



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by J.G.
AICAC File No.: AC-03-107**

PANEL: Ms. Yvonne Tavares, Chairperson
The Honourable Mr. Armand Dureault
Ms. Barbara Miller

APPEARANCES: The Appellant, J.G., was represented by Mr. Ellery Strell;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms. Dianne Pemkowski.

HEARING DATE: June 30, 2004.

ISSUE(S): Entitlement to Income Replacement Indemnity benefits
beyond June 9, 2002.

RELEVANT SECTIONS: Subsection 110(1)(c) of The Manitoba Public Insurance
Corporation Act (the 'MPIC Act').

**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, J.G., was involved in a motor vehicle accident on September 20, 2000 wherein he sustained a fractured left wrist, hematoma of the left quadricep muscle and mid-dorsal back pain. Due to those injuries, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was unemployed and collecting Employment Insurance ('EI') benefits. He was classified as a non-earner and initially his

Income Replacement Indemnity ('IRI') benefits were based on the EI rate for the time he was entitled to EI benefits. However, the Appellant had a promised job working as a carpenter's helper installing windows from October 2, 2000 to February 5, 2001. His IRI benefits were adjusted during this period of time in accordance with the salary he would have earned at this position. As of February 6, 2001 his IRI entitlement reverted back to the EI rate.

In accordance with ss. 86(1) of the MPIC Act, as of the 181st day after the accident, MPIC determined an employment for the Appellant as a "carpenter's helper". The Appellant's IRI benefits as of the 181st day following the date of the accident were based on the gross yearly employment income for the determined position, adjusted to reflect the amount of time the Appellant was absent from the workforce in the five years prior to the accident.

On February 28, 2001, an occupational therapy assessment was undertaken to assess the Appellant's physical abilities and functional tolerances with respect to returning to his pre-accident employment as a carpenter's helper. The assessment noted findings of decreased muscle strength and muscle endurance through the upper back muscles; slightly decreased range of motion in selected trunk and right lower extremity movements, and decreased left wrist/hand strength. The occupational therapy assessment concluded that the Appellant did not demonstrate the ability to perform the physical demands of his pre-accident job. A work hardening or reconditioning program was suggested to upgrade the Appellant's functional and work tolerances.

The Appellant was reassessed by Dr. Conrad Hoy on October 24, 2001. At that time, the Appellant continued to complain of neck pain, upper back pain and low back pain. Dr. Hoy concluded that the Appellant's subjective complaints and objective findings suggested posterior

cervical, upper thoracic and lumbosacral myofascial pain syndrome of mild to moderate severity. Dr. Hoy also recommended an eight week work hardening program.

The Appellant commenced the work hardening program on February 11, 2002 at Associated Rehabilitation Consultants of Canada ('ARCC'). As part of the intake process for the work hardening program, a psychological assessment was undertaken with Dr. Darrell Lindsey to determine if there were any psychological barriers to the Appellant's rehabilitation. Dr. Lindsey noted symptoms of anxiety that were felt to be due to pre-existing factors. Dr. Lindsey felt there were no indications of a psychological disorder secondary to the motor vehicle accident. However, he felt that due to the Appellant's limited literacy skills and concrete cognitive style, he would not be a good candidate for a functional restoration or pain management program, nor would he be a good candidate for individual therapy or participation in pain management classes.

A Work Hardening Program Discharge Report dated April 15, 2002 was prepared by ARCC upon the Appellant's completion of his eight week work hardening program. The Discharge Report concluded that:

On discharge, [J.G.] demonstrated the functional ability to work within the **Light** to **Medium** strength classification on a full-time basis with restrictions. [J.G.] did not demonstrate the functional ability to meet the full-time work demands of a Carpenter's Helper as defined by the N.O.C. due to subjective complaints of pain within his neck, upper back and right hip. [J.G.] demonstrated the ability to sustain an 8-hour workday tolerance within the clinical setting, and is therefore able to work within the **Light** to **Medium** strength classification on a full-time basis. [J.G.] did not meet the appropriate **Heavy** strength demand rating required of his chosen occupation, and thus, at this time we would feel it necessary to temporarily restrict him from performing repetitive lifting in excess of the **Medium** strength demands, as demonstrated in the clinical setting. This restriction should be re-evaluated upon [J.G.'s] re-entrance into the work force, for future functional improvement over time.

The Appellant's file was subsequently referred to MPIC's Health Care Services team for review.

Dr. Jerry Shrom, in an Inter-Departmental Memorandum dated May 14, 2002, concluded the following upon review of the Appellant's file:

COMMENTS

As a result of the motor vehicle accident of September 20, 2000, the claimant sustained a fracture to the distal left radius, soft tissue injury to the upper back and an injury to the right knee. By late February 2001 an occupational therapy opinion was advanced with respect to a work hardening or reconditioning program to achieve the physical demands of the claimant's pre-accident job. With respect to the right knee, MRI evaluation of April 2001 noted thickening and potential tear of the ACL. Reference has been made to arthroscopic repair having taken place in October 2001. However, there is no documentation from the treating orthopedic surgeon (Dr. Muller) as to the definitive diagnosis and treatment. This should be obtained for review.

Dr. Hoy has provided a Work Hardening Program Discharge Report (April 15, 2002) providing impression that, due to subjective complaints of pain, the claimant falls into the light to medium strength category. Dr. Hoy has indicated that the rehabilitation team was unable to identify any objective pathophysiological condition that, in Dr. Hoy's words, "would preclude him from returning to his pre-accident employment if that is what he chose to do". Although a diagnosis of myofascial pain syndrome has been assigned by Dr. Hoy, notation of inconsistency between perception of capability and objective findings was documented along with observance of pain behavior and pain-limiting factors. Dr. Hoy's impression was that the claimant's perception of disability did not correlate with the actual level of physical capability and that subjective complaints of pain appeared to factor into assignment of the above noted work strength classification.

Based on review of the foregoing, it appears that the claimant did not demonstrate the functional ability to meet the full time work demands of a carpenter's helper (as defined by the NOC) due to subjective complaints of pain as opposed to an objective pathophysiological condition.

MPIC's case manager in a decision dated May 23, 2002 advised the Appellant that his IRI benefits would cease as of June 9, 2002. The case manager determined that since the Work Hardening Discharge Report from ARCC concluded that there was no objective pathophysiological condition that would preclude the Appellant from returning to his pre-accident employment, the Appellant could hold the determined employment. Accordingly, the Appellant's benefits were terminated on the basis of ss. 110(1)(c) of the MPIC Act, which provides that:

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:

(c) the victim is able to hold an employment determined for the victim under section 106.

The Appellant sought an internal review of the case manager's decision. Prior to the Internal Review hearing, the Appellant was reassessed by Dr. Engel, an orthopedic surgeon. In his report dated September 25, 2002, Dr. Engel advised, in response to the question of whether there was any pathophysiologic condition that would preclude the Appellant from returning to his heavy strength classification occupation of a carpenter's helper, that:

2. . . . There is definitely an objective pathophysiologic condition and that is the L5-S1 disc bulge and possible disc herniation. This goes along with his history of flying out of the back of a pick-up truck at 110 km. The location of the pain is correct, he has been to the office and had some central low back pain as well as a right buttock pain consistent with sciatic nerve irritation and at times had more severe irritation of the L1 nerve root with some numbness and pain going down the leg. All of these things are objective evidence of a pathophysiologic condition. This disc injury would certainly preclude [J.G.] from returning to heavy work as any work that would involve bending, lifting, twisting would increase this man's pain, possible cause an overt disc herniation requiring surgery.

The new medical information was referred to MPIC's Health Care Services team for review. In an Inter-Departmental Memorandum dated December 16, 2002, Dr. Shrom noted the following:

The available medical information from Dr. Hoy and Dr. Engel presents a discrepancy in diagnosis of the low back/ referred right lower limb symptoms. Dr. Hoy has provided objective findings that support a diagnosis of regional myofascial pain, referencing lumbar paraspinal and gluteal trigger points along with the absence of dural tension finding. Based on review of Dr. J. Engel's September 25, 2002 correspondence to legal counsel, he has provided opinion of a diagnosis of L5-S1 disc bulge with possible disc herniation. In this correspondence, his opinion with regard to diagnosis references the claimant's symptoms of central low back and right buttock pain with right lower leg numbness and pain. This opinion appears to be based upon the claimant's symptom report with the only objective findings demonstrated being negative straight leg raise, negative bowstring testing and negative Lasegue testing.

Due to the discrepancy in the medical opinions of Dr. Hoy and Dr. Engel, Dr. Shrom suggested that the Appellant undergo an independent third party examination to clarify the diagnosis. As a result, the Appellant was referred to Dr. Christopher Bourque for an independent medical opinion.

Dr. Bourque in his report dated January 14, 2003 concluded the following with respect to the Appellant's condition:

At the time of this dictation I have reviewed this patient's chart. I find I must agree almost entirely with comments of Dr. Jerry Shrom who notes that this patient went many months from the time of his accident without any significant complaint referable to his low back. As well, multiple examiners of this patient over the months subsequent to his accident did not identify any significant low back pathology until the report of Mr. Victor Andres, RN, in his letter of September 6, 2001. In this letter Mr. Andres states that "[J.G.] also reported that a few months ago he went to the Emergency Department at Thompson Hospital due to an exacerbation of low back pain. He was seen by Dr. Van Dyk and was apparently told that he has "pinched nerve in his low back". He was then referred to Dr. Engel whom he saw on July 17th and August 9th, 2001 ". It is my conclusion from this that this man's low back pain developed at a time quite remote from the time of the accident. The relationship of this pain to the accident is therefore quite uncertain.

I also agree that the findings as outlined on the CT scan of the lumbosacral spine are not that remarkable and can be seen even in an asymptomatic population. This does not mean that the possible "very small shallow central disc herniation" identified at L5-S1 (on the CT scan of 19/06/2002) cannot possibly have pathological significance. I admit that this possible disc herniation could be the cause of some pain. However, there is nothing to suggest that this disc is pushing on a nerve root and causing radicular pain, and this patient's complaints on physical examination are much more consistent with a mechanical back pain rather than radiculopathy.

In summary I am not convinced that the findings on CT scan have any pathological significance in this man's case, nor do I feel that he requires any further neurological investigations, MRI or EMG. He has been investigated enough. While the presumed diagnosis may be myofascial pain syndrome, it is my believe (sic) that this patient will simply go from one pain to another, that he has a personality which is very pain focused. He has not seemingly shown any significant response to therapy and I would not recommend a continuation of such therapy in future. I think that his prognosis for return to heavy work is quite poor given the behavior that he has demonstrated throughout.

Dr. Engel had a further opportunity to examine the Appellant on January 27, 2003 and to reply to Dr. Bourque's report. In his report dated April 2, 2003, Dr. Engel concluded that:

3.) On the balance of probability given my examination and findings and the review of medical documentation, [J.G.'s] low back pain is directly related to the motor vehicle accident of September 20th 2000. The man was ejected from his vehicle and landed on his head in muskeg. He had pain ever since. He has the physical findings of a disk injury. Dr. Bourque suggested this man does not have a radiculopathy (nerve root compression by a disk herniation). I would agree. Not every disk injury has nerve root compression. One can have a disk injury such as a tear of the annulus which would produce mechanical low back pain. This can radiate as far as the knees. This would be consistent with this man's history, physical exam. On page 3 of Dr. Bourque's letter he stated that the first time back pathology was identified was September 2001 (see line 4 on page 3). In Dr. Schrom's letter on page 2, paragraph 2 "notation of a sore back was noted on November 6 2000". This would indicate that this man's back pathology was identified earlier than 2001, more specifically on November 6 2000.

....

4.) [J.G.'s] disk injury would disable him from performing the duties of employment that he held at the time of the accident. He had limited range of motion with forward flexion to the distal two-thirds of his tibia. His straight leg raise test was positive at 70 degrees causing pain and numbness in the S1 nerve root distribution. He had a positive bowstring test.

The Internal Review Officer in his decision dated June 27, 2003 carefully reviewed and assessed all of the medical information on the Appellant's file. The Internal Review Officer concluded that it was not unreasonable for the case manager to rely upon and prefer the opinions of Dr. Bourque and Dr. Shrom to that of Dr. Engel. He therefore confirmed the case manager's decision of May 23, 2002 and dismissed the Appellant's Application for Review.

The Appellant has now appealed from the Internal Review decision to this Commission. The issue which requires determination in this appeal is whether the Appellant's IRI benefits were properly terminated pursuant to ss. 110(1)(c) of the MPIC Act as of June 9, 2002.

At the appeal hearing, counsel for the Appellant submitted that:

1. The Appellant has a number of physical injuries which provide objective evidence to explain his pain and his resulting disability;
2. The Appellant's low back pain which is caused by the disc herniation, is causally connected to the motor vehicle accident of September 20, 2002; and
3. The Appellant has a limited psychological capacity to deal with his pain, and his subjective complaints of pain are a relevant factor to be taken into account, when they prevent him from functioning.

As a result, counsel for the Appellant maintains that the Appellant cannot hold employment as a carpenter's helper and he is therefore entitled to reinstatement of his IRI benefits.

Counsel for MPIC, in support of the Internal Review decision, submits that:

1. The Appellant's low back pain and herniated disc are not connected to the motor vehicle accident of September 20, 2000;
2. If the Appellant cannot work, it is not the injuries sustained in the motor vehicle accident which prevent him from holding the determined employment (the Appellant has recovered from his motor vehicle accident-related injuries); and
3. Subjective complaints of pain do not prevent an individual from working.

Accordingly, counsel for MPIC maintains that the Appellant was capable of holding employment as a carpenter's helper as of June 9, 2002 and therefore, the Internal Review decision dated June 27, 2003 should be confirmed and the Appellant's appeal dismissed.

Discussion:

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant was not able, as of June 9, 2002, to hold employment as a carpenter's helper. Therefore, we find that the termination of IRI benefits pursuant to ss. 110(1)(c) of the MPIC Act as of June 9, 2002 was not justified.

The case manager's decision, which was confirmed by the Internal Review Officer, was based upon the Work Hardening Discharge Report from ARCC, which found that there was no objective pathophysiological condition which would preclude the Appellant from returning to his pre-accident employment. However, the case manager's decision and the subsequent Internal Review decision ignored the remainder of the conclusions contained in the ARCC Work Hardening Discharge Report. Specifically, the Discharge Report concluded that:

On discharge, [J.G.] demonstrated the functional ability to work within the **Light** to **Medium** strength classification on a full-time basis with restrictions. [J.G.] did not demonstrate the functional ability to meet the full-time work demands of a Carpenter's Helper as defined by the N.O.C. due to subjective complaints of pain within his neck, upper back and right hip. [J.G.] demonstrated the ability to sustain an 8-hour workday tolerance within the clinical setting, and is therefore able to work within the **Light** to **Medium** strength classification on a full-time basis. [J.G.] did not meet the appropriate **Heavy** strength demand rating required of his chosen occupation, and thus, at this time we would feel it necessary to temporarily restrict him from performing repetitive lifting in excess of the **Medium** strength demands, as demonstrated in the clinical setting. This restriction should be re-evaluated upon [J.G.'s] re-entrance into the work force, for future functional improvement over time.

Apparently, the case manager and the Internal Review Officer chose to ignore or discount the Appellant's limitations and restrictions due to his subjective complaints of pain, on the basis that subjective complaints of pain do not prevent an individual from working. However, this Commission has previously found that subjective pain complaints can provide an obstacle to an

individual's return to work. As noted by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340:

Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary*, Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:

In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.

In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

Although the case manager, Dr. Shrom and the Internal Review Officer concluded that the Appellant's subjective pain complaints would not have prevented him from returning to his determined occupation as a carpenter's helper, we find that the ARCC Work Hardening Discharge Report clearly demonstrates that the Appellant did not have the functional ability to meet the full-time work demands of a carpenter's helper. The fact that the Appellant's functional ability was limited due to his subjective complaints of pain and not an objective pathophysiological condition does not change that determination. Rather, his subjective pain complaints should have been considered in light of his inability to resume his normal physical function and the consistency of the findings reported by all of his caregivers as to the severity of his complaints. Upon considering the totality of the evidence before us, and the Appellant's testimony at the hearing, we find that the Appellant's subjective pain complaints were genuine and precluded his return to work as a carpenter's helper as of June 9, 2002.

As a result, we find that the Appellant's entitlement to IRI benefits shall be reinstated as of June 10, 2002 and shall continue until such time as it is terminated or suspended in accordance with the MPIC Act. In accordance with Section 163 of the MPIC Act, the Appellant shall be entitled to interest upon the monies due to him by reason of the foregoing decision.

Dated at Winnipeg this 20th day of October, 2004.

YVONNE TAVARES

HONOURABLE ARMAND DUREAULT

BARBARA MILLER