

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-133**

PANEL: Ms Laura Diamond, Chairperson
Mr. Les Marks
Ms Jean Moor

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.

HEARING DATE: April 27, 2011

ISSUE(S):

- 1. Whether the Appellant is entitled to a Lump Sum Student Indemnity.**
- 2. Whether the Appellant is entitled to further Permanent Impairment benefits.**
- 3. Whether the Appellant is entitled to Income Replacement Indemnity benefits.**

RELEVANT SECTIONS: Sections 88(1), 89(1) and 107 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 September 5, 2005. He reported a concussion, loss of consciousness, pain to his neck and back, headaches and blurred vision as a result of the accident.

At the time of the accident the Appellant was a high school student. Following a case manager's decision and an Internal Review Decision overturning this, the Appellant, by letter dated August

23, 2006 was awarded a Lump Sum Indemnity for a lost school term as a result of his inability to attend high school from September 5, 2005 to February 6, 2006. He also received a permanent impairment benefit for the loss of consciousness he sustained as a result of the motor vehicle accident.

Following graduation from high school in June 2007, the Appellant commenced an [text deleted] at [text deleted] in September of 2007. After completing approximately three to four weeks of the program, he withdrew. As a result, he sought a lump sum student indemnity relating to the withdrawal from the [text deleted] as well as a further permanent impairment benefit for injury to his back. He also sought Income Replacement Indemnity (“IRI”) benefits.

The Appellant’s case manager wrote to him on May 11, 2009 indicating that the Appellant’s back symptoms at the time of his withdrawal from the [text deleted] were not causally related to the motor vehicle accident and that he was not entitled to a student Lump Sum Indemnity, a permanent impairment benefit, or IRI benefits on this basis.

The Appellant filed an Application for Review from the case manager’s decision.

On October 21, 2009, an Internal Review Officer for MPIC upheld the case manager’s decision stating:

“The reason why you are not able to complete your studies at [text deleted] was because of lower back pain. The medical information on your file indicates that on a balance of probabilities, this back pain is not causally related to your motor vehicle accident of September 5, 2005 and therefore, I must uphold the case manager’s decision that you are not entitled to a Lump Sum Indemnity in relation to any time missed from school as a result.”

The Internal Review Officer also found that the medical information on the Appellant's file did not substantiate that he would be completely unable to perform any work whatsoever as a result of injuries sustained in the motor vehicle accident and as such he was not entitled to an IRI benefit.

Further, the Internal Review Officer found that since the medical information on his file indicated that his lower back pain was not causally related to the motor vehicle accident of September 5, 2005 he was not entitled to a permanent impairment benefit in that regard.

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 and his attendance at [Hospital] following the motor vehicle accident. He said that he then went to see [Appellant's Pediatrician], because he was having back pain and because of his concussion.

He testified that before the motor vehicle accident he was able to do everything, and participate fully in the [text deleted] course he was taking in high school. Now, he says, he cannot do this. He has limitations regarding what he can do. He can only sit for a limited period of time and he can't really reach or touch the floor. He testified that he could not do the proper functions of a normal person.

The Appellant testified that a sharp stabbing pain in his lower back, sometimes accompanied with "numby tingly" feelings, began right after the motor vehicle accident.

The Appellant described attending at some physiotherapy treatment sessions in 2005. However, when he returned for further treatments, in 2007 and 2008, he could not continue because of the pain in his back.

He recalled being examined by [Appellant's Doctor #1], to whom he was referred by [Appellant's Pediatrician], and attempting to do the exercises that [Appellant's Doctor #1] prescribed for him. However, he testified that this increased the pain in his lower back. Because of this, and because he believed that [Appellant's Doctor #1] was employed by MPIC, he did not follow-up and go back to see [Appellant's Doctor #1] again.

The Appellant also testified that he cannot work because, due to his motor vehicle accident related problems, he has developed an addiction to oxycontin.

On behalf of the Appellant, it was submitted that the Appellant's inability to complete an [text deleted] or to work was supported by [Appellant's Pediatrician], then his general practitioner, [Appellant's Doctor #2], and [Appellant's Doctor #3], who replaced [Appellant's Doctor #2].

The Appellant was involved in a high impact rear-end collision which resulted in \$10,000 of damage to the vehicle he was in, which even had its seats broken.

It was submitted that right from the beginning, MPIC did not want to acknowledge the Appellant's claim, with the case manager even closing his file. The Appellant was not able to remember the details very well because he had been unconscious at the time of the motor vehicle accident.

It was submitted that there was nothing wrong with the Appellant's back before the motor vehicle accident, and that following the motor vehicle accident he developed a wedge deformity.

It was noted that [Appellant's Doctor #1], in his report dated November 11, 2007, stated that it could not be ruled out that the Appellant's low back complaints were causally related to the motor vehicle accident.

After the motor vehicle accident, the Appellant saw [Appellant's Pediatrician], and went for approximately 20 physiotherapy treatments.

After [text deleted], he began to see [Appellant's Doctor #2] but there was some confusion and difficulty with the [text deleted] Clinic and [Appellant's Doctor #2's] practice. Eventually, he began to see [Appellant's Doctor #3]. When he complained to [Appellant's Doctor #3] that the second round of physiotherapy was causing too much pain, [Appellant's Doctor #3] withdrew him from physiotherapy treatment.

The Appellant's representative pointed to X-rays of the Appellant's back, dated December 13, 2007, which showed:

“There is slight loss of height of the L2 vertebral body which may be developmental. However, compression cannot be entirely ruled out. No other abnormality is demonstrated.”

It was submitted that the Appellant had never had a problem with his back before the accident, yet he was unable to complete the [text deleted] course and had never been offered a retraining or rehabilitation program. His parents have had to take care of him as a result. His back will

always bother him, so it was submitted that he would need a deskwork career and that MPIC had not provided with any assistance in this regard.

Evidence and Submission for MPIC:

Counsel for MPIC referred to a number of X-ray, CT and MRI reports, as well [Appellant's Doctor #1's] report and reports from [Appellant's Doctor #4] and [MPIC's Doctor], a medical consultant with MPIC's Health Care Services Team.

Counsel for MPIC took the position that on the balance of probabilities, the Appellant's back pain was not causally related to the motor vehicle accident. As such, he was not entitled to permanent impairment benefits in that regard, nor was he entitled to a Lump Sum Student Indemnity in connection with withdrawal from the [text deleted] at [text deleted]. In addition, the medical information had not substantiated the Appellant's position that he was unable to do any work whatsoever as a result of his injuries, and as such, he was not entitled to IRI benefits.

Counsel reviewed initial reports following the Appellant's accident, including the ambulance report, which did not indicate that the Appellant lost consciousness. However, the Appellant did allege a loss of consciousness and concussion and was in receipt of a Lump Sum Indemnity for the high school semester during which his doctor recommended he be off school, as well as a permanent impairment benefit for the sequelae resulting from his loss of consciousness.

Counsel for MPIC noted that the Appellant gave up on the [text deleted] course allegedly based upon the recommendation of [Appellant's Doctor #2]. However, there is no documentary evidence on file to indicate that [Appellant's Doctor #2] ever made that recommendation. In fact, the evidence did not even show that [Appellant's Doctor #2] was available at that time to

make such a recommendation. The only evidence on the file, in spite of repeated requests to the [text deleted] Clinic for clinical information regarding the dates of the Appellant's visits with [Appellant's Doctor #2], the last visit that can be established with [Appellant's Doctor #2] was on May 3, 2007. The Appellant did not withdraw from the [text deleted] until October 2007. It was submitted that at that time, a letter from the [text deleted] Clinic dated September 2, 2007, indicated that "[Appellant's Doctor #2] is currently indisposed and will be unable to respond" to the request for information and enclosing a copy of [Appellant's Doctor #2's] clinical notes for the visits with the patient.

Counsel submitted that there was no injury that occurred at the time of the motor vehicle accident that would prevent the Appellant from employment and entitle him to permanent impairment benefits. Any issues with the Appellant's lower back that may appear in the documentation on the file did not appear until well over two years after the motor vehicle accident. After such a length of time, no causal connection can be made.

In reviewing the documents on file, counsel pointed to a CT scan from the day of the accident, dated September 5, 2005, showing no mass lesion, hemorrhage or acute large vessel infarction, or extra-axial fluid collection in the Appellant's head. An X-ray of the cervical spine that day showed no acute fracture dislocation.

[Appellant's Pediatrician] reported on November 24, 2005 noting that the Appellant had reported pain in the low back and neck and that he had been seen by physiotherapy. He did not believe that further testing was required and noted:

“...The only therapeutic intervention was physiotherapy, analgesics and a lengthy period of recovery from pain. I believe it was very reasonable to have [the Appellant] away

from school for an extended period as he was having quite severe persistent back pain which limited his activity and he was not able to sit for lengthy periods of time.”

Counsel submitted that this showed that in [Appellant’s Pediatrician’s] view, the Appellant should have been back in school by November.

The Appellant then saw [Appellant’s Doctor #4]. [Appellant’s Doctor #4] reported on February 23, 2006. He viewed lumbosacral spine films and noted that there were no fractures or dislocations, and that the disc spaces were of normal height. He stated:

“I advised that he walk more. I reassured him and his mother that he had only soft tissue injuries from this accident. I did not advise further physiotherapy...

...MRI scan of lumbar spine. Report dated 8 March 2006. Normal MRI scan of lumbosacral spine...

Conclusion:

[The Appellant] was involved in a motor vehicle accident, 5 September 2005, and sustained multiple soft tissue strains to his neck and low back and had some loss of memory at the time of the accident.

The prognosis for recovery from the effects of this accident is good. I expect no permanent impairment and no sequelae from the effects of this accident on his musculoskeletal system. His pre-existing conditions have not been altered by this motor vehicle accident.”

A subsequent MRI of the Appellant’s lumbar spine noted that the lower lumbar spinal cord appeared unremarkable and there was no evidence of desiccation or disc prolapse.

[Appellant’s Doctor #4] reported again on March 21, 2006, noting that physical findings in regard to the Appellant, in his opinion, were of a “minor degree” and “would not preclude him from attending school”.

[Appellant's Pediatrician] reported again on May 29, 2006, confirming that the Appellant would not have been able to go to school at all for a number of months and could not do his [text deleted] work for a longer period. He estimated that this would have been a five month period, because of the instability of his back pain and the severity of his condition.

Counsel for MPIC suggested that this was the last time a doctor suggested that the Appellant should refrain from any activities and that these restrictions only applied to the five month period he was off from high school.

[Appellant's Doctor #1's] report dated November 11, 2007, was also reviewed by counsel for MPIC. He noted that [Appellant's Doctor #1] conducted an examination and did not just rely upon subjective evidence from the Appellant regarding his symptomology. He noted that:

“My clinical summary on September 4, 2007 was that this patient was presenting with a chronic pain disorder and possibly some degree of depression. I was unable to discern and (sic) anatomic pain generator from the clinical evaluation primarily weakness at all levels tested from L3 distally, with less than grade 3 power in the muscles assessed. The sensory examination was noted to be normal from L3-S1.

In specific reference to your question, it is uncertain whether his low back complaints are causally linked to the motor vehicle collision since they are not documented on the September 5, 2005 emergency record. Nevertheless, according to the patient, the symptoms emerged at the time of the collision.”

[Appellant's Doctor #1] recommended a comprehensive reconditioning exercise program.

The Appellant then testified that he did some of these exercises on his own, but could not continue because it hurt too much.

He then undertook some physiotherapy in 2007 and 2008, prescribed by [Appellant's Doctor #3], after he began seeing [Appellant's Doctor #3] in December 2007.

A CT of the Appellant's lumbar spine dated January 17, 2008, indicated that there was

“no abnormality as identified at L1-L2. Mild wedge deformity of L2 is thought to be due a remote injury...

...At L5-S1, there is a small central disc protrusion. No nerve root compression or spinal stenosis is identified.”

[Appellant's Doctor #3] provided clinical notes which referred to the Appellant as having a lumbar spine herniated disc determined with CT scan, a disc prolapsed at L4-L5 and an L-2 compression fracture. He also provided a report dated August 6, 2010 which stated:

“[The Appellant] had been in an accident in 2005. He sustained a compression fracture of his L2 vertebral body. He attempted to enrol in a [text deleted] course but could not finish the course due to the pain in his spine when lifting was attempted. He had to forfeit the money he paid for the course. For the first 2 years after the accident, pain prevented [the Appellant] from engaging in any gainful occupation. He is entitled to wage loss compensation for this period.”

Counsel for MPIC questioned the authority for [Appellant's Doctor #3's] assertion that the Appellant had sustained a compression fracture at L2 in the motor vehicle accident. [Appellant's Doctor #3] did not see the Appellant until more than two years after the motor vehicle accident, so there was no way he could make such a causal connection after that passage of time, and at such a late date. He was relying only upon what the Appellant was telling him, counsel submitted. Counsel noted that this was not a useful report regarding the Appellant's capabilities or the reasons for his capability at that time.

[MPIC's Doctor], a health care consultant with MPIC, provided a lengthy report dated April 24, 2009. He looked at the Appellant's medical file in depth and provided answers to a series of questions. In [MPIC's Doctor's] view, the Appellant suffered mild to moderate tenderness and sprain in his cervical spine (Whiplash 2) with possible mild thoracic and lumbar spine strain, in

the motor vehicle accident. He reviewed reports from [Appellant's Pediatrician], [Appellant's Doctor #4], [Appellant's Doctor #1] and [Appellant's Doctor #3], as well as a radiological investigation and concluded that:

“...[The Appellant] sustained what appeared to be mild to moderate musculotendinous strain and/or ligamentous sprain involving the cervical spine and possibly a minor musculotendinous strain or ligamentous sprain involving his lower back as a result of the incident in question...

The diagnostic tests performed in 2007 and 2008 identify minor changes that would not account for his symptoms and could not be causally related to the incident in question based on the balance of medical probabilities. It is not medically probable that [the Appellant's] lower back was subjected to a significant level of trauma to the extent that abnormalities would only be identified 2+ years after the incident in question and that the abnormalities would be minor at best.”

[MPIC's Doctor] noted that the abnormalities identified, including the possible wedge shaped deformity of the L2 vertebral body which was noted, did not appear to be identified in the CT scan, X-rays and MRI scans involving the lumbosacral spine. He opined that:

“...it is reasonable to conclude that these changes, if present at all, developed at a time quite distant from the incident in question. The changes involved in the L2 vertebral body do not confirm the presence of a compression fracture. Minor disc protrusions in the lumbosacral region are very common in the population not exposed to a traumatic event.”

It was [MPIC's Doctor's] opinion that the medical evidence did not confirm the presence of a compression fracture at L2 and the medical evidence did not contain sufficient medical evidence to establish a cause/effect relationship between the incident in question and this abnormality.

Counsel for the Appellant submitted that the evidence did not establish that the Appellant was incapable of working; in fact, the opposite was true. The medical evidence established that the Appellant recovered in a normal fashion from the motor vehicle accident and normal exercise and activities had been recommended by caregivers. There was no objective information that the

Appellant was unable to do the course at [text deleted], or that he had suffered any permanent impairment to his back in the motor vehicle accident.

As a result, counsel for MPIC submitted that the Appellant's appeal should be dismissed.

Discussion:

The MPIC Act provides:

Student entitled to fixed indemnity

[88\(1\)](#) A student is entitled to an indemnity for the time that he or she is unable because of the accident to begin or to continue his or her current studies, and the entitlement ceases on the day that is scheduled, at the time of the accident, for the completion of the current studies.

Entitlement to I.R.I.

[89\(1\)](#) A student is entitled to an income replacement indemnity for any time after an accident that the following occurs as a result of the accident:

- (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;
- (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

New determination after second anniversary of accident

[107](#) From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

The onus is on the Appellant to show, on a balance of probabilities, that as a result of injuries to his lower back sustained in the motor vehicle accident, he is entitled to a further lump sum student indemnity, IRI benefits and a further permanent impairment benefit.

The panel has reviewed the documentary evidence on the Appellant's file, as well as the testimony of the Appellant at the hearing and the submissions made on his behalf. We have also reviewed the submission of counsel for MPIC.

The panel is unable to conclude that the Appellant's withdrawal from the [text deleted] at [text deleted] was recommended by [Appellant's Doctor #2]. Although the Appellant testified that [Appellant's Doctor #2] recommended this, his memory was somewhat affected by the passage of time, as well as by the concussion and consciousness issues he experienced. The last documentary evidence on the file shows that [Appellant's Doctor #2] last saw him on May 3, 2007, and various requests to [Appellant's Doctor #2] and/or his clinic for further clinical notes or information did not produce any further documentation. Accordingly, it is not clear when the Appellant last saw [Appellant's Doctor #2] or what recommendations, if any, [Appellant's Doctor #2] made regarding the Appellant's continued participation in the [text deleted] course.

As well, the documentary evidence on file, and in particular the medical reports, do not support a finding that the Appellant was unable to continue with the [text deleted] course or work at any employment due to physical injury to his back sustained in the motor vehicle accident. Nor does the evidence establish that he was entitled to a permanent impairment benefit for injuries to his back.

The panel finds that the evidence established that the Appellant did suffer from concussion and head injuries following the motor vehicle accident, as well as soft tissue injuries to his neck and back. [Appellant's Pediatrician] supported a five month absence from his high school program. However, [Appellant's Doctor #4] diagnosed multiple soft tissue injury strains to his neck and low back with no permanent impairment and no sequelae from the effects of this accident on his

musculoskeletal system. He recommended therapeutic interventions such as a physical hardening program and participation in regular sports activities program. In his view, the Appellant's injuries were of a minor degree which would not preclude him from attending school.

[Appellant's Doctor #1's] report of November 11, 2007 also noted that there was no documentation of a low back complaint or examination at [Hospital] and that he was discharged home with diagnosis of a soft tissue injury to his neck. He later presented to his paediatrician with central lumbosacral pain. [Appellant's Doctor #1] noted that he was unable to discern an anatomic pain generator from his clinical evaluation although he could not rule out the fact that some of his symptoms may be emanating from an L5-S1 disc bulge and it was uncertain whether his low back complaints were causally linked to the motor vehicle accident. [Appellant's Doctor #1] also recommended a "comprehensive reconditioning exercise program".

The panel agrees with [MPIC's Doctor's] conclusions, contained in his report of April 20, 2009 wherein he finds that the Appellant had suffered a mild to moderate musculotendinous strain and/or ligamentous sprain involving the cervical spine and possible mild musculotendinous sprain and ligamentous sprain involving the thorocolumbar spine. However, we agree that the medical evidence does not confirm the presence of a compression fracture at L2 or contain sufficient medical evidence to establish a cause/effect relationship between the incident in question and any abnormality involving L2, on the balance of probability.

Further, we agree with [MPIC's Doctor] that the file does not contain sufficient objective medical evidence to indicate that the Appellant had a physical impairment of function that

prevented him from attending and participating in an [text deleted] at [text deleted] in September 2007, or from participating in other employment.

The evidence on the file also did not establish, on a balance of probabilities, that the Appellant developed a medical condition as a result of the motor vehicle accident that would entitle him to a permanent impairment benefit.

Accordingly, the Appellant's appeal regarding entitlement to a lump sum indemnity, IRI benefits or permanent impairment benefits as a result of physical injuries to his lower back sustained in the accident, is dismissed.

However, a review of the file leads us to conclude that the Internal Review Officer erred in failing to consider the issue and questions surrounding the possibility that the Appellant has developed a chronic pain condition as a result of the motor vehicle accident. This was referred to in the case manager's decision of May 11, 2009.

“...It was noted that [Appellant's Doctor #1] was of the opinion that you had chronic pain disorder and possibly some degree of depression. It was noted that [Appellant's Doctor #1] was unable to discern an anatomic pain generator due to the presence of non-anatomic findings.”

[MPIC's Doctor], in his report dated April 20, 2009, also stated:

“...It is noted that [Appellant's Doctor #1] was of the opinion that [the Appellant] had chronic pain disorder and possibly some degree of depression...”

The panel notes that references to chronic pain were made by [Appellant's Pediatrician] in his report dated October 12, 2007:

“[The Appellant] suffers from chronic pain syndrome, primarily involving his back since a motor vehicle accident on September 5th, 2005...”

[Appellant's Doctor #1], on November 11, 2007 noted:

“He was referred to me by his pediatrician to evaluate his chronic pain...

My clinical summary on September 4, 2007 was that this patient was presenting with a chronic pain disorder and possibly some degree of depression. I was unable to discern and (sic) anatomic pain generator from the clinic evaluation primarily because of the presence of non-anatomic findings...”

The Internal Review Officer either failed to take into consideration, or failed to note, the suggestions that the Appellant had possibly developed a chronic pain syndrome as a result of the motor vehicle accident. However, the Appellant's testimony at the hearing regarding the nature of his pain, as well as of his addiction to pain killers such as oxycontin, were certainly consistent with this possibility.

Accordingly, the panel finds that the Internal Review Officer, in her decision dated October 21, 2009, failed to consider the issue of chronic pain with the possible attendant issues of painkiller addiction, and its possible impact upon the Appellant and his abilities.

Accordingly, the issue of whether the Appellant suffers from a possible chronic pain condition arising out of the motor vehicle accident will be referred back to the Appellant's case manager for investigation and review.

The Appellant's appeal regarding his entitlement to a lump sum student indemnity relating to withdrawal from the [text deleted] at [text deleted], a further permanent impairment benefit and IRI benefits, as a result of a lower back injury is hereby dismissed. The question of the Appellant suffering from a possible chronic pain condition arising out of the motor vehicle accident is referred back to the Appellant's case manager for investigation and review.

Dated at Winnipeg this 18th day of May, 2011.

LAURA DIAMOND

LES MARKS

JEAN MOOR