

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by L. Y.**  
**AICAC File No.: AC-05-147**

**PANEL:** Ms Laura Diamond, Chairperson  
Ms Sandra Oakley  
Ms Deborah Stewart

**APPEARANCES:** The Appellant, L. Y., was represented by Ms Marla Garinger Niekamp of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

**HEARING DATE:** April 3, 2007

**ISSUE(S):** Whether Appellant's current low back symptoms are causally related to the motor vehicle accident of March 18, 2004

**RELEVANT SECTIONS:** Section 136(1) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Section 5 of Manitoba Regulation 40/94

**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**

L. Y. (hereinafter referred to as the 'Appellant') was injured in a motor vehicle accident on March 18, 2004. He sustained injuries including cervical/thoracic rib sprain and headaches. He was treated by his family doctor as well as by a physiotherapist, and was in receipt of Personal Injury Protection Plan ('PIPP') benefits in this regard.

On October 24, 2004, the Appellant attended at the Concordia Hospital Emergency Department with complaints of left hip pain and left sciatica. Then, on November 5, 2004 he attended the Victoria General Hospital Emergency Room with complaints of back pain, reporting a two week history of sharp lower back pain radiating to the left foot. He was diagnosed with sciatica and a lumbar spine x-ray revealed an overall disc bulging at the L4-L5 level.

On March 8, 2005, the Appellant's case manager wrote to him indicating that his diagnosis of discogenic etiology did not relate to the injuries sustained at the time of the March 2004 motor vehicle collision.

. . . Your presentation of low back pain with left radicular involvement was quite distinct from the lumbar strain-type pain reported earlier on in the course of the injury. Medical documentation confirms you were asymptomatic at the time of discharge from therapy in early August 2004 with no record of lumbar symptoms subsequent to the June 3, 2004 examination.

The Appellant sought Internal Review of the case manager's decision. On June 20, 2005, an Internal Review Officer for MPIC found that the medical evidence did not support the likelihood that his lower back symptoms in late October 2004 were related to the motor vehicle accident, and as such, MPIC did not have an obligation to consider funding of requested physiotherapy treatment as it related to these lower back symptoms.

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

### **Evidence and Submission for the Appellant**

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident and the treatments he received from his doctor and physiotherapist. It was his evidence that

these practitioners, for the most part, concentrated on problems he was having with his shoulder and neck, which at the time, were worse than his lower back symptoms.

Following his return to work, in approximately June of 2004, he experienced an increase in his low back pain. He took pain killers to deal with the pain and sought assistance from MPIC, until finally, in October of 2004, he was diagnosed with a disc problem in his lower back.

It was submitted on behalf of the Appellant that he had been experiencing low back pain on and off, since the time of the accident. In March 2004, there were references, in the physiotherapy and medical reports, to some low back complaints. However, the upper body injuries were considered to be the areas of greater concern and received more attention from his caregivers.

It was submitted that through April and June 2004, there were references in the file materials, to the Appellant's low back complaints, although neck and upper back pain were still the primary complaints. There were also references to his having difficulty sitting. He continued to work through June of 2004, in spite of the aggravating factor of his lower back. It was submitted that post-accident postural issues had not been resolved when the Appellant went back to full duties at work as a truck driver. These placed greater tension loads on his mid and low back extensor muscles.

In support of this position, counsel for the Appellant relied upon a report from Dr. Robert Chase, dated December 15, 2006. Although Dr. Chase did not examine the Appellant, he reviewed the medical information on his file. He indicated that although it was unlikely that direct L4-L5 disc injury had occurred at the time of the accident, the onset of symptoms related to the lower spine

and disc which developed six (6) months later could have been related to the upper back and shoulder injury caused by the motor vehicle accident.

*By my assessment it is unlikely that direct L4-5 discal injury occurred at the time of the accident; symptom onset related to the lumbar spine and disc developed six months later. Had there been direct discal trauma sustained in the March 18<sup>th</sup> injury event such as annular rupture, the leg and lower spinal findings would have manifested earlier within the days and weeks following of the event. However, it is plausible and by my assessment probable that the lower back condition symptoms were causally related to the upper back and shoulder injury, by the indirect effect of the MVA related injury changing back posture, muscle tone and chronic compressive forces on the lumbar spine and the L4-L5 disc.*

...

*. . . Additionally, back strain injuries of relatively long duration commonly result in co-contractions, tensing up of opposing muscle groups, effectively stiffening the spine, the hypertonic (tense) and shortened musculature restricting movements and adding further compressive forces on the lumbar spine. Sustained increased compressive forces could well have caused the circumferential disc bulging at L4-L5 level demonstrated on CT scan, which is the presumptive site of nerve root impingement consistent with the clinical picture. By my analysis, the March 2004 MVA and subsequent upper back and neck injury likely did significantly contribute to the development of his lumbar disc injury.*

The Appellant's general practitioner, Dr. Werier, reported that the Appellant had not complained to him of low back pain following the accident. He did not examine the Appellant's lumbar spine prior to October 29, 2004, as the Appellant had not complained of such symptoms to him.

However, he provided a report dated December 18, 2006 which indicated:

1. Apparently his back pain was reported to his physiotherapist shortly after the accident. It was not noted to me until Oct. 29, 2004. It is conceivable that MVA caused his lumbar complaints, as aside from a visit in 1990 that he never complained of low back pain.
2. your second question concerning the progression of symptoms could be due to increasing muscle spasm.

Appellant's counsel referred to previous decisions of the Commission in *D.C.H.* (AC-98-78); *J.L.A.W.P.* (AC-98-80); *M.H.* (AC-05-99); *G.R.Z.* (AC-96-48); and *K.C.N.* (AC-96-71).

It was submitted on behalf of the Appellant, that these cases established that, where an issue is not one capable of scientific proof and there are two (2) or more divergent views expressed by a competent and honest professionals, the Commission must rely upon what it perceives as a reasonable balance of probabilities after carefully weighing all of the evidence.

It was submitted that, as in the case of *H.P.*, even if the disc protrusion did not have its origin in the motor vehicle accident, the accident had exacerbated the condition and it was sufficient that the collision be a cause. It was not necessary for the Appellant to establish that the defendant's negligence was the sole cause of the injury.

Even where there is a lapse of time between the motor vehicle accident and the acute symptoms of disc injury, it was argued, the Commission should consider the ongoing symptoms from the date of the motor vehicle accident, the fact that the claimant continued working, and the worsening or progressions of those symptoms with the resulting diagnosis of the disc injury.

It was submitted that, as in the *K.C.N.* case, the Appellant's low back injury, with a gradual onset and increase in pain and discomfort, was a result of an acute lumbar disc protrusion and caused by the automobile accident (in the absence of any previous history of low back pain or any other trauma that could have caused the injury).

**MPIC's Submission**

It was the position of counsel for MPIC that the Appellant's lower back symptoms and disc bulge were not related to the motor vehicle accident.

The Appellant's own physician, Dr. Werier, notes that the Appellant did not mention any low back symptoms to him until October of 2004. It was submitted that if the Appellant had had an issue with symptoms such as these, he would have told his doctor about it.

Although Dr. Chase reviewed information on the Appellant's medical file, there was no indication in Dr. Chase's report, that he had any knowledge of or considered the fact that the Appellant had been working as a bus driver between June and October of 2004, and had been able to do so full time since August of that year. Counsel pointed to a note by physiotherapist, Cara Windle, on the Appellant's file, dated August 16, 2004 which noted that the Appellant's lumbar range of motion was normal with no pain.

In her submission, Dr. Chase's report was based on assumptions of elements (such as a change in posture), which he had no way of confirming and had not been proven.

Instead, counsel for MPIC relied on reports by Dr. Shrom, who, it was submitted, had the ability to assess and review the Appellant's complete file four (4) times. Dr. Shrom provided a review on March 14, 2005. At that time she indicated:

The neck/shoulder symptoms appear to temporally relate to the March 04 MVA. A short course of PT directed at education re: home program + self directed pain management should be emphasized. . . .

A more comprehensive review was undertaken by Dr. Shrom on February 24, 2005. Dr. Shrom reviewed medical information from Dr. Werier, Dr. Adam and the Concordia and Victoria

Hospital Emergency Departments. She also reviewed the physiotherapist's medical notes on the Appellant's file. She found that a review of the chronologic documentation notes that the claimant sustained a whiplash associated sprain involving the cervical and thoracic regions with some early mention of lower back symptoms, in the motor vehicle accident. The predominant focus of treatment was related to the cervical spine and parascapular areas. There were periodic notations of low back symptoms in physiotherapy notes of April 12, 19 and 21 and June 3, 2004, but subsequent to June 3, 2004 treatment continued through August 6<sup>th</sup> with no documentation in the clinical notes relating to lumbar symptoms. Even when the claimant returned to the physiotherapist on September 30, 2004, the symptoms were described as pain relating to the cervical spine, interscapular area right chest and left bicep, with no mention of lumbar symptoms at the time of this return visit.

Dr. Shrom concluded:

Based on review of the chronologic record, it appears that a strain of the low back likely accompanied the cervical/interscapular and shoulder soft tissue injuries which occurred as a result of the March 2004 motor vehicle collision. Having said this, the documentation notes that subsequent to June 3, 2004 through the latter part of October 2004, there was no mention of low back symptoms. The physiotherapy discharge record of August 6, 2004 specifically makes mention that the low back area was asymptomatic with normal range of motion. The September 30, 2004 re-visit to the physiotherapist was for pain symptoms unrelated to the lumbar spine. The onset of left lower limb symptoms prompting medical attention in mid October 2004 appears to have come on historically in late August/early September 2004 and has been diagnosed as a discogenic etiology. This pathology, on a balance of probability, does not relate to the injuries sustained at the time of the March 2004 motor vehicle collision. This presentation of low back pain with left radicular involvement is quite distinct from the lumbar strain-type pain reported earlier on in the course of the injury and which, based on medical documentation, was asymptomatic at the time of discharge from therapy in early August 2004, with no record of lumbar symptoms subsequent to the June 3<sup>rd</sup> examination. The type of lower level lumbar pain reported by the claimant subsequent to the motor vehicle accident through June 3, 2004 (2 ½ months) represents a typical timeframe for a whiplash associated soft tissue sprain.

Counsel for MPIC submitted that this full review by Dr. Shrom is more reliable than the opinion provided by Dr. Chase, and submitted that it is clear that the Appellant's discogenic injury which was diagnosed in October 2004 was not related to or caused by the motor vehicle accident.

### Discussion

The onus is on the Appellant to show, on a balance of probabilities, that the treatment sought was medically required due to an injury sustained in the motor vehicle accident.

#### **Reimbursement of victim for various expenses**

[136\(1\)](#) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

#### **Manitoba Regulation 40/94**

##### **Medical or paramedical care**

**5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;
- (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The panel has reviewed the evidence, as well as the cases submitted to us by counsel for the Appellant. Many of the cases referred to did not require the Appellant to establish that the

accident was the sole cause of his injury, but rather, found that the Appellant had established that the accident had exacerbated a condition.

In most of these cases, however, where there was a lapse of time between the motor vehicle accident and the acute symptoms of the injury, there was evidence of a worsening or progression of the symptoms and the resulting diagnosis of the disc injury.

Counsel referred to the case of Payjach v. Fochheim, 57 Man R. (2d) 263, which the Commission had considered in *K.C.N.* The Court had noted that “*the onset and increase in pain and discomfort was not an abrupt, but rather a gradual process and that it was quite possible that there might be no back pain at the beginning or minimal symptoms, but as time went on . . . the symptoms would begin to impact upon the plaintiff.*”

The Court considered evidence of an initial small tear which had progressed over time to the point where a prolapse and protrusion took place.

In the Appellant’s case however, there is no such clear evidence (such as evidence of a tear), which shows a connection between the motor vehicle accident and the disc injury. The evidence submitted in the Appellant’s case does not disclose complaints of back pain by the Appellant progressing through the period after he returned to work in June of 2004 and continuing until October 2004. A review of statements submitted by the Appellant on November 10<sup>th</sup> and November 16<sup>th</sup>, 2004, seem to indicate that the onset of the Appellant’s back pain in the fall of 2004 was quite acute or sudden.

A report compiled by the Appellant's physiotherapist, Cara Windle, dated December 1, 2004, indicates:

I did speak with [L.Y.] about a month ago about reports of severe lower back pain (not the same complaint). I have not treated him for this problem.

It seems that in Ms Windle's view, the Appellant's complaints in late October and early November 2004 were not the same complaints of low back pain that had been previously treated.

There is no evidence that the Appellant suffered from ongoing back complaints in the period following his return to full duties. His testimony did not touch upon any issues of significant low back pain which required any medical intervention during that time. Aside from one visit to his family doctor in September of 2004, for which there is no documentation regarding an investigation of low back pain, there are no reports of the Appellant seeking assistance from his health care providers during the period leading up to his acute lumbar spine symptoms in October and November, 2004.

Accordingly, the panel does not view the onset of the Appellant's disc problems as being of a similar nature to those described in the cases submitted to us by the Appellant's counsel.

The acute onset of the Appellant's disc condition in the fall of 2004, and the absence of any other evidence to connect it with the motor vehicle accident does not substantiate Dr. Chase's theory that postural stresses and compressions resulting from the motor vehicle accident caused the discogenic injury. Accordingly, we conclude that the Appellant has failed to establish, on a balance of probabilities, that his lumbar disc problems and symptoms diagnosed in October and

November 2004 were caused by the motor vehicle accident. Accordingly, we hereby dismiss the Appellant's appeal and confirm the Internal Review decision dated June 20, 2005.

Dated at Winnipeg this 12<sup>th</sup> day of June, 2007.

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**LAURA DIAMOND**

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**SANDRA OAKLEY**

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**DEBORAH STEWART**