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## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by J.B.**  
**AICAC File No.: AC-04-177-FF**

**PANEL:** Ms Laura Diamond, Chairperson  
Mr. Antoine Frechette  
Mr. Paul Johnston

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

**HEARING DATE:** April 20, 2006

**ISSUE(S):** Whether the medical information produced since the Appeal  
Commission last dealt with the Appellant's claim provides  
new information capable of founding a fresh decision.

**RELEVANT SECTIONS:** Section 171(1) 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, J.B., was injured in a motor vehicle accident on January 25, 1997. As a result of the injuries he sustained in the motor vehicle accident the Appellant was unable to return to his employment and became entitled to receive Income Replacement Indemnity ('IRI') benefits in accordance with Section 81(1) of the MPIC Act, and reimbursement for medical and paramedical care for treatment of his injuries in accordance with Section 136(1) of the MPIC Act.

The Appellant had a significant history of motor vehicle and work related injuries to his cervical, thoracic and lumbosacral areas. Following the motor vehicle accident, he underwent rehabilitative assessment, including a reconditioning program and chiropractic treatment.

The Appellant's entitlement to continue with chiropractic and acupuncture benefits, as well as to receive IRI benefits beyond February 4, 2000, as a result of the January 25, 1997 motor vehicle accident, was the subject of a decision of the Automobile Injury Compensation Appeal Commission ('AICAC') dated April 24, 2002. In that decision, the Commission dismissed the Appellant's appeal and confirmed the decisions of MPIC's Internal Review Officer bearing dates March 30, 2001 and April 2, 2001. It was the decision of the Commission that the Appellant had reached maximum medical improvement, and that, as of September 20, 1998, the Appellant was able to hold the employment that he held at the time of the accident.

Subsequent to this decision of the Commission in April 2002, the Appellant forwarded a new report from his chiropractor, Dr. Dan Wilson, dated February 2, 2004 to MPIC. This report was reviewed by MPIC, to determine whether the new information warranted a fresh decision to that of which had been previously rendered. Dr. Wilson's report was reviewed by Dr. Timothy Pethrick, a Chiropractic Consultant with MPIC's Health Care Services Team. Dr. Wilson noted, among other things, that the disc spaces in the Appellant's cervical spine in 1997 were within normal spaces, and that x-rays taken May 7, 2003 revealed moderately severe degenerative narrowing of the C5-6 disc space. The Appellant's case manager found, on June 29, 2004, that these findings could not support a relationship between the cervical disc degeneration, the Appellant's symptoms and trauma in the motor vehicle accident, to the extent that this would change the decisions previously rendered by MPIC and upheld by AICAC.

The case manager's decision was reviewed by an Internal Review Officer for MPIC on September 13, 2004. The Internal Review Officer agreed with the finding of Dr. Pethrick and the case manager. She found that two of the three arguments put forward by Dr. Wilson had already been dealt with in the AICAC decision. The third argument, regarding the cervical spine x-rays, did not support a conclusion that the present cervical spine degeneration was directly related to the motor vehicle accident in 1997. She confirmed the decision of the case manager and dismissed the Application for Review.

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

### **Preliminary Matters**

The parties were not in agreement as to the definition of the issues under appeal before the Commission. The Appellant's position was that the issue is:

Whether the Appellant's current symptoms are related to the motor vehicle accident of 25 Jan 97 and, if so, is he entitled to further Personal Injury Protection Plan benefits.

MPIC's position was that the issue under appeal is:

Whether the medical information produced since the Appeal Commission last dealt with the Appellant's claim provides new information capable of founding a fresh decision.

The panel heard submissions from the parties in regard to the definition of the issue. We held a recess to review the submissions and positions of the parties. When the hearing was reconvened, the panel held that, having regard to the correspondence on file and the issues which had already been dealt with by the Commission in April of 2002, the relevant issue under appeal was:

Whether the medical information produced since the Appeal Commission last dealt with the Appellant's claim provides new information capable of founding a fresh decision.

The hearing proceeded on this basis.

### **Submission of the Appellant**

The Appellant submitted that Dr. Wilson's narrative report of February 2, 2004 contained new information which should cause MPIC to issue a fresh decision based upon the new information.

Dr. Wilson, in his report, took the position that the Appeal Commission's decision that the Appellant was able to return to the employment he held at the time of the accident was not correct, since although the Appellant had been capable of modified/light duties, the Appeal Commission failed to acknowledge that the long term prognosis for full recovery changed dramatically after the January 1997 motor vehicle accident.

Dr. Wilson also dealt with the issue of treatment frequency (which MPI had considered as an indication that the Appellant had returned to pre-accident status), stating that the Appellant had not reached pre-accident status although chiropractic treatment had reached a frequency of once per week. He took the position that treatment intervals were reduced only because the Appellant was not at work (with the resulting absence of physical work stress) and because of Dr. Wilson's desire to avoid accusations of over treatment.

Dr. Wilson's report also referred to new objective evidence relating to the severity of the Appellant's neck injuries, arising out of a comparison of x-rays of the cervical spine.

Dr. Wilson stated:

. . . Initial x-rays of the cervical spine after the MVA of January 1997 revealed disc spaces that were within normal limits. X-rays taken at the request of Dr. Garey Mazowita on May 7, 2003 reveal moderately severe degenerative narrowing of the C5-C6 disc space. Based upon the accident history, injuries sustained and post accident recovery, the balance of probabilities would indicate that this disc space narrowing has developed as a result of post traumatic osteoarthritis.

Dr. Wilson also submitted a further report dated February 21, 2005, reiterating his view that the x-rays confirmed slow progressive deterioration and degenerative narrowing consistent with post-traumatic degenerative spinal disease.

The Appellant submitted that the new evidence from Dr. Wilson, particularly the x-ray findings, was evidence not present at the time of the first AICAC hearing. He submitted that these findings were relevant to his entitlement to benefits, and dealt with a decisive or potentially decisive issue from the first hearing.

The Appellant submitted that Dr. Wilson's evidence and reports were credible. Dr. Wilson had provided a thorough, in-depth and detailed review of research in the area.

The Appellant also submitted that if this x-ray evidence had been available at the first AICAC hearing, it could well have had an effect on the Commission's decision. He submitted that post-traumatic degenerative narrowing would not normally be evident immediately following an accident. Rather, this is an effect that occurs over time. Accordingly, the x-ray findings of May 7, 2003 provide the best medical evidence regarding the effects of the accident upon the Appellant.

#### **Submission of MPIC**

Counsel for MPIC reviewed Dr. Wilson's reports. He submitted that the first two points, regarding the Appellant's ability to return to his employment and the frequency of treatment, could in no sense be considered new information. He submitted that the Commission has already thoroughly dealt with these issues and arguments in its decision of April 24, 2002 and there is no basis for this panel reopening any review of these issues.

In regard to the third issue – the x-ray results of May 7, 2003 – counsel for MPIC submitted that while these x-rays might contain a kernel of fresh information, they are not capable of affecting the results of the decision already rendered by the Commission in April 2002 and do not provide a basis for a fresh decision.

In regard to the prognosis for the Appellant's ability to return to the workplace, counsel for MPIC submitted that this issue had been fully dealt with before the Commission in April 2002. The Commission did not accept the prognosis being advanced by the Appellant, and clearly found that the Appellant had reached the same physical condition that he had been in just prior to the January 1997 motor vehicle accident.

In regard to the frequency of treatment, counsel for MPIC submitted that Dr. Wilson's position in the February 2, 2004 letter was not new credible information, and in fact was not correct. By August 1998, the Appellant was receiving chiropractic treatment at a frequency of approximately once per week, when between February 1997 and July 1998, he had been receiving treatment approximately seven to ten (7 – 10) times per month. Further, he submitted that the Commission has already, in its earlier decision, accepted the references to treatment frequency made by Dr. Minuk, in his two, earlier, reports. This has not been disturbed in any way by the new information.

This example of error on Dr. Wilson's part, it was submitted, should affect the weight that the Commission gives to Dr. Wilson's opinions overall.

In regard to the x-ray results showing degenerative narrowing in 2003, counsel for MPIC submitted that, in order for the Commission to find that this was new information which would

affect previous decisions regarding the Appellant's benefits, the Commission would have to accept a list of assumptions, which counsel for MPIC submitted were without merit. Some of these assumptions included:

- ◆ The Commission would have to accept that the degenerative narrowing had something to do with the motor vehicle accident and ignore all of the other accidents and Worker's Compensation Claims in the Appellant's history.
- ◆ The Commission would have to accept not just that the degenerative changes were caused by trauma, but that they were caused by this specific trauma.
- ◆ If the Commission accepts that such changes take a long time to develop after a trauma, why is the cause only being traced back to the 1997 motor vehicle accident, and not further?
- ◆ The Commission would have to accept that the changes in the x-rays were a cause of his condition, even though the Appellant has had a variety of complaints throughout. Particularly, his complaints following the motor vehicle accident involved low back complaints, and these x-ray changes are at the higher C5-C6 level.
- ◆ The Commission would have to accept that the changes in the x-rays account for the Appellant's condition and inability to function, even though the wealth of medical evidence accepted in the previous Appeal Commission decision demonstrates that the Appellant had essentially the same complaints both before and after the changes developed on the x-rays.
- ◆ The Commission would have to accept that the changes on the x-rays somehow explain the Appellant's inability to function even though, again, there was no particular difference in his subjective limitations before and after the January

1997 motor vehicle accident.

Counsel for MPIC relied upon opinions provided by Dr. Timothy Pethrick, on June 7, 2004 and April 4, 2005. Dr. Pethrick referred to studies and literature in the area which showed no relationship between cervical degeneration and past trauma.

Counsel for MPIC noted flaws in the reports and studies referred to by Dr. Wilson in his reports, indicating that in many cases these studies do not stand for any of the points which Dr. Wilson is making, and deal with very different sets of circumstances than the mechanics of the Appellant's injury etc. There is no evidence to establish that any of the factors found in these studies (such as G-force readings), were present in the same manner in the accident of January 25, 1997. As well, we are dealing here with a series of accidents, and the studies tend to review only single traumatic accidents.

Counsel for MPIC submitted that thus, this one small kernel of new information found in the change in the x-rays, is not sufficient to dislodge the findings of the Commission's earlier decision. It is quite clear from the Commission's decision, supported by Dr. Pethrick's two (2) recent reports, that the January 1997 car accident did not make any fundamental difference to the Appellant's condition or to his ability to function. Although the x-ray change is "new" in the sense that it was not before the Commission in 2002, it is not material. It does not hold sufficient weight to call for a fresh decision under Section 171 of the Act. In essence, counsel for MPIC submitted that this was the substance of the Internal Review decision of September 13, 2004 and that no reason has been shown to warrant any interference with that decision.

## Discussion

### **Corporation may reconsider new information**

**171(1)** The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer was not correct and that there is new information upon which the corporation should make a fresh decision in the Appellant's claim.

The Supreme Court of Canada, in *R. v. Palmer*, [1980] 1 S.C.R.759, set out the requirements under the law to establish a claim for the introduction of new evidence at a Court of Appeal:

The following principles have emerged:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief.
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. (at 775)

The Federal Court of Canada, in *Canada v. Lambie*, (1995) 30 Admin L. R. (2d) 218 (F.C.T.D.), held that the rules can be relaxed somewhat in relation to practice before the Canadian Human Rights Review Tribunal. This Commission follows the practice as set out by the SCC and modified by the FCC.

The information in question is contained in Dr. Wilson's report of February 2, 2004, and elaborated upon in his report dated February 28, 2005.

The Commission has reviewed all of the information and material on file, as well as the reports of Dr. Wilson and reports provided by Dr. Timothy Pethrick on the same issue.

In regard to the issue of prognosis regarding the Appellant's ability to return to full work duties, the panel agrees with counsel for MPIC that there is nothing new about Dr. Wilson's theory. This theory was set out in the original April 2, 2001 Internal Review decision and quoted at pages 7 and 8 of the Appeal Commission's Reasons for Decision of April 24, 2002. This matter has already been fully considered and dealt with by the Commission in this earlier decision and there is no new information on this point to support a fresh decision.

In regard to Dr. Wilson's comments regarding the frequency of the Appellant's treatment, the Commission finds that, as submitted by counsel for MPIC, this matter has already been considered by the Commission, and that there is no, new reliable information that would impact or change this decision.

Finally, the panel has reviewed the evidence and submissions regarding the potential effect of the degenerative changes detected in the x-ray of May 7, 2003.

In his report dated February 2, 2004, Dr. Wilson reviewed and compared the x-rays of the Appellant's cervical spine taken after the motor vehicle accident in January 1997 to the x-rays taken on May 7, 2003. According to Dr. Wilson, the May 7, 2003 x-rays reveal changes:

. . . moderately severe degenerative narrowing of the C5-C6 disc space.

Dr. Wilson reviewed literature which stated:

The high incidence of cervical osteoarthritis and spondylosis observed in those presenting

with symptoms years after an acceleration/deceleration injury suggests a very strong casual (sic) relationship, especially when the disease is localized to one or two levels. . .

Dr. Wilson concluded that on this basis, a review of MPIC's decision to deny responsibility for the Appellant's ongoing disability was necessary and stated:

. . . Based upon the accident history, injuries sustained and post accident recovery, the balance of probabilities would indicate that this disc space narrowing has developed as the result of post traumatic osteoarthritis.

In a subsequent report dated February 28, 2005, Dr. Wilson conducted a thorough review of his examination findings in regard to the Appellant, as well as the x-ray findings. He noted:

There can be no argument as to whether or not there is objective evidence of disc deterioration at the C5-C6 level of [J.B.'s] cervical spine. Manitoba Public Insurance and I appear to have different viewpoints on the etiology of these objective findings.

Following an extensive review of literature in the area, Dr. Wilson stated, at page 6 and 7 of the report:

[J.B.'s] initial x-rays of the cervical spine in 1997 taken immediately after his January 25, 1997 accident, showed no indication of disc degeneration. Manitoba Public Insurance has based its denial of further responsibility for [J.B.'s] ongoing problems based upon a lack of objective evidence that his ongoing condition is related to his motor vehicle accident of January 25, 1997. Follow up x-rays dated May 7, 2003 revealed moderately severe degenerative narrowing of the C5-C6 disc. This objective evidence lends credibility to the ongoing subjective complaints that [J.B.] has consistently related since his 1997 motor vehicle accident.

Based upon the literature cited above, I would suggest that on a balance of probabilities, the degenerative narrowing of C5-C6 is substantially related to the motor vehicle accident of January 25, 1997. Cervical spine degeneration related to the 1997 accident has associated soft tissue and biomechanical complications which are at least partially responsible for [J.B.'s] ongoing disability.

The information regarding these x-ray changes was not before the previous panel in the Commission's decision of April 2002. The new reports were reviewed by Dr. Timothy Pethrick, a Chiropractic Consultant to MPIC's Health Care Services, in reports dated June 7, 2004 and April 4, 2005. Dr. Pethrick identified several concerns regarding Dr. Wilson's references to the cervical spine x-rays. Dr. Pethrick's concerns were based upon:

- Substantial literature questioning the relationship of cervical osteo-arthritis, including disc degeneration to symptomatic status
- Literature questioning the relationship of traumatic injuries to the later development of osteo-arthritis, including disc degeneration
- Even if a relationship between cervical disc degeneration and symptoms and development of degenerative changes to trauma were accepted, there is still difficulty in relating this development to a single injury
- Difficulty in distinguishing the effects of a single injury from other injuries or from the gradual effect of wear and tear in the general population, where segmentally confined disc degeneration is not uncommon

Although Dr. Wilson's opinion regarding the connection between the January 25, 1997 motor vehicle accident and the 2003 x-ray changes was presented quite forcefully, Dr. Pethrick raises significant valid concerns. The panel has reviewed the reports of both doctors, and the medical evidence on file. We have concluded that, based on the concerns identified by Dr. Pethrick, the Appellant has failed to meet the onus of establishing, on a balance of probabilities, that the x-ray results show a causal relationship between the motor vehicle accident and the Appellant's symptoms. The evidence has not clearly established, on a balance of probabilities, that the x-ray changes were caused by a traumatic event, or by the motor vehicle accident of January 25, 1997, or that these changes are the cause of the Appellant's symptoms. The panel is not convinced that

there is new information that would bear upon a decisive or potentially decisive issue at the previous hearing of the Commission, and/or that, when taken with the other evidence adduced at that hearing, they would reasonably be expected to have affected the result.

In this regard, the panel has reviewed and relied upon the concerns expressed in the opinion of Dr. Pethrick who stated, on June 7, 2004, that:

However, accepting that the degeneration as described by Dr. Wilson is supported by review of the actual films, I do not find this evidence compelling either in its relationship to [J.B.'s] continuing persistent cervical spine symptoms nor in its relationship to the motor vehicle accident. There is substantial biomedical literature that questions both the relationship of cervical osteoarthritis, including disc degeneration, to symptomatic status, and the relationship of traumatic injuries to the later development of osteoarthritis, including disc degeneration. I have attached several articles obtained from a Medline search to support this position. However, even if a relationship between cervical disc degeneration and symptoms and development of the degenerative changes to trauma were accepted, it would still be very difficult to relate this development to a single injury which occurred in 1997, and to sort this effect out from the effects of other injuries or from the gradual effect of wear and tear. It is not uncommon in the general population to find patients with segmentally confined disc degeneration (that is, at one level). This diagnosis is not exclusive to those with a history of motor vehicle trauma.

In summary, the evidence presented by Dr. Wilson is not likely to change the positions as taken by Manitoba Public Insurance.

On April 4, 2005, Dr. Pethrick stated:

I have reviewed my prior opinion in the context of the information supplied by Dr. Wilson. My opinion remains unchanged. As noted by Dr. Wilson, [J.B.] has experienced multiple accidents both under Workers Compensation Board coverage and through Manitoba Public Insurance. Dr. Wilson, in his letter, referenced 27 WCB injuries and 12 automobile accident injury claims. In reviewing the information on file, I am unable to attribute his current symptoms or recent x-ray changes to the effect of any one of these accidents. Specifically, in my opinion, there is no probable causal relationship between his x-ray changes and the effect of the motor vehicle accident of 1997.

The panel finds that the Appellant has not presented “new information” in the sense required by Section 171(1). It is not clear that this information, had it been placed before the Commission,

would have affected the decision of the Commission on April 24, 2002. The Appellant has failed to establish, on a balance of probabilities, that there is any new evidence, in Dr. Wilson's comments regarding prognosis of ability to return to work, frequency of treatment or disc changes on the x-ray, that should cause the corporation to make a fresh decision in respect of the Appellant's claim for compensation. Therefore, the panel finds that the Appellant has failed to establish, on a balance of probabilities, that the medical information produced since the Appeal Commission last dealt with his claim, is new information sufficient to support a fresh decision by the Corporation. The decision of the Internal Review Officer of September 13, 2004 is hereby confirmed, and the Appellant's appeal dismissed.

Dated at Winnipeg this 30<sup>th</sup> day of May, 2006.

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**LAURA DIAMOND**

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**ANTOINE FRECHETTE**

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**PAUL JOHNSTON**