submitted that the Appellant had

provided clear testimony which explained that the symptoms he felt prior to the motor vehicle accident did not have the degree of severity and chronicity which he experienced following the accident. He was still able to maintain employment and function normally in spite of minor shoulder problems, while seeking care for these and other issues. He did so because he was counselled to do so by his son, in order to take advantage of chiropractic benefits from his employment. He testified that these shoulder symptoms were not anything he felt he needed to worry about. They were not a chronic condition and did not affect him to any degree which would be problematic. He simply attributed them to side sleeping and morning stiffness.

However, counsel noted the Appellant's testimony that after the motor vehicle accident there was a clear difference in his symptoms. He sought care from a number of providers, including chiropractic treatment and cortisone shots, which did not help.

[Appellant's Orthopaedic Surgeon], after having had the opportunity to physically examine the Appellant, review his X-Rays and obtain a history, diagnosed a right rotator cuff tear. This was confirmed during a surgical procedure to repair it. Counsel submitted that [Appellant's Orthopaedic Surgeon] was in the best position to make a comment on the causation of this tear and that he had opined that the motor vehicle accident had either directly caused or materially contributed to this rotator cuff tear.

[Appellant's Chiropractor #1], reported that while there were prior shoulder symptoms, this weakened state would have responded in a more extreme fashion to the motor vehicle accident. Both his chiropractor and the surgeon felt that there was a strong causal link between the shoulder rotator cuff tear and the motor vehicle accident.

Counsel cited two cases of the Commission in *AC-06-132* and *AC-07-70*. She submitted that, as was argued in *AC-06-132*, the Commission should not base its opinion upon the kinds of injuries which could result from one particular type of collision, and should reject the contention of the Internal Review Officer that in this case, such a shoulder injury could not result from a frontal collision. In addition, this collision did not occur completely and solely from the front of the vehicle.

Counsel also submitted, citing *AC-07-70*, that the Commission did not need to find a definitive scientific medical diagnosis, but rather could apply experience and conventional wisdom to find that the motor vehicle accident caused the Appellant's shoulder injury. She noted that not all conditions of an appellant are always immediately documented with scientific precision and that, an inference can be drawn, in the absence of evidence to the contrary that the Appellant's injury resulted from the motor vehicle accident.

She also indicated that it was possible, as [Appellant's Chiropractor #1] noted in his report, that the Appellant's shoulder, in its already somewhat weakened state, might not be able to respond to the trauma of the motor vehicle accident and that his complaints were aggravated and accelerated during the accident.

She submitted that the Appellant had been compliant with all MPIC medical directives and had pursued care in an attempt to resolve his motor vehicle injuries. It was not because of a lack of diligence in seeking care that the Appellant was not able to find a diagnosis and remedy for his condition until almost three years after the accident. He sought help and tried a variety of approaches until finally, an orthopaedic specialist made a diagnosis. That specialist also made a causal connection between the Appellant's injury and the motor vehicle accident. Accordingly,

the opinions of [Appellant's Chiropractor #1] and [Appellant's Orthopaedic Surgeon], who had the opportunity to physically examine the Appellant as well as assess his credibility, obtain a full medical history and arrive at a diagnosis should have greater weight than the opinions of the doctors with MPIC's Health Care Services who simply relied upon a paper review.

The Appellant's appeal should be allowed and the decision of the Internal Review Officer overturned.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that the medical evidence established that the Appellant experienced similar symptoms of shoulder stiffness and pain one to three months prior to the motor vehicle accident. Reports from the [Appellant's Chiropractor #1], noted pre-accident complaints of similar shoulder stiffness and pain.

Counsel relied upon a review of the Appellant's file and a report dated March 23, 2004 conducted by [text deleted], MPIC's chiropractic consultant. [MPIC's Chiropractor] noted that the Appellant had a significant pre-existing condition necessitating care more than once per week and that the Appellant had been involved in a low speed collision and had not likely sustained a significant injury requiring long-term care in that accident.

Notes from the Appellant's case manager dated June 20, 2005 show that almost three years after the accident the Appellant contacted the case manager reporting problems with his shoulder while working as a [text deleted]. Then, in July of 2005, [Appellant's Orthopaedic Surgeon] diagnosed the Appellant with a right rotator cuff injury, recommending surgery which the Appellant underwent.

Counsel for MPIC also relied upon a report by [MPIC's Doctor #1] [text deleted]. [MPIC's Doctor #1] was of the view that rotator cuff tears are infrequently seen as a consequence of motor vehicle collision related trauma, particularly from a frontal collision. He considered the Appellant's prior history of shoulder problems and treatment, including treatment two days prior to the motor vehicle accident. He believed that while a temporary aggravation of that problem might have occurred at the time of the motor vehicle accident, it was his view that the natural history of that condition was not altered by the motor vehicle accident.

Counsel reviewed [Appellant's Orthopaedic Surgeon's] reports, noting that in his report dated March 6, 2006, [Appellant's Orthopaedic Surgeon] had stated that to his knowledge the Appellant had not had shoulder problems prior to that event. Further, in a report dated March 27, 2006, [Appellant's Orthopaedic Surgeon] stated that he was unaware of any previous injury to the Appellant's shoulder. Finally in an opinion dated September 20, 2009, [Appellant's Orthopaedic Surgeon] again stated that the Appellant had not had any shoulder symptoms prior to the accident and that he had noticed the onset of the pain in the shoulder only two days later.

Counsel submitted that contrary to [Appellant's Orthopaedic Surgeon's] understanding, the Appellant did in fact have pre-existing shoulder problems and, since [Appellant's Orthopaedic Surgeon's] opinion was based on inaccurate information, and since the Appellant had admitted that he did not advise [Appellant's Orthopaedic Surgeon] about any pre-existing shoulder issues, those opinions should not be given a great deal of weight.

Counsel submitted that [Appellant's Orthopaedic Surgeon's] opinion that the Appellant's shoulder injury was related to the motor vehicle accident is based on inaccurate information. [Appellant's Orthopaedic Surgeon] did not have knowledge of the full set of facts and

circumstances, while [MPIC's Doctor #1] did. His opinion was later supported by [MPIC's Doctor #2], in a report dated April 12, 2010. Both doctors had the full opportunity to look at all the information on the Appellant's file. They concluded that the Appellant's shoulder problems were the result of a pre-existing condition, not caused by the motor vehicle accident. Counsel submitted that the medical evidence did not establish that the Appellant's rotator cuff tear is related to the motor vehicle accident of August 17, 2002 and as such, the appeal should be dismissed.

Discussion:

The Appellant took the position that his rotator cuff tear, diagnosed in 2005, was a result of his 2002 motor vehicle accident.

The MPIC Act provides:

Definitions

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

"accident" means any event in which bodily injury is caused by an automobile;

"bodily injury" means any physical or mental injury, including permanent physical or mental impairment and death;

"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;

Entitlement to I.R.I. after relapse

[117\(1\)](#) If a victim suffers a relapse of the bodily injury within two years

(a) after the end of the last period for which the victim received an income replacement indemnity, other than an income replacement indemnity under section 115 or 116; or

(b) if he or she was not entitled to an income replacement indemnity before the relapse, after the day of the accident;

the victim is entitled to an income replacement indemnity from the day of the relapse as though the victim had been entitled to an income replacement indemnity from the day of the accident to the day of the relapse.

Relapse after more than two years

117(3) A victim who suffers a relapse more than two years after the times referred to in clauses (1)(a) and (b) is entitled to compensation as if the relapse were a second 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;

(b) the purchase of prostheses or orthopedic devices;

(c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;

(d) such other expenses as may be prescribed by regulation.

The onus is on the Appellant to show, on a balance of probabilities, that his right shoulder symptoms were caused by the motor vehicle accident, entitling him to PIPP benefits.

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

The panel finds that the Appellant did suffer from symptoms in his right shoulder prior to the motor vehicle accident. Between June and August 2002 he attended for 17 chiropractic visits, at

a rate of approximately 1.5 visits per week, with the last visit occurring two days before the motor vehicle accident. His shoulder was treated but he still had no relief from those symptoms and was still attending for treatment almost twice a week, right up until two days prior to the motor vehicle accident.

Although the Appellant testified that the quality of the pain was different and that before the motor vehicle accident his pain was from bursitis, we could find no evidence of a diagnosis of bursitis, or in fact any diagnosis or opinion as to the cause of his shoulder pain prior to the motor vehicle accident.

Although he tried a significant number of chiropractic treatments for that pain, he saw no improvement.

Following the motor vehicle accident, the Appellant moved to Ontario and the panel heard evidence that the work he performed there, as a [text deleted], challenged his shoulder. The symptoms and pain in his shoulder were increased and aggravated. Further medical examination finally led to his examination by an orthopaedic specialist and a diagnosis of and surgery for a rotator cuff tear.

The primary evidence upon which the Appellant relied was the reports of the surgeon who performed the procedure, [Appellant's Orthopaedic Surgeon].

[Appellant's Orthopaedic Surgeon] noted that the Appellant was involved in a motor vehicle accident in August 2002, with initial pain in his neck and back and pain two days later in his

right shoulder. He described the Appellant's pain and limitation of rotation and, after viewing X-Rays, diagnosed a tear of the rotator cuff.

[Appellant's Orthopaedic Surgeon] reported, on March 6, 2006 and March 20, 2006 that the Appellant's shoulder pain became evident soon after the accident, and that he had no knowledge of the Appellant having any shoulder problems prior to that event. He felt the shoulder pain was related to the accident. In her decision of July 5, 2006, the Internal Review Officer noted that pre-existing shoulder problems of pain and stiffness were documented on the Appellant's file and were identified by MPIC's Health Care Services in its review. Yet, [Appellant's Orthopaedic Surgeon] stated he was unaware of any pre-existing shoulder problems.

The information of pre-existing shoulder complaints noted by MPIC's Health Care Services Team, including chiropractic reports, was then sent on to [Appellant's Orthopaedic Surgeon] on July 22, 2009, and another opinion requested from him. However, in his letter of response dated September 20, 2009, [Appellant's Orthopaedic Surgeon] still did not address the Appellant's prior history of shoulder complaints stating that the Appellant had:

“...not had any shoulder symptoms prior to the accident and he had noticed the onset of the pain in the shoulder about 2 days later...”

The panel finds that the evidence provided by the Appellant, including the reports of [Appellant's Orthopaedic Surgeon], fails to establish that the Appellant's shoulder complaints were caused by the motor vehicle accident. [Appellant's Orthopaedic Surgeon's] reports provide little acknowledgement and demonstrate little awareness or consideration of the Appellant's prior shoulder problems, pain and complaints and the significant treatment that he had sought for this issue before the motor vehicle accident.

As a result, the panel is unable to rely on that evidence, in the face of the analysis and review undertaken by [MPIC's Doctor #1] and his colleagues, who did take that medical history and information into account in reaching their conclusion that the Appellant suffered from a pre-existing condition relating to his right shoulder and that the motor vehicle accident could not be established as the cause of the shoulder problems and rotator cuff tear.

The panel finds that the evidence presented by the Appellant has failed to establish, on a balance of probabilities, that his right shoulder rotator cuff tear was caused by the motor vehicle accident of August 2002. As a result, the decision of the Internal Review Officer dated July 5, 2006 is hereby confirmed and the Appellant's appeal is dismissed.

Dated at Winnipeg this 15th day of February, 2011.

LAURA DIAMOND

MARY LYNN BROOKS

PAUL JOHNSTON