

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by E. L.
AICAC File No.: AC-05-07**

PANEL: Mr. Mel Myers, Q.C., Chairperson

APPEARANCES: The Appellant, E. L., was not present at the appeal hearing; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Leanne Zabudsky.

HEARING DATE: June 11, 2007

ISSUE(S): Entitlement for further funding for medical treatment, medication or other benefits

RELEVANT SECTIONS: Section 136(1)(a) 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

E.L. (hereinafter referred to as the 'Appellant') was involved in a motor vehicle accident and in respect of the motor vehicle accident injuries was treated by his physician, Dr. C. Minnaar. Dr. Minnaar described the injury as a 'whiplash' kind of injury and noted that the Appellant's complaints were of left shoulder pain and mild pain with movement of the head. In a narrative report dated August 17, 2004 Dr. Minnaar stated:

MVA in Oct 2002: rearended and had 'whiplash'-kind of injury (inury (sic) to the spine due to sudden extension of the neck). This has resolved completely. His (sic) also hurt his shoulder; this has improved significantly to the point where he can function normal now, without any pain or limitations.

Very shortly after the MVA he started complaining of lower backpain. This was not the main complaint initially- see above. However, as the neck improved, the lower back became more of a problem. He has complained of lower back pain since then causing daily discomfort and requiring analgesics.

...

Obviously the patient has ongoing problems with his lower back pains- different than before the MVA. XR does suggest that he had some form of underlying degenerative disease prior to the MVA. However, he had minimal symptoms then and did definitely not need ongoing analgesics or other medical interventions like seeing chiropractors or massage therapists.

The case manager referred the Appellant's file to Dr. Fougere, MPIC's Health Care Services, and requested an opinion as to whether or not there was a causal connection between the Appellant's back complaints and the motor vehicle accident.

Dr. Fougere provided an Inter-Departmental Memorandum to MPIC dated July 8, 2004 and stated:

The claimant had a pre-existing history of osteoarthritic changes involving the neck and lumbar region. From the descriptives on file, the claimant was involved in a two vehicle collision which resulted in \$700 damage to the rear-end of a 5th wheel travel trailer that he was towing with his truck. He was belted. He first attended for medical care over 7+ weeks post motor vehicle collision. His family physician noted complaints of left shoulder pain and mild pain with movement of the head. He circled complaint of lower back pain. Clinical examination findings were limited to the neck and shoulder regions. The physician queried neck muscle spasm and diagnosed left infraspinatus tendonitis. Physiotherapy treatment was recommended.

...

... a temporal relationship is not evident between the claimant's complaints of lower back disability and the motor vehicle collision. The most recent documented assessment of the claimant is for May 26, 2004 when he attended his family physician. The physician appears to indicate that the claimant's current problems relate to his lower spine. On this premise, the claimant's current medical status is not, on the balance of probabilities, a reflection or sequela of injuries sustained in the motor vehicle collision. As such, further therapeutic intervention is not warranted.

On July 22, 2004 the case manager wrote to the Appellant advising:

This confirms our decision regarding Dr. Minnaar's recommendations regarding further treatments as outlined in his report of June 16, 2004.

That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. The medical information reviewed indicates that there is insufficient evidence to support a causal relationship between your current low back complaints and the motor vehicle accident of October 18, 2002. Therefore, we are unable to approve funding of the recommended treatments or any further funding for medication or other benefits under the Personal Injury Protection Plan.

We base our decision on Section 136(1)(a) of The Manitoba Public Insurance Act (Appendix #4) and Section 38 of Manitoba Public Insurance Regulation 40/94 (Appendix #5).

On August 20, 2004 the Appellant applied for a review of the case manager's decision.

On October 4, 2004 Dr. Minnaar advised MPIC, after reviewing the Appellant's chart, his first mention of back pain that Dr. Minnaar noted was on May 1, 2003, a period of five (5) months and thirteen (13) days after the motor vehicle accident of October 18, 2002.

Internal Review Officer's Decision

The Internal Review Officer conducted a hearing on September 23, 2004 and issued her decision on October 29, 2004 confirming the case manager's decision and dismissing the Appellant's appeal. The Internal Review Officer, in her decision, adopted the medical opinion of Dr. Fougere, who found that the Appellant had pre-existing problems with respect to his lumbar region, and the first indication of significant problems involving the lumbar region occurred when he attended at his family physician in the month of August 2003. The Internal Review Officer stated:

Dr. Fougere concluded that a temporal relationship is not evident between your complaints of lower back disability and the motor vehicle collision. Dr. Fougere wrote

that your current medical status is not, on the balance of probabilities, a reflection of sequela of injuries sustained in the motor vehicle accident and further therapeutic intervention is not warranted.

During the hearing, it was agreed that I would write to Dr. Minnaar asking when you first complained of low back pain following the accident. Dr. Minnaar replied on October 4, 2004 stating the following:

“After reviewing [E.L.’s] chart, the first mention of back pain I saw was on May 1, 2003.”

Section 136(1) of the Act provides that a victim is entitled to reimbursement of expenses incurred because of a motor vehicle accident. Section 5 of Manitoba Regulation 40/94 provides that Manitoba Public Insurance shall pay an expense incurred to a victim for medical or paramedical care when that care is medically required as a result of an accident.

On December 29, 2004 the Appellant requested the Commission to review the decision of the Internal Review Officer. In this document the Appellant states that his home address was “[*text deleted*]”.

On November 2, 2006 the Commission sent a Notice of Hearing to the Appellant setting down the hearing for April 11, 2007 at 9:30 o’clock in the forenoon, at the Commission offices at 301-428 Portage Avenue, Winnipeg, Manitoba.

The Notice of Hearing stated in part:

Should either party fail to appear or to be represented at the above time and place, the Commission may proceed with the hearing and render its decision. Alternatively, it may dismiss the appeal, adjourn the hearing to a new time and date, or take such other steps as it deems appropriate.

On April 11, 2007 at 9:30 a.m. the appeal hearing convened in the presence of MPIC’s legal counsel, Leanne Zabudsky. The Appellant did not attend this hearing. An officer of the Commission contacted the Appellant by telephone at 9:45 a.m., left a voice mail message

requesting that the Appellant return the officer's call as he was absent at the hearing. At approximately 10:00 a.m. the Commission had not heard from the Appellant and the Commission decided to adjourn the hearing sine die in order to give the Appellant an opportunity of personally attending the hearing.

On April 12, 2007 the Commission wrote to the Appellant advising him that the Commission had adjourned the appeal hearing to June 11, 2007 at 9:30 a.m. The Commission advised the Appellant that the Commission intended to proceed with the hearing whether or not the Appellant attended. He was also advised that if he had any questions he could contact the Commissioners' secretary and a telephone number was set out in this Notice.

The Commission reconvened the hearing on June 11, 2007 at 9:30 a.m. and Ms Leanne Zabudsky attended the hearing on behalf of MPIC, but the Appellant was not present. The Commission adjourned the hearing until 9:45 a.m. when an officer of the Commission attempted to contact the Appellant by telephone but no one was present at the Appellant's home telephone number.

The Commission's records indicated that the Commission had sent the Notice of Hearing to the Appellant by regular mail and as well by Xpresspost. An officer of the Commission checked with Canada Post Corporation, via Internet, which confirmed that the Xpresspost envelope was sent from Winnipeg on April 17, 2007 to the Appellant's home address at [text deleted], and was received at this address on May 1, 2007. The signature image recorded for online viewing by Canada Post Corporation indicated a signature of E.L (*not Appellant*).

The Commission is satisfied that the Appellant was served with notice of the hearing for June 11, 2007 at 9:30 a.m. at the Commission office in Winnipeg, pursuant to Section 184.1(1)(a) & (b)(ii) of the MPIC Act. The Commission therefore advised MPIC's legal counsel that the hearing would proceed.

MPIC's legal counsel, in her submission, reviewed the Internal Review Officer's decision and stated that:

1. the Appellant has not established, on a balance of probabilities, that there was a causal connection between the motor vehicle accident and the injury to the Appellant's back.
2. therefore, pursuant to the provisions of Section 136(1)(a) of the MPIC Act, and Section 5 of Manitoba Regulation 40/94, the Appellant was not entitled to receive any further benefits from MPIC.
3. the Commission should confirm the decision of the Internal Review Officer dated October 29, 2004 and dismiss the Appellant's appeal.

Decision

The Commission has reviewed the documentation that was filed with the Commission, and considered the submission by MPIC's legal counsel. The Commission finds, for the reasons set out in the decision of the Internal Review Officer dated October 29, 2004 (a copy of which is attached hereto, marked as Schedule A, and forms part of this decision) that the Appellant failed to establish, on a balance of probabilities, any entitlement to benefits under the MPIC Act pursuant to Section 136(1)(a) of the MPIC Act and Section 5 of Manitoba Regulation 40/94. As

a result, the Commission confirms the decision of the Internal Review Officer dated October 29, 2004 and dismisses the Appellant's appeal.

Dated at Winnipeg this 22nd day of June, 2007.

MEL MYERS, Q.C.