

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by W.M.
AICAC File No.: AC-02-28**

PANEL: Mr. Mel Myers, Q.C., Chairman
Mr. Wilson MacLennan
Mr. Antoine Fréchette

APPEARANCES: The Appellant, W.M., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Tom Strutt.

HEARING DATE: September 11, 2002

ISSUE: Entitlement to Income Replacement Indemnity ('IRI')
benefits from June 29, 1999, to September 17, 1999, inclusive.

RELEVANT SECTIONS: Section 81(1)(a) of The Manitoba Public Insurance
Corporation Act (the 'MPIC Act')

Reasons For Decision

The Appellant, W.M., was involved in a motor vehicle accident ('MVA') on September 7, 1994. As a result of the MVA, the Appellant sustained serious injuries to his face, as reflected in the receipt of a Permanent Impairment award of 47.25%. Included in the injuries that he sustained as a result of the MVA were facial fractures, lacerations, loss of teeth, and concussion. The Appellant was required to undergo surgery which resulted in the placement of two plates near the cheek area and permanent loss of smell and taste. As a result of the MVA, the Appellant has also suffered from headaches, sinus, nasal and vision problems.

After the accident, the Appellant returned to his work, initially on a part-time basis, at the [Text deleted] and, in 1997, was appointed the administrator of this facility. The Appellant advised the hearing that subsequent to the accident he continued to experience ongoing symptoms related to the facial injuries, including problems clearing his mucous, difficulty sleeping due to a blocked ear passage, and headaches which he attributed to the MVA injuries. He also testified that his difficulties in sleeping and the constant headaches made him tired in the morning and, as a result, through 1998 he began to miss time from work in the mornings. He further testified that due to these absences from work, the directors of the [Text deleted] requested in June 1999 that he take some time off work to address his ongoing problems.

The Appellant was absent from work between June 29, 1999, and September 17, 1999. He subsequently claimed Income Replacement Indemnity ('IRI') benefits on the basis that the blocked airway and his headaches were related to his MVA of September 7, 1994, and caused his absence from work.

In a letter dated November 22, 2001, MPIC's case manager wrote to the Appellant to advise him that:

As we discussed, our Health Care Services Department has reviewed the medical information on file. Based on this information, it was their conclusion that a causal link between the motor vehicle accident of September 2 [sic], 1994 and your headaches in 1999 could not be made. As such we are unable to consider your request for Income Replacement Indemnity from June 29, 1999 to August 31, 1999 inclusive.

The Appellant sought an Internal Review of this decision, and the Internal Review Officer, in his decision dated February 22, 2002, confirmed the case manager's decision and denied the

Application for Review. In arriving at his decision, the Internal Review Officer adopted the opinion of a family physician, Dr. Muller, who concluded that the symptoms which prevented the Appellant from working between June 29, 1999, and September 17, 1999, were not connected to the injuries sustained in the motor vehicle accident but were simply a case of stress-related anxiety and depression.

The Appellant has now appealed the decision of the Internal Review Officer, dated February 22, 2002. The issue which requires determination in this appeal is the entitlement to IRI benefits for the period June 29, 1999, to September 17, 1999. The relevant section of the MPIC Act is as follows:

Section 81(1)(a) of the MPIC Act provides:

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;

At the appeal hearing, the Appellant submitted that the Commission should reject the medical opinion of Dr. Muller and accept the medical opinions of Dr. Manfred Ziesmann, a plastic surgeon, and the neurologists, Dr. Mel Fast and Dr. Brian Schmidt. The Appellant asserted that Dr. Muller, who is a family physician, saw the Appellant only on one occasion, knew nothing about the Appellant's medical history and the injuries the Appellant sustained in the MVA and, as a result, little weight should be given by the Commission to Dr. Muller's medical opinion.

The Appellant further submitted that as a result of the MVA injuries, which resulted in a blocked airway, nasal mucous problems and headaches, he was prevented from sleeping properly, and this resulted in his absence from work between June 29, 1999, and September 17, 1999. In support of his position, the Appellant referred to the medical reports of Dr. Ziesmann, Dr. Fast, and Dr. Schmidt.

Dr. Ziesmann is a plastic surgeon who initially treated the Appellant in respect of his facial injuries arising out of the MVA and subsequently saw him on a number of occasions. In a report dated September 12, 1995, Dr. Ziesmann advised MPIC of a number of the Appellant's current problems, including nasal congestion, headaches, numbness of forehead, and easy fatigue. In a further report to MPIC, dated February 7, 1997, Dr. Ziesmann stated that the Appellant continued to suffer from an airflow obstruction, there was an increase in the mucous production since the time of the accident, and the headaches had cleared up.

In his testimony before the Commission, the Appellant challenged Dr. Ziesmann's report that the Appellant's headaches had cleared up in 1997. The Appellant testified that he never advised Dr. Ziesmann that his headaches had cleared up and that Dr. Ziesmann was in error in respect of this comment. The Appellant further testified that his headaches, which were a result of the MVA, had continued and never ceased. The Appellant did, however, acknowledge that as a result of the nasal surgery performed by Dr. Les Garber, his headaches were less severe and permitted him to sleep at night.

The Appellant further testified that in a further report to MPIC, dated January 21, 2001, Dr. Ziesmann indicated that he had seen the Appellant on October 5, 1999, and stated that:

At that time he complained of frontal headaches, which were relieved by Tylenol #3. The headaches were worse when he was at work. He had returned to work full time in 1995, but was now missing work because of the headaches. He complained of difficulty breathing through his nose, and also stated that he had trouble with mucous plugs in his nose. He had lost the sense of smell. As a result of that visit, he was referred to Dr. Les Garber, an ENT Surgeon for treatment of his airflow obstruction; and Dr. M. Fast, a neurologist, for management of his headaches. [W.M.] underwent a septoplasty by Dr. Garber January 21, 2000. According to Dr. Garber, he would require 2 weeks off work in order to recover. I have no record of the result of the visit with Dr. Fast.

[W.M.'s] most recent visit was April 25, 2000. At that time he stated that his headaches were much less frequent and less severe. He also felt that his breathing had improved.

The various problems discussed above are the direct result of injuries sustained in the motor vehicle accident of 1994. The loss of vision in the right eye and loss of smell would be permanent. The headaches seem to be settling, and the breathing problem would seem to have been corrected. [*underlining added*]

The Commission notes that Dr. Ziesmann's report refers to the Appellant's visit on October 5, 1999, shortly after the Appellant's return to work on September 17, 1999. In this report, Dr. Ziesmann clearly states that as of October 5, 1999, the Appellant continued to suffer from headaches, had difficulty breathing through his nose, and had trouble with mucous plugs in his nose, and that these symptoms were the result of injuries sustained in the MVA of 1994. This medical opinion confirms the Appellant's position that his absence from work between June 29, 1999, and September 17, 1999, was due to the injuries he sustained in the motor vehicle accident.

The Appellant further testified that Dr. Ziesmann had referred him to Dr. Fast, a neurologist, who saw the Appellant on November 1, 1999, and provided a written report to Dr. Ziesmann, dated November 4, 1999. In that report, Dr. Fast stated:

The headaches began right after the injury and they have not really changed to the present. They are daily, especially at night. He wakes up because he has difficulty breathing and he has a lot of "mucus" in the nose. He also will develop a right-sided headache at that time. Also, if he spends too much time looking at the computer or has too much stress on the job (he is a [Text deleted] administrator), they will be worse. [*underlining added*]

...

He does miss a bit of work in the morning because he does sleep so poorly at night.

...

In conclusion, I think the headaches are multi-factorial. Part of the problem is from the trauma to the face. An additional part of the problem is analgesic rebound....I understand he is also seeing an ENT specialist regarding the nasal congestion. Certainly solving that problem would help the headaches as well. [*underlining added*]

Dr. Fast, who saw the Appellant approximately six weeks after the Appellant had returned to work, concluded that the Appellant's headaches were caused, in part, by the injuries he had sustained to his face in the MVA. This medical opinion confirms the Appellant's position that his absence from work between June 29, 1999, and September 17, 1999, was due to the injuries he sustained in the MVA.

Dr. Ziesmann also referred the Appellant for an assessment by Dr. Schmidt, a neurologist, who saw the Appellant on February 12, 2002. In this report, Dr. Schmidt noted that the Appellant had identified stress as a major aggravating factor with respect to his headaches over the years. In particular, stress at work had been a problem. However, Dr. Schmidt also stated in his report that:

[W.M.] states that he had no history of headaches until after 1994. In 1994, he was involved in a motor vehicle accident wherein his face and forehead hit the steering wheel. He states he had surgery to repair his face, which included “wires and plates” to repair the nose and sinuses especially over the right side of the face. For several years following the accident, he was on Tylenol #3 because of pain in the facial region. He progressively noted, however, increasing headaches centered in the right frontal area sometimes extending over the parietal occipital region. By 1998, these had increased in frequency such that he was having them almost everyday. Around that time, he saw Dr. Mel Fast, Neurology, who stated he may be over using Tylenol #3 and suggested he decrease his use.

[W.M.] states he was able to decrease his use of Tylenol #3 around 2000, and in that year he also had another operation to “remove dead cartilage”. Since then, he states he has improvement of his headaches and no longer has to use Tylenol #3 on a regular basis. He does, however, still have mild to moderate headaches 4 or 5 times a month and more severe episodes every 2-3 months, which require Tylenol #3.

In summary, the neurological examination is intact apart from the absence of smell, the right enophthalmos, and mild sensory disturbance over the right forehead.

It seems clear that his headaches center around the area of pathology resulting from the motor vehicle accident in 1994. These are not migraine headaches. Along the way, aggravating factors seem to have included stress, especially at work, and possibly a sleep disturbance (for which he is awaiting referral to the Sleep Disorders Clinic). *[underlining added]*

Fortunately, over the past 1-2 years, his headache pattern has improved such that he can now go for several weeks at a time without any headache and the mild to moderate headaches that still occur for 5 times a month respond to Tylenol extra strength.

The Commission notes that Dr. Schmidt has concluded that the Appellant’s headaches were caused not only by stress from work but also from the MVA in 1994. Dr. Schmidt’s medical opinion supports the Appellant’s position that the MVA injuries materially contributed to the Appellant’s absence from work between June 29, 1999, and September 17, 1999.

In his decision dated February 22, 2002, the Internal Review Officer adopted Dr. Muller's medical opinion that stress was the sole cause of the Appellant's absence from work and that the Appellant's symptoms could not be linked directly to the MVA. In arriving at his decision, the Internal Review Officer rejected, in whole or part, the medical opinions of Dr. Ziesmann, Dr. Fast, and Dr. Schmidt who concluded that the injuries the Appellant sustained in the MVA materially contributed to his absence from work.

The Internal Review Officer, in his decision dated February 22, 2002, stated:

In my view, the issue isn't whether the headaches you were experiencing in 1999 were related to the 1994 accident, rather what was the reason you were required to be absent from the workplace? On that point it appears that Dr. Muller's opinion is most helpful as he was specifically asked to comment on whether the reason you were required to miss work was related to the accident. In response to that inquiry and, in the face of your assertion that all your complaints were motor vehicle accident related, Dr. Muller said:

In my mind I doubt that his symptoms could be linked directly to that previous MVA. I think that this is simply a case of stress related anxiety and depression.

Your comments about the level of stress and responsibility you were under at that time would support this conclusion. Therefore while you still may have been experiencing motor vehicle accident symptoms, which may have even contributed to the difficulty you had coping with the demands being placed upon you, in my view, the motor vehicle accident related symptoms were not the cause of your absence to the extent that would be required to invoke the payment of further IRI benefits. Therefore I am upholding the decision of November 26, 2001 and dismissing your Application for Review.

Decision

In order to establish an entitlement to IRI, the Appellant must demonstrate, on the balance of probabilities, a causal connection between his absence from work and the injuries sustained in the MVA of September 7, 1994.

Throughout the hearing of this matter, the Appellant presented himself in a forthright and honest manner, and the Commission determines that he was a credible witness.

The Commission finds that:

- (a) as a result of the injuries the Appellant sustained in an MVA, he suffered from headaches, a blocked nasal airway, and nasal mucous problems which resulted in his inability to sleep and made it extremely difficult for him to work at his job as an administrator of a [Text deleted]. These physical problems, together with the work-related stress that the Appellant suffered from, resulted in his absence from work between June 29, 1999, and September 17, 1999;
- (b) Dr. Ziesmann saw the Appellant on a number of occasions at the time of the MVA and was in the best position to determine why the Appellant was absent from work between June 29, 1999, and September 17, 1999. Dr. Ziesmann was of the view that the headaches, breathing difficulties, and mucous problems were the direct result of the injuries the Appellant sustained in the MVA in 1994 and caused him to be absent from work between June 29, 1999, and September 17, 1999;
- (c) the neurologist, Dr. Fast, specifically found that the headaches that the Appellant suffered from were multi-factorial and that part of the headache problem was due to the trauma from the motor vehicle accident;
- (d) the neurologist, Dr. Schmidt, concluded that the Appellant had suffered from headaches which were caused by work stress and that the headaches in question centred around the area of pathology resulting from the MVA in 1994; and

- (e) the medical opinions of Dr. Ziesmann, Dr. Fast, and Dr. Schmidt corroborate the Appellant's testimony that the injuries the Appellant sustained in the MVA in 1994 resulted in his headaches, blocked airway, and mucous problems which materially contributed to his absence from work between June 29, 1999, and September 17, 1999.

The Commission determines that the Internal Review Officer erred in concluding that the Appellant's absence from work between June 29, 1999, and September 17, 1999, was due solely to stress-related symptoms arising from the workplace and that there was no direct connection to the symptoms the Appellant had suffered in respect to the injuries sustained in the 1994 MVA. The Commission determines that the symptoms the Appellant suffered from and which resulted in his absence from work on June 29, 1999, were due not to a single cause but to a combination of causes.

The Commission has dealt with the issue of causation in its decisions in T.J.-AC-01-42 (dated September 19, 2001) and G.B.-AC-02-34 (dated October 7, 2002). See also *Athey v. Leonati et al* (1996), 140 D.L.R. (4th) 235 (S.C.), *Liebrecht v. Egesz et al*, 150 Man.R. (2nd) 257 (Man. C.A.), *Mitchell v. Rhaman*, 149 Man.R. (2nd) 254, and *McMillan v. Thompson (Rural Municipality)* (1997), 115 Man.R. (2nd) 2 (Man. C.A.).

The Commission finds, on the balance of probabilities, having regard to the totality of the medical evidence and the testimony of the Appellant which the Commission accepts as credible, that the injuries the Appellant sustained in the MVA of September 7, 1994, caused his headaches, mucous problems, and a blocked airway and, together with his work-related stress,

materially contributed to his absence from work between June 29, 1999, to September 17, 1999. As a result, the Appellant is entitled to receive IRI for this absence from work.

The Commission, therefore, determines that:

- (a) the Appellant is entitled to IRI benefits for the period from June 29, 1999, to September 17, 1999, both inclusive, and interest to the date of payment at the prescribed rate; and
- (b) the decision of the Manitoba Public Insurance Corporation's Internal Review Officer, bearing date February 22, 2002, is, therefore, rescinded.

Dated at Winnipeg this 11th day of October, 2002.

MEL MYERS, Q.C.

WILSON MacLENNAN

ANTOINE FRÉCHETTE

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