

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by K.A.
AICAC File No.: AC-00-152**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Yvonne Tavares
Ms. Deborah Stewart

APPEARANCES: The Appellant, K.A., did not attend the hearing;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Jim Shaw.

HEARING DATE: April 4, 2003

ISSUE(S): Entitlement to Permanent Impairment Benefits

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation
Act ("MPIC Act") and Schedule A of Manitoba Regulation
41/94

**MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

Reasons For Decision

The Appellant, who resides in the State of [text deleted], was involved in a motor vehicle accident in the City of Winnipeg on May 23, 1998. The Appellant was the driver of a motor vehicle that was rear ended by a second vehicle that was travelling at approximately 20 mph. As a result of the collision, the Appellant developed neck and mid-back pain, blurred vision, difficulty focusing, lower back pain and a lack of sensation down the entire left leg.

On June 25th 1999, approximately thirteen months after the motor vehicle accident had occurred, the Appellant made an application to MPIC for compensation. In the Application for

Compensation the Appellant described the injuries he sustained at the time of the accident as follows:

“Neck and mid-back pain; blurred vision; difficulty focusing; lower left back pain; devoid of sensation down entire left leg.”

On July 3, 2000 R.L., legal counsel for the Appellant, provided MPIC with a copy of Dr. M. Clay Vaughan’s report dated June 13, 2000. Dr. Vaughan, an Orthopaedic Surgeon, who practices in [text deleted], stated in this report that he evaluated the Appellant on June 13, 2000 in respect of the injuries the Appellant sustained in a motor vehicle accident on May 23, 1998 and further stated:

“He has tenderness and palpable spasm in the left lumbar paravertebral muscles, but has normal deep tendon reflexes in the lower extremities. He has tenderness along the left sciatic nerve pathway through the left buttocks and has positive straight leg raising on the left at thirty-five degrees with negative straight leg raising on the right. A MRI of his lumbosacral spine done on March 6, 1999 shows bulging at L4-5 secondary to damage to the annular ligament protecting that intervertebral disc.

In conclusion, [K.A.] sustained severe whiplash injuries to his cervical and lumbar spine with radicular symptoms secondary to intervertebral disc injuries with pain in the left upper and lower extremities. He is in DRE Impairment Category III for his cervical spine injury, which provides him with a fifteen percent impairment of the whole person (Table 73, Page 110 of Guidelines to the Evaluation of Permanent Impairment by the American Medical Association, Fourth Edition). He is also in DRE Impairment Category III for his lumbosacral spine injury, which provides him with another ten percent partial impairment of the whole person (Table 72, Page 110 of Guides to the Evaluation of Permanent Impairment). His total partial permanent impairment of the whole person is twenty-four percent (using the combined value chart on Page 322 of Guides to the evaluation of Permanent Impairment).”

On receipt of that report, MPI referred the Appellant’s entire medical file to Dr. Michael J. MacKay, MPIC’s Medical Consultant to the Claims Services Department. Dr. MacKay provided an Inter-Departmental Memorandum to MPIC, dated July 31, 2000, wherein he indicated that he had reviewed the Appellant’s file to determine the following matters:

- “1. Given the totality of the medical information, is there objective evidence supporting the existence of a permanent impairment arising from the medical conditions which developed as a result of the collision in question.
2. Are further therapeutic interventions a medical necessity in the management of the motor vehicle collision related medical conditions?
3. Is the bulging of the L4-5 disc a direct result of the May 23, 1998 motor vehicle collision?”

In this Inter-Departmental Memorandum, Dr. MacKay concluded:

IMPAIRMENT

“After reviewing [K.A.’s] file, it is my opinion that the medical evidence indicates that as a result of the motor vehicle collision related to medical conditions, [K.A.] developed a partial temporary impairment of physical function. There is insufficient documentation to identify a medical condition arising from the collision in question resulting in a permanent impairment of physical function. Dr. Vaughan indicated that [K.A.] qualified for 24% Whole Person Permanent Impairment. The medical evidence on file does not support this opinion. I am uncertain as to what parameters Dr. Vaughan used in his determination but the percentage he noted far exceeds any percentage [K.A.] might qualify for if in fact he did develop an abnormality involving the cervical and/or lumbar spine that would qualify him for a permanent impairment award according to the MPI Schedule of Permanent Impairments. Based on my review of the information obtained from the documents contained in [K.A.’s] file, it is my opinion that he does not qualify for a permanent impairment award.” (underline added)

This Inter-Departmental Memorandum, dated July 31, 2000, was reviewed by MPIC’s Case Manager who wrote to R.L. on August 23, 2000 and stated:

“We have referred [K.A.’s] medical information to our Health Services Team for review and opinion. Although Dr. Vaughan has rated [K.A.] at 24% whole body permanent impairment, the medical evidence does not support this opinion. This percentage far exceeds any percentage [K.A.] might qualify for if in fact he did develop an abnormality involving the cervical spine and/or lumbar spine that would qualify him for a permanent impairment award according to the MPI Schedule of Impairments. Medical information does not support any entitlement to a permanent impairment award.

The Appellant provided additional medical documents to MPIC which were forwarded to Dr. MacKay for his review and comment. Dr. MacKay provided MPIC with an Inter-Departmental

Memorandum, dated November 7, 2000, where he reviewed a report from Dr. Guernsey dated May 2, 1999, and he concluded that Dr. Guernsey's examination findings did not identify a condition that might have arisen from the collision in question that would in turn qualify the Appellant for a total permanent impairment award.

Dr. MacKay further stated in his Inter-Departmental Memorandum:

“Comments

The MRI findings identify changes involving the L4-L5 region that are minor in nature. These changes are quite common for [K.A.'s] age group. These changes are not reflective of underlying pathology that would account for his ongoing symptoms. There is no evidence of nerve root compression or foraminal stenosis that might result in the development of sciatica. It is not medically possible to causally relate the changes noted on the MRI to the collision in question. As indicated in my previous review, disc injuries most often occur when the spine is flexed and/or rotated. In a rear end collision [K.A.'s] lumbar spine would not be subjected to any flexion and/or rotation-type movements, in all probability.

It is my opinion, based on the balance of medical probability that the MRI findings are not causally related to the collision in question.”

APPLICATION FOR REVIEW

As a result of the Case Manager's decision to reject the Appellant's entitlement to a permanent impairment award, the Appellant made an Application for Review of the Case Manager's decision, dated October 7, 2000, which was received by MPIC on October 19, 2000.

On November 20, 2000 the Internal Review Officer wrote to the Appellant, care of the L. Law Firm, and relying on Dr. MacKay's Inter-Departmental Memorandums dated July 31, 2000 and November 7, 2000, stated:

“The MPI Medical Consultant, Dr. MacKay, is familiar with the provisions of the Schedule of Permanent Impairments contained in the Regulation. Based upon Dr. MacKay's opinion, with which I concur, it has not been established that you are entitled to any permanent impairment award pursuant to the MPI Schedule of Permanent Impairments. Accordingly, I am dismissing your Application for Review and upholding Mr. Buchanan's decision letter of August 23, 2000.”

The Appellant filed a Notice of Appeal with the Commission, dated February 20, 2001, and enclosed a report which his solicitor, R.L., had received from Dr. Vaughan dated December 12, 2000. In this letter Dr. Vaughan states:

“I am writing in response to the information you received from Manitoba Public Insurance, re: [K.A.]. I do not understand some of the comments made by Dr. Michael J. MacKay. He states “in a rear end collision [K.A.’s] lumbar spine would not be subjected to any flexion and/or rotation-type movements, in all probability.” I must disagree completely. [K.A.] was in a vehicle, which was turning to the left when the vehicle in which he was riding was struck in the rear. His vehicle was struck so hard that the front seats were avulsed from the body of the vehicle. The multitude of forces would require his lumbar spine to be initially extended, then dramatically flexed and rotated. The comment that my report “did not identify any neurological abnormalities” is also false. I noted a diminished left brachioradialis reflex, which is highly suggestive and probably related to injury to the left C6 nerve root. A comment on [K.A.’s] MRI report that the “changes involving the L4-L5 region that are minor in nature. These changes are quite common for [K.A.’s] age group. These changes are not reflective of underlying pathology that would account for his ongoing symptoms.” The injury to the L4-5 intervertebral disc may be due to some injury other than the motor vehicle accident, but the accident cannot be eliminated as the most likely cause of that disc injury. I have no information about any other significant injury to his lumbar spine, which could have caused the intervertebral disc bulging, that was noted on the MRI following the motor vehicle accident.

It is more likely than not that [K.A.’s] left cervical radicular symptoms and his lumbar spine symptoms are directly related to the motor vehicle accident in question. The partial permanent impairment ratings given by me are very readily found in the Guides to the Evaluation of Permanent Impairment by the American Medical Association, Fourth Edition.”

The Appellant subsequently provided further medical reports from the Mayo Clinic to MPIC, who referred these medical reports to Dr. MacKay for his review and comments. Dr. MacKay provided an Inter-Departmental Memorandum to the Case Manager, dated February 21, 2002, wherein he concluded:

“Based on the various assessments [K.A.] underwent at the Mayo Clinic, it was determined that he had the following conditions:

- Low back pain and leg numbness
- Post-traumatic headache (i.e. chronic tension type headache)

- Neck pain
- Irritable Bowel Syndrome
- Gastroesophageal reflex

DISCUSSION

The origin of [K.A.'s] back and neck pain is not known. It is possible that the underlying cervical spondylosis contributes to some of his symptoms. The medical evidence does not establish a cause/effect relationship between the spondylosis and the incident in question.

From an objective standpoint, there is no documentation of [K.A.] having an impairment of physical function that in turn would preclude him from performing any type of occupational activities.

The medical evidence does not indicate [K.A.] has an impairment of physical function that in turn would entitle him to permanent impairment benefits.

The medical evidence does not establish a cause/effect relationship between [K.A.'s] gastrointestinal problems and the incident in question.

CONCLUSION

Based on my review of the new documents submitted to [K.A.'s] file in conjunction with information previously reviewed, it is my opinion that there is insufficient objective evidence identifying [K.A.] as having an impairment of physical function that would prevent him from performing work as a carpet cleaner or performing the duties associated with an ice cream parlor business.”

On February 23, 2002 the Case Manager referred a report from Dr. Fleming of the Mayo Clinic, dated January 8, 2002, to Dr. MacKay for his review and comments. In an Inter-Departmental Memorandum, dated March 4, 2002, Dr. MacKay stated:

“REVIEW OF DOCUMENTS

In a report submitted by Dr. Fleming, a review of [K.A.'s] history and physical examination was outlined. It is documented that [K.A.] had neck and low back pain, most likely the result of a flexion/extension type injury in conjunction with Chronic Pain Syndrome. It is noted that [K.A.] was placed on a trial of oral steroid taper and was encouraged to remain physically active. The examination findings outlined in the report were relatively unremarkable.

In the reports outlining the results of MRI evaluation of the cervical, dorsal and lumbar spine, it is noted that mild degenerative changes were present at the C4-5, C5-6 and C6-7 level. No abnormalities were identified involving the thoracic spine. Mild disc changes were identified in the L4-5 region in the absence of foraminal stenosis. A MRI of the pelvis did not identify any abnormalities.

CONCLUSION

It is my opinion that the information obtained from the medical documents does not identify [K.A.] as having a medical condition that can be causally related to the incident in question. In fact the documents do not specifically identify the source of [K.A.'s] symptoms. It is not possible to establish a cause and effect relationship in the absence of a medically probable diagnosis.

It is my opinion that it is not medically possible to determine whether any of the radiological findings are causally related to the incident in question. The MRI findings are quiet (sic) common in the asymptomatic middle aged population.”

APPEAL

The issue in this appeal is the entitlement of the Appellant to permanent impairment benefits pursuant to Section 127 of the Act and Schedule A of Manitoba Regulation 41/94.

Section 127 of the Act states:

Lump sum indemnity for permanent impairment

127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

The Appellant was represented by R.L. of the L. Law Firm, which is located in the City of [text deleted]. The Commission was informed by an officer of the L. Law Firm that neither the Appellant nor R.L. wished to participate in the appeal hearing either personally or via teleconference.

Counsel for the Appellant set out the basis for the appeal in a letter to the Commission, dated March 14, 2003, as follows:

“This letter serves to set forth the grounds of the appeal in the above-referenced matter. As you are aware, [K.A.] was the driver of a vehicle which was stopped to make a left hand turn when it was rear-ended in an accident which occurred on May 23, 1998. We are appealing the decision by Manitoba Public Insurance which denied permanent impairment benefits to [K.A.].

The basis of our appeal is the medical documentation which has already been forwarded, including the two reports from Dr. Clay Vaughan, copies of which I am enclosing for your review. As you can see by the June 13, 2000 report, Dr. Vaughan concludes that [K.A.] sustained severe whiplash injuries to his cervical and lumbar spine with radicular symptoms secondary to intervertebral disc injuries with pain in the left upper and left lower extremities. Dr. Vaughan places his total partial permanent impairment of the whole person at twenty-four (24%) percent.”

Dr. MacKay testified at the appeal hearing and was examined by both MPIC’s legal counsel and members of the Commission. Dr. MacKay testified that:

(a) his examination of the Mayo Clinic medical reports reinforced his medical opinion that the previous medical documentation provided by the Appellant did not identify a medical condition arising from the motor vehicle accident which would have resulted in a permanent impairment of physical function to the Appellant.

(b) An MRI report of the Appellant’s cervical spine performed by Independent Radiology Services Ltd. on July 17, 1998 stated:

“Conclusions were mild degenerative changes but no acute or subacute disc herniation seen. No cord compression identified.”

and he concluded that there was no acute injury to the Appellant’s disc as a result of the motor vehicle accident.

(c) Subsequent MRI’s showed similar findings which demonstrated that there were degenerative changes to the Appellant’s cervical spine consistent with changes that would occur to a person of the Appellant’s age.

(d) A Mayo Clinic neurological examination, dated November 13, 2000, did not indicate there were any neurological abnormalities based on nerve conduction studies and examinations.

- (e) An electromyography was performed on September 12, 2001 at the Mayo Clinic and the report with respect to this examination revealed:

“SUMMARY: Motor and sensory nerve conduction studies are normal in the left lower extremity. Needle examination of left lower extremity muscles innervated by multiple lumbosacral roots and peripheral nerves is normal.

INTERPRETATION: There is no neurophysiologic evidence for a left lumbosacral radiculopathy.”

- (f) Electromyography is the most definitive way to diagnose radiculopathy and there was no evidence that the motor vehicle accident caused the Appellant to have a radiculopathy.
- (g) The Mayo Clinic medical reports indicated that the Appellant experienced functional limitations due to cervical strain. These reports indicated that sometimes the Appellant had a full range of movement and other times his range of movement was limited. Since there was a variation in movement from full to limited, these reports demonstrated the Appellant did not suffer from a permanent impairment in respect of the cervical strain.

MPIC’s legal counsel, in his submission to the Commission, stated that:

- (a) the Mayo Clinic medical reports submitted by the Appellant were consistent with Dr. MacKay’s medical opinions and inconsistent with the medical opinions of Dr. Vaughan;
- (b) these medical reports corroborated Dr. MacKay’s opinion that the Appellant did not suffer from any permanent impairment as a result of the motor vehicle accident;
- (c) the Commission should accept Dr. MacKay’s medical opinions and reject Dr. Vaughan’s medical opinions in respect of the issue of permanent impairment.

The Commission has carefully reviewed all of the medical evidence, the testimony of Dr. MacKay, the written submissions of R.L., the Appellant's legal counsel, the verbal submissions of MPIC's legal counsel, and has determined that the Appellant has not established on the balance of probabilities, pursuant to Section 127 of the MPIC Act, that as a result of the motor vehicle accident on May 23, 1998 the Appellant sustained a permanent physical impairment.

The Commission finds:

1. that Dr. MacKay's testimony was clear, cogent and consistent with the medical reports he provided to MPIC;
2. that the Mayo Clinic medical reports corroborate Dr. MacKay's medical opinion that the Appellant does not have a permanent physical impairment as a result of the motor vehicle accident which would qualify the Appellant to receive a lump sum indemnity payment pursuant to Section 127 of the Act;
3. that Dr. Vaughan's medical opinion supporting a 24% impairment award is not supported by the other medical reports provided by the Appellant to the Commission.

As a result, the Commission therefore rejects the medical opinion of Dr. Vaughan which supports a permanent impairment award and accepts the medical opinion of Dr. MacKay which does not support a permanent impairment award.

In conclusion, the Commission, for these reasons, dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer, bearing date November 20, 2000.

Dated at Winnipeg this 22nd day of April, 2003.

MEL MYERS, Q.C.

YVONNE TAVARES

DEBORAH STEWART