Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-190

PANEL:	**Pamela Reilly, Chairperson** **Leona Barrett** **Dr. Sharon Macdonald**
APPEARANCES:	**The Appellant, [Text Deleted], was represented by [Text Deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Steve Scarfone.**
HEARING DATE:	**May 17, 2022; May 18, 2022**
ISSUE:	**Whether MPIC properly terminated the Appellant's Income Replacement Indemnity ("IRI") benefits on June 19, 2015, on the basis that his injuries were not MVA related.**
RELEVANT SECTION(S):	**Section 70(1) of The Manitoba Public Insurance Corporation Act ("the 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

Background:

On March 20, 2014, the Appellant was waiting to make a right hand turn at a yield when he was rear-ended by another vehicle ("the MVA"). He was looking to the left at the time of impact and hit his head on the pillar between the front and back doors. He reported injuries of left head pain, headaches, left ear pain, injury to left shoulder, left

lower back, left eye light sensitivity and blurred vision, concussion and neck pain. The Appellant reported a pre-existing right knee condition and torn MCL.

As a result of his injuries, the Appellant was unable to return to work as a commercial [text deleted]. Pursuant to the Act, MPIC deemed the Appellant to be a temporary earner and paid him IRI benefits.

In accordance with the Act, after 180 days, MPIC determined the Appellant's National Occupation Code employment to be that of [text deleted]. Pursuant to that determination, on September 17, 2014 MPIC continued the Appellant's IRI benefits.

MPIC referred the Appellant for an independent psychological examination ("IPE"). In the IPE report dated November 24, 2014, the psychologist diagnosed the Appellant with Borderline Personality Disorder, Major Depressive Disorder and Generalized Anxiety Disorder. MPIC's Health Care Services ("HCS") Psychological Consultant reviewed the IPE and concluded that the Appellant's psychological diagnoses were not caused by his MVA.

MPIC's HCS Medical Consultant reviewed the file to determine whether the Appellant's physical injures still prevented him from returning to his determined employment as a [text deleted]. The Medical Consultant concluded that the Appellant did not have an MVA-related medical condition that would prohibit him from driving. Accordingly, by letter dated June 16, 2015, the Appellant's case manager terminated his IRI benefits effective June 19, 2015.

The Appellant requested an internal review of the case manager's decision. At the internal review stage, the Appellant provided additional medical evidence of lower back pain ("LBP"), and another psychological report, both of which the Internal Review Officer ("IRO") referred back to MPIC's respective Medical and Psychological consultants for consideration. The subsequent HCS Reviews by both consultants concluded that the new evidence did not change their opinions that the Appellant did not suffer MVA-related injuries that would prevent him from returning to employment as a [txt deleted].

The IRO issued an Internal Review Decision ("the IRD") dated August 25, 2015 that upheld the case manager's decision. The Appellant disagreed with this decision and on October 16, 2015, filed an appeal to the Commission.

Issue:

Whether MPIC properly terminated the Appellant's IRI benefits on June 19, 2015, on the basis that he did not suffer MVA-related injuries that prevented him from returning to work as a [text deleted].

Decision:

The Panel finds that the Appellant has not proven, on a balance of probabilities, that he suffered MVA-related injuries that prevented him from working as a [text deleted]. The Commission dismisses the appeal and confirms the IRD dated August 25, 2015.

The Hearing

As a result of safety considerations arising from the pandemic, and with the parties' consent, the hearing of the appeal was conducted remotely, through videoconference technology.

In preparation for the hearing, the Commission compiled an Indexed File, which contains all documents agreed upon by the parties as evidence to be relied upon at the hearing. These documents are numbered for ease of reference by the parties and the Panel. Attached to these reasons and marked as Schedule "A" is a copy of the Indexed File Table of Contents.

Appellant testimony and documents:

The Appellant testified that he was [age] and lived in [text deleted], Manitoba. He said that as of February 2022, he had been working as a [text deleted.

The Appellant described the March 20, 2014 MVA when he was stopped for traffic in the right merge lane, attempting to exit [boulevard] onto [avenue]. He was leaning forward and to the left, looking out his driver's window. He was rear-ended and said that when he realized what had happened, he had hit his head on the pillar between the front and back doors. He said that his glasses broke. He said that he was driving a small [sedan] and was struck by a "full size [SUV]".

The Appellant said that he sought medical treatment the next day because his neck and the left side of his head were sore. He also had a bad headache. His said his back and

upper body were really sore. He thought that he was diagnosed with a concussion "a couple days later."

At the time of the MVA, he said he was working as a [text deleted] for [company] in [text deleted]. His duties involved [text deleted].

He said that he was unable to work after the MVA because he could not manage to sit for more than 30 minutes without having to get out and walk around his vehicle. He said his doctor told him he could not go back to driving. MPIC paid him benefits for one year. He confirmed that he had not received IRI benefits since MPIC terminated them effective June 19, 2015.

The Appellant confirmed that when he attended for his Internal Review hearing he provided a letter dated May 29, 2015 from his MD, [text deleted]. He said that [text deleted] had been his family doctor for over 20 years. The Appellant confirmed the contents of [family doctor]'s letter that stated, as follows:

> [The Appellant] is unable to work as a [text deleted] given his severe low back pain that was worsened by his motor vehicle accident. He has been unable to drive for longer than 30 minutes before he needs to get out of his vehicle to stretch his back and move around. This would make it impossible to drive long-distance. This has been present since his accident Mar 20, 2014.

The Appellant said that in June 2015, when his benefits were terminated, he would have had to advise any potential employer of his need to stop every 30 minutes. He would never make it to his destination on time, and no one would hire anyone like him.

Appellant's Counsel reviewed a June 2, 2014 MPIC file note that documented a call from [text deleted] requesting a rental wheelchair for the Appellant because of a possible bulging disc. The Appellant said he recalled being at access Mobility and speaking with the person there.

Appellant's Counsel reviewed the June 2, 2014 x-ray interpretation that stated the Appellant had mild degenerative disc space narrowing at L1-L2, L2-L3 and mild multilevel anterior endplate spurring. The Appellant said that, at this time, his back was "pretty sore" and he "would have wanted to return to work, if he could have".

Appellant's Counsel read the January 17, 2016 MRI interpretation of the Appellant's T12 to S1 lumbar spine image that variously showed minor or shallow disc bulges or protrusions at every level. The Appellant said that although he did not specifically recall, he would have spoken with [family doctor] about these results.

Counsel referred the Appellant to a June 16, 2016 Disability Tax Certificate. The Appellant said that he applied for disability in June 2016 because he had been unable to work in the past year; he needed income. He received CPP disability benefits saying, "A big part was because of my back and also my knees." He received treatment at the [pain clinic] in 2016 consisting of steroid injections into his back, approximately every three months.

Appellant's Counsel reviewed comments in the December 6, 2016 HCS Medical Review, which stated that minor degenerative changes were noted in the Appellant's June 2, 2014 lumbar spine x-ray report. Further, the HCS Medical Review referred to a

CT scan dated July 2, 2014. Counsel read portions of the CT scan interpretation, as follows:

> CLINICAL HISTORY: Worsening pain at mid to lower back after MVA…
> …
> CONCLUSION: Multilevel osteoarthritis as described above, most marked at L4 - L5. There is a tiny central disc herniation identified as described above.

Counsel asked if the Appellant's pain was getting worse, to which the Appellant agreed it was. He confirmed that he was driving his own car as much as he could, but this was "not much". Counsel noted the HCS Medical Consultant's reference to the Appellant's CPP application, on which [family doctor] had documented that the Appellant was no longer able to work at any occupation as a result of severe and prolonged disability.

Counsel asked the Appellant if he recalled being diagnosed with PTSD. The Appellant said that MPIC referred him to Registered Clinical Psychologist and PhD, [text deleted], who diagnosed him with PTSD. The Appellant said that he was depressed because he could not return to work. His relationship with his wife had broken down and he was all alone. He was in a bad place after the MVA.

Appellant's Counsel reviewed a January 27, 2017 letter from the Spine Assessment Clinic. The Appellant agreed with the letter's statements describing his limitations in function that related to the degenerative changes noted in his January 17, 2016 MRI. The Appellant testified that in late January 2017 he did not drive or do any work because he was "not able to sit for any length of time, or stand in an assembly line for any long period of time."

The Appellant said that after the termination of his benefits, he separated from his wife and moved from [text deleted] to [text deleted], MB. He was still in a lot of pain despite his pain medications, which his care providers had changed. He was also receiving different back injections.

He said that his CPP Disability income was insufficient and also, for his mental health, he needed to work. He said that from April to August 2018 he drove a passenger bus between [text deleted] and [text deleted], which he could manage because the drive was only 30 minutes and he could get out and stretch at each end of the trip.

He also obtained his [text deleted] job licence and was hired as a [text deleted] at [entertainment venue], where he operated the scanning machine from September 2018 until February 2022. He worked part-time and he was allowed to sit or stand as needed, which was ideal because this was all he could manage. Toward the end of 2021, he switched from part-time to full-time. He did not work at [entertainment venue] between November 2020 and February 2021 because events were cancelled due to COVID19.

In addition, the Appellant testified that starting in August 2020 he drove text deleted]. He delivered items to [grocery store], working 4 shifts on and 4 shifts off. The longest distance he drove was between [text deleted] and [text deleted].

He reiterated that he now worked as a [text deleted]. Both vehicles are “air ride” and each job only requires 30 minutes of driving. He said his back was still sore but he copes. He was receiving a new treatment called “rhizotomy” that involves 4 long

needles with electrodes inserted into the right side of his back, which burn certain nerves. He received this treatment every 4 months so that he "will have very little pain." He was taking the same medications as before, although "not nearly as strong." His medication helps him sleep at night after a hard work-day, and he sometimes took medication during the day if his back got too sore.

Appellant cross-examination

MPIC Counsel reviewed the IRD, which stated the Appellant reported being rear-ended by a vehicle travelling 40-60 kms, and that the vehicle damage was $1,240.00. The Appellant confirmed these statements. He reiterated that he was rear-ended by "a big [SUV]…a big one, yep." The Appellant said he experienced symptoms right away but did not think they were serious so he waited to go to the hospital emergency. He said he saw a chiropractor the next day.

MPIC Counsel advised that his initial questions would relate to pre-MVA documents in the Indexed File. These involved prior Worker's Compensation Board ("WCB") claims and a June 2009 MVA, which, he submitted, were relevant to the underlying assumptions in the expert opinions.

MPIC Counsel suggested to the Appellant that his June 2009 MVA was a more serious collision. The Appellant replied that he was not hurt. MPIC Counsel pressed that it was a roll-over accident and the Appellant agreed that it was a more serious MVA.

MPIC Counsel reviewed a June 22, 2009 MPIC file note that documented the Appellant's injuries as neck pain, LBP, 4 cracked ribs on the right side, and sore left

knee. The Appellant said that he did not believe he was hurt in the 2009 accident but conceded that he must have thought so at the time.

MPIC Counsel reviewed September 2009 documents that referred to the Appellant's complaints of neck, back and head pain. The Appellant agreed that investigative CT scans of that time did not reveal significant objective findings.

Counsel referred the Appellant to a WCB document which stated that the Appellant's persisting left shoulder complaints and functional limitations were unclear; his surgeon had expected a full recovery. MPIC Counsel also referred to an October 13, 2009 medical report from Orthopedic Surgeon, [text deleted] in which [orthopedic surgeon] commented that, while it sometimes happens, the Appellant's shoulder surgery had a poor functional outcome without an obvious reason for failure. The Appellant said that he could not recall whether his recovery was as expected.

Counsel reviewed the December 15, 2009 Examination Notes from WCB Orthopedic Consultant, [text deleted], who documented the Appellant's statements that he had full range of motion before his shoulder surgery. [WCB orthopedic consultant] noted that the Appellant's statement contradicted information in the initial consultation report, which stated that the Appellant demonstrated difficulty elevating above 90º, and that passive elevation was quite painful with only a few degrees gain. The Appellant agreed that there was a difference in his reporting about range of motion.

The Appellant initially denied that he had two left shoulder surgeries until presented with the documentation. The Appellant then agreed that he had two left shoulder and one

right shoulder surgery; was diagnosed with arthritis in his right knee; and, had left knee surgery because of an injury. He explained that the doctor “messed me up and there was a snowball effect from there”. He then conceded his left knee surgery was partially because of arthritis. He volunteered that his right knee surgery was after his 2014 MVA.

The Appellant agreed with [WCB orthopedic consultant]’s statement in the December 2009 report that the Appellant “continues on massive doses of opioid analgesic, far in excess of any analgesic requirement for left shoulder pain based on his examination.” Counsel then referred to a June 12, 2012 pre-op report from [family doctor], which documented a diagnosis of right shoulder osteoarthritis and listed a number of the Appellant’s medications including Percocet, clonazepam, Zopiclone and methadone.

The Appellant denied he was taking the listed medications at the time of his 2014 MVA, although he may still have been taking a sleeping pill. He said he was already off methadone in 2011. The Appellant agreed with a June 24, 2012 physiotherapy report that he was experiencing low back pain, chronic knee issues, and awaiting right shoulder surgery. When asked if he had developed a dependency for opioids, the Appellant responded that he did not think so. When asked if he was taking his wife’s prescription medications, he emphatically denied this.

A May 14, 2013 report from Rheumatologist, [text deleted] stated that although a definitive diagnosis of inflammatory arthritis had not yet been made, the Appellant would not be dissuaded from his demand for medication. The Appellant agreed with the statement that he insisted on being prescribed more effective medication, and received prednisone.

The Appellant agreed that he developed an infection in his left ankle from a “big cut” when he “gouged it” on a trailer. An October 24, 2013 medical report from [rheumatologist] stated that he was reluctant to start medication until the Appellant’s infection had resolved, and queried whether the left ankle was associated with an inflammatory arthritis process.

The Appellant said he did not know if he had arthritis in his ankle, but did receive IV antibiotics. [Rheumatologist]’s report also documented the Appellant’s comments that he was symptomatic with arthritis in his wrists, hands, knees and lower back. The Appellant did not recall those statements.

Moving to documents related to the MVA, and with reference to [family doctor]’s May 29, 2015 medical letter, MPIC Counsel asked the Appellant if he provided [family doctor] with the information about being unable to drive any longer than 30 minutes because of severe low back pain. The Appellant said the information came from him, as well as his doctor’s examination.

Counsel referred to the IPE report completed by Registered Psychologist and PhD, [text deleted], which noted that the Appellant’s extremely low scores on the Test of Memory Malingering, suggested the likelihood of malingering and an exaggeration of his struggles with memory. [Psychologist] further stated that “…it is likely that any self-report [the Appellant] provides will over-represent the extent and degree of symptoms he may be experiencing.” Counsel suggested that this statement applied to the Appellant’s reports to [family doctor]. The Appellant said “no”.

[Psychologist] concluded that on psychological testing, the Appellant "displayed a consistent attempt to present in a negative way and magnify or over-endorse his problems and symptoms." The Appellant said he did not specifically recall the assessment but disagreed with those conclusions.

MPIC Counsel reviewed the diagnoses of Borderline Personality Disorder, Major Depressive Disorder (moderate), and Generalized Anxiety Disorder. Counsel read from the IPE, at page 10, as follows:

> It appears that most of [the Appellant's] physical and mental health problems predated the March 2014 MVA. There were preexisting [sic] issues with personality functioning, depression, anxiety, and chronic pain prior to the accident that appear to have resulted in a stronger than typical reaction to the severity of the MVA that he was involved with (that did not result in serious physical harm.)

Counsel asked the Appellant if he agreed that he did not suffer serious physical harm and that he exaggerated his complaints. The Appellant disagreed with this statement. Counsel asked if he remembered meeting with the psychologist for five hours, to which the Appellant responded, "no".

Counsel referred to statements in the IPE that [family doctor] had also identified issues with depression, anxiety and Borderline Personality Disorder. The Appellant said that he has never disagreed that he was depressed or had anxiety issues.

With reference to the Disability Tax Credit Certificate dated June 16, 2016, the Appellant confirmed [family doctor]'s description of his impairments as osteoarthritis of the knees, obesity and borderline personality disorder. Counsel noted that the December 6, 2016 HCS Medical Review had referred to [family doctor]'s June 17, 2015

Medical Report to Service Canada (not the Tax Certificate), which listed the following conditions:

- Chronic severe LBP;
- Degenerative arthritis, left knee;
- Head injury characterized as occipital neuralgia and hemi facial spasm;
- Migraine;
- Depression;
- Post traumatic stress disorder;
- Seronegative rheumatoid arthritis.

The Appellant agreed that not all of these listed conditions were related to his MVA, saying that while his PTSD was related to his MVA, his osteoarthritis/arthritis was not. He agreed that pre-MVA he suffered from depression and mild migraines.

MPIC Counsel reviewed the August 25, 2015 IRD with the Appellant and confirmed that the issue for MPIC was whether the Appellant's LBP was causally related to his MVA. The Appellant understood, but said he did not agree with that position.

With respect to his employment, the Appellant agreed that [company] got someone else to [text deleted] while he was collecting IRI benefits. When asked to confirm that he was laid off, the Appellant replied, "That's the nice way to put it". The Appellant confirmed that it was his opinion that he would be unemployable because of his need to take breaks from driving, and he confirmed that he did not approach any employers to ask for accommodation for his disability.

Appellant closing submissions:

Appellant Counsel emphasized the chronology and impacts of the MVA. He said that at the time of the MVA the Appellant was a full-time [text deleted] when he was rear-ended

on March 20, 2014 and within days, the Appellant sought treatment for neck and back pain, and blurred vision.

Appellant's Counsel reviewed the July 2, 2014 CT scan of the Appellant's thoracic and lumbar spine and noted the tiny central disc herniation at L4-L5. The Appellant sought and received IRI benefits and attended physiotherapy for his back and neck pain. Counsel noted the April 2, 2015 Physiotherapy Progress Report comments that the Appellant's tolerances for walking, sitting and standing remained unchanged and recommended that a Functional Capacity Evaluation (FCE) be conducted to determine the Appellant's employment capabilities.

Counsel reviewed [family doctor]'s May 29, 2015 opinion stating that the Appellant was unable to work due to severe LBP, which was worsened by the MVA, and he was unable to drive longer than 30 minutes. Counsel pointed out that the Appellant's IRI benefit was discontinued not more than one month later on June 19, 2015.

Counsel reviewed [family doctor]'s June 26, 2015 letter that stated the Appellant sustained injuries to his head, neck and back, he had significant issues with headaches, LBP and anxiety – PTSD. It stated the Appellant cannot drive for more than 15 minutes without needing to stop and stretch and when he does, he cannot walk for a minute or two.

He submitted it was [family doctor]'s opinion that the Appellant's back pain was significantly caused by the MVA even if he had back pain in 2010. Counsel stressed that [family doctor] had been treating the Appellant for many years. He noted that this report was only one week after the Appellant's IRI was discontinued.

Counsel referred to the July 3, 2015 letter from Clinical Psychologist, [text deleted] to whom MPIC had referred the Appellant, while he awaited his IPE. Counsel quoted from the letter, noting [clinical psychologist]'s 12 sessions with the Appellant, and that [clinical psychologist] administered a series of psychological tests "to provide extra data for an accurate diagnosis and treatment plan."

Counsel submitted that [clinical psychologist] diagnosed the Appellant with PTSD from his MVA, and stated that, in his assessment, the Appellant was not malingering, but had represented himself honestly during testing.

Counsel referred to the January 17, 2016 Lumbar Spine MRI that showed multi-level disc bulges and degenerative changes in the Appellant's spine. He submitted that the Appellant's diagnosed injuries in July 2014 were worsening, and therefore the notion that the Appellant was a malingerer who was not advancing his claim in good faith, should be discounted.

Counsel referred to the December 6, 2016 HCS Medical Review that documented the degenerative changes in each of the Appellant's 2014 x-ray and CT scan results. Counsel submitted that the report appeared to ignore that there could be a line drawn from the early diagnosis in July 2014 of degenerative discs, to the Appellant's inability to return to work as a long distance [text deleted]. He submitted that there is in fact a direct line from the Appellant's 2014 injuries, which were aggravated and then worsened over time. He submitted that this conclusion is supported by the evidence from [family doctor] and the Appellant's physiotherapist.

Counsel submitted that the January 27, 2017 correspondence from the [spine clinic] documented the Appellant's limitations with respect to his activities of daily living, although his sitting time had improved to 40 minutes. He submitted that the Appellant described his back eventually improving, which allowed him to work part-time and ultimately obtain his full-time [text deleted] job. However, the Appellant still required shorter, local driving trips with breaks to manage his pain.

Counsel submitted that the Appellant's testimony, about the significant damage to his lower back as a result of the MVA, is supported by [family doctor], the diagnostic imaging, and the subsequent referrals to physiotherapy and the [spine clinic]. He noted that the Appellant took the time necessary to recover. He then obtained employment, while also pursuing his appeals. He submitted that, on balance, the evidence showed the Appellant was not able to work in June 2015 and this was too soon to discontinue his IRI benefits.

MPIC closing submissions:

MPIC Counsel submitted that in order to succeed, the Appellant must show, on a balance of probabilities, that it is more likely than not that his chronic LBP was caused by the March 20, 2014 MVA. On the psychological issue, as noted in the IRD, cognitive therapy was provided but discontinued when [psychologist] completed her report and the HCS Psychological Consultant concluded the Appellant's psychological condition was not MVA-related. Counsel noted that this issue was not part of the Appellant's initial request for review, but the IRO nonetheless enlivened this issue when he engaged HCS to review the report of [clinical psychologist].

Counsel submitted that if the Appellant makes out either the physical or psychological components of the appeal, then he is entitled to IRI beyond June 2015. However, MPIC's position is that the documentary evidence makes clear that neither complaint can be related to the March 2014 MVA. All of the Appellant's conditions were pre-existing and, as seen in the [hospital] chart note of March 22, 2014, the only diagnosis was left-sided neck pain.

Counsel noted that although the claim period was relatively short, the documents are voluminous, due to the Appellant's complex pre-accident history. Counsel divided his submissions into the components of past medical history, and then the Appellant's respective MVA-related physical and psychological conditions.

Past medical history

Counsel submitted that the March 2014 MVA cannot be viewed in isolation, but must be viewed in the context of the nearly 200 documents that outline the Appellant's prior medical history. It was noteworthy that the Appellant was involved in a June 2009 violent MVA in which the car flipped from side-to-side and then front to back.

Counsel submitted that the Appellant tried to downplay his 2009 MVA until he was confronted with the documented injuries. [Family doctor] documented that the Appellant was mixing medications, and described the Appellant as a chronic opioid user. Counsel reviewed medical reports from September 2009 that documented the Appellant's ongoing complaints of head and neck pain, but noted that imaging and neurological

assessments were unremarkable. He submitted that this represents the first sign of the Appellant's malingering.

Counsel submitted that we saw other examples of malingering in relation to the Appellant's WCB claim for his left shoulder. He had ongoing complaints, but the doctors were perplexed because the Appellant's recovery appeared to be progressing well. Counsel pointed out the inconsistent reports by the Appellant about his shoulder ROM.

MPIC Counsel pointed out the inconsistent testimony of the Appellant in denying he had had a second surgery on his left shoulder, which is contradicted by the WCB documentation that confirmed he had a second surgery in February 2010. Counsel also pointed out the documentation from 2012 that demonstrated a pattern of opioid reliance such as methadone and Oxycocet, which his practitioners considered barriers to good functional outcomes regarding the Appellant's joint problems. Similar and numerous medications are also documented in 2013.

MPIC Counsel referred to the medical documentation that showed the Appellant's non-compliance with medical orders such as removing his IV and leaving the hospital early after surgery on his right shoulder, and not following orders with respect to antibiotic medication, despite similar behaviour in the past leading to infection. Counsel submitted that during the WCB claim, and in relation to the June 2009 MVA, the documents showed that the Appellant did not help in his own recovery.

A September 2012 report from physiotherapy diagnosed chronic low back pain that "comes and goes but never goes away completely." The physiotherapist noted: "This

just seems to be an ongoing cycle of pain and settling…" Counsel submitted the Appellant had long-term chronic back pain.

MPIC Counsel compared the February 16, 2013 MRI of the Appellant's lumbar spine with his January 17, 2016 lumbar spine MRI. Counsel submitted that we do not know if such comparison leads to a conclusion that the Appellant's spine condition was worsening, but we do know that the Appellant had pre-existing degenerative changes. He suggested that a worsening condition could also be due to the Appellant's diagnosed arthritis. He submitted that the degenerative changes existed long before the March 2014 MVA, and there is no evidence in the medical documents that the disc bulging or degenerative changes were the result of the MVA.

MPIC Counsel noted the importance of the WCB documentation regarding the Appellant's claim related to his ulcer that developed from his small cut. This injury was only one year prior to the MVA. Counsel referred to the Appellant's cross-examination in which he denied his cut was small. Counsel referred to the August 21, 2013 WCB File memo that documented the "worker had a cut… was like a small paper cut and it stopped bleeding. He wasn't going to go to ER for a quarter inch cut."

Counsel noted with interest the WCB documentation dated August 22, 2013 that said, "I called the worker…he says he did not say anything to anyone. The cut seemed insignificant. There were no witnesses." WCB documents showed that it denied the claim because there were no witnesses. However, the Appellant later contacted WCB to say that he forgot to mention there was a witness who saw him "get scratched", but he did not think to mention this person because they were American and not Canadian.

Counsel submitted that these details support the underlying psychological findings, referred to in the IPE.

Counsel submitted that the IPE called into question the reliability of the Appellant's self-reporting. He submitted, noting other references to the Indexed File, additional examples of the Appellant's inconsistent descriptions of his injuries as between claim adjusters and medical practitioners, and how often his medical practitioners were perplexed by the Appellant's apparent delayed recovery from his various injuries.

MPIC Counsel submitted that his lengthy review of the Appellant's prior history was also relevant in relation to the Appellant's March 21, 2014 Initial Chiropractic Report. Counsel had questioned the Appellant about the information he provided under the heading "5 YEARS PRIOR" patient history. The Appellant answered "no" to the question about whether he had taken more than 4 weeks off work because of a previous injury or health problem. Counsel submitted that this is clearly inconsistent with the WCB documentation for the years 2009 to December 2013, which showed the Appellant's 2013 WCB claim for his "cut" was seven months in duration.

MVA and physical injures

MPIC Counsel reviewed the HCS Medical Review opinion dated August 19, 2014. The Medical Consultant considered the vehicle damage information, which demonstrated minor damage to the rear of the Appellant's vehicle, and reflected a relatively low-energy collision mechanism. Counsel read the following portion of the Medical Review, at page one:

> … An anatomic diagnosis with respect to back symptoms such as fracture, dislocation, or neurologic disorder is not supported by the information on file; rather, the current presentation could be characterized as non-specific back pain superimposed on a complex medical history of chronic pain (for which opioid medication was used on a pre-collision basis), rheumatoid arthritis, bilateral knee osteoarthritis, migraine headache, strabismus and amblyopia of the left eye, and depression…

And at page two:

> … A clear temporal relationship between the collision and increased back symptoms is not supported by the clinical notes; the clinical notes following the collision identified neck pain and headache.
>
> Given the collision mechanism, the probable collision-related diagnosis is Whiplash Associated Disorder (WAD) Type II of [the Appellant's] cervical spine...

Counsel referred to the August 11, 2015 HCS Medical Review opinion and read the comments from page two, as follows:

> … non-specific back pain is a multifactorial condition, without a single probable cause. In the context of [the Appellant's] pre-collision medical history, which includes multiple risk factors for back pain, and based upon the medical evidence following the collision, the collision in question was not the probable cause for the development of [the Appellant's] reported low back symptoms.

Counsel submitted that this statement is unequivocal and makes sense given the low energy nature of the collision, and the Appellant's complex medical history.

<u>MVA and psychological condition</u>

MPIC Counsel next referred to the July 29, 2014 HCS Psychological Review opinion. He noted the documented MVA circumstances that state the Appellant was rear-ended by a [SUV]. Counsel submitted this is an SUV but significantly smaller than the "big" [SUV] testified to by the Appellant.

Counsel reviewed the December 23, 2014 HCS Psychological Review and submitted it described a lot of what appeared in the IPE, noting that the independent psychologist, [psychologist], was retained to help determine the impact of the MVA on the Appellant's psychological functioning. Counsel quoted from page four of the HCS Psychological Review, as follows:

> Overall, [psychologist] indicated that [the Appellant's] symptoms were consistent with DSM-5 diagnoses of Borderline Personality Disorder, Major Depressive Disorder (MDD; moderate), and Generalized Anxiety Disorder (GAD). She indicated that, *It appears that most of [the Appellant's] physical and mental health problems predated the March 2014 MVA. There were preexisting issues with personality functioning, depression, anxiety, and chronic pain prior to the accident that appear to have resulted in a stronger than typical reaction to the severity of the MVA that he was involved with (that did not result in serious physical harm). The magnitude of the functional impairment that he has experiences* [sic] *since the March 2014 MVA appears to be related to his underlying personality characteristics, his psychological reaction to his physical pain and losses he has suffered (his perceived inability to be involved in some previous physical activities, change in work status), poor coping skills, and his investment in portraying himself in an overly negative light.* [Psychologist] noted that his tendency to exaggerate difficulties makes it harder to determine the severity of his symptoms and to comment on *what symptoms are actually present.* She added that *[the Appellant's] insistence that all of his current mental health and physical problems related to the relatively minor MVA is most likely explained by his need to find blame for his feelings of personal failure (i.e., externalizing the focus of his problems to avoid other uncomfortable feelings), or a conscious effort to achieve secondary gain.* [Italics in original]

MPIC Counsel submitted that the Appellant's Borderline Personality Disorder was diagnosed in 2012. He referred to the HCS Psychological Review pages 4-5, as follows:

> [The Appellant] was struggling with anxiety and depression prior to the MVA in question. Current psychological symptoms are thought to be consistent with diagnoses of MDD and GAD. He also has a diagnosis of Borderline Personality Disorder, which by definition, is an enduring

> pattern of inner experiences and behaviors that typically develops in adolescence or early adulthood. His personality pathology and poor coping abilities were thus pre-existing conditions. It should also be noted that people with Borderline Personality Disorder typically have chronic problems with depression and anxiety.

Counsel submitted that we saw hints of malingering during the Appellant's cross-examination particularly when the Appellant was asked about the 'ulcer and cut' claim with WCB. He submitted that the Appellant's inconsistent responses were consistent with [psychologist]'s findings.

Counsel reminded the Panel of his cross-examination questions regarding the Appellant's self-reported ability to sit for long periods, which formed the basis of [family doctor]'s statements about the Appellant's inability to drive for long distances. He submitted that, pursuant to [psychologist]'s IPE and findings, we must consider carefully the veracity of the Appellant's self-reporting.

MPIC Counsel read a portion of the December 23, 2014 HCS Psychological Consultant's conclusions at page 5, as follows:

> The claimant was involved in a MVA of minor severity. One would not expect an individual to develop GAD or a MDD episode of moderate severity following such an accident… On the balance of probabilities, it is the writer's opinion that [the Appellant's] current psychological challenges were not cause [sic] by the MVA in question. As such, the pre-approved individual psychological services are not supported at this time. Indeed, it appears that current psychotherapy services with [clinical psychologist] are not focused on MVA-related challenges. It would however be reasonable for [clinical psychologist] to have two more psychotherapy sessions with [the Appellant] to terminate services…

Counsel noted that the HCS Psychological Consultant reviewed [clinical psychologist]'s subsequent letter, and in a further review dated August 21, 2015, he concluded that [clinical psychologist]'s letter did not alter the above opinion.

MPIC Counsel submitted that it is important to consider the Appellant's pre-MVA medical and psychological history. He submitted that the evidence does not show causation on a balance of probabilities, and MPIC rightfully ended the Appellant's IRI.

Appellant rebuttal

Appellant's Counsel cautioned against imputing the Appellant's subjective characteristics from the WCB documents. He submitted that the fact there are competing opinions in relation to the Appellant's condition, does not automatically impute malingering on his part. The issue is whether the denial of IRI was improper.

Legislation:

The applicable section of the MPIC Act is as follows:

> **Definitions**
>
> **70(1)** In this Part,
>
> **"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,
>
> **Powers of commission on appeal**
>
> **184(1)** After conducting a hearing, the commission may
>
> (a) confirm, vary or rescind the review decision of the corporation; or
> (b) make any decision that the corporation could have made.

Substantive Issue:

Did MPIC properly terminate the Appellant's IRI benefits on the basis that the Appellant's lower back pain and psychological condition were not MVA-related?

Discussion:

The Appellant bears the burden of showing, on a balance of probabilities, that MPIC improperly terminated his IRI. The basis for the termination was that his lower back pain was not causally related to the MVA. At the Internal Review stage, the Appellant submitted a psychological report which the IRO accepted as part of the Appellant's appeal. Therefore, the Appellant's psychological functioning became part of the appeal before this Panel.

Consideration of the Appellant's pre-MVA history

Over half of the 386 documents in the Indexed File relate to the Appellant's pre-MVA medical history, which involved WCB claims and a prior 2009 MVA. The Panel considered the Appellant's pre-MVA documents, and noted the documented inconsistent and sometimes exaggerated reports about the severity of his injuries, as well as his care providers' concerns about his medication use.

With the Appellant's pre-MVA history in mind, the Panel considered the Appellant's testimony and the 2014 MVA-related documents, and found as follows:

- During testimony, the Appellant embellished the size and type of vehicle that rear-ended him (a "full size", "big" [SUV]);

- During testimony, the Appellant exaggerated his sitting limitation in or about 2017. He stated that he was “not able to sit for any length of time” which is inconsistent with the [spine clinic] letter that stated he was able to sit for 40 minutes;
- During testimony he exaggerated the severity of the cut, describing it as a “big cut” and a ‘gouge’, which contradicts his previous description of it being an insignificant “scratch”;
- On the March 21, 2014 Initial Chiropractic Report (one day post-MVA) the Appellant under-reported his pre-MVA time off work due to injury;
- The Appellant testified that he stopped taking methadone in 2011, which is contradicted by [family doctor]’s letter dated April 10, 2014 that states the Appellant is “on chronic methadone for knee pain”;
- The Appellant provided inconsistent and contradictory reports about his driving time tolerance to his occupational therapist (“OT”). (May 9, 2014, [text deleted], OT Initial Report);
- The Appellant did not voluntarily report to his OT that he was taking methadone for a pre-existing knee condition, (May 9, 2014, [text deleted], OT Initial Report)
- During testimony, the Appellant denied taking his wife’s medication, however this is contradicted in the OT report, which states that he advised he was taking his wife’s Hydromorphine [sic] (May 9, 2014, [text deleted], OT Initial Report);
- The Appellant’s OT documented his self-medicating behaviour as being a barrier to recovery (May 9, 2014, [text deleted], OT Initial Report).

The above examples represent the Appellant's embellishment, exaggeration and inconsistency. When such examples are present in an individual's statements, including testimony, they undermine the reliability of those statements and testimony. Notably, the above examples are consistent with the Appellant's pre-MVA behaviour and injury reporting, and demonstrates a pattern of behaviour. Further, [psychologist] made similar findings in her psychological evaluation.

In particular, [psychologist] documented the Appellant's stronger than typical reaction to the severity of the MVA (i.e. embellishment), his investment in presenting an unfavourable impression of himself (i.e. inconsistent presentation compared to objective findings), and a tendency to over-represent the extent and degree of his symptoms (i.e. exaggeration). [Psychologist] concluded that the Appellant would likely over-represent his symptoms in any self-report.

The Panel finds the pre-MVA documents relevant to the Appellant's pattern of inconsistent reporting and his tendency to exaggerate and embellish. The Panel finds that the Appellant's testimony and self-reporting are unreliable, and therefore primarily relies on the documentary material.

MVA and the Appellant's physical injuries

On the issue of the Appellant's physical injuries, the Appellant emphasized the deterioration of his lumbar spine as depicted on various medical imaging reports. However, the Appellant appeared to gloss over his pre-existing degenerative and arthritic condition as reported in the imaging and the pre-MVA medical records. There

is no evidence to show that the Appellant's arthritic and degenerative changes are causally related to the MVA.

On April 10, 2014, [family doctor] provided a report to MPIC in which he diagnosed the Appellant's MVA related injuries as "Whiplash injury neck and with radicular pain related to scalene (i.e., neck) muscle spasm; Concussion with secondary diplopia." In May 2014, the Appellant's pain seemed to inexplicably escalate, as documented by his physiotherapist, who therefore requested further investigation.

[Family doctor] ordered another x-ray and prescribed a wheelchair for the Appellant on June 2nd. The June 2nd x-ray revealed mild degenerative disc space narrowing and mild multi-level anterior endplate spurring. A subsequent CT on July 2nd showed multilevel osteoarthritis most noted at L4-L5 with a tiny central disc herniation.

The August 19, 2014 HCS Medical Review found that the Appellant was experiencing non-specific back pain that was superimposed on a complex medical history of chronic pain, which was not explained by the MVA. The probable MVA diagnosis was WAD II of his cervical spine. This corresponds with [family doctor]'s April 10, 2014 diagnosis.

The Medical Consultant opined that the collision mechanism did not support an anatomic injury that would explain the Appellant's declining function due to increased back pain, which was first documented two months post-MVA. That is, there was no clear temporal relationship between the MVA and the declining back symptoms.

The Medical Consultant concluded that “a collision-related condition which would prevent [the Appellant] from returning to his previous employment…is not supported by the medical information on the file.”

The Panel notes that in 2014, the Appellant’s self-reports about the duration of his tolerance for sitting and driving, were fairly consistent at 40 - 45 minutes. He reported as follows: July 24, 2014 Physiotherapy Reconditioning Report (tolerance for sitting is 40 minutes); August 6, 2014, Level of Function Form (can only drive 40 minutes b/c of LBP); October 28, 2014, Physiotherapy Progress Report (self-reported tolerance for sitting is 45 minutes); November 24, 2014, IPE (self-report of being unable to sit or concentrate for greater than 45 minutes); December 2, 2014, Reconditioning Progress Report (sitting tolerance unchanged at 45 minutes. The physiotherapist opined that one-hour sitting intervals were likely, albeit with subjective reports of pain.)

On January 19, 2015, [family doctor] completed a CUMIS Insurance Supplemental Disability Claim Form for the Appellant which listed Axis III diagnoses of “head injury; concussion; migraine; hemifacial spasm; occipital neuralgia”. Under the request for any physical/medical conditions, [family doctor] noted “motor vehicle accident Mar 2014”. Again, [family doctor] did not diagnose lower back pain or any back pain related to the MVA.

A February 3, 2015 letter from the Appellant’s physiotherapist documented a “new diagnosis of cervico-thoracic whiplash”. A February 10, 2015 physiotherapy letter noted that the Appellant “was involved in another motor vehicle accident last week.” However,

it is interesting to note that there is no corroborating documentation or information from the Appellant that he opened another MPIC claim file.

Subsequently, a February 17, 2015 physiotherapy letter documented that the Appellant reported he was unable to drive the full distance to his appointment and now had to stop and rest ½ way due to back pain. On March 5, 2015, the Appellant's physiotherapist documented her concern about the amount of medication the Appellant reported taking, and that he admitted to mixing his medication with alcohol.

The Appellant referred to [family doctor]'s May 29 and June 26, 2015 letters in support of his position on causation. It is noteworthy that [family doctor] provided these reports within a month of each other and reported a deterioration of the Appellant's ability to sit; that is, his tolerance dropped from 30 minutes on May 29th to 15 minutes on June 26th. [Family doctor]'s reports are based upon the Appellant's self-reports, and the Panel has found the Appellant's self-reporting to be unreliable. [Family doctor]'s reliance on the Appellant's self-reports undermines the strength of his opinion on causation.

Further, and as previously noted, on April 10, 2014, [family doctor]'s MVA-related diagnosis was "whiplash injury neck and with radicular pain related to scalene muscle spasm; concussion with secondary diplopia". One year later, on March 24, 2015, [family doctor]'s Subsequent Health Care Report documented symptoms of headache, back and neck pain, but his MVA diagnosis was "head injury, migraine, blepharospasm" (involuntary tight closure of eyelids).

[Family doctor]'s May 29, 2015 letter then stated that the Appellant's "severe low back pain was worsened by his motor vehicle accident." The Panel notes that "worsened" does not establish causation of the severe low back pain, but implies a pre-existing condition of severe low back pain. It is only on June 26, 2015 report, 2 years post-MVA that [family doctor] states the Appellant's back pain was caused by the MVA. However, this report lacks a diagnosis or information about objective findings.

There is little question that the Appellant suffers from a long-standing arthritic and degenerative spinal condition. This may very well have been causing the Appellant to experience LBP that hindered his ability to drive long distance. However, as previously stated, there is no medical evidence to show that the MVA caused the arthritic or degenerative changes.

The Panel finds the HCS Medical Review opinion to be more objective and reliable than the opinion of [family doctor] who did not support his opinions with objective findings, but rather, appears to have stated what the Appellant reported. The HCS Medical Consultant Opinion dated August 11, 2015 and endorsed again on December 6, 2015, states as follows:

> In the context of [the Appellant]'s pre-collision medical history, which includes multiple risk factors for back pain, and based upon the medical evidence following the collision, the collision in question was not the probable cause for the development of [the Appellant's] reported low back symptoms.

<u>MVA and the Appellant's psychological condition</u>

[Psychologist]'s examination specifically focused on assessing the Appellant's MVA-related difficulties. Her 11-page IPE was based upon her 5-hours of interview time,

various psychological testing, and her review of 21 documents provided by MPIC that included medical records, OT reports, WCB reports, and chiropractic reports, as well as others. She diagnosed a number of problematic personality traits and warned about malingering and exaggerated self-reports.

By comparison, [clinical psychologist]'s services did not specifically focus on the Appellant's MVA-related difficulties. [Clinical psychologist] provided a brief, seven sentence letter, addressed to [family doctor], which was provided "at the request of our mutual patient". [Clinical psychologist] stated that he met with the Appellant for "12 sessions…from September 2014 to February 2015." [Clinical psychologist] stated that "in addition to patient comments and reports" he administered a series of psychological tests to obtain a diagnosis. [Clinical psychologist] diagnosed Post Traumatic Stress Disorder. His assessment concluded that the Appellant was not malingering.

[Psychologist]'s report is much more detailed and comprehensive than [clinical psychologist]'s brief letter, and [psychologist] provides an analysis of how she came to her conclusions. As such, the Panel gives more weight to [psychologist]'s conclusion about the Appellant's malingering than to [clinical psychologist]'s conclusion. [Psychologist] also concluded that most of the Appellant's physical and mental health problems pre-dated the MVA.

In turn, the HCS Psychological Consultant conducted a forensic file review, as well as considered [psychologist]'s IPE. The Psychological Consultant concluded as follows:

> The claimant was involved in a MVA of minor severity. One would not expect an individual to develop GAD or a MDD episode of moderate severity following such an accident… On the balance of probabilities, it is the writer's opinion that [the Appellant's] current psychological challenges were not cause [sic] by the MVA in question. As such, the pre-approved

> individual psychological services are not supported at this time. Indeed, it appears that current psychotherapy services with [clinical psychologist] are not focused on MVA-related challenges. It would however be reasonable for [clinical psychologist] to have two more psychotherapy sessions with [the Appellant] to terminate services…

Conclusion:

The Panel relies on the HCS Medical and Psychological Consultant reviews, as well as the IPE, to find, on a balance of probabilities, that the Appellant did not suffer MVA-related medical or psychological injuries that prevented him from returning to work as a [text deleted]. The Panel finds that the Appellant has not proven, on a balance of probabilities, that MPIC improperly terminated his IRI effective June 19, 2015.

Disposition:

The Appellant's appeal is dismissed and the August 25, 2015 Internal Review Decision is confirmed.

Dated at Winnipeg this 28th day of July, 2022.

PAMELA REILLY

LEONA BARRETT

DR. SHARON MACDONALD