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Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-018**

PANEL: Ms Laura Diamond, Chairperson
Ms Mary Lynn Brooks
Mr. Neil Cohen

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: September 11, 2012

ISSUE(S): Entitlement to permanent impairment benefits for disc degeneration of the neck, or loss of range of motion affecting the neck, back and shoulder as it relates to the motor vehicle accidents of April 29, 2001, October 28, 2001 and January 12, 2006;

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 motor vehicle accidents on April 29, 2001, October 28, 2001 and January 12, 2006. The Appellant's claims regarding permanent impairment awards for an injury to his left thumb and loss of consciousness or amnesia were dealt with separately, in previous decisions of MPIC and the Commission.

The Appellant's case manager wrote to him on October 1, 2007 (with an addendum of October 3, 2007) indicating that on January 2, 2007 a decision had been made confirming there was no permanent impairment relating to the disc degeneration of the Appellant's neck. The Appellant sought an Internal Review of the case manager's decision and on January 18, 2008 an Internal Review Officer reviewed the decision of January 2, 2007 as a claim for entitlement to an award for loss of range of motion relating to the cervical spine, back and shoulder, as well as disc degeneration.

The Internal Review Officer reviewed the medical evidence on the Appellant's file, including a memorandum from MPIC's Health Care Services team, who noted that none of the permanent impairment categories sought applied to the medical evidence on the Appellant's file.

The Internal Review Officer concluded that:

“The legislative impairment benefits serve to address organic pathology and associated permanent loss of function. The medical documents on your file do not support a rateable permanent impairment for degenerative disc disease or for your alleged deficits in range of motion, even if these impairments were listed in the Schedule.”

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

At the outset of the hearing, counsel for the Appellant noted that the Appellant was withdrawing a previous appeal that had been filed regarding a permanent impairment for a knee injury. The remaining issue in the current appeal was a permanent impairment benefit for disc degeneration of the neck, as well as loss of motion affecting the neck, back and shoulders.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing. He described the motor vehicle accidents in which he had been involved, as well as a snowmobile accident on March 7, 2001.

The Appellant indicated that he did not have any injuries or issues following the snowmobile accident, but that in a motorcycle accident of April 29, 2001, his bike landed on his body, hurting his neck when his head was pinned into the ground. He suffered injuries to the left side of his body when he landed on that side.

The Appellant sought treatment from a walk-in clinic and also received treatment from [Appellant's Chiropractor]. He then went to see his own doctor, [Appellant's Doctor #1]. He was having difficulty with headaches and his body was very stiff.

The Appellant explained that prior to the motor vehicle accident he had been very active. He played hockey and golf. He was trying to become a [text deleted], so had gone back to school and participated in volunteer activities such as coaching. Following the motor vehicle accident, he tried to continue with this, walking the street for the "[text deleted]". However he could not tolerate this walking, and his injuries prevented him from pursuing his dream of becoming a [text deleted]. Instead, he has been working as a [text deleted] for a couple of hours in the morning and a couple of hours in the afternoon. He had to stop playing hockey as well.

The Appellant explained that he no longer sleeps well.

The Appellant described another motor vehicle accident which occurred on his motorcycle on October 28, 2001. He explained that he hurt everything he had already injured, all over again.

He continued to see [Appellant's Chiropractor], as well as [Appellant's Pain Specialist #1], [Appellant's Pain Specialist #2], and a physiotherapist.

The Appellant also described the final motor vehicle accident which occurred when he lost control of his truck on January 12, 2006. He banged his head and hurt his neck and back.

The Appellant took anti-inflammatories, and also attended at another chiropractor for treatment. He still has difficulty when he turns his head, as well as posture problems and difficulty sleeping.

The Appellant explained that he never had any of these problems prior to the motor vehicle accident.

The Appellant also provided a copy of an X-ray report taken prior to his accidents and dated March 7, 2001, which showed no abnormalities to the lumbosacral or cervical spine.

“No bone, disc space or articular abnormality is identified. No fracture is recognized.”

In contrast, the Appellant provided the Commission with a cervical spine X-ray report read on January 12, 2006 (after the motor vehicle accidents) which showed:

“No prevertebral soft tissue swelling is identified. No fracture of subluxation is identified. Incidental note is made of C4-C5 disc degeneration.”

The Appellant also provided a report from a chiropractic X-ray dated March 21, 2012 which showed:

“...At C4-5 there is endplate sclerosis with anterior spondylosis and narrowing of the disc height. This is consistent with degenerative disc disease...”

IMPRESSION

1. Degenerative disc disease at C4-5.

2. Right lateral list of the cervical spine with straightening of the lordotic curvature. These changes may be related to myospasm and/or other soft tissue injury and may be associated with other postural changes. Correlate clinically.”

The Appellant provided an opinion dated May 3, 2012 from [Appellant’s Chiropractor]. [Appellant’s Chiropractor] reviewed reports on the Appellant’s file and noted that a permanent impairment award was warranted as a result of a motor vehicle related injury to the Appellant’s shoulder. He suffered pain and dysfunction in this region, which, on a balance of probabilities, was substantially and significantly related to the motor vehicle accident. [Appellant’s Chiropractor] also commented on the development of C4-5 degenerative disc disease with a narrowing of the disc height which, on a balance of probabilities, involved symptomology in the neck and lower back, and was substantially and significantly related to the motor vehicle accident. [Appellant’s Chiropractor] recommended a total permanent impairment award of 33%.

Counsel for the Appellant submitted that the medical evidence on the file, both radiological and from [Appellant’s Chiropractor’s] reports supported a permanent impairment benefit for the Appellant’s neck, back and shoulder dysfunction. The Appellant’s complaints, as recorded by [Appellant’s Doctor #1] following the motor vehicle accident, were consistent with [Appellant’s Chiropractor’s] findings of a chronic whiplash. The Appellant’s physiotherapist noted signs of limited neck range of motion, tenderness, limited lumbar range and cervical segmental dysfunction.

Counsel submitted that this was not just typical neck pain, but rather persistent pain which began in April of 2001 and continued until 2006. Further, this was not just a case of subjective reporting of pain. Rather, it also involved x-ray evidence of a worsening of the Appellant’s condition. Given the Appellant’s relatively young age, these degenerative disc changes should

not be dismissed as merely incidental findings. Rather, it must be concluded that it was the trauma of the motor vehicle accidents which contributed to or caused the Appellant's condition. Given the length of time in which these subjective findings have remained consistent, and the relatively young age when the degenerative changes occurred, counsel submitted the Commission should find the Appellant entitled to a permanent impairment award, consistent with [Appellant's Chiropractor's] assessment of 33% permanent impairment.

Submission for MPIC:

Counsel for MPIC submitted that there is no coverage under the MPIC Act for pain and suffering. The permanent impairment provisions provide compensation only for rateable impairments under the Act and Regulations. This requires objective and not subjective evidence.

The Appellant seeks compensation regarding neck range of motion and disc degeneration as well as alleged injuries to the back and shoulders. Counsel noted that the neck and back were more consistently referred to in the medical information on the Appellant's indexed file, particularly that obtained shortly after each motor vehicle accident. For example the Application for Compensation filed following the April 2001 motor vehicle accident lists neck and back problems, but there is no mention of a shoulder injury. The traffic accident report following the October 2001 motor vehicle accident lists injury to the left knee, but to no other body part. These documents were provided shortly after the motor vehicle accident and are more reliable than the Application for Compensation filed in November of 2002, more than a year after the motor vehicle accident, which still did not mention any shoulder injury.

Counsel for MPIC also reviewed the Primary Health Care Report completed by [Appellant's Doctor #2] on February 10, 2006 which listed symptoms in the Appellant's neck and shoulder, but did not list low back pain.

Counsel reviewed a variety of reports from [Appellant's Chiropractor]. Some of them mentioned neck and lower back pain as subjective symptoms, while others noted cervical spine and lumbar problems. Later reports discussed physical spine complaints with no indication of lumbar spine symptoms at that moment in time.

When [MPIC's Chiropractor] reviewed the information on the Appellant's file, he concluded that the documentation on the file was sufficient to support a relationship between treatment in June, July and September of 2004 and injuries sustained in the motor vehicle accident.

However, in regard to permanent impairment, counsel submitted there was a lack of supporting evidence. A cervical spine radiological examination of January 2006 noted:

“No prevertebral soft tissue swelling is identified. No fracture or subluxation is identified. Incidental note is made of C4-C5 disc degeneration.”

Counsel submitted that one cannot ignore the use of the word “incidental” in that report. This obviously meant that the finding of disc degeneration was not causally connected to the motor vehicle accident, and counsel submitted that this was the radiologist's way of ensuring he noted this was just a side finding he had made. Counsel submitted that in adhering to the balance of probabilities standard of proof applied by the Commission, one cannot disregard the opinion of the radiologist.

That opinion was echoed in the findings of [MPIC's Doctor], who reported on November 17, 2006 and on July 5, 2012.

On November 17, 2006, [MPIC's Doctor] noted:

“With regards to January 2006 imaging, the interpreting radiologist made incidental note of degenerative disc changes with (sic) typify the general population in the presence or absence of previous trauma.

Of issue here is that persistent neck pain is not a ratable impairment according to established Guidelines. Structural pathology that is recognized relates to injuries or subsequent surgical procedures considered causally related to the motor vehicle collision. In my opinion, none of the recognized categories for impairment consideration covered under Subdivision 3.1; Cervical Spine, page 330 and 331, or 4; page 332 and page 333 apply to the claimant.

To specifically respond to your inquiry, there is no rateable impairment for persistent neck complaints that the claimant attributes to the October 28, 2001 episode.”

On July 5, 2012, [MPIC's Doctor] compared cervical spine X-ray reports from October 13 and March 7, 2001 with the imaging report of January 12, 2006. At that time she noted:

“With the progression of time, anticipated changes involving the cervical spine include degenerative disc change. The fact that degenerative disc change was not documented in the 2000-2001 imaging but was noted in later imaging, does not alter my November 17, 2006 opinion with regards to impairment benefit due to the claimant for injury to the neck region.

In general, age-related or trauma-related degenerative disc changes that are not passed off as being incidental in nature relate to degenerative changes that are accompanied by the patient presenting with cervical radiculopathy. This was not documented to be the case for [the Appellant]. Neurologic examination findings reported after each of the collisions at issue reflected normal neurologic examinations. The involved cervical nerve root at the C4-5 level is the C5 nerve root. Cervical neuropathies are covered in Division 2, Subdivision 4, Table 2.1 of the Regulations but, as stated, I have found no documented support for the claimant demonstrating cervical radiculopathy.”

[MPIC's Doctor] also noted that there was no documentation confirming that the Appellant had suffered injury between his shoulder blades or to his shoulder and that the reviewed

documentation was absent for documented pathology, rateable or otherwise, pertaining to the shoulder.

Counsel compared [MPIC's Doctor's] report of July 5, 2012 with [Appellant's Chiropractor's] most recent report dated May 3, 2012. She submitted that as [MPIC's Doctor] had full access to the Appellant's entire file when she arrived at her opinions, her report should be considered the most reliable. [Appellant's Chiropractor's] conclusions in his 2012 report are of limited value, as he does not give proper consideration to whether the degenerative disc disease of the Appellant was caused by the motor vehicle accident or whether it was indeed merely incidental. [Appellant's Chiropractor] essentially accepted the subjective reporting of the Appellant throughout the file as to when his symptoms arose. He was merely responding to the Appellant's complaints of pain. However, pain is not a rateable impairment. A notation of degenerative disc disease is not atypical of the general population. The Appellant's neurological exam was normal and there is nothing on the Appellant's file that would substantiate his claim that he is entitled to a permanent impairment for cervical injury.

Counsel submitted that the Appellant's appeal should be dismissed. There is no basis in the Personal Injury Protection Plan "(PIPP)" regulation for a permanent impairment based on pain and suffering. Objective evidence is required to support a rateable impairment, and, she submitted, the Appellant's issue with neck degeneration and range of motion were incidental findings consistent with the general population, absent any trauma. Nor was there any specific diagnosis of back and shoulder injury to warrant a permanent impairment award. Accordingly, counsel submitted that the appeal should be dismissed and the decision of the Internal Review Officer upheld.

Discussion:

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, on a balance of probabilities, that he is entitled to a permanent impairment benefit under the MPIC Act and Regulations, as a result of the motor vehicle accident.

The panel has reviewed the testimony of the Appellant, as well as the documentary evidence on the Appellant's file and the submissions of counsel.

We note that the evidence does not disclose any neurological findings, fractures, or abnormalities which were diagnosed as a result of the motor vehicle accident. The Appellant's file, for the most part, describes soft tissue findings, pain and symptoms.

The only abnormality described in the Appellant's medical file was an "incidental" finding of disc degeneration at the C4-C5 level. However, the physiatrist, [MPIC's Doctor], and the radiologist, both specialists in this area, described this finding as incidental. [MPIC's Doctor] went on to note its presence in the general population. Although counsel for the Appellant asserted that the Appellant was too young for these C4-C5 changes to have resulted merely from age, no medical evidence or findings were provided to support that assertion. In addition, in spite of the Appellant's relatively young age, we also note his previously active and strenuous

lifestyle. More importantly, we have noted [MPIC's Doctor's] comments regarding the lack of documented signs, symptoms or established diagnosis of cervical radiculopathy.

“In general, age-related or trauma-related degenerative disc changes that are not passed off as being incidental in nature relate to degenerative changes that are accompanied by the patient presenting with cervical radiculopathy. This was not documented to be the case for [the Appellant]. Neurologic examination findings reported after each of the collisions at issue reflected normal neurologic examinations.”

Accordingly, the panel finds that the Appellant suffered from soft tissue injury and pain complaints as a result of the motor vehicle accident. However, the permanent impairment scheme found in the PIPP regulations does not, as [MPIC's Doctor] points out, “provide award for symptoms”. Absent medical evidence of pathological abnormalities diagnosed as a result of the motor vehicle accident, [Appellant's Chiropractor's] recounting of the Appellant's symptoms and range of motion measurements do not meet the test, on a balance of probabilities, which is required to establish a basis for rateable permanent impairment awards resulting from the motor vehicle accident, under the MPIC Act and Regulations.

As a result, we find that the Appellant has failed to meet the onus, on a balance of probabilities, of showing that he suffered rateable impairments in his neck, back, or shoulders, as a result of the motor vehicle accident, which would entitle him to permanent impairment benefits under the MPIC Act and Regulations. Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated January 18, 2008 is upheld.

Dated at Winnipeg this 24th day of October, 2012.

LAURA DIAMOND

MARY LYNN BROOKS

NEIL COHEN