



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by W.N.
AICAC File No.: AC-05-158

PANEL: Mr. Mel Myers, Q.C., Chairperson
 Mr. Neil Cohen
 Dr. Patrick Doyle

APPEARANCES: The Appellant, W.M., appeared on his own behalf;
 Manitoba Public Insurance Corporation ('MPIC') was
 represented by Ms Kathy Kalinowsky.

HEARING DATE: December 7, 2005 and May 15, 2006

ISSUE(S): Entitlement to Income Replacement Indemnity benefits
 beyond December 5, 2004

RELEVANT SECTIONS: Sections 71(1) and 81(1)(a) of The Manitoba Public
 Insurance Corporation Act (the '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

W.N. (hereinafter referred to as the 'Appellant') was involved in a motor vehicle accident on July 7, 2004 in which he failed to stop at a stop sign and struck another vehicle in the intersection. The injuries the Appellant sustained in the accident included chest wall contusion, multiple contusions to his right shoulder and arm. After the motor vehicle accident the Appellant complained of pain to his right shoulder and right arm, as well as quite severe pain to his lower right chest, which pain was considered to be due to the tearing of muscle fibres in the chest wall at the bony rib insertion. He also experienced a transitory pain to his left knee.

At the time of the motor vehicle accident the Appellant was [text deleted] years old and worked in sales for [text deleted], a company the Appellant formally owned until he transferred it to his daughter.

As a result of the motor vehicle accident injuries that the Appellant received to his right shoulder, right arm and lower right chest, the Appellant was unable to return to his employment and was in receipt of Income Replacement Indemnity ('IRI') benefits as of July 15, 2004.

A Physical Demands Analysis was prepared by Karen Leach-MacLeod, Occupational Therapy Assessment & Consultation, dated October 4, 2004, which indicates that the Appellant performed various supportive functions within the business. These were reported to include:

Essential Functions:

1. Inspecting and monitoring job sites.
2. Administrative work including paperwork, phone calls
3. Reviewing submitted estimates.
4. Selling a job after a quote has been submitted.

[W.N.] indicated he typically inspects and monitors sites to which he is the main contact for the customer or had sold the job.

The Appellant reported working Monday through Saturday, twelve (12) hours per day and during the course of his employment he was exposed to outdoor weather conditions when inspecting and monitoring job sites while the remainder of his essential functions were performed indoors in an office environment. The report further indicated that physical demands of his job of lifting and carrying or dragging pieces, as well as climbing apparatus, were minor components of the Appellant's responsibilities.

The Appellant, in an Application for Compensation to MPIC, dated August 24, 2004, reports that he did not suffer a loss of consciousness or suffer a blow to his head. He further indicated that

he was in shock, was unable to recognize anyone at the scene of the accident and for some three (3) or four (4) weeks after the accident his head had not been clear and he was unable to think straight. He further stated that he was unable to write because of the shaking of his right arm and hand.

The Appellant testified at the hearing and confirmed the contents in his Application for Compensation. The Appellant's close friend, [M.S.], testified at the hearing and stated that she attended at the scene shortly after the accident occurred and saw the Appellant to be confused, meek and distraught. She further testified that before the accident he had always been an aggressive, direct, take-charge type of individual.

After the motor vehicle accident the Appellant did not return to work for approximately one (1) month and then attempted to return to do some office work but was unable to carry out the essential duties of his job and was not placed back on the payroll.

As a result of the motor vehicle accident injuries the Appellant attended at the office of his physician, Dr. Breckman, on July 13, 2004, approximately six (6) days after the motor vehicle accident. In a report to Mr. Morley Hoffman, the Internal Review Officer, dated June 23, 2005, Dr. Breckman reported that:

1. he had seen the Appellant for a complete medical examination prior to the motor vehicle accident of July 5, 2004 and at that time there was no evidence of any problem with his right arm.
2. when he examined the Appellant on July 13, 2004 the Appellant's primary concern related to his anterior chest and there was evidence of significant right sided chest tenderness.

3. the Appellant first reported problems with his right shoulder and tremor of the right arm on November 12, 2005.

The Commission notes that on August 24, 2004 the Appellant, in his Application for Compensation, stated that his “...(R) *hand shakes to write*”. As well, the Appellant informed his case manager on September 13, 2004 that he was experiencing shaking of the right hand which precluded him from writing and shaving. He further informed the case manager that he wasn’t shaky prior to the accident and he would be talking to his doctor about this. The Appellant further stated that he continued to have pain to the right side of his chest and was unable to drive.

On September 13th Dr. Breckman provided a medical note to the case manager advising him that the Appellant was not capable of returning to work and would be reassessed in four (4) weeks time. At the request of MPIC the Occupational Therapist, Ms Karen Leach-MacLeod of the firm Approaching Function, conducted an assessment of the Appellant. Ms Leach-MacLeod issued two (2) reports dated September 27, 2004 and October 4, 2004. In her September 27, 2004 report to the case manager, Ms Leach-MacLeod reported that she had examined the essential duties of the Appellant’s employment and concluded that the Appellant:

...is currently unable to perform a portion of the job duties associated with inspecting/monitoring. He is currently unable to perform approximately 16% of this task (based on 20 minutes of climbing/working near unprotected heights in a 2 hour inspection period for 1 worksite. This is based on the current productivity demands). (underlining added)

On November 12, 2004 Dr. Breckman referred the Appellant to D’arcy Bain Physiotherapy for an assessment in respect of the Appellant’s right shoulder tendonitis. The Appellant had received five (5) or six (6) physiotherapy treatments and in a report to MPIC dated November 16, 2004 the physiotherapist reported to MPIC that the Appellant could return to work.

However, Dr. Breckman in his medical report to MPIC dated November 29, 2004 disagreed with the physiotherapist and stated:

I believe [W.N.] is currently capable of performing 50% of his duties. He remains limited in his functioning due to ongoing chest pain and due to depressive symptoms.

I do not anticipate any permanent impairments resulting from [W.N.'s] MVA.

Case Manager's Decision

On December 1, 2004 the case manager wrote to the Appellant and stated:

On November 16, 2004, Wayne Lacko, your physiotherapist confirmed that you are capable of returning to your full duties at work. As of this date, you are no longer entitled to Income Replacement Indemnity (IRI) benefits.

I agreed to extend your IRI benefits to **December 5, 2004**. The extra time can be used to make arrangements in your return to work. There will be no further payment of IRI benefits past December 5, 2004.

The physiotherapist, in a report to MPIC dated November 16, 2004, reported that the Appellant's right shoulder was doing well and that the Appellant would be seeing his doctor for review regarding right hand tremor.

At the request of MPIC Dr. Breckman provided a further report to MPIC dated December 20, 2004 wherein he stated that the Appellant remained unable to work at any occupation. Upon receipt of that report the case manager contacted the Appellant and in a note to file dated December 23, 2004 the case manager stated:

I asked [W.N.] what he was unable to do and why. He said that his right arm is giving him problems. It is not due to his chest wall injury that he can't work. He said he can't write with his right hand. I looked through the medical information on file and advised that I don't see any mention of a right arm injury related to the MVA. (underlining added)

Dr. Breckman provided a further report to MPIC dated January 10, 2005:

SINCE [W.N.'S] MVA ON JULY 7/04, HE HAS BEEN UNABLE TO PERFORM ANY TASKS USING HIS RIGHT ARM. THIS WOULD INCLUDE WRITING, LIFTING, PUSHING PULLING. RIGHT CHEST PAIN HAS ALSO LIMITED HIM IN TERMS OF PERFORMING PHYSICAL DUTIES. HE REMAINS DISABLED IN TERMS OF THE USE OF HIS RIGHT ARM.

On January 12, 2005 the case manager wrote to Dr. MacKay, Medical Consultant with MPIC's Health Care Services, providing him with the entire MPIC file in respect of the Appellant. The case manager referred specifically to the September 22, 2004 Physical Demand Analysis and pointed out the conflicting opinions of Dr. Breckman and the physiotherapist, Wayne Lacko, about the ability of the Appellant to return to work and asked Dr. MacKay the following questions:

- ◆ Can a causal relationship be established between the right shoulder/arm injury and the MVA?
- ◆ Does the medical information support [W.N.'s] inability to perform his occupational duties due to his MVA injuries?
- ◆ Is further physio TX medically required?

Dr. MacKay provided an Inter-Departmental Memorandum dated January 13, 2005 to the case manager. Dr. MacKay concluded after reviewing the reports of Dr. Breckman, the physiotherapy reports of Mr. Lacko, and the Physical Demands Analysis conducted by Ms Leach-MacLeod the Occupational Therapist, and stated:

It is my opinion [W.N.] recovered from the medical condition arising from the incident in question to the extent he was able to return to his work duties as of August 27, 2004. The file does not contain documentation indicating [W.N.] had a physical impairment of function arising from the incident that precluded him from performing his full-time occupational duties at that time.

On January 25, 2005 the case manager wrote to the Appellant and advised him that on January 19, 2005 the Health Care Services Team had reviewed all of the medical information on January 19, 2002 reported:

. . . There is insufficient medical information to establish a causal relationship between your right shoulder/arm symptoms and the July 7, 2004 motor vehicle accident. Furthermore, there is no medical evidence to indicate that your motor vehicle accident injuries continue to prevent you from performing your pre-accident occupational duties past December 5, 2004.

Therefore, since your motor vehicle accident is not responsible for your inability to work, our decision that your entitlement to IRI benefits ends on December 5, 2004 remains unchanged.

Application for Review

On January 27, 2005 the Appellant applied for a review of the decision of the case manager and in a supporting letter attached to the Application for Review dated January 11, 2005 the Appellant stated:

I still have some chest pain at times and my right arm and wrist are still shaking. I have taken it upon myself to put a heating pad on my right shoulder 2 – 3 times a day for an extended period of time. Dr. Breckman advised me to keep doing it.

On February 11, 2005 Dr. Breckman provided a further report to MPIC wherein he stated:

[W.N.] was examined by myself on July 5, 2004. At that time he was found to be in good health. No tremor of the right hand was evident at that point. Subsequent to the MVA he has developed a tremor in his right hand. I am unable to state whether this tremor is directly related to the MVA. (underlining added)

Dr. Breckman referred the Appellant for an assessment by the Neurologist, Dr. Fast. Dr. Fast, in a report to Dr. Breckman dated April 25, 2005 stated that he had examined the Appellant and that the CT scan showed a left inferomedial parietal lobe stroke, which was likely the cause of

his right sided tremors. Dr. Breckman, in his report to the Internal Review Officer dated June 23, 2005, wherein he stated:

It would appear that [W.N.] has suffered a CVA at some point between his MVA on July 7/04 and Nov.12/05. I have no way of knowing when this actually occurred.

As Dr. Fast suggests in his letter May 3/05, it is likely the right sided tremor and decreased coordination relates to the CVA.

Internal Review Officer's Decision

The Internal Review Officer conducted a hearing on February 9, 2005 and issued his decision on July 7, 2005 confirming the decision of the case manger rejecting the Appellant's Application for Review.

The Internal Review Officer, in his decision at paragraph 10, stated:

10. At the hearing, you advised that you no longer had chest pain but you still had hand shaking problems which also affected your forearm and wrist. You also mentioned that you felt your wrist pop while doing physiotherapy.

In arriving at his decision, the Internal Review Officer stated:

It is obvious the primary stumbling block in your ability to work full duties has been the tremors in your right arm which greatly impacts on your ability to write. This accounts for the Occupational Therapist noting that you could work 84% of your duties in September 2004.

In March 2005, Dr. Breckman thought you may have suffered a stroke and this was confirmed by neurologist Dr. Fast in May, 2005. The date of the stroke is unclear. However, it is known that it occurred after the accident and before November 12, 2004.

Both Dr. Fast and Dr. Breckman are of the view that your right hand tremors are from the stroke and not from the motor vehicle accident.

When Dr. McKay (sic) reviewed the file in January 2005, he did not think there was medical evidence showing the accident related to the hand tremor. This was before the stroke had even been identified. Dr. McKay's (sic) views were fully supported and confirmed by the evidence of Dr. Fast and Dr. Breckman.

You had largely recovered from the injuries sustained in the accident, which were mostly to your chest and knee, to the point where you could have worked substantially, if not all of your duties. Any work duties you could not have done after September 2004, were from the stroke and not from the motor vehicle accident. While it would have been preferable if the case manager had received further medical information before ending your IRI benefits, on December 1, 2004, that decision was the proper one and must be confirmed.

Appeal Hearing

At the initial appeal hearing on December 7, 2005 the Appellant testified and was cross-examined by MPIC's counsel. At the conclusion of the Appellant's testimony, the Commission panel indicated that it wished to obtain a medical report from Dr. Fast as to whether or not the motor vehicle accident caused or materially contributed to the right arm problems the Appellant was suffering from. At the request of the Commission panel MPIC's counsel wrote to Dr. Fast on January 23, 2006 and provided him with all of the relevant medical reports relating to the Appellant's appeal and requested Dr. Fast's opinion on the following matters:

- a) the causation of the stroke suffered by [W.N.];
- b) the stroke is a result of the motor vehicle accident;
- c) there is any causal connection between the stroke and the motor vehicle accident;
- d) it is possible to determine when the stroke occurred, and if so, provide a possible date.

In reply, Dr. Fast wrote to MPIC's counsel on January 31, 2006 and stated:

This is in response to your request for information dated January 23, 2006 on the above-named patient. I understand you have copies of my letters. As you know, the accident was on July 7, 2004 and I saw him for the first time on March 8, 2005. At that time, some right arm tremors and decreased coordination of the fingers of the right hand were noted. There was also some pain with movement of the right wrist and some decreased right arm swing. As you know, I felt the signs were suspicious for a small stroke, which was confirmed on the CT scan of March 23, 2005 to involve the left parietal area. His carotid dopplers did not detect a significant stenosis.

I have reviewed the information which you have supplied. I understand according to your note that he did report right hand tremors to MPI on August 24, 2004. The report from the emergency responders as well as the emergency room physician are not specific enough to indicate whether or not he had a neurological deficit at that time. The patient did indicate to me on his initial visit that his right arm and shoulder had been bruised in the accident and the right arm had been shaking since the accident. There also was no history of a concussion.

To answer your questions, I do not know the cause of the stroke suffered by [W.N.]. I cannot tell you whether or not it was the result of the motor vehicle accident. It is not possible to determine when the stroke occurred. (underlining added)

MPIC's legal counsel requested a further report from Dr. MacKay as to whether in his opinion a cause/effect relationship could be established between the motor vehicle accident and the documented left inferomedial parietal lobe stroke. Dr. MacKay provided an Inter-Departmental Memorandum to MPIC's legal counsel, dated February 17, 2006, and did an extensive review of the relevant medical reports, as well as a Medline search of medical literature leading to post-traumatic cerebral infarction. He concluded that it was not probable that there was a causal relationship between the motor vehicle accident and the Appellant's stroke.

MPIC's legal counsel, in her written submission to the Commission, summarized Dr. MacKay's conclusion in his report as follows:

- The stroke was likely ischemic, rather than hemorrhagic, in origin since there was no severe sudden onset of headache, nausea, vomiting, seizure;
- Ischemic strokes are most often the result of either extracranial embolism or intracranial thrombosis;
- Since [W.N.]'s carotid dopplers did not reveal any significant stenosis which can develop as a result of atherosclerotic plaques that can become dislodged and emboli in the brain, this is not the probable cause of the stroke, based upon diagnostic test performed;
- It is reasonable to assume the stroke was a byproduct of thrombotic occlusion of a branch of cerebral artery (thrombosis is the obstruction of the artery by a blood clot);
- The only risk fact [W.N.] had for developing stroke was his advanced age;

- The risk for stroke doubles for every decade of age;

MPIC's legal counsel further stated in her written submission:

Dr. MacKay concluded his opinion that it is medically possible that [W.N.'s] stroke developed as a result of the mva. However, it was his opinion a cause-effect relationship between the mva and the diagnosed stroke is not medically probable based on the following:

- Absence of traumatic head injury;
- Absence of altered level of consciousness;
- Absence of symptomatology associated with traumatic brain injury – headaches, nausea, altered concentration; increased irritability;
- Absence of stroke symptoms after the mva;
- Advanced age (risk factor for developing stroke); and
- Inability of health care professionals to determine origin and/or cause of [W.N.'s] stroke.

Dr. MacKay also provided abstracts of several articles on topic. These demonstrated that:

- He was able to find one case in Japan of a post traumatic occlusion of the anterior cerebral artery following a minor head injury;
- Gross mechanical shift in the brain and herniation led to a stroke for which the death rate was significant in Norway (post traumatic cerebral infarctions have a very poor outcome – death or vegetative state in half the cases); and
- Severe traumatic brain injury can be pre-disposing factor of delayed ischemic stroke in 3 of 140 cases studied.

The Canadian and American Heart and Stroke Foundations provide various risk factors for stroke. Trauma is not included, but age is.

Decision

The relevant provisions of the Act in determining this appeal are:

- A. Section 110(1)(a) of the Act, which states:

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;

- B. Definition of “victim” as set out in Section 70(1) of the Act states:

Definitions**70(1)** In this Part,**"victim"** means a person who suffers bodily injury in an accident.

The Commission determines that the Appellant has not established, on a balance of probabilities, that as a result of the injuries he sustained in the motor vehicle accident that he was unable to continue his employment after December 5, 2004.

As a result of the motor vehicle accident on July 7, 2004, the Appellant suffered soft tissue injuries to his right shoulder and right arm and complained of pain to his right shoulder and right arm and severe pain to his lower right chest. These injuries prevented the Appellant from returning to his employment in sales for [text deleted]. It is clear from an examination of the case manager's decision that the case manager was satisfied that, based on the report from the physiotherapist, the Appellant's motor vehicle accident injuries had resolved themselves and the Appellant was able to return to his former employment.

The Internal Review Officer, in his decision dated July 7, 2005, stated that at the Internal Review hearing on February 9, 2005 the Appellant advised him that he no longer had chest pain but had hand shaking problems which affected his forearm and wrist. This was confirmed by the Appellant's testimony at the appeal hearing where he testified that the reason why he was unable to return to work was not because of the soft tissue injuries he sustained to his right shoulder and right arm or chest, but because of the tremors in his right arm.

Dr. Breckman, the Appellant's personal physician who had examined the Appellant two (2) days before the motor vehicle accident on July 5, 2004, and who treated the Appellant for his injuries on July 13, 2004 (approximately six (6) days after the motor vehicle accident), provided a report to MPIC dated June 23, 2005 wherein he indicated that when he examined the Appellant on July

13, 2004 the Appellant's primary concern related to his anterior chest, and that there was evidence of significant right side tenderness. Dr. Breckman further stated that the Appellant first reported problems with his right shoulder and tremors on November 12, 2005, approximately four (4) months after the motor vehicle accident.

The Commission further notes that the Appellant:

1. on August 24, 2004, in his Application for Compensation, a period of approximately seven (7) weeks after the motor vehicle accident, complained about right hand tremors.
2. advised his case manager on September 13, 2004, approximately ten (10) weeks after the motor vehicle accident, that he was experiencing shaking of the right hand which precluded him from writing and shaving.

The Commission finds that there was no evidence before the Commission which established that shortly after the motor vehicle accident the Appellant complained about right hand tremors.

In a report to MPIC dated February 11, 2005 Dr. Breckman stated that when he examined the Appellant prior to July 5, 2004 the Appellant did not have a right hand tremor but subsequent to the motor vehicle accident the Appellant did develop a tremor to his right hand. However, Dr. Breckman stated that he was unable to determine whether this tremor is directly related to the motor vehicle accident.

The Internal Review Officer in his decision dated July 7, 2005, after reviewing all of the relevant evidence, concluded that, having regard to the medical reports of Dr. Breckman and Dr. Fast, the date of the Appellant's stroke was unclear but that it had occurred after the motor vehicle accident and before November 12, 2004, when the Appellant had reported these tremors to Dr.

Breckman. As a result of the medical evidence the Internal Review Officer concluded that the Appellant had largely recovered from his motor vehicle accident injuries to his chest and knee and he could have worked substantially, if not all, of his duties. He further stated in his report that any work duties the Appellant could not have done after September 2004 were due to the stroke and not the motor vehicle accident.

Dr. Fast, upon a review of all of the relevant medical information, in his report to MPIC dated January 31, 2006, stated:

To answer your questions, I do not know the cause of the stroke suffered by [W.N.]. I cannot tell you whether or not it was the result of the motor vehicle accident. It is not possible to determine when the stroke occurred. (underlining added)

Dr. MacKay, who reviewed all of the relevant medical information, in his Inter-Departmental Memorandum to MPIC dated February 17, 2006, concluded that the medical evidence does not establish that there was a connection between the motor vehicle accident and the Appellant's stroke.

The Commission finds that the medical evidence of Dr. Breckman, Dr. Fast and Dr. MacKay confirms the Internal Review Officer's decision that there was no determinable evidence to establish on a balance of probabilities a causal connection between the motor vehicle accident and the Appellant's stroke that caused the right hand tremors and which prevented the Appellant from returning to work.

As a result, the Commission has concluded, after carefully examining all of the medical evidence, as well as the testimony of the Appellant and [M.S.], that the Appellant has not established, on a balance of probabilities, that the stroke which caused the right hand tremors,

and which prevented the Appellant from returning to his employment, were the result of the motor vehicle accident injuries he sustained on July 7, 2004.

The Commission found the Appellant to be a very impressive witness who testified in a direct, candid and unequivocal fashion. The effects of the motor vehicle accident and the subsequent stroke had a traumatic effect on the Appellant and adversely affected his quality of life. It is clear that prior to the motor vehicle accident the Appellant enjoyed good health, thoroughly enjoyed his work and was able to live an independent life. Unfortunately, subsequent to the motor vehicle accident, as a result of the stroke he became extremely depressed and frustrated because he was unable to continue working, earning an income and being independent.

The Commission was also very impressed with the testimony of the Appellant's friend, [M.S.], who had provided him with a great deal of support and assistance during a very difficult time that the Appellant experienced after the motor vehicle accident.

Unfortunately, having regard to the totality of the evidence, the Appellant has been unable to establish, on the balance of probabilities, pursuant to Section 110(1)(a) of the Act, a causal connection between the motor vehicle accident and the stroke which has caused right hand tremors and which has prevented the Appellant from returning to his employment. For these reasons the Commission dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated July 7, 2005.

Dated at Winnipeg this 6th day of June, 2006.

NEIL COHEN

DR. PATRICK DOYLE