

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by E.M.
AICAC File No.: AC-02-15**

PANEL: Ms. Yvonne Tavares, Chairperson
Ms. Deborah Stewart
Mr. Wilson MacLennan

APPEARANCES: The Appellant, E.M., appeared on his own behalf, assisted by Mr. Don Woloshyn; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: August 29, 2002

ISSUE(S):

- 1. Entitlement to Income Replacement Indemnity ('IRI') benefits beyond May 21, 2001; and**
- 2. Entitlement to reimbursement of ongoing treatment expenses.**

RELEVANT SECTIONS: Sections 81(1)(a), 110(1)(a), 110(1)(c) and 136(1) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act')

Reasons For Decision

The Appellant, E.M., was involved in a motor vehicle accident ('MVA') on April 25, 2000, when he swerved to avoid a head-on collision, and the vehicle he was operating rolled on to its side. Initially, the Appellant suffered from headaches, head pain, neck pain, back pain, hip pain, and left upper leg pain as a result of the MVA. He attended for treatment of his MVA-related injuries with his chiropractor, Dr. Brian Mestdagh.

At the time of the accident, the Appellant was employed as a long-distance truck driver with [Text deleted], working between 45 to 50 hours per week. He attempted to return to work on April 27, 2000, but his lower back became painful and he was unable to continue his shift. He also had difficulty depressing the clutch of the truck, due to the injury to his left leg.

Since the Appellant was unable to continue with his employment due to the injuries sustained in the MVA, he became entitled to Income Replacement Indemnity ('IRI') benefits in accordance with Section 81(1)(a) of the MPIC Act, which provides that:

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment.

Dr. Mestdagh provided a medical report dated May 28, 2000, detailing the Appellant's ongoing difficulties with his return to his employment. In his report, Dr. Mestdagh stated that:

Functional deficits significant to this patient's employment is that the patient states that, although he may be able to tolerate the back and leg pain, enough weakness in the left leg developed that would seriously compromise his ability to safely depress the clutch in the highway truck. This is the basis of the patient's current disability, but he has progressed fairly well in the last month and strength appears to be returning as the probable lower lumbar discogenic involvement seems to be healing.

The Appellant underwent an Independent Chiropractic Examination with Dr. Chester on June 1, 2000. In his report of June 1, 2000, Dr. Chester noted that:

Following my examination and consultation with [E.M.] it is my opinion that as a result of his accident dated April 5, 2000 (*sic*) that in all probability he suffered from a cervical thoracic muscular ligamentous type of injury. There would be the contusion to the left lateral skull. It is questionable if there was a concussion. There is a lumbar muscular ligamentous type of injury with involvement of the

lumbar intervertebral joint complexes. There is the contusion type of injury involving the left elbow resulting in a left common extensor tendinitis/epicondylitis. There is a contusion/bruising to the ilio-tibial band, mid thigh level.

Following my examination objectively [E.M.] has a mild reduction of cervical rotation, and lumbar extension movements. There is weakness/discomfort noted on resisted muscle testing of the left common extensor muscles and to the left tensor fasciae latae musculature. Subjectively there is cervical thoracic and lumbar discomfort.

...

At this time it is my opinion that [E.M.] is not able to perform his regular work duties. There is still discomfort noted in the cervical thoracic and lumbosacral spine. Sitting for prolonged lengths of time will aggravate both of these situations.

Dr. Chester recommended that the Appellant should be instructed with stretch/exercise activity to the areas of discomfort. Subsequently, the Appellant underwent a detailed Functional Abilities Evaluation at Associated Rehabilitation Consultants of Canada Ltd. ('ARCC'). ARCC recommended that the Appellant should participate in a six-week reconditioning program involving stretching and strengthening exercises. The Appellant commenced such a program at ARCC on or about the beginning of November, 2000. He also continued to attend for chiropractic care in conjunction with the reconditioning program.

In a Discharge Report dated January 12, 2001 from ARCC, it was noted that:

[E.M.] presented with a long history of health issues that predate the motor vehicle accident of April 25, 2000. He admits to having prior chronic pain involving his neck, back, and knees with a significant amount of treatments that were rendered by the chiropractor. These significant injuries were outlined in the initial rehab assessments, please refer. Dr. Mayba also saw [E.M.] and states that he has a pre-existing history of chronic pain in his neck and low back with degenerative changes in those areas. [E.M.] states that he knows he will never return to being 100% because he was never 100% to begin with.

...

Thus although [E.M.] is still experiencing ongoing pain from his injuries related to his motor vehicle accident, it is of this clinic's opinion that he now has the capacity to perform his pre-accident occupation of a long distance truck driver, without causing harm to himself. Pain in itself is not an impairment and he is not impaired from performing work within the heavy physical demand level.

On February 23, 2001, MPIC's case manager wrote to the Appellant to advise him that:

As I advised, based on the totality of the medical information on file, you have the capacity to perform your pre-accident occupation as a long-distance truck driver.

Please find enclosed a copy of Associated Rehabilitation Consultants of Canada's discharge report of January 12, 2001, for your perusal. You will note that the report states the following:

"He now has the capacity to perform his pre-accident occupation of a long-distance truck driver, without causing harm to himself."

"[E.M.] has in the past sought chiropractic care for ongoing back problems, which appear to be due to a degenerative condition and may wish to continue to do so, however, this condition is not a result of his recent motor vehicle accident."

"In regards to further forms of passive care in the form of physiotherapy, massage and chiropractic treatments, [E.M.] has demonstrated the physical capacity to perform his pre-accident employment of a heavy truck driver, this passive treatment as mentioned above cannot be deemed a medical necessity in the ongoing management of [E.M.]'s injuries related to his motor vehicle accident."

....

The medical information on file confirms that you are able to hold the employment that you held at the time of the accident, thus ending your entitlement to IRI benefits pursuant to Section 110(1)(a) of the Manitoba Public Insurance Corporation Act, which reads as follows:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;

Pursuant to Section 110(2)(b) of the Manitoba Public Insurance Corporation Act, this will confirm that you are entitled to a further 90 days of IRI benefits as you lost your job because of the said accident. For your information, we quote the said section as follows:

Temporary continuation of I.R.I. after victim regains capacity

110(2) Notwithstanding clauses (1)(a) to (c), a full-time earner or a part-time earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:

- (b) 90 days, if entitlement to an income replacement indemnity lasted for more than 180 days but not more than one year;

This will confirm that your IRI benefits will conclude on May 21, 2001.

The Appellant sought an Internal Review of the case manager's decision. In the Internal Review decision dated January 16, 2002, the Internal Review Officer upheld the case manager's decision and dismissed E.M.'s Application for Review. After a concise review of all of the medical documentation on the Appellant's file, the Internal Review Officer concluded that the Appellant had not established, on a balance of probabilities, that his ongoing problems, including his shoulder problems, were causally connected to the accident of April 25, 2000.

The Appellant has now appealed the decision of the Internal Review Officer, dated January 16, 2002, to this Commission. The issues which require determination in E.M.'s appeal are:

1. Entitlement to IRI benefits beyond May 21, 2002; and
2. Entitlement to reimbursement of ongoing treatment expenses.

At the hearing of the appeal, the Appellant submitted that the injuries he sustained in the MVA continued to prevent him from returning to work as a long-haul truck driver. He advised that as

a result of the MVA, he developed problems involving his left shoulder, which prevent him from properly operating the steering wheel of a semi-trailer truck. He also testified that he continues to experience ongoing symptoms involving his lower back, left leg, hip and thigh which preclude him from returning to his former occupation.

With regard to his left shoulder problems, the Appellant testified that he developed the shoulder injury as a direct result of the MVA. He explained that the shoulder symptoms weren't identified in the early medical reports because his caregivers felt that the pain radiated from his neck injury. It wasn't until his assessment at ARCC and his reconditioning program that the shoulder injury was aggravated and the shoulder problem was isolated as a source of pain. The Appellant maintains that the shoulder was in fact injured at the same time as he sustained his other injuries in the motor vehicle accident. Furthermore, the Appellant submits that since the shoulder injury, which prevents him from returning to work, developed directly from the MVA, IRI benefits and reimbursement of ongoing treatment expenses should be reinstated.

In support of his position, the Appellant relies on the report of Dr. T.P. Lesiuk, dated October 23, 2001, wherein Dr. Lesiuk expresses the following opinion:

2. Regarding causal/relationship. It is my impression that the AC joint symptoms were aggravated by the exercises received post motor vehicle accident. The AC joint problems are likely pre-existing. I suspect possible aggravation as a result of the motor vehicle accident but would not be able to prove this, as findings are by report. [E.M.] reports ongoing symptoms in the AC joint since the motor vehicle accident and persisting.

He also relies on the opinion of Dr. Peter MacDonald, who noted in his report dated May 13, 2002, that:

I agree that his symptoms are primarily related to the left AC joint. This is in keeping with the opinion of Dr. Thomas P. Lesiuk in the reports supplied. My suggestion is that the patient undergo left shoulder scope, acromioplasty, and resection distal clavicle to treat the AC joint related pain. I think that his current disability is likely related to the accident and the MVA. His longterm disability would be established approximately six months post surgery.

Counsel for MPIC submits that the Appellant has not established, on the balance of probabilities, that the left shoulder problems that prevent him from returning to work are causally connected to the MVA of April 25, 2000. He also notes that there are no medical reports which state that the Appellant is unable to return to work because of the other injuries he sustained in the MVA.

In order to establish an entitlement to ongoing IRI and reimbursement of treatment expenses, the Appellant must demonstrate, on a balance of probabilities, a causal connection between the MVA of April 25, 2000, and his ongoing medical problems. The difficulty in establishing causation in this case arises primarily because of a lack of reported complaints relating to the shoulder injury immediately after the MVA.

There is a lack of documentation on the Appellant's file indicating that his left shoulder was injured at the time of the accident. In E.M.'s Application for Compensation, there is no reference to any shoulder complaints. Rather it is documented that he developed symptoms involving his neck, back and leg as a result of the April 25, 2000 motor vehicle accident. Despite several attendances for treatment with Dr. Mestdagh, there is no report of shoulder complaints in his medical reports until his Treatment Plan Report dated September 26, 2000. Dr. Chester's detailed assessment of E.M. in June 2000, identified symptoms in keeping with a cervical-thoracic musculoligamentous injury as well as a lumbar musculoligamentous injury.

Dr. Chester did not discover any problems involving the shoulder regions. In Dr. Mayba's September 7, 2000 report, he notes that:

Presently he complains that his neck aches and it hurts to rotate his neck; he has aches in the right and left shoulders, more so the left shoulder; his back hurts when he is bending or sitting or getting up or lifting. He complains of pain in the back when coughing.

However, Dr. Mayba does not identify any abnormality related to the shoulder. Lastly, even in the initial assessment at Associated Rehabilitation Consultants of Canada Inc., there is no documentation of E.M. reporting symptoms of shoulder pain.

The Appellant explained that the lack of a reference to his shoulder problems was due to the fact that the treating practitioners related his complaints to his neck and neglected to mention his complaints related to his shoulder. We have difficulty accepting that explanation. Throughout the detailed and concise reports from Dr. Mestdagh and a very thorough report from Dr. Chester, there is simply no documentation of problems involving the shoulder regions. Without any corroboration from these practitioners that they omitted the reference to these complaints, we conclude that the shoulder problem likely presented on or about the beginning of September 2000.

Subsequent to the onset of this complaint, the Appellant aggravated his shoulder with the exercise program at ARCC. We find that the shoulder problem pre-existed the reconditioning program at ARCC and its onset was not related to the exercise program. Although Dr. Lesiuk and Dr. MacDonald came to the conclusion that the Appellant's symptoms were connected to the MVA, based on his subjective account of the incidents related to the injury, we are unable to find such a connection based upon the totality of the objective evidence in the Appellant's file.

With respect to the Appellant's claim that his ongoing complaints relating to his lower back, left leg, hip and thigh continue to prevent him from returning to his former employment, we find that the Appellant has failed to establish, on a balance of probabilities, that those complaints preclude his return to work. Relying on the Discharge Report from ARCC dated January 12, 2001, we find that those injuries had resolved to the extent that E.M. had the capacity to perform his pre-accident occupation of a long distance truck driver as of that date. Similarly, the Appellant did not establish that any ongoing medical treatment he may require was related to the MVA of April 25, 2000.

Accordingly, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer, bearing date January 16, 2002.

Dated at Winnipeg this 7th day of October, 2002.

YVONNE TAVARES

DEBORAH STEWART

WILSON MacLENNAN

[Ed. Note: The note "[Text deleted]" indicates the removal of information which may identify individuals.]