



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by D.J.
AICAC File No.: AC-05-91

PANEL: Ms Laura Diamond, Chairperson
Ms Wendy Sol
Mr. Neil Cohen

APPEARANCES: The Appellant, D.J., was represented by Ms Liisa Cheshire of the Claimant Adviser Office;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Jim Shaw.

HEARING DATE: January 12, 2006

ISSUE(S): Entitlement to Income Replacement Indemnity benefits

RELEVANT SECTIONS: Sections 81(1), 110(1) and 150 of The Manitoba Public Insurance Corporation Act ('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, D.J., was injured in a motor vehicle accident on June 4, 2004. The Appellant had a history of back injuries prior to this motor vehicle accident. His history included back surgery in 1993 as a result of an injury in 1991, and a motor vehicle accident in December 1996 in which he aggravated his back injury. As well, a CT scan in August 1997 identified L4-L5 disc prominence, and the Appellant was diagnosed with spinal stenosis.

At the time of the accident, the Appellant was employed distributing flyers for [text deleted].

Following the June 4, 2004 motor vehicle accident, the Appellant was unable to work due to his injuries. He was in receipt of Income Replacement Indemnity ('IRI') benefits until November 5, 2004, when the Appellant's case manager indicated that based on a review of the most recent motor vehicle accident injuries, the Appellant was able to return to his job duties held prior to the motor vehicle accident.

The Appellant sought internal review of this decision. On May 3, 2005, an Internal Review Officer for MPIC upheld the decision of the case manager. The Internal Review Officer stated:

16. At the hearing, you took issue with Dr. Lesiuk's report. You said all your current symptoms stem from the June 2004 motor vehicle accident. You brought surveillance videos taken in December 2003 which you said showed that you were functioning fine prior to the June 2004 motor vehicle accident.

.....

Based on the detailed review of Dr. MacKay, the evidence supports the decision to end your IRI benefits. I watched the videos but they are not dispositive of anything in my view. The evidence does not support your contention that your current back symptoms are related to the June 2004 motor vehicle accident. In all probability they stem from your prior back problems.

Accordingly the case manager's decision must be confirmed.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence

At the hearing into the Appellant's appeal, the panel heard evidence from the Appellant. The panel also viewed surveillance video tapes conducted of the Appellant on December 21, 22 and 23, 2004. The video tapes depicted the Appellant getting in and out of vehicles, walking into stores and homes, shopping in stores and bending and squatting to examine items in the stores. The video tapes also depicted the Appellant carrying certain items and outside bending over a

vehicle and what would appear to be a heating plug and outlet. The Appellant was questioned on cross-examination by counsel for MPIC, in regard to these video tapes.

The Appellant gave an account of the motor vehicle accident of June 4, 2004. He indicated that the impact bounced him from side to side in the vehicle and that he was only wearing a lap belt.

According to documents on the Appellant's file, he had initially indicated that at the time of the accident he had not been suffering from any problems with his back and had not been seeing any health care practitioners for problems related to his back immediately before the motor vehicle accident. He indicated that he had a problem free back for two or three months prior to the motor vehicle accident.

The Appellant described the pain that he had suffered following the motor vehicle accident and the recommendations for treatment made by his caregivers, which he indicated he had followed.

As a result of his previous accidents, the Appellant had been in receipt of IRI benefits from MPIC for approximately eight (8) years prior to the June 2004 motor vehicle accident. His IRI benefits were discontinued in March of 2004 because he began helping his wife with her job of distributing flyers. He had failed to disclose this payment, which he indicated first began in approximately May of 2004, to MPIC, and when MPIC discovered the payments, they discontinued his IRI benefits, concluding that he was able to work. The Appellant testified that he regretted the way he had handled this issue and that he should have reported the work and income to MPIC.

The Appellant testified that his participation in helping his wife with her job had evolved as he saw how difficult and exhausting the job was for her. He testified that whenever he did physical work to help her, he knew that this would result in him suffering more pain or “paying for it” later that evening. He testified that the job would have been too difficult for him to do on his own at that time, as it involved too much weight, too much bending and lifting and would have been too painful to his lower back, hips, legs and thighs and between his shoulder blades.

The Appellant described the physical tasks involved in the job of an area distributor for flyers. He indicated that physically the job was very difficult and involved loading, crawling, climbing up and down, and lateral bending. He said it was a difficult job.

The Appellant testified that his back today is one hundred percent (100%) worse than it was after his IRI benefits were discontinued in November and December 2004. In his view, this was because at that time, MPIC also discontinued his physiotherapy and acupuncture treatment benefits, and his condition had become progressively worse since then. The Appellant testified that it was his understanding that it was the view of his physiotherapist, Anastasia Meseman, his chiropractor Dr. Kisil, and his general practitioner Dr. Pacin, that there was very little chance that he would be able to return to his job as an area distributor. He also believed that it was Dr. Johnson’s view that he would not be able to return to the level of work he was doing prior to the accident, and that another physiotherapist, Anne Dawson, had concluded that his condition was worsening and that he was unable to work.

On cross-examination, the Appellant was asked whether his back was symptom free prior to the motor vehicle accident in the fall of 2003 and the spring of 2004. He testified that he still had back pain then but that it started to alleviate. He indicated that prior to the motor vehicle

accident he was experiencing back pain to a degree, although his evidence was not entirely consistent on this point. He did indicate however that he was not taking Naproxyn as a result of his back pain at the time, but rather to treat occasional flare-ups of gout which he experienced in his two (2) big toes.

Counsel for MPIC also questioned the Appellant in regard to the demands of the job of area distributor. The Appellant admitted that there was some flexibility and the ability to pace himself, as he was not an employee but a self-employed contractor.

The Appellant's evidence concerning the weight of the bundles of flyers which he was required to handle was contradictory, when viewed in conjunction with information obtained by his caregivers in various reports. Some reports indicated that the bundles weighed thirty to forty (30-40) pounds while others indicated that the job required him to lift over sixty (60) pounds. However, the evidence at the hearing indicated that each bundle weighed less than twenty (20) pounds (or 18.7 pounds according to a physical demands analysis which was completed).

When asked on cross-examination whether he had in fact shown improvement in his condition, in spite of his reports to his caregivers to the contrary, the Appellant maintained that he had shown a slight improvement, but only up until November 2004, when his physiotherapy and other treatment benefits were terminated.

After reviewing the video tape evidence, the Appellant indicated that the days depicted, December 21, 22 and 23, were not typical days for him. He testified that he had only received his CPP cheque on December 22, a few days before Christmas, and so had no alternative but to cram several days worth of Christmas shopping and errands into just a few days. The Appellant

submitted that the days depicted on the video tapes were extremely busy, with trips to many stores and businesses.

He indicated that one should not assume from watching the activity on the video tapes that he was not in pain, and in fact, he had gone home to lie down and rest during the day. The Appellant indicated that on these days he was in pain and used extra Advil to relieve it.

The Appellant also testified that while there was a fair amount of bending and twisting depicted on the video tape while he was trying to get a block heater on his son's van working, this was necessary as it was for his son, and he had to help him out.

Submissions

Appellant's Submission

Counsel for the Appellant submitted that while he had a history of back problems, the Appellant had not been experiencing back problems in the two (2) or three (3) months immediately prior to his accident. This was corroborated by evidence from Dr. McLeod who indicated he had not seen the Appellant for back problems in the eleven (11) months prior to the accident, and from the chiropractor, Dr. Kisil, who indicated that, prior to the accident the Appellant's function level had been very good and he had not seen the Appellant since February 2004.

Following the motor vehicle accident of June 2004, Dr. Kisil diagnosed myofascial strain on June 10, 2004. Dr. McLeod, on June 16, 2004, diagnosed a strain to the Appellant's neck and back. Anastasia Meseman, physiotherapist, provided a clinical diagnosis of lumbar stain and noted some spasm.

The physiatrist, Dr. Lesiuk, conducted an independent examination and provided a report dated October 20, 2004. He also noted some areas of tenderness upon palpitation in these areas.

Dr. Kisil again provided a diagnosis of myofascial strain on March 30, 2005, and Dr. Pacin again referred to a diagnosis of “mechanical and myofascial back pain” on May 2, 2005.

According to the Appellant’s testimony, his pain varies throughout the day and varies day by day. His physical capabilities will be different on different days, depending upon his pain level. This, it was submitted, is corroborated by the medical reports on the Appellant’s file.

The Appellant also testified that when he increases his activity, he pays for that later with increased pain. It was submitted that this is corroborated by the medical reports as well, particularly when the reports indicate that the Appellant has reported increased symptoms after a physical examination.

It was submitted that the medical practitioners have consistently provided assessments that the Appellant cannot manage the demands of the area distributor’s job. The physiotherapist, Anastasia Meseman, reported on November 8, 2004 that the Appellant is restricted from lifting weight over ten (10) pounds.

Dr. Kisil, on June 12, 2005, although noting that the Appellant was able to perform his duties, also stated the Appellant was not able to do heavy lifting or assume awkward postures.

Dr. Pacin restricted the Appellant to no lifting over twenty-five (25) pounds with no repetitive bending or twisting of his back.

Dr. Johnson, in a report dated July 8, 2005, did not feel that the Appellant would be able to return to the level of work that he was doing, in his present physical condition.

The physiotherapist, Anne Dawson, in a report dated September 26, 2005, indicated that the Appellant had severe functional limitations and was unable to work.

Counsel for the Appellant spent some time reviewing the independent medical examination report prepared by Dr. Lesiuk and dated October 20, 2004. She pointed out several flaws in this report which included:

- A reference to pre-existing knee problems, which the Appellant denies
- A reference to the physical demands analysis showing the Appellant's job to be at the light level, when the physical demands analysis assessed this job at a medium level
- The use of the definition of impairment from the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, which stated that "An individual who complains of pain but who has no objectively validated limitations in daily activity has no impairment."
- Counsel for the Appellant noted that the Fourth Edition used by Dr. Lesiuk is out of date, and that the Fifth Edition of the same guide referred to in Dr. Johnson's report of July 18, 2005. The Fifth Edition of the Guide states that an impairment can be manifested objectively, for example by a fracture and/or subjectively, through fatigue and pain. Although the guide emphasizes objective assessment, subjective symptoms are included within the diagnostic criteria.

Accordingly, Dr. Lesiuk's insistence on relying upon objective findings is among significant flaws in his report.

The case manager, in his letter of November 6, 2004, which terminated the Appellant's entitlement to IRI benefits, relied upon the report of Dr. Lesiuk.

Counsel for MPIC also pointed to the case manager's memo dated November 24, 2004, a few weeks after the discontinuation of his IRI benefits, which noted that the Appellant would be approved for six (6) future chiropractic or physiotherapy treatments. She noted the inconsistency in approving further treatment arising out of the accident while at the same time discontinuing his entitlement to IRI benefits. Then again, on November 29, 2004, funding was approved for a sacral belt for the Appellant.

Counsel for the Appellant also pointed to errors in a report by Dr. MacKay dated April 26, 2005. She argued that Dr. MacKay relied too heavily on the Appellant's pre-existing back problems, which she submitted had resolved by the time of the June 2004 motor vehicle accident. Dr. MacKay had speculated that the Appellant's use of Naproxyn was a result of his back problems at the time but the Appellant had indicated it was prescribed for treatment of his gout.

Counsel for the Appellant also criticized a report completed by Dr. Fougere, Medical Consultant to MPIC's Health Care Services Team on January 21, 2005 which contained unnecessary speculation regarding the time lines of the reviewed surveillance tapes.

It was her submission, that, similar to the situation in a previous appeal in front of the Commission in **M.K.** (AC-03-02) that MPIC had failed to discharge its duty under Section 150 of the MPIC Act to advise and assist claimants and to endeavor to ensure that claimants are informed of and receive compensation to which they are entitled under the Act. She submitted that MPIC's medical investigation of the Appellant's claim do not meet this duty.

Counsel for the Appellant also relied on a series of other decisions of the Commission. She referred to the case of **G.L.** (AC-03-66) to support the genuine belief of the Appellant based on the advice of his medical practitioners that he would injure himself if he resumed work. She also referred to the case of **J.G.** (AC-03-107) regarding the legitimacy of the Appellant's subjective complaints, and **D.A.L.** (AC-03-18) and **H.M.U.** (AC-03-27) regarding the value of consistent medical assessment performed by an Appellant's caregiving medical practitioners, as opposed to file reviews conducted by MPIC's Health Care Services staff.

Counsel for the Appellant stressed that it was the opinion of Dr. Johnson, who was a specialist in this area, that the Appellant was not able to return to his job as an area distributor. In his letter of July 18, 2005, Dr. Johnson stated:

From the examination at the time of this assessment, it was noted that there was stiffness and tightness in the neck region with it taut bands in the trapezius bilaterally. The neck problem was not affecting his functional level considerably but certainly added aggravation. It is highly probable that the June 2004 collision aggravated his neck problems. Again the degree to which his neck was a significant concern prior to the collision would be best decided with the description of his pre-collision complaints through the treating chiropractor and/or family physician. He would've had significant difficulty performing the duties of his job if he was experiencing significant pain in his neck and shoulder area.

...

[D.J.] has not able to perform the duties of his job since June 2004, primarily because of the pain which has been present since the motor vehicle collision of June 2004. The work in the warehouse and on the truck requires lifting, bending and assuming awkward positions. These activities significantly aggravate his pain and limit his functionality. . . .

At this point, [D.J.] has not reached maximum medical recovery. It would be worthwhile considering some work hardening to see if he could return to his previous work. There is a significant probability that it will take some further time for recovery to take place but on a positive note, even though it has been relatively prolonged in the past his recovery has resulted in his ability to be actively employed. I do not feel that he is able to return to the level of work that he was doing in his present physical condition.

It was submitted that Dr. Johnson's opinion remained the same after viewing the video tapes, according to his letter of December 4, 2005. In that report Dr. Johnson states:

Fortunately, there is really no evidence on the basis of the physical and investigative findings to indicate that there were new physical conditions created but (sic) the collision of June 2004. From [D.J.'s] description as well as the information in the letters from Dr.'s McLeod and Kisil, there has been a change in his ability to perform physical activity, however, secondary to an aggravation of the pain condition he experienced prior to the collision. The change in physical pain is the main reason for [D.J.'s] inability to return to his job. The pain is arising from the soft tissues around the spine and right hindquarter. The exact mechanism of aggravation of these tissues is not always clear. There is conflicting information regarding the role played by degenerative disc and facet disease. I feel that there is a strong probability that the balance reached with the amount of activity tolerated by the lumbosacral levels affected by disc and facet degeneration have been disturbed by the forces experienced in the June 2004 collision. There is a probability that this change in balance is the reason for increased pain [D.J.] experiences. Time is required to reach a new level of tolerance. . . .

In reviewing the video tape evidence, counsel for the Appellant submitted that the days which were depicted, just before Christmas in December, were not typical days. She noted the Appellant's evidence that due to financial circumstances, he had to compress all his Christmas errands into that time, and that he was in pain on those days and took extra Advil. She also noted that in the video tapes, the Appellant's movements were not rapid, but rather were considered and gradual, and that he was limping. She pointed to Dr. Johnson's assessment of the video tape evidence contained in his report dated December 4, 2005, where he noted that the Appellant favoured his right leg with antalgic, methodical gait, and that the Appellant was careful in getting in and out of motor vehicles.

MPIC's Submission

Counsel for MPIC submitted that the Appellant was not a reliable witness and that his credibility was very much in issue in this appeal. In support of this position, counsel for MPIC emphasized the following points:

1. The Appellant initially asserted that his back was symptom free prior to the motor vehicle accident of June 2004. This is a questionable assertion given the pattern of injuries, which is very similar to his pre-existing history of back injuries and pain. Although he reported to some of his caregivers that when he took the job of area distributor in May 2004 he had no pain in his back, the Appellant testified at the hearing that when he started to help his wife with this job in the fall of 2003 he did have back pain, lasting until the spring of 2004. Thus, he had not been completely forthright when representing to Dr. Johnson and Dr. Lesiuk that he had no back pain just prior to the motor vehicle accident.
2. The circumstances surrounding the accident do not support the Appellant's contention that he sustained serious injury. Counsel for MPIC submitted that photographs of the vehicle indicate minimal visible damage. The Appellant was able to maintain control of his vehicle, was wearing a seatbelt, and sustained no bruises, cuts or lacerations. His daughter, who was also in the vehicle, was not injured, no ambulance was called to the scene and the Appellant did not seek emergent or urgent care.
3. The Appellant has provided inconsistent versions of how his body moved inside the van as a result of the impact. In some instances he indicated that his body was thrown from side to side, while other versions he gave indicated his body dropped inside the truck or that he was retained in his seat. These very serious inconsistencies would make it difficult for a medical practitioners to rely on an accurate version of the events in order to make any comments regarding the mechanism of injury.
4. The Appellant's previous claim for benefits was, as the Appellant admitted, terminated pursuant to Section 160 of the MPIC Act as a result of false information he gave to MPIC.

5. The Appellant has demonstrated an almost pathological unwillingness to admit any improvement in his symptoms as a result of treatment. This is similar to the pattern he demonstrated after his previous motor vehicle accidents, when he was not willing to concede any improvement from various kinds of treatment. He has consistently told his case manager that his condition is going backwards and getting worse, despite documentation which reveals that by August 31, 2004 he had received twenty-three (23) chiropractic and thirty (30) physiotherapy treatments since the date of the accident. While objective measurements indicated he had full spinal range of motion by October of 2004 the Appellant continued to portray himself as totally disabled.
6. The Appellant has provided a variety of inconsistent estimates regarding the weight of bundles of flyers which he was required to lift in his job, ranging from 18-20 pounds, to 30-40 pounds, to a high of 60 pounds reported to Dr. Lesiuk.
7. Dr. Lesiuk, in his report dated October 20, 2004, noted numerous inconsistencies during the examination:

There were inconsistencies on the current examination, in that although there were complaints of symptoms in a number of areas, with a number of activities he however displayed fluid transitional movements such as when changing direction while walking, changing from supine to prone, getting on and off the examining bench, and performing various maneuvers. Little if any symptoms were reported with range of movement of a number of areas of the body, including the neck, upper and low back, and also the lower extremities. There was no evidence of any articular involvement on examination. The history suggests possible posterior structure involvement of the neck and low back, but he did not describe any symptoms on specific stress tests of these areas. There was no evidence on the current clinical examination of any ongoing lumbosacral nerve root involvement or other, including cervical nerve root or other peripheral nerve root involvement. There were inconsistencies on the stress testing across the lumbosacral segments. He reported some discomfort on PA thrust maneuvers done from the mid-thoracic, across the lumbosacral spine and lumbosacral junction, but alternate forms of mechanical stress to the low back and across the lumbosacral junction did not produce any low back discomfort.

8. Although the Appellant insisted on cross-examination that he had followed the home exercise program recommended to him, it is apparent that he had not followed it. It would be unusual, counsel for MPIC submitted, for soft tissue injuries such as the Appellant had suffered to get worse instead of better with active therapy.
9. The activities of the Appellant observed on the video tapes show fluid, normal movement without any signs of distress. The Appellant does not show a twinge of discomfort and the overall impression is that he is not a man in great distress. This is consistent with the opinion of Dr. Fougere of January 21, 2005:

The observed normal function and absence of indication of symptom disability associated with several typical daily activities are consistent with the unremarkable clinical examination findings documented by Dr. Lesiuk. There is an obvious discrepancy between the claimant's reported perceived symptom disabled state and his demonstrated normal function.

...

Having reviewed the videotapes, at no time did I obtain the impression that the claimant suffered from a physical disability. The claimant's movement patterns were conspicuously absent for reflecting organic pathology and, in my opinion, would not indicate that the claimant was incapable of attempting the activities depicted in the Personal Demands Analysis report.

10. Counsel for MPIC questioned the Appellant's failure to even attempt any return to work to his former duties, remaining unemployed even though all of the medical practitioners have indicated that activity would assist in his recovery.

Counsel for MPIC also reviewed the medical evidence on file in great detail. He went through several reports from the Appellant's chiropractor, Dr. Kisil, physiotherapist Ed Zwingeman, Dr. Pacin, and physiotherapists Anastasia Meseman, and Anne Dawson. He also reviewed the physical demands analysis dated July 15, 2004 and the reports of Dr. Lesiuk, independent medical examiner, and Dr. Johnson. He also reviewed reports from Dr. Pethrick, chiropractic

consultant and Dr. MacKay and Dr. Fougere, medical consultants, to MPIC's Health Care Services.

Based upon these reports, counsel for MPIC argued that the Appellant had provided inaccurate reporting to many of his caregivers, for example, exaggerating the heaviness of the lifting duties required by the job. The reports did not show much in the way of objective findings arising out of the June 4, 2004 accident, identifying only a minor aggravation of the Appellant's prior symptoms. The weight of opinion indicated that the Appellant's condition should improve and was improving, and that with attention to proper exercise and activities, he would be capable of working at least modified duties.

Dr. Lesiuk, Dr. Pethrick, Dr. MacKay and Dr. Fougere, after reviewing the reports, concluded that there were few objective findings attributable to the motor vehicle accident and that the Appellant had ample time to recover from the natural history of an exacerbation of injuries. He had been provided with ample assistance and regained full spinal range of motion.

Even a review of Dr. Johnson's reports, counsel for MPIC argued, showed a lack of objective findings on examination, and did not support a finding that the Appellant could not return to work.

Given the difficulties with the Appellant's credibility and lack of accurate reporting, combined with the activities depicted on the videotapes, the panel should conclude that Dr. Fougere and Dr. Lesiuk were correct in their most recent findings. Dr. Fougere stated on December 13, 2005:

The multiple clinical examinations that the claimant has undergone in the past 18 months have demonstrated a paucity of objective findings to support the persistently elevated pain scores. . . .

Medical management of this claimant's injuries appears to have, for the most part, been symptom driven. . . . This is an example of symptoms ruling over objective findings and in effect further disabling the patient.

On December 17, 2005, Dr. Lesiuk noted that:

. . . The review of the video-surveillance tape does not alter my prior opinions. They confirm, as I suspected, that no impairment was produced related to the MVA of June 04, 2004.

The activities observed supported my prior suspicions, the claimant was observed performing activities which suggested against any impairment present. The claimant was observed to perform without apparent difficulty routine activities, and some heavier activities including lifting and carrying a large box. Observation of the surveillance activities also did not suggest the presence of any symptoms affecting activity.

This contradicts the history provided by the claimant, however is supported by page 5 of Dr. Johnson's report of December 4, 2005: "It is not evident on casual observation that he has back pain of any significant degree."

. . .

My prior opinions are not altered by the review of Dr. Johnson's reports. I would note that in the reports of Dr. Johnson, some of the conclusions appeared not clearly supported on the basis of the body of the discussion.

However Dr. Johnson does correctly conclude on the basis of his review of available information (page 3 of the report of December 4, 2005), as I have in my prior opinions that: "It is highly probable that no new injury was created as a result of the collision of June 2004."

Appellant's Reply

In reply, counsel for the Appellant took issue with the suggestion that inconsistencies in the caregivers reports reflect upon the Appellant's credibility. The fact that various caregivers interpreted or repeated the information provided to them by the Appellant in different ways, does not reflect on the Appellant's credibility or indicate that he had been less than straightforward with his caregivers.

Counsel for the Appellant submitted that the Appellant's testimony was clear that although he was still having some problems with his back in February or March of 2004, he was not experiencing significant problems in the two (2) to three (3) months prior to the motor vehicle accident.

The Appellant denies that he had not been doing his home exercises. Further, counsel for the Appellant noted that the Appellant's genuine pain was evident in his reaction to an examination by Anne Dawson, who documented the Appellant's "sweating" response during testing. She submitted that it is not fair to make an assessment of the Appellant's pain only by examining his face on the video tapes to look for examples of grimaces etc.

Any lack of objective findings alleged by MPIC does not lead to the conclusion that the Appellant's chronic pain is not valid and is not causally related to the motor vehicle accident of June 2004. As recognized by Dr. Johnson, the Appellant, due to his history and fragile back, may be a slow healer, and the exacerbation of his current symptoms which prevent him from returning to work, is causally connected to the motor vehicle accident of June 2004.

Discussion

The MPIC Act provides as follows:

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;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

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;

The onus is on the Appellant to show, on a balance of probabilities, that he was unable, as a result of injuries sustained in the motor vehicle accident, to work at his employment. Entitlement to an income replacement indemnity ends when a victim is able to hold the employment that he held at the time of the accident.

After reviewing the documentary evidence on the file and the testimony of the witnesses, the panel is of the view that the Appellant has not met the onus upon him of showing, on a balance of probabilities, that he was unable to work as a result of the accident. We find that as of November 5, 2004 the Appellant was able to hold the employment that he held at the time of the accident.

The panel finds that the evidence presented by the Appellant was not credible or consistent. In this regard, the panel has considered:

1. The inconsistencies in the Appellant's description of his condition immediately prior to his accident, and the circumstances regarding his return to work at that time.
2. The inconsistencies in the Appellant's description of the mechanics of accident and injury.
3. The inconsistencies in the Appellant's reports to his case manager. For example, the case manager's notes of June 11, 2004 indicate that when asked for the start date of employment, the Appellant replied "about one and a half years ago, well maybe a bit less", when later evidence indicated that he began work there, at the earliest, in the

- fall of 2003. As well, although in his initial meeting with the case manager the Appellant indicated that he was functioning and could sit for approximately forty-five (45) minutes, he indicated, in a meeting with her on August 31, 2004, that he “can only sit for about fifteen (15) minutes when he drives”.
4. The inconsistencies in the Appellant’s reporting of the physical demands of his job to the medical practitioners.
 5. The Appellant’s exaggeration of symptoms and inconsistencies in his reporting to caregivers and medical practitioners. The Appellant gave different information to various caregivers, then at the hearing went on to disagree with some of their reports, including the report from his chiropractor, Dr. Kisil, dated March 30, 2005, which stated that the Appellant had full range of motion.
 6. The inconsistencies reported by Dr. Lesiuk during the Appellant’s independent medical examination. Dr. Lesiuk noted:

There were inconsistencies on the current examination, in that although there were complaints of symptoms in a number of areas, with a number of activities he however displayed fluid transitional movements such as when changing direction while walking, changing from supine to prone, getting on and off the examining bench, and performing various maneuvers. Little if any symptoms were reported with range of movement of a number of areas of the body, including the neck, upper and low back, and also the lower extremities. . . .

.....

7. Other information: The claimant was able to improve through to what he alleges as being symptom free and being able to “lift anything” in the period immediately prior to the most recent MVA. I see no basis on review of the mechanism of the most recent MVA on the current examination to suggest any structural or other physical contraindications as to why he would not be able to achieve a similar level. On review of the Physical Demands Analysis of the position of Area Distributor, I felt that the evaluated Physical Demands Analysis appears to be primarily to a light level. I would again point out that based on the current review of the most recent MVA, I would not see why the claimant would not be able to return to his prior job duties on the basis of having had the most recent MVA.

7. The Appellant's demonstrated capacity to function when necessary. Where circumstances provided the Appellant with sufficient motivation, (for example in the videotape surveillance tapes) he was able to function quite effectively and actively to perform the necessary tasks with no objective evidence to the contrary.

The panel also finds that, on a balance of probabilities, there is a lack of objective evidence that the Appellant is suffering from a medical condition arising out of the motor vehicle accident which would prevent him from working.

In this regard, the panel has considered the video tape evidence of the Appellant's activities. On these video tapes, the Appellant did not demonstrate any apparent weakness, pain or fatigue through very active days.

The panel has also considered the lack of objective medical evidence to support the Appellant's claim. It is difficult for the panel to prefer the medical reports of any one doctor over the reports of other doctors in this case, given the evidence regarding the Appellant's lack of consistency in reporting his symptoms and condition to the medical practitioners. However, when the panel considers and weighs the evidence of all the medical reports taken together, we are of the view that, on a balance of probabilities, the Appellant has not shown evidence of disability which would continue to prevent him from performing his job after November 2004.

This, together with the difficulties encountered with the Appellant's credibility and inconsistent reporting, leads the panel to the conclusion that the Appellant has failed to show, on a balance of probabilities, that he is unable, as a result of a condition resulting from the motor vehicle accident to perform the duties of his job as an area distributor.

For these reasons, the Commission therefore confirms the decision of MPIC's Internal Review Officer dated May 3, 2005.

Dated at Winnipeg this 28th day of February, 2006.

LAURA DIAMOND

WENDY SOL

NEIL COHEN