Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-133

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Jacqueline Freedman** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATE:	**February 10, 2015**
ISSUE(S):	**Entitlement to Personal Injury Protection Plan benefits in relation to the Appellant's back surgery in December, 2010.**
RELEVANT SECTIONS:	**Sections 70(1) and 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on July 5, 2009 when he was a pedestrian struck by a reversing vehicle in a parking lot. At the time of the accident the Appellant was not employed, as he was not capable of employment due to a pre-existing disability, following two workplace injuries. He had a pre-motor vehicle accident medical history which included degenerative back disease and previous back surgery.

On July 14, 2010, the Appellant contacted MPIC to indicate that his back injury had gotten progressively worse since the accident. He sought further PIPP benefits from MPIC. In December of 2010, the Appellant underwent back surgery for disc herniation. He took the position that the need for this surgery was causally related to the injuries sustained in the motor vehicle accident.

Upon receipt of further medical information, MPIC's Health Care Services Medical Consultant reviewed the Appellant's file and came to the conclusion that a cause/effect relationship did not exist between the motor vehicle accident and the Appellant's diagnosed lumbar disc abnormalities, for which he underwent surgery. On June 21, 2011, the Appellant's case manager wrote to him advising that a review of the medical information on file, in consultation with the Health Care Services team, indicated that there was no causal relationship between the Appellant's back surgery and the motor vehicle accident injuries of July 5, 2009.

The Appellant sought an Internal Review of this decision.

On September 19, 2011, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer agreed with the opinion provided by [MPIC's doctor] (Health Care Services team) that there was no causal relationship between the requirement for low back surgery and the motor vehicle collision. The evidence did not satisfy the Review Officer that there was any indication of serious injury to the Appellant's lower back at the time of the motor vehicle accident. On a balance of probabilities test, the requirement for further back surgery could not be attributed to the accident.

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

Evidence:

The Appellant provided reports from several caregivers including his general practitioner, [Appellant's doctor #1]; nurse practitioner, [text deleted]; [Appellant's doctor #2] and [Appellant's anesthetist] from the [Clinic]; and Neurosurgeon, [Appellant's neurosurgeon]. In addition to the documentary reports, both the Appellant and his wife testified at the hearing into his appeal.

MPIC provided reports from its Health Care Services team.

Evidence of the Appellant:

The Appellant admitted that he had experienced back problems since a workplace accident which occurred in [text deleted] in 1986. However, until the motor vehicle accident, he had never experienced pain shooting down his leg.

The Appellant described the workplace accident which occurred when he was a [text deleted] operating a skidder at the age of [text deleted] and he was hit by a tree across the back of his neck, resulting in fractures in his C-spine as well as injuries to his T-11 vertebrae. As a result, the Appellant is in receipt of ongoing benefits from [text deleted] Workplace Safety [text deleted] with a partial disability attributed to his cervical spine and neck and an impairment award determined in regard to his lower back.

Following that accident, the Appellant retrained to work as a [text deleted], and worked sporadically at this for several years. It was eventually determined that, due to flare-ups in his neck and back, he did not have the tolerance to work as a [text deleted]. He retrained in [text deleted]. A second workplace injury occurred in October of 1998 when he was picking up a computer tower and felt his back lock-up, with some pain down his leg. This led to a CT scan of his spine in 1999, which showed a disc herniation between L4-L5 and L5-S1. The Appellant underwent a lumbar discectomy due to significant right leg pain and weakness, following which he reported improvement of the weakness, with the pain fairly unchanged.

The evidence of the Appellant described the motor vehicle accident which occurred while he was walking in a parking lot. He described a van backing around the corner and hitting him, causing him to suddenly fly through the air. He described the distance which he was thrown, which could be estimated at approximately 19 feet**.** He said that right away there was pain in his legs, back and neck and that he had scrapes on his knees. For a few weeks after the motor vehicle accident his whole body was sore and he was on the couch, with pain in his legs, back and neck. Before the motor vehicle accident he had been able to take care of his son and his wife and do all the household chores and shopping, but after the accident his wife had to do everything. Although he could move around, the pain was debilitating and depressing and he required assistance. He described the pain flowing down his right calf and into his ankle as a constant throb.

On cross-examination, he confirmed that he had remained conscious at all times and was not showing signs of injury such as rubbing a painful spot or bleeding. He agreed that when the fire/paramedics attended the parking lot he was ambulatory and walking around and did not want

to go to the hospital. However, he did attend the hospital and noted that MPIC paid for his ambulance bill.

The Appellant described a visit to [hospital] on August 7, 2009 as a result of severe pain and difficulty walking. The pain was in his back, calf and ankle and he had been experiencing it ever since he was hit by the car. A CT scan was ordered by the [hospital].

The Appellant had been seeing his family doctor, [Appellant's doctor #1], who referred him to [Appellant's doctor #2] at the [text deleted] Clinic. He had been attending the [text deleted] clinic, on and off, for years. He attended a few months after the motor vehicle accident and explained to [Appellant's doctor #2] that he was not feeling well and that since being hit by a van, he had shooting pain down his legs. [Appellant's doctor #2] obtained the CT scan from [hospital] and went on to order an MRI.

The appellant described an incident which occurred while he was in the shower, when his right leg gave out and he fell. The faucet hit him between the shoulder blades and spinal column. The Appellant also described an incident when he felt progressive pain in his right leg, after lifting his [text deleted] year old son. However, the Appellant maintained that this pain had been bothering him well before he lifted his son, and that this just aggravated it and motivated him to seek medical treatment.

Medical investigation ultimately led to the Appellant undergoing back surgery for a disc protrusion in December of 2010. He explained that following the surgery, his back felt two-thirds better. He still had some pain and still used a cane, but the pain was not excruciating

anymore. Following the surgery he was able to move around better, make coffee, do some household chores, and lift and care for his son.

Evidence of the Appellant's Wife:

The Appellant's wife also testified at the hearing into his appeal. She indicated that although the Appellant was not working prior to the motor vehicle accident, he was very active in caring for their household. She described him as "Mr. Mom" who took care of her son, the house chores, yard work, and shopping etc.

After the motor vehicle accident the Appellant's pain limited the way he could walk around. He couldn't really carry laundry or do yard work, and immediately after the motor vehicle accident he was on the couch healing. She said the change was black and white and that the Appellant was not the same. He could not do the same activities that he could before the motor accident. He could not care for their son as efficiently and so she took some vacation time immediately following the motor vehicle accident in order to be at home and do the work. When she had to go back to work, she managed as best as she could, preparing meals ahead of time and bringing some crutches up from the basement so that her husband could get around more easily.

Even after that initial convalescence, the Appellant had trouble coping with any other activities until he had his back surgery. When she took him to the doctor, she would drive him up to the door and use a wheelchair in order to wheel him up to his appointment. He needed a crutch to get up from the couch and the longer he kept trying to function, the worse it got. He was sore all the time.

The Appellant frequently described a shooting pain in his leg, and had many incidents of pain. But after the incident in May 2010 where he ended up in the emergency room after lifting his son, she realized that regular everyday life was causing him to flare up and something more was going on. In the end, she felt she had to take a leave of absence from her job to take care of her son and husband. She had returned to work in January 2010, when a family member was able to help out in the house. However, she had to take another leave of absence in June 2010, as her husband was not in any shape to take care of himself or his son.

Following the back surgery in December of 2010, the pain dramatically decreased and the Appellant could walk around with better pain control. He could do chores like he had before even though he still had to go for rhyzotomy treatments to help with his pain control.

Medical Evidence:

[Appellant's doctor #1] provided a report dated August 9, 2009 which noted low back pain and a positive neurological examination. He diagnosed exacerbation of the Appellant's degenerative disc disease in the lumbosacral spine and an exacerbation of the degenerative joint disease in his cervical spine. He also documented tenderness of the L4 area with decreased range of motion of the low back and reduced strength and power in the legs. Upon review of the CT scan, he recommended that the Appellant would need an MRI. He referred the Appellant to the [text deleted] Clinic.

At the [text deleted] Clinic, [Appellant's doctor #2] provided a report dated November 20, 2009. She noted her clinical impression that the Appellant's leg symptoms were due to a recurrent disc herniation.

[Text deleted] (the nurse practitioner who took over the Appellant's file from [Appellant's doctor #1]) reviewed MRI's of the Appellant taken in 2001 and 2010 and compared them. She noted that the MRI of 2001 showed only right posterior perimedial disc herniation at L4-L5 and a small protrusion of L5 to S1, with all other discs being normal. However, the more recent May 28, 2010 MRI showed changes to L3 and L4 to L5. Right sided nerve root irritation was also found:

> "In summary, this patient has had a severe back injury in the past and his back is permanently weakened. It is possible that the pedestrian motor vehicle accident that occurred in July 2009, may have further exacerbated his condition."

The Appellant sought treatment from [Appellant's neurosurgeon], a neurosurgeon. He provided a surgical report dated December 16, 2010 which described the surgery of December 10, 2010. A number of disc fragments, including a large fragment of sequestrated disc material was removed from the L4-L5 disc. Following surgery the Appellant had shown improvement, though he still walked with a limp and required a cane. He was free of specific neurological fall-out. [Appellant's neurosurgeon] stated that while it was not possible for anyone to comment on the causality of the prolapsed disc, there was a temporal relationship between the accident and the occurrence of the Appellant's pain.

Submission for the Appellant:

The Appellant acknowledged that his lower back, particularly the L4-L5 disc was not completely healthy prior to the motor vehicle accident of July 5, 2009. He had a previous discectomy at that level about 10 years prior to the motor vehicle accident, in addition to problems with the cervical and thoracic spine resulting from previous workplace injuries. However, the Appellant took the position that the July 5, 2009 motor vehicle accident exacerbated an already damaged L4-L5 disc to the extent that he eventually required further surgery to relieve some of the pain and disability related to the resulting neuropathy.

Counsel for the Appellant noted that [MPIC's doctor] (of MPIC's Health Care Services team) had conceded that the motor vehicle accident may have exacerbated the Appellant's pre-existing low back problems while taking the position that it had not enhanced those problems. [MPIC's doctor's] view was that it was medically probable that the fall in the bathtub and the incident when the Appellant lifted his son had caused the need for back surgery.

However, counsel submitted that this theory did not fit the totality of the evidence. The theory ignores several key pieces of evidence, particularly the evidence of the August 2009 CT scan showing problems with the Appellant's back, and the evidence from [Appellant's doctor #1] and [Appellant's doctor #2] of neurological signs occurring long before either of those incidents.

The Appellant testified that on July 5, 2009 he was struck quite violently in the back by a vehicle. The paramedic report noted that he complained of pain to the neck and lower back and that he was transported to [hospital] by ambulance.

The Appellant's testimony confirmed that during the next month his lower back symptoms increased, with neurological symptoms in his legs. As a result, he attended [hospital], on August 7, 2009 and received a CT scan of his lumbar spine which identified a central/right paracentral disc protrusion and abnormal soft tissue around the right L5 root in the lateral recess. This was likely due to epidural fibrosis but the report noted that a recurrent disc herniation could not be excluded.

[Appellant's doctor #1] reported on August 18, 2009 noting low back pain and a positive neurological examination, including sensory and motor deficits in at least one leg as well as reflex changes. He diagnosed an exacerbation of the degenerative disc disease in the LS spine

and exacerbation of the degenerative joint disease in the cervical spine, calling for an MRI. He also referred the Appellant to the [text deleted] Clinic.

[Appellant's doctor #2] from the [text deleted] Clinic reported on November 25, 2009, noting her clinical impression that the Appellant's leg symptoms were due to a recurrent disc herniation. Although she noted that the Appellant had described a year history of worsening low back pain with radiation to his legs bilaterally, counsel submitted that this was not quite correct. The Appellant had complained of some flare-up of back symptoms in 2007 and 2008, but during the year prior to the motor vehicle accident there was only one report of radicular signs which could possibly be related to the L4-L5 disc. This report occurred almost a full year before the motor vehicle accident.

Counsel explained that while the Appellant was waiting for an MRI to determine the exact nature of his L4-L5 problem, two incidents occurred, one in the bathtub and one lifting his son, which were a result of his right leg giving way. These were aggravations of an already herniated L4-L5 disc.

An MRI report on May 28, 2010 confirmed a disc protrusion in the right paracentral area of L4-L5 compressing the nerve root, and another disc protrusion at L3-L4 which was contacting the nerve root. The report indicated that the changes at L3-4 or L4-5 could cause right sided nerve root irritation. Counsel argued that since the disc protrusion shown on the CT scan was in the exact same location as that seen on the MRI, it had been demonstrated that the L4-L5 disc herniation was already present a month after the motor vehicle accident.

The Appellant's nurse practitioner reported on September 3, 2010, comparing a 2001 MRI with the MRI of 2010 and concluded that the more recent MRI showed a right paracentral disc protrusion at L4-L5 compressing the L5 nerve root, as well as damage to other discs. It was submitted that these were not present in the 2001 MRI.

[Appellant's neurosurgeon] also provided reports following the Appellant's surgery, describing the procedure and responding to questions regarding his opinion of any causal connection between the motor vehicle accident and the need for surgery. It was submitted that while [Appellant's neurosurgeon] had stated it was not possible for anyone to comment on the causality of the prolapsed disc, he had recognized a temporal relationship between the accident and the occurrence of the Appellant's pain.

Counsel also referred to the significant changes in the Appellant's functionality before and after the motor vehicle accident, which were described by both the Appellant and his wife. He submitted that this significant change was caused by motor vehicle accident related injuries. The Appellant had no right-sided radicular symptoms for at least a year prior to the motor vehicle accident. Almost immediately after the accident he began to experience bilateral radicular signs. His CT scan on August 7, 2009 confirmed a problem at the L4-L5 level and neurological symptoms were found by [Appellant's doctor #1] on August 9, 2009. In November of 2009, [Appellant's doctor #2] suggested that a recurrent L4-L5 disc herniation was the cause of the Appellant's neurological symptoms. While waiting for an MRI, the Appellant experienced periodic episodes of his right leg giving way, which led to emergency room visits. Then, the MRI exam ultimately showed disc protrusions at L3-L4 and L4-L5, explaining the right-sided radicular symptoms. Counsel submitted that this chain of evidence would lead a reasonable person to the logical conclusion that, on a balance of probabilities, the July 5, 2009 motor vehicle

accident enhanced the Appellant's pre-existing disc problems to the point that he required surgery to the L4-L5 disc.

Accordingly, counsel for the Appellant requested the Commission to overturn the Internal Review decision of September 9, 2011 and find that, on a balance of probabilities, the Appellant's need for back surgery in December 2010 was a consequence of the July 5, 2009 motor vehicle accident.

Submission for MPIC:

Counsel for MPIC took the position that the Appellant's L4-L5 disc herniation, which required surgery in December of 2010, was not causally related to the motor vehicle accident, but rather to significant back injuries preceding the July 5, 2009 incident and other later incidents which occurred in the home.

Counsel for MPIC made it clear that she viewed the motor vehicle accident of July 2009 as a "parking lot incident". Prior to this incident, she noted, the Appellant had a 23 year history of significant cervical and lumbar injuries in the workplace. He was considered 20% partially disabled due to his cervical condition and 30% disabled due to his lumbar spine condition, by the [text deleted] Workers Compensation system.

Then, following the motor vehicle accident, the Appellant injured himself when he fell in the bathtub, and also when he was lifting his child.

Following the incident in the bathtub, the Appellant was provided with a diagnosis of chronic back pain and advised to follow-up with the pain clinic. Following the incident lifting his child, he was diagnosed with sciatica, thought to be linked to an L4 vertebrae problem.

In fact, counsel for MPIC submitted the motor vehicle accident consisted of a very low speed incident where a vehicle bumped the Appellant, causing him to lose his balance. The Commission was provided with differing accounts of what happened on that day, from the Appellant and from the written accounts of witnesses at the scene. The Appellant testified that the motor vehicle accident was of sufficient force to propel him from the witness stand in the hearing room several feet across to the exit door, flying through the air, yet evaluations at the scene by emergency personnel noted no obvious trauma.

Counsel submitted that the written account provided in the driver's statement was more accurate and credible, as the driver did not have any motive to downplay the incident. The driver's description set out the very minor nature of the incident. Nor did emergency personnel at the scene after the accident note any neuro-sensory or motor function difficulties, or injuries to the lower limbs.

Counsel urged the panel to have careful regard to the reports of the Appellant's health care practitioners. None of them linked the requirement for the Appellant's surgery to the motor vehicle accident, on a balance of probabilities.

[Appellant's neurosurgeon's] report of February 2, 2011 indicated that he could not comment on the causality of the prolapsed disc other than to note the temporal relationship of the Appellant's

pain complaints to the motor vehicle accident. He noted that quite clearly, based on MRI pictures alone, this is not something one can "rationally comment on".

[Appellant's doctor #2's] report of February 28, 2013 indicated that, as she was not a surgeon, she could not comment on whether the disc protrusion occurred as a result of the motor vehicle accident or other incidents such as the bathtub incident. Although [Appellant's doctor #2], in her report dated November 25, 2009, had referred to the Appellant's "year history of worsening low back pain with radiation to his legs bilaterally" she was not asked or given an opportunity by the Appellant to dispute this comment, so the panel must be left with the assumption that this information was correct.

The report of the nurse practitioner, [text deleted], on July 22, 2014 indicated that without access to medical records between the date of the motor vehicle accident and the Appellant's intake exam of May 3, 2010, it was difficult to ascertain whether the Appellant's symptoms were exacerbated following the motor vehicle accident. She also made note of the Appellant's deconditioning and poor muscle strength.

Counsel also relied upon reports from MPIC's Health Care Services medical consultant who had performed a file review of all the reports and documents and concluded that there was no causal relationship between the motor vehicle accident and the requirement for the 2010 back surgery. His report of April 20, 2011 listed a number of reasons why he concluded that there was no cause and effect relationship, including the prior medical history of chronic low back pain that also affected the Appellant's lower leg, no obvious trauma noted on site following the motor vehicle accident, and [Appellant's doctor #1's] notation of exacerbation of prior degenerative disc disease. Neurological examinations conducted in the emergency department in May of 2010

did not show any abnormalities. The Health Care Services team reviewed further information obtained from the Appellant's caregivers, and concluded that this did not cause them to change their opinion.

The Appellant's testimony showed that over the years, he had periodically suffered from flare-ups of back pain which were so bad that they prevented him from even getting off the couch for periods at a time. This, when combined with the medical information on the Appellant's file, should lead the Commission to conclude that the Appellant had not established, on a balance of probabilities, that the Internal Review Officer erred in concluding that there was no causal connection between the motor vehicle accident and the need for the Appellant's back surgery in 2010. It was submitted that the Internal Review decision should be upheld and the Appellant's appeal dismissed.

Discussion:

The MPIC Act provides:

> **Definitions**
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> 70(1) In this Part,
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> **"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
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> (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;
>
> **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;

The onus is on the Appellant to show, on a balance of probabilities, that the motor vehicle accident caused or materially contributed to the disc condition which required surgery.

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

The panel notes that there were indeed several discrepancies in the evidence regarding the circumstances of the motor vehicle accident. Counsel for MPIC relied upon other reports from the scene of the accident and questioned the Appellant's credibility regarding his description. However, MPIC did agree that there was some exacerbation of the Appellant's back and leg symptoms following that accident, although they may have been of a temporary nature. [MPIC's doctor] indicated, on April 20, 2011 that:

> "It is medically probable that [the Appellant] exacerbated his pre-existing chronic pain condition as a result of the incident in question. The file does not contain documentation indicating his pre-existing medical condition was enhanced..."

The panel heard extensive evidence from the Appellant and his wife regarding the Appellant's condition before and after the motor vehicle accident, and the significant changes which occurred. They testified that while the Appellant had some back problems prior to the motor vehicle accident, his condition was better and more functional before the accident.

However, the Appellant does acknowledge that he had a lengthy history of pre-existing back and neck pain, including two compensable workplace accidents and back surgery performed in 1999.

Radiological investigations in 2001 showed narrowing of the L4-5 and L5-S1 inter-vertebral discs as well as minimal osteophite formation at the anterior margins of lumbar discs. An MRI showed loss of disc space height at L4-5 and L5-S1. Axial views showed focal right posterial para-median disc herniation at L4-5 and a small posterior central disc protrusion at L5-S1.

Reports from the workers compensation system in [text deleted] indicated that although the Appellant went on to have an L4-5 discectomy, he continued to complain of symptoms in the lower back. There were also complaints of leg pain. A report of March 7, 2002 described his complaints of:

> "...constant pain in the low back radiating to both buttocks which he described as burning. There was also a throbbing in the right calf that felt like a toothache. There was some discomfort in the left calf as well but this was less on the right side. He was uncertain when the pain started but he felt it was probably from the time of the original injury. He would develop episodes of extreme pain which would occur 1 – 2 times per year. He had pain so excruciating during these times that he had difficulty walking. He had pins and needles sensation over the left foot on the lateral aspect but he did feel more pain in the right leg. He had difficulty lifting up his thighs in the sitting position or in a lying position; however, he was able to walk. The small toes of his left foot became cold and numb when exposed to cold. [The Appellant] described how he almost attended the hospital emergency department recently because of the loss of sensation in the 2 toes after taking his boots off after being out in the cold.
>
> In 1998, he had severe back pain which was so severe that he was unable to walk at all. Eventually he ended up undergoing back surgery. He found that if he sat for longer than half an hour he would have increased pain and he would have to stand up and move around. He had a lot of difficulty estimating what he was able to lift. He noticed that he wasn't able to bend at all, to be very careful how he twisted. He also had a lot of difficulty estimating how far he could walk. He felt that he could walk around the block usually, unless he was flared up. He was able to lift and carry from the fridge a 4-litre milk carton. His wife was quick to point out that he would not be able to do this repetitively. He also felt that he could manage it because it was at hand level and he wouldn't have to change the position of his back in order to obtain it from the fridge. He was not able to say how long he could stand for.

> He had pins and needles in his left hand over the 4th and 5th fingers and he wasn't sure when he first noticed this but remarked it was for a long time."

A review of the indexed file shows that the Appellant's complaints of back and leg pain, with documented degenerative changes, continued throughout the years between his first back surgery and the motor vehicle accident.

A signed statement from the Appellant dated April 29, 2002 indicated:

> "...The motion of my shoulders and legs is of concern for me. The question about why my movements are restricted is difficult to answer. I have pain but it seems that I just can not (sic) move them. There seems to be no power there. The same is true for flexing my hip against gravity in the sitting positions and lifting my leg against gravity in the lying position..."

On November 30, 2002, [Appellant's anesthetist], an anesthetist with the [Clinic], noted the Appellant's persisting neck and low back pain with "evidence of degenerative change and disc bulge at C5-6 as well as an osteophyte formation at C5-6 in addition to that he has evidence of epidural fibrosis incasing the right L5 nerve root..."

[Appellant's anesthetist] reported again on December 9, 2003 noting "a significant degree of neck and back pain" and "degenerative changes at C5-6 disc, as well as asymmetry of the dural tube at L4-L5 particularly on the right side..."

The Appellant's psychologist, [text deleted], described some of the Appellant's complaints in a report of March 18, 2004:

> "...He also feels a burning pain in his lower back and buttocks, and sometimes experiences swelling of the lower back. His right calf throbs and he reports also that he has a numb patch on his right calf. He also has a numb patch on his left calf but it is not as bad as on the right leg. He occasionally experiences a kind of "shock" that goes through his whole body. He also experiences pain in the rib area at times and has a "bruised feeling" in his middle back. He does report that bending, twisting and lifting exacerbate the pain and he gets a sharp back pain if he moves "the wrong way"."

[Appellant's anesthetist] reported on March 14, 2005, again noting the Appellant's significant degree of pain in his upper back and his upper neck, head and lower back. He stated:

> "In the low back, sacroiliac pain facet pain may also be accompanying some nerve root traction from scarring overlying the dura at the site of previous laminectomy."

[Appellant's anesthetist] noted low back pain again on December 16, 2005:

> "...In his low back, the epidural fibrosis compressing the L5 root on the right side may be a contributor to some of the radiating pain and the facet joint arthritis may be a contributor to some of the low back pain and spasms as well..."

The chart notes of the Appellant's general practitioner, [Appellant's doctor #1], noted back spasm on August 27, 2007, flare-up of back pains on October 4, 2007, mid-back rib level pain on November 8, 2007 and L2 (inner thigh) symptoms on February 19, 2008. The next report, of radicular signs in the right calf with back pain, was on August 12, 2008.

Accordingly, the medical evidence shows that although the Appellant did experience relief, as he described, following his surgery in 1999, his back problems continued. The evidence showed that the Appellant's back pain continued, in a chronic manner, with evidence of degeneration at various levels, after this first back surgery and indeed that they continued through the next several years.

After the motor vehicle accident in 2009, the Appellant's complaints increased. Medical investigations, including CT and MRI scans showed significant degenerative disease, with disc changes causing nerve root irritation. An MRI of May 28, 2010 showed:

> "At L2-3 there is a shallow disc bulge but no nerve root compression, central stenosis or foraminal narrowing.
>
> At L3-4 there is a moderate central disc protrusion which just contacts the L4 nerve roots slightly greater on the right side. No definite compression is seen and there is no central stenosis or foraminal narrowing.

> At L4-5 there is disc space narrowing and a disc protrusion is present in the right paracentral area compressing the right L5 nerve root slightly with posterior deviation. There is no central stenosis or foraminal narrowing.
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> At L5-S1 there is considerable degenerative disc space narrowing but only a shallow endplate osteophyte without nerve root compression, central stenosis or foraminal narrowing.
>
> IMPRESSION:
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> The changes are L3-4 or L4-5 could cause right-sided nerve root irritation."

This led to a diagnosis of degenerative disc disease and disc prolapse or herniation, followed by surgery.

The panel reviewed reports completed by three of the Appellant's caregivers, following his second back surgery in December of 2010, and noted their comments regarding causation of the Appellant's condition.

[Appellant's doctor #2], from the [text deleted] Clinic, reported on February 28, 2013:

> "2. Your question asks on the balance of probability is it likely that the L4-L5 disc protrusion result occur (sic) as a result of the motor vehicle accident sustained in July 5 2009, requiring this gentleman to have surgery. I am not a surgeon and can not (sic) specifically comment and would suggest that you go to ask this question of [Appellant's neurosurgeon], a neurosurgeon who performed the micro-discectomy at the L4-5 level on this gentleman...
>
> 4. With respect to the diagnosis of an L3-L4 disc herniation this was present on the May 28, 2010 MRI scan. Imaging prior to the accident in July 5, 2009 did not reveal any sort of issues with disc protrusion at this level. So it is possible that this disc herniation did occur as a result of the accident.
>
> 5. With respect to the degenerative changes present at L5-S1 I find it difficult to comment as prior to imaging in this gentleman did show some degenerative changes at this level."

In September 2010, the nurse practitioner opined that it was possible that the pedestrian motor vehicle accident may have exacerbated the Appellant's condition. Her report of July 22, 2014 stated:

> "Question 1: Did the MVA of July 5, 2009 exacerbate or enhance [the Appellant's] disc condition?
>
> [The Appellant] had chronic neck and back pain pre-dating the MVA of July 5, 2009. At his intake interview and exam on May 3, 2010, he reported chronic neck and low back pain but presented with other more acute symptoms of abdominal pain. At his intake physical exam, he had some weakness in his arms and legs, his neurologic exam was normal. The MRI of May 2010 ordered by [Appellant's doctor #2] did show disc protrusion at L3-L4 and L4-L5 which could irritate the nerve root and account for his leg weakness. This finding was a change from the MRI of August 2001 which showed focal disc herniation at L5 only. Without access to medical records between the date of the accident and May 3, 2010, it is difficult to ascertain whether this patient's symptoms and leg weakness was exacerbated following the MVA. It is probable that given the chronicity of [the Appellant's] pain, he became deconditioned over the years such that the MVA of July 2009 resulted in poor recovery and further deconditioning. Poor muscle strength and deconditioning can enhance [the Appellant's] disc condition and make him more prone to further injury and herniation.
>
> Question 4: Is the diagnosis of L3-L4 disc herniation related to the MVA of July 5, 2009?
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> As explained in question 1, the MVA may have exacerbated [the Appellant's] back pain because he was likely deconditioned after many years of chronic back pain with herniation at L5. Further deconditioning and weakened core muscles would put him at higher risk for disc herniation."

The neurosurgeon [Appellant's neurosurgeon], reported on February 2, 2011:

> "[The Appellant] has requested me to give an opinion as to whether or not the problem he had, related to his motor vehicle accident. Quite clearly based on MRI pictures alone, this is not something one can rationally comment on. The patient has degenerative disc disease at L3-L4, L4-L5, and L5-S1, and preoperatively obviously had the prolapsed disc at L4-L5 on the right. Apparently, this was not present before and this is being documented at [text deleted] by his nurse practitioner and by a CT scan. There is therefore a temporal relationship between the accident and the occurrence of the patient's pain. Aside from this, it is not possible for anyone to comment as to the causality of disc prolapsed."

None of these caregivers have provided an opinion establishing that the need for the Appellant's back surgery was due to the motor vehicle accident. Their reports do not go beyond a recognition that this was a possibility. The evidence and opinions they have provided are not sufficient to meet the onus upon the Appellant to show, on a balance of probabilities, that the motor vehicle accident injury necessitated his back surgery. The panel finds that the Appellant has failed to meet the onus upon him of establishing, on a balance of probabilities, that the need for the surgery was caused by injuries suffered during the motor vehicle accident. Accordingly, the Internal Review decision dated September 19, 2011 is upheld and the Appellant's appeal is dismissed.

Dated at Winnipeg this 26th day of February, 2015.

LAURA DIAMOND

JACQUELINE FREEDMAN

PAUL JOHNSTON