



## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by W.H.  
AICAC File No.: AC-04-09**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Ms. Barbara Miller  
Dr. Patrick Doyle

**APPEARANCES:** The Appellant, W.H., appeared on his own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Ms. Dianne Pemkowski.

**HEARING DATE:** November 24, 2004

**ISSUE(S):** Entitlement to Income Replacement Indemnity ('IRI')  
Benefits after July 31, 2003

**RELEVANT SECTIONS:** Section 81(1)(a) of The Manitoba Public Insurance  
Corporation Act ('MPIC Act') and Section 8 of Manitoba  
Regulation 37/94

**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

W.H. (hereinafter referred to as the "Appellant") was involved in a motor vehicle accident on December 27, 2002. Approximately two hours after the motor vehicle accident the Appellant attended at the office of his chiropractor, Dr. D. Wilson. Dr. Wilson, in a letter to MPIC dated March 1, 2004, stated that:

1. when he saw the Appellant on December 27, 2002 the Appellant did not mention the motor vehicle collision to him.

2. he performed Thompson Terminal Point adjustments to the pelvis and applied interferential current therapy for what he thought was a continuation of a low back pain condition that the Appellant had presented to him for on November 18, 2002.
3. he only became aware of the Appellant's collision on April 24, 2003 when the Appellant attended at his office and reported that he had been involved in a motor vehicle accident and had suffered injuries to his neck and back.

The Appellant testified at the appeal hearing that at the end of March 2003 he was the owner and operator of a taxicab in the City of Winnipeg and sold his cab as he felt he was unable to safely drive a taxi with neck and back pain along with the medication he was taking.

The Appellant, after receiving four chiropractic treatments from Dr. Wilson, was referred by him to the Appellant's family doctor, Dr. S. Koven, who recommended that the Appellant commence physiotherapy treatments at the Wellness Institute. Dr. Koven provided an Initial Health Care Report to MPIC dated May 13, 2003 wherein he indicated that the Appellant was complaining of headaches, left shoulder pain, neck and low back pain and that he had referred the Appellant to have a CT scan of his head.

Upon receipt of Dr. Koven's report, the case manager referred the Appellant's file to Dr. B. Baydock, Medical Consultant for MPIC Health Care Services, for his review. In a memorandum dated June 10, 2003 Dr. Baydock concluded that there were functional limitations documented in the Appellant's file which would have likely limited some of the Appellant's functional ability but it did not impair the Appellant's ability to carry out his cab driving duties.

Dr. Koven provided a narrative report to MPIC dated June 8, 2003 in which he reported that:

1. the Appellant was complaining of headaches, left shoulder pain along with neck and back pain.
2. he found that the decreased range of motion in the Appellant's neck and shoulders and his headaches could affect his concentration and that medication could affect his alertness.
3. having regard to the duties of a taxi cab driver, Dr. Koven felt it prudent that the Appellant avoid driving taxi pending his recovery.

The Commission notes that Dr. Baydock, in his report to MPIC dated June 10, 2003, does not report that he had reviewed Dr. Koven's report dated June 8, 2003 at the time he prepared his memorandum to MPIC dated June 10, 2003.

#### **Case Manager's Decision**

On June 17, 2003 the case manager wrote to the Appellant and stated that after reviewing the medical reports of Dr. Wilson, Dr. Koven and Dr. Baydock, the case manager concluded that the Appellant was not entitled to receive IRI for any period because there was little evidence to show a causal connection between the motor vehicle accident and the period of time the Appellant could not drive (ie after March 21, 2003). As well, the case manager informed the Appellant that although the Appellant's function may have been limited there is no information to suggest that he was unable to perform his pre-accident employment.

The Appellant filed an Application for Review dated June 23, 2003 with MPIC to have the case manager's decision reviewed by an Internal Review Officer.

Dr. T. Pethrick, a chiropractor, provided a report to MPIC dated July 31, 2003 wherein he indicated that he saw the Appellant on that date and that while the Appellant had some myofascial tightness in his cervical and para-cervical muscles, there were few other objective findings to go along with the Appellant's subjective pain complaints.

The Appellant had been referred by Dr. Koven to the neurologist, Dr. Mark Young, who provided a report to Dr. Koven dated September 25, 2003. In this report Dr. Young indicated that:

1. he saw the Appellant on September 24, 2003 and he could not explain why the Appellant had any ongoing complaints of headaches.
2. in respect of neck complaints he thought that these complaints were soft tissue in nature and advised the Appellant to attempt further physiotherapy and possibly nortriptyline medication.
3. that neck movement while driving may cause some discomfort. He guessed that the Appellant could probably work as a taxi driver.

#### **Internal Review Decision**

A hearing was conducted by the Internal Review Officer on September 4, 2003. In his decision the Internal Review Officer states:

12. At the hearing, you said that you still have headaches although you acknowledge that you can go 3 to 4 days without a headache. You said that when you do have headaches, they last between 5 and 7 minutes in duration and that you might have 1 or 2 of the them on a day that you have a headache. You said that you could not make a living driving taxi 4 to 5 hours a day as one must drive a full shift in order to make a living driving taxi.

13. I forwarded all the recent medical information to Dr. Baydock for further review, and by memorandum dated November 18, 2003, (copy enclosed) Dr. Baydock noted that he thought there was medical documentation on file that you had a temporary partial impairment in function of your cervical spine. He commented that

the medical practitioners seem to indicate that you would have been able to function in some fashion but that you did have a fluctuating decreased range of motion. He did not think that you had a permanent restriction in function that would have precluded you from returning to work as a taxi driver indefinitely. Dr. Baydock concluded that your symptom reported in May 2003 likely represented a transient partial impairment in function that would have affected your ability to fully work as a cab driver. Dr. Baydock was not clear as to what the duration of your inability to work as a taxi driver was and did not specifically comment on this. Dr Baydock also reiterated his concern about whether the headaches that you had were actually caused by the accident.

The Internal Review Officer, after reviewing the medical reports, and in particular Dr. Koven's report of June 8, 2003 and Dr. Baydock's report of November 18, 2003, concluded that the medical evidence supported the Appellant's entitlement to IRI benefits for the period April 24 – July 31, 2003. The Internal Review Officer's rationale for this decision was stated as follows:

With respect to the duration of you (sic) inability to work however, it is my view that the medical evidence does not support a period of inability to work beyond July 31, 2003. This is the date in which Dr. Pethrick reported that you only had some tightness in your cervical and para-cervical muscles. He does not specifically address functioning, but there is no indication from his report that you could not work as a taxi driver. Certainly on September 24, 2003, Dr. Young thought you could work as a taxi driver. Your own evidence at the hearing that you have 1 or 2 headaches every few days, lasting 5 - 7 minutes, does not strongly suggest you are unable to drive a taxi. I think that on a balance of probability the evidence is such that you could likely have returned to work as a taxi driver around July 31, 2003.

### **Appeal**

The Appellant filed a Notice of Appeal on January 14, 2004. The relevant provisions in respect of this appeal are:

#### **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;

**Manitoba Regulation 37/94****Meaning of unable to hold employment**

**8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Pursuant to the filing of the Notice of Appeal, the Appellant provided MPIC with a number of medical reports. Ms. D. Pemkowski, MPIC's legal counsel, wrote to Dr. Baydock in an Inter-Departmental Memorandum dated April 8, 2004 and forwarded the Appellant's entire medical file to Dr. Baydock, including all of the reports subsequent to the Appellant's Internal Review decision dated November 24, 2003. Ms. Pemkowski requested Dr. Baydock to review the new medical reports and the Appellant's entire medical file.

Dr. Baydock provided an Inter-Departmental Memorandum to Ms. Pemkowski dated May 25, 2004 and stated:

The Internal Review Officer requested that I review the chronologic medical documentation on file to determine if there was a direct causal relationship between the motor vehicle collision and the claimant's reports of headaches, neck, shoulder pain and low back pain. She also requested that I comment upon the claimant's functional impairments and determine if they would, on the balance of medical probability, have affected his ability to be employed as a taxi driver beyond July 31, 2003.

Dr. Baydock further stated:

1. the Appellant had attended at the office of his chiropractor, Dr. Wilson, within two hours of the motor vehicle accident and did not mention to Dr. Wilson that he was involved in a motor vehicle accident or that he suffered any injuries as a result of this motor vehicle accident. The purpose of the attendance of the Appellant at Dr. Wilson's office was to be treated in respect of previous complaints that he had prior to the motor vehicle accident.

2. Dr. Wilson reported to MPIC, dated March 1, 2004, that he did not become aware that the Appellant was involved in a motor vehicle accident until April 24, 2003, approximately four months following the motor vehicle accident. At that time the Appellant for the first time complained about neck and shoulder pain which the Appellant related to the motor vehicle accident. *“If one were to reasonably assume that injuries occurred to the cervical spine and shoulder and a concussion occurred in the motor vehicle collision, then it would also be reasonable to assume that symptoms would develop immediately following the traumatic event. The fact that the claimant had seen his chiropractor the day of the collision and had not been recognized to have had a significant new injury would argue against the collision leading to the development of the cervical spine or shoulder girdle injuries and a post-concussion syndrome so as to cause the ongoing symptomatology described by the claimant later to Dr. Wilson and to other caregivers.”*
3. The Appellant first saw his family physician, Dr. Koven, on April 7, 2003, approximately 3 ½ months after the motor vehicle accident in respect of injuries which the Appellant attributed to the motor vehicle collision on December 27, 2002. *“Prior to that, it did not appear that the claimant had attended any other caregivers for treatment of any symptomatology related to the motor vehicle collision. As stated by Dr. B. Lecker, a chiropractor, in his March 5, 2004 report, it was only after the claimant self-determined his disability and sold his taxi cab, did he attend his physician's office for treatment. It is difficult for this reviewer to ascertain what factors prevented the claimant from seeking medical attention from December 2002 to April 2003. It is also difficult for this reviewer to determine the specific physical impairments present at the time of the claimant's self-initiated period of disability as*

*no medical documentation was presented at the time the claimant chose to terminate his employment as a taxi driver.”*

Dr. Baydock also stated in his report to MPIC of May 25, 2004 that in a report by Dr. Koven to MPIC, the Appellant's initial complaints to Dr. Koven on April 7, 2003 in respect of injuries sustained in the motor vehicle accident had resolved itself when he saw the Appellant on May 13, 2003. Dr. Baydock concluded that the development of the Appellant's symptoms after May 13, 2003 in respect of neck pain developed following a vacation. Dr. Baydock stated *“In my opinion this series of events would most likely indicate that the claimant developed neck pain for unknown reasons during his vacation as his symptoms resolved before he left for this vacation.”*

Dr. Baydock further noted that subsequently the Appellant sought numerous treatment modalities from the caregivers for his headaches, neck, back and shoulder pains and numerous diagnoses were reported by different caregivers to account for the Appellant's symptoms. Dr. Baydock reports that he was unable to determine from the medical documentation the specific diagnoses to account for these symptoms.

In reviewing the chronologic medical record on file, the claimant's motor vehicle collision did not initially lead to new symptoms that were distinguishable by the claimant's treating chiropractor as being materially different than his condition prior to the motor vehicle collision. The later development of symptoms consisting of neck pain, headaches, shoulder pain and low back pain would be difficult to relate to the motor vehicle collision based on the application of the conditions for medical causation assessments.

Notwithstanding the inability for this reviewer to determine a probable cause and effect relationship for the numerous reasons stated above, an employability review was requested. Immediately following the collision, it had been documented that the claimant continued to work as a cab driver for a significant period of time (estimated at 12 weeks based on the date of the collision and the day he sold his taxi on March 26, 2003). This fact by itself would indicate the claimant was functionally able to continue his employment following the motor vehicle collision despite his reports of neck and

shoulder pain and headaches. Thereafter, he decided unilaterally that he could no longer to work as a cab driver and terminated his vocation by selling his cab. He voiced the headaches, neck pain and shoulder pain as being the reasons why he could not continue to work, despite the fact that he stated these symptoms were present shortly after the collision when he was still able to work. Later in the chronologic record, the claimant's low back pain became more of an issue and was most recently reported to be his most limiting condition. The documented change in the low back pain syndrome could not be related to the collision for reasons already discussed.

Thus, in reviewing the entirety of medical documentation on file, my previous opinions would not have been altered by the newest submitted medical documentation. The opinions provided in my previous memoranda would still remain valid, in my opinion, with respect to the claimant's employability.

The appeal hearing took place on November 24, 2004. The Appellant represented himself and Ms. Dianne Pemkowski acted as MPIC's legal counsel. The Appellant submitted to the Commission that:

1. as a result of the motor vehicle accident he sustained injuries to his neck and back which caused him a great deal of pain and headaches and as a result he was unable to continue employment as a taxi cab driver.
2. as a result of these injuries he sold his taxi cab on March 26, 2003 and has been unable to work since that period time.
3. MPIC was not justified in terminating his IRI benefits.
4. he did not see his doctor initially after the motor vehicle accident and continued to work because he believed that the injuries would resolve themselves.
5. he denied that prior to the motor vehicle accident he suffered any significant back or neck pain or headaches which prevented him from working.
6. that in these circumstances MPIC had, in error, terminated his IRI benefits on July 31, 2003 because he was unable to work due to the injuries he sustained in the motor vehicle accident.

MPIC's legal counsel reviewed the medical reports and stated that the medical evidence established, on a balance of probabilities, that:

1. the motor vehicle accident injuries did not prevent the Appellant from working;
2. the motor vehicle accident injuries had resolved themselves shortly after the motor vehicle accident;
3. the Appellant's present medical complaints arose subsequent to the motor vehicle accident and were not caused by the motor vehicle accident.

MPIC's legal counsel therefore requested that the Commission confirm the Internal Review Officer's decision dated November 24, 2003 and dismiss the Appellant's appeal.

### **Decision**

The Commission has reviewed the Appellant's testimony, the submissions of both the Appellant and MPIC's legal counsel, has reviewed all of the medical documentation on the file and concludes that the Appellant has not established, on the balance of probabilities, that he was entitled to receive IRI subsequent to July 31, 2003.

The Commission finds that the Appellant:

1. within two hours of the motor vehicle accident on December 27, 2002 saw his chiropractor, Dr. Wilson, for the purpose of being treated in respect of a pre-existing medical problem.
2. did not inform his chiropractor, Dr. Wilson, that he was involved in a motor vehicle accident or complained to Dr. Wilson about any motor vehicle accident injuries at that time.

3. did not make any complaint about injuries sustained in the motor vehicle accident to Dr. Wilson until approximately four months after the accident.
4. did not see his own physician, Dr. Koven, in respect of the medical complaints that he had which he attributed to the motor vehicle accident until approximately 3 ½ months after this accident.

The Commission accepts:

1. Dr. Baydock's medical opinion that it would be reasonable to assume that had the Appellant's current symptoms developed immediately following the motor vehicle accident on December 27, 2002 he would have sought treatment in respect of these symptoms immediately after the motor vehicle accident but the Appellant did not do so.
2. the opinion of Dr. B. Lecker, the chiropractor, who in his March 5, 2004 report stated that it was only after the Appellant self-determined his disability and sold his taxi cab (on March 26, 2003) that he did attend at his physician's office for treatment in respect of his complaints relating to the motor vehicle accident.
3. Dr. Baydock's opinion that subsequent to the Appellant's termination of his employment and sale of his taxi cab on or about March 26, 2003, that any injuries the Appellant sustained in the motor vehicle accident had resolved themselves at the time he saw Dr. Koven on April 7, 2003.

The Commission therefore concludes that the medical evidence establishes, on a balance of probabilities, that:

1. any injuries the Appellant sustained in the motor vehicle accident on December 27, 2002 would not have prevented the Appellant from returning to work;

2. any injuries that the Appellant sustained in the motor vehicle accident resolved themselves by July 31, 2003.
3. any symptoms of neck pain, headaches, shoulder pain and low back pain that the Appellant complained of as of July 31, 2003 were not caused by the motor vehicle accident but occurred months after the accident had taken place.

It is for these reasons that the Commission finds that MPIC has correctly interpreted Section 81(1)(a) of the MPIC Act and Section 8 of Manitoba Regulation 37/94 in terminating the Appellant's entitlement to IRI benefits on July 31, 2003. The Commission therefore confirms the decision of the Internal Review Officer dated November 24, 2003 and dismisses the Appellant's appeal.

Dated at Winnipeg this 16<sup>th</sup> day of December, 2004.

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**MEL MYERS, Q.C.**

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**BARBARA MILLER**

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**DR. PATRICK DOYLE**