

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by R.B.
AICAC File No.: AC-03-157**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Robert Malazdrewich
Ms Linda Newton

APPEARANCES: The Appellant, R.B., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: June 5, 2008

ISSUE(S): Entitlement to coverage for medication Tramacet;
Entitlement to assistance and funding for rehabilitation
and job training;
Entitlement to coverage for massage therapy.
Entitlement to Income Replacement Indemnity benefits;
Entitlement to coverage for medications Zopiclone, Advil
and Robaxacet.

RELEVANT SECTIONS: Sections 81(1)(a) and 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

On July 28, 1997 R.B. (hereinafter referred to as the "Appellant") was the driver of a vehicle which was struck from behind while stopped in traffic. At the time of the motor vehicle accident the Appellant was forty-five (45) years of age.

The Internal Review Decision dated October 1, 2003 sets out the essential background information relating to the Appellant's motor vehicle accident:

1. You have held inter-provincial certification as an Auto Repair and Paint Technician since about 1988. You are also ICAR and Masters ASE certified in autobody repairs and painting. Most of your training has been on-the-job.
2. Your Application for Compensation dated October 11, 2000 does not indicate what level of formal education you completed, although it does indicate that you missed 20 weeks of work in 1996 due to bilateral carpal tunnel syndrome.
3. According to the Emergency Report Form, the accident happened around 12:00 noon and you attended at 3:20 p.m. complaining of neck and left shoulder pain, headache, and nausea.

On examination, your cervical spine was non-tender (but with reduced flexion noted), your left trapezius muscle was tender, your shoulder (presumably the left) was non-tender to palpation, and your shoulder ranges of motion (again presumably the left) were normal.

The diagnosis was "neck sprain". You were advised to use Tylenol #3 and ice, and to limit yourself to "light activities". You were told to follow up with your doctor in a week if you had not, by then, improved.

4. In your initial Claims Report to MPI on July 31, 1997, you said that you had missed half a day of work (on the date of the accident), but you were unsure whether any more time would be missed. You described your injuries as "whiplash" with sore upper and lower back, sore arms, and sore shoulders.
5. MPI sent an initial contact letter to you on August 4, 1997. No response of any kind was received, so your PIPP file was closed on October 22, 1997.
6. On March 13, 1998, you called to say you wanted to go for physiotherapy treatments. An application for Compensation and a Medical Information Authorization were sent to you on April 22, 1998. The authorization was not signed by you until October 23, 1998, and the application was not completed by you until October 11, 2000.

On March 30, 1998, Dr. Marilyn Singer, the Appellant's physician, provided a report to MPIC which indicated that she had seen him twice in respect of his motor vehicle accident of July 28, 1997. Dr. Singer reported that she first saw him on August 8, 1997 and, at that time, the Appellant complained of neck and back pain. Upon examination Dr. Singer reported that "the

Appellant's motion in his neck was flexion to seventy-five (75) degrees, extension twenty (20) degrees, rotation to seventy-five (75) degrees bilaterally and, in his lumbar spine, he had slightly decreased flexion. He had minimal muscular spasm in his neck or lumbar spine. Dr. Singer further indicated that she referred the Appellant to physiotherapy, but he never attended.

The Appellant was next seen by Dr. Singer on March 24, 1998 and he reported that "his neck is still giving him problems. He gets grinding and popping sensations. He is sore with extension". She further reported that the Appellant was taking an occasional Tylenol tablet.

The Appellant also reported to Dr. Singer that he wished to pursue physiotherapy or chiropractic treatments, which had been approved by MPIC. In concluding her report Dr. Singer stated:

I do feel that his neck problems are related to his accident. His chart dates back to 1984 and I do not see and (sic) evidence of previous neck problems. (Underlining added)

On April 6, 1998, the Appellant began full time work as an autobody man/painter in the [Text deleted].

Mr. G. Young, a physiotherapist, provided MPIC with an Initial Physiotherapy Report dated, October 30, 1998, wherein he indicated that the Appellant's neck pain was progressively getting worse and he reported no other subjective complaints on the Appellant's part. He also reported the Appellant had "full function with symptoms" and was capable of working his full duties, and recommended six (6) to eight (8) weeks of physiotherapy treatments.

In a Memorandum to file dated April 15, 1999, the case manager reported a telephone discussion with the Appellant, who indicated that he was still having problems with his neck and that physiotherapy had not helped much. The Appellant advised the case manager that he wanted to see a chiropractor or possibly another medical doctor.

The Commission notes that the Internal Review Decision dated October 1, 2003 indicated that the physiotherapy treatment billing records showed that the Appellant had “attended for 30 treatments between October, 1998 and February, 1999, and another 21 treatments between June, 1999 and October, 1999.”

On October 27, 2000 Dr. Singer provided a report to the case manager and stated:

He was next seen in October of 1998. He was, again, reporting that his neck was still troublesome with some soreness at the base of his neck. His range-of-motion was about the same. I elected to try a further course of physiotherapy.

He was next seen December 15th, 1998, when he felt that there was some improvement in the movement in his neck, but he was still having snapping sensations. On examination, at that point, he had a full range-of-motion in his neck with minimal spasm. He was advised to continue with physiotherapy.

He was next seen April 13th, 1999. He reported that his neck was still giving him problems. The movement had improved, but he was still having difficulty with extension. On examination, he did have a mild limitation of extension.

Dr. Singer further reported that after discussion the Appellant had agreed to chiropractic treatments but apparently he did not attend for such treatments.

On April 19, 1999, approximately twenty-one (21) months after the motor vehicle accident, Dr. Singer forwarded a report to MPIC and stated:

This gentleman continues to have problems with his neck related to this car accident. He had no symptoms prior to the accident. He primarily has problems with extension

at this point of time. Physiotherapy has not been able to improve this much for him. I have agreed that a chiropracter (sic) may be of some benefit for him. On examination he does have a limitation of extension. (Underlining added)

On July 20, 1999, approximately two (2) years after the motor vehicle accident, the physiotherapist, Mr. Young, submitted a physiotherapy report to MPIC indicating the Appellant was complaining of neck and lumbar pain. Mr. Young reported that the Appellant had decreased neck and back extensions which still caused intermittent sharp pain. Mr. Young further noted and recommended six (6) or eight (8) physiotherapy treatments in respect of the Appellant's back.

In a memorandum to file dated September 27, 2000, the case manager reported a telephone call from the Appellant in the week of September 18, 2000 wherein the Appellant advised him that he was still having problems as a result of the accident and that he was now off work and wanted to claim Income Replacement Indemnity ('IRI') benefits.

The Commission noted that the Internal Review Officer, in his decision dated October 1, 2003, stated:

18. When the case manager spoke to you on October 4, 2000, you said that your neck had never quit bothering you and that it had recently gotten worse, causing you to miss several days from work. You had also started receiving injection therapy and expected to be missing several days from work after each injection. Although IRI calculations were done at that time (based on the employment you then held), no IRI was actually paid.

On October 11, 2000, the Appellant made an Application for Compensation to MPIC describing the injuries he sustained in the motor vehicle accident as "neck pain, pain going down into arms and back."

Dr. Singer, in her report dated October 27, 2000, stated:

He did not attend again about his neck until September 19th of this year. He reported that he was still having problems with neck pain. He has a popping sensation at times which is followed by a decreased range-of-motion. He also has grinding at times. He reports that he has symptoms daily with intermittent flare-ups superimposed on this. At times, he will now get pain into his left arm. On examination, he was able to flex to 75 degrees, extend to 15 degrees, rotate to the left to 45 degrees and to the right to 60 degrees. An x-ray of his neck showed only very slight degenerative changes. (Underlining added)

I have referred him to see Dr. V. Daniels at the Rehab. Centre to see if there may be a myofascial component to his pain. He is not currently attending for any other therapy.

To the best of my knowledge, he doesn't have any pre-existing condition. At this point in time, I feel that he may have a permanent, mildly decreased range-of-motion in his neck accompanied by crepitus.

MPIC requested Dr. Daniels, a physiatrist and rehabilitation expert, to provide a report to MPIC. On December 5, 2000 Dr. Daniels provided a report to MPIC which was summarized by the Internal Review Officer in his decision dated October 1, 2003 as follows:

- a. You saw Dr. Daniels for the first time on October 3, 2000 (more than 38 months after the accident) complaining pain in the neck and back, down the left arm, and into the head.
- b. You told her that the pain had started with the accident, and had been getting worse during the year prior to your visit.
- c. You said you had experience a sudden worsening of the symptoms in your arms – tingling and numbness – about 10 days earlier.
- d. You said you were not taking any medications for pain (apart from an occasional Tylenol). [This is quite different from what you told me at the hearing – that you had been taking 6-8 analgesic tablets a day since the accident.]
- e. You said you had missed two days from work due to an exacerbation of your symptoms after doing some yard work.

The Commission notes that on October 14, 2001 Dr. Daniels had completed a Manitoba Government Medical Assessment Report with respect to the Appellant setting out work restrictions with respect to the Appellant's employment.

On October 10, 2001, Dr. Daniels provided a handwritten note to the Appellant address "To whomever it may concern" and she indicated that the Appellant had "problems with neck and right upper limb due to MVA". The Doctor further reported that the Appellant's condition was being made worse by his job and advised that the Appellant should obtain a more sedentary job with no repetitive craning, twisting, or lifting.

In a note to file dated November 20, 2001 the case manager reported that he had received a telephone call from the Appellant who advised that he could not work any longer and his doctor told him to stop working.

On November 23, 2001 the case manager, in a note to file, indicated that a review of the file indicated that the Appellant may have missed one (1) day from work and that MPIC had not paid any IRI, but had reimbursed the Appellant for physiotherapy treatments. The case manager further stated that a review of the file indicated the Appellant had been working for the last three (3) years for [Text deleted]. He had been referred to Dr. Daniels by Dr. Singer, and he had been receiving injections for the past year. Dr. Daniels recently reported he could not work any longer, he had been getting worse instead of better, he has not worked since November 16, 2001, and he has applied for LTD through his employer with [Text deleted]. The Appellant also applied for EI and is coming to MPIC to claim IRI benefits which he says is related to his motor vehicle accident in 1997.

In a memorandum to file dated December 6, 2001, the case manager reported that he met with the Appellant on November 29, 2001.

EMPLOYMENT

As indicated in note of Nov 23/01, he is claiming he is no longer able to work as a result of mva injuries. His employer cannot accommodate him with the restrictions Dr. Daniels has indicated he has and as a result his (sic) has not worked since Nov 16/01. Since the mva, he has missed the odd day (mostly recently due to injections).

He had "jabbing" pains in his neck, it felt like his neck locked when he got into certain positions with work. He could hardly hold the spray gun and everything aches when he when he (sic) doesn't do anything. (underlining added)

Dr. Singer provided a report to MPIC dated December 27, 2001 and stated:

[R.B.] was seen October 30, 2001 with regards to his neck. At that point in time, he reported that Dr. Daniels recommended that he should find a different job. He reported that he was continuing to have problems with pain in his neck, right shoulder and arm. His job involves having to crane his neck and work in awkward positions, as well as repetitive work with painting. He reported sharp pain in his neck at times. He felt that his symptoms were gradually worsening. He was also having some pain in his right elbow. He felt that he was very achy by the end of the day. On examination, at that point, he had a slight restriction of his range-of motion, but moderate spasm in his neck and trapezius area.

He was next seen November 30, 2001. This was with regard to work. He reported that he was told that he was no longer able to work at his place of employment. They didn't have a job that meets his restrictions. He reported that his last day worked was November 9th. His neck examination was the same as the previous visit. (Underlining added)

Dr. Singer further stated:

At this point in time, I do not feel that he is able to perform the duties of his occupation. If you will review the notes from the five years previous to his accident, you will see that he had one episode of a mild neck strain in 1994 which resolved in three days. (underlining added)

She further stated:

. . . his last day of work was November 9th, subsequent to this he was unable to perform the duties of his occupation as result of the motor vehicle accident injuries. (Underlining added)

In a memorandum to file, dated January 11, 2002, the employer confirmed to the case manager that the Appellant could no longer work as a result of the restrictions/limitations set out in Dr. Daniels' Medical Assessment report, and, as a result, they were unable to accommodate the Appellant in his department and that they had looked at alternative positions within the department.

Dr. Daniels provided a further report to MPIC dated January 24, 2002 and stated that:

1. she had seen the Appellant on December 5, 2000, December 12, 2000, January 17, 2001, June 8, 2001, August 10, 2001 and November 7, 2001.
2. she had reviewed extensively the treatments she had provided the Appellant during this period of time.
3. she advised the Appellant that the symptom exacerbations the Appellant was experiencing were due to the nature of the his work and that the repetitive movements by his work were aggravating his symptoms.
4. she had discussions with the Appellant about alternative work.
5. she had discharged the Appellant from her care because he was not doing the recommended stretches and because his work was aggravating the myofascial pain syndrome she had been trying to treat.
6. the work related restrictions were appropriate in his case.
7. she was of the view that he could do a job where there was more supervisory duties and less autobody technician duties.

At the request of the case manager, Dr. MacKay, Medical Consultant with MPIC Health Care Services provided a report to MPIC dated July 7, 2002. Dr. MacKay set out the reasons for review:

1. What medical condition(s) did he develop as a direct result of the July 28, 1997 motor vehicle collision?
2. Does the medical evidence indicate that [R.B.] developed an impairment of physical function that in turn prevented him from performing his occupational duties, and if so, to what extent?
3. Does the medical evidence identify [R.B.] as being permanently disabled from his pre-collision occupational duties as a result of the medical condition(s) arising from the incident in question.

The Internal Review Officer's decision dated October 1, 2003, reviewed Dr. MacKay's report and stated:

... In his memo to the file dated July 2, 2002, Dr. MacKay noted that the initial medical reports suggested a mild strain/sprain of the neck – a condition which, in the majority of cases, heals without treatment. He noted further that there was a conflict in the reports over whether physiotherapy was helping, although there was an indication that cervical extension had improved with treatment. Dr. MacKay observed that, in 1999 (two years post-accident), there was no evidence of any work-related impairment and no objective evidence that your condition was worsening (as was being alleged at the time). He noted further that none of the investigations to date had identified any underlying pathology which would account for the myofascial pain symptoms.

Dr. MacKay concluded that:

- a. You had sustained a mild injury to your neck, with no evidence of any structural change and no indication of a significant soft-tissue injury leading to a permanent impairment of function.
- b. There was insufficient objective evidence of a work-related impairment of physical function.
- c. The objective medical evidence did not identify a medical condition which would permanently disable you from your pre-accident work duties such that a change of job would be required.

Case Manager's Decision – Income Replacement Indemnity Benefits

On July 11, 2002, the case manager wrote to the Appellant and indicated that the medical information contained on the Appellant's file did not support his inability to work as a result of the motor vehicle accident of July 28, 1997. As a result, pursuant to Section 81(1)(a) of the MPIC Act, the Appellant was not entitled to IRI benefits.

On July 23, 2002 the case manager wrote to the Appellant and advised him:

The medical information on file does not support that your symptoms requiring Ziplene, Advil, and Robaxacet, are as a result of the motor vehicle accident injuries; therefore we are unable to provide you reimbursement for your medication receipts submitted.

On September 10, 2002, the Appellant filed an Application for Review of the case manager's decision.

On October 17, 2002 MPIC received a CT scan which disclosed degenerative disc changes throughout the Appellant's cervical spine and three (3) "very small central posterior protrusions". No spinal cord impingement or deformity was noted.

Internal Review Officer's Decision – Income Replacement Indemnity Benefits

The Internal Review Officer, in his decision dated October 1, 2003, confirmed the case manager's decision dated July 11, 2002 denying the Appellant IRI benefits and denying the Appellant his claim for reimbursement in respect of the three (3) medications. The Internal Review Officer stated:

My decisions with respect to the above issues are as follows:

1. I am not convinced that any residual effects of the injuries you sustained in the motor vehicle accident in July, 1997 contributed in any material fashion to the work-related restrictions imposed in November, 2001. I am therefore confirming the July 11, 2002 decision to deny your claim for IRI.
2. The only evidence suggesting that the Zopiclone was prescribed for an accident-related purpose is the fact that Dr. Daniels wrote the prescriptions. She does not comment on the medical necessity for the medication in her reports. An entitlement to reimbursement under PIPP for the costs of this medication has not been established.

I am therefore confirming the July 23, 2002 decision of the case manager on this point.

In arriving at his decision the Internal Review Officer indicated that:

1. For the past four (4) years the Appellant had continued to work at his pre-accident employment without any complaints of pain and discomfort.
2. Apart from fairly regular physiotherapy treatments between October 1998 and February 1999 the Appellant's attendances for medical attention had been at best sporadic.
3. Notwithstanding the opinion of Dr. MacKay, which he was prepared to accept, it was advisable for the Appellant to stop doing autobody repair work in November 2001.
4. He had difficulty accepting the notion that the Appellant's work related disability, commencing November 2001, had a sufficient causal connection to the accident to establish an entitlement to IRI benefits.

The Internal Review Officer further stated:

As Dr. MacKay rightly points out, the initial reports indicated quite a minor soft-tissue of the type which normally heals in short order without any treatment.

The fact that – contrary to the clear recommendation of Dr. Singer made at your first post-accident visit with her – you attended for no treatment at all until October, 1998 (almost 15 months post-accident), and the fact that you saw Dr. Singer only three times during that interval, strongly suggest that any injuries attributable to the accident had healed, as expected, within a relatively short time.

I have carefully considered the views expressed by Drs. Singer and Daniels on this point but I respectfully disagree with their opinions that there is a probable casual connection between the disabling symptoms described in November, 2001 and the accident in July 1997.

In respect of the case manager's decision letter of July 23, 2002 denying the Appellant's claim for PIPP coverage for three (3) medications, the Internal Review Officer stated:

In a decision letter dated July 23, 2002, the case manager denied your claim for PIPP coverage for three medications – Zopiclone (sic), Advil, and Robaxacet. Travel expenses related to your visits with Dr. V. Daniels were paid.

At the hearing, you said that Zopiclone (sic) was a sleeping pill which had been prescribed by Dr. Daniels, and that she had suggested taking Advil (an over-the-counter analgesic) as well. You said that you had started taking the Robaxacet (another over-the-counter analgesic) on your own, and that you had been taking 6-8 tablets of the over-the counter analgesics a day since the accident.

The Internal Review Officer further stated:

(b) Reimbursement of Medication Expenses

There are two conditions which must be met before MPI becomes obligated to reimburse a claimant for medication expenses:

1. the expenses must have been incurred because of the accident (i.e. the medications must have been prescribed to treat an injury sustained in the accident) in accordance with Section 136(1)(a) of the *Act* (copy enclosed); and,
2. the medications must have been “medically required” in accordance with Section 5 of Manitoba Regulation MR P215-40/94 (copy enclosed).

As noted above, I am not convinced that either branch of the test has been met. An entitlement to reimbursement has not, therefore, been established.

The Appellant filed a Notice of Appeal dated December 29, 2003.

Appeal

The relevant provisions of the MPIC Act and Regulation in respect of this appeal are:

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;

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.

At the appeal hearing the Appellant testified that:

1. Prior to the motor vehicle accident he had no problems with his neck and back.
2. As a result of the motor vehicle accident he sustained injuries to his neck and back, which resulted in a persistent and on-going pain for a number of years.
3. He acknowledged that he did not, in a timely fashion, seek medical help to obtain physiotherapy treatments.
4. His parents taught him, as he was growing up, to accept whatever life brought him without complaint.
5. As a result, he continued working with considerable pain for many years without actively seeking medical assistance.

The Appellant further testified that:

1. He was unable to continue his pre-accident employment due to the motor vehicle accident injuries and obtained employment with the [Text deleted] where his job duties were light in nature.
2. Over a period time the physical demands of this job made it extremely difficult for him to continue due to his persistent neck and back pain.

3. He was advised by Dr. Daniels, the physiatrist, that he should not continue his employment because of repetitive movements of the job aggravated his symptoms.
4. Dr. Daniels imposed certain restrictions in the manner in which he should carry out his work.
5. His employer determined that they could not accommodate the Appellant due to these work restrictions
6. As a result, he was terminated from his employment.

Dr. MacKay, MPIC's medical consultant, testified at the hearing and confirmed the comments he made in his report to MPIC dated July 7, 2002. Dr. MacKay testified that the Appellant suffered a mild strain/sprain to his neck which in the majority of cases heals without treatment. He further testified that an examination of the medical reports provided by the Appellant's caregivers did not indicate any evidence of any structural change and there was no indication of a significant soft tissue injury leading to a permanent impairment of function. Dr. MacKay concluded that there was no objective evidence of a work related impairment of physical function which would permanently disable the Appellant from his pre-accident work duties which would require the Appellant to change his job.

In response to a question from the Commission, Dr. MacKay indicated that a mild soft tissue injury to the neck, if it does not heal within a reasonable period of time, can result in a person developing a myofascial pain syndrome and chronic pain.

Submissions

MPIC's legal counsel submitted that the Internal Review Officer was correct in rejecting the Appellant's request for IRI benefits on the grounds that the Appellant's complaints involving

his forearm, shoulder, arms and low back were not accident related and, as a result, there was no impairment of work related physical function identified in the medical reports. MPIC's legal counsel reviewed the Appellant's testimony, the documentary evidence, the medical reports that were filed in these proceedings, and submitted that the Appellant was employable and his inability to do so after November 2001 was not causally connected to the motor vehicle accident in order to entitle the Appellant to IRI benefits.

MPIC's legal counsel also submitted that the Internal Review Officer was correct in rejecting the Appellant's claim for PIPP coverage for three (3) medications, Zopiclone, Advil and Robaxacet.

Discussion **IRI Benefits**

The Commission, after careful review of the Appellant's testimony, the documentary evidence and reports filed at the proceedings, and after considering the submissions made by MPIC's legal counsel, rejects MPIC's position and concludes that MPIC erred in not providing IRI benefits pursuant to Section 81(1)(a) of the MPIC Act.

The Commission notes that both Dr. Singer, the Appellant's personal physician, and Dr. Daniels, the physiatrist, were of the view that as a result of the injuries the Appellant sustained in the motor vehicle accident, he was unable to continue his employment with the Manitoba Government.

Dr. Singer, who was the Appellant's doctor before and after the motor vehicle accident, reported that prior to the motor vehicle accident the Appellant had no neck or back problems and that the Appellant's complaints commenced as a result of the motor vehicle accident. In a

series of medical reports, Dr. Singer reported that she had treated the Appellant before and after the motor vehicle accident, and corroborated the Appellant's testimony that since the motor vehicle accident he consistently complained about the significant pain he was suffering to his neck and back. In Dr. Singer's view the Appellant's neck and back pain complaints were connected to the motor vehicle accident.

Since the physiotherapy treatments did not resolve the Appellant's problems, Dr. Singer referred the Appellant to Dr. Daniels, a physiatrist and rehabilitation expert. Dr. Daniels was also of the view that the Appellant's problems in his upper neck and right arm were due to the motor vehicle accident and that the Appellant's condition was aggravated by the work he was performing on his job. Dr. Singer recommended the Appellant should obtain employment of a sedentary nature where there was no repetitive craning, twisting or lifting.

It should be noted that Dr. Daniels did not treat the Appellant in respect of any mechanical problems the Appellant had to his neck or back. Dr. Daniels reported that the Appellant developed a myofascial pain syndrome as a result of the motor vehicle accident injuries, which caused the Appellant persistent pain to his neck and right arm. As a result, Dr. Daniels, on October 14, 2001, completed a Manitoba Government Medical Assessment Report wherein she set out certain work restrictions with respect to the Appellant's employment.

Dr. Singer, in a report to MPIC dated December 27, 2001, stated that:

1. the Appellant advised her that Dr. Daniels recommended that he find a different job.
2. his present job, which involved craning his neck and back in awkward positions, as well as repetitive work, was aggravating his symptoms.

3. she was informed by the Appellant on November 30, 2001, that his employer indicated to him that he was no longer able to work at his place of employment because he could not meet the job restrictions and his last day of work was November 9, 2001.
4. *“At this point in time I do not feel he is able to perform the duties of his employment as a result of the motor vehicle accident injuries.”*

Dr. MacKay only conducted a paper review and did not interview the Appellant and determined that:

1. there was no causal connection between the Appellant’s injuries and the motor vehicle accident.
2. any complaints the Appellant had in respect of his neck and right arm were not the result of any injuries he sustained in the motor vehicle accident.
3. any injuries the Appellant received in the motor vehicle accident had been resolved and did not prevent the Appellant from carrying out his employment.
4. none of the medical investigations to date had identified any underlying pathology which would account for myofascial pain syndrome.

Notwithstanding his medical opinion, Dr. MacKay did acknowledge to the Commission that a soft tissue injury does not heal quickly and could develop into a myofascial pain syndrome which could result in a person developing a chronic pain condition.

The Commission notes that both Dr. Singer and Dr. Daniels, unlike Dr. MacKay, had the opportunity of personally meeting with the Appellant, discussing with him his complaints, conducting physical examinations and assessing the Appellant’s credibility. Dr. Singer, who

was the Appellant's personal physician before the motor vehicle accident and after the motor vehicle accident, reported that the Appellant never complained about his neck or right arm prior to the motor vehicle accident but did complain about pain to his right arm and neck after the motor vehicle accident. Dr. Singer observed the Appellant on a number of occasions, found him to be a credible person and concluded that the Appellant's complaints in respect of pain to his neck and right shoulder were due to the motor vehicle accident.

Dr. Daniels, who is a physiatrist and whose expertise includes the myofascial pain syndrome, also had the opportunity of personally meeting with the Appellant, discussing his medical complaints and his work duties, and conducting physical examinations. Dr. Daniels had the opportunity of observing the Appellant on a number of occasions and concluded that the Appellant developed a myofascial pain syndrome which resulted in the Appellant complaining about chronic pain to his neck and right shoulder. She concluded that the Appellant could not continue his employment with the Manitoba Government unless he did so under certain restrictions. Dr. Daniels was of the view that the repetitive motions of the Appellant and the nature of his duties were aggravating the Appellant's symptoms which she was attempting to treat. As a result, Dr. Daniels concluded that the Appellant could not work in his present job unless he worked under certain work conditions. Unfortunately, his employer was unable to accommodate these working conditions.

For these reasons the Commission gives greater weight to the medical opinions of Dr. Singer and Dr. Daniels than it does to Dr. MacKay.

The Commission finds that the Appellant was an impressive witness who testified in a very candid, direct, unequivocal fashion and his testimony has been corroborated by Drs. Singer and

Daniels. The Appellant testified that, due to the manner in which he was brought up by his parents, he was trained not to complain when he was confronting difficulties, but to tough it out. As a result, he advised the Commission that he generally ignored the pain in his back and arm and therefore did not, in a timely fashion, comply with the directions of Dr. Singer and Dr. Daniels. The Commission finds the Appellant to be a credible witness and accepts his testimony in respect of all issues he has in dispute with MPIC.

The Commission has in the past recognized that as a result of chronic pain a claimant could be prevented from employment and, as a result, would be entitled to receive IRI benefits. In it's decision in *T.U.* (AC-03-07) the Commission stated at page 9:

Despite the Appellant's ongoing complaints of pain, little weight was given to her subjective concerns. Judicial treatment of subjective pain complaints in disability cases is considered by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340, where he notes that:

Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary*, Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:

In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.

In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

McCulloch v. Calgary (City) (1985), 16 C.C.L.I.222 (Alta. Q.B.)

In the Supreme Court decision of Nova Scotia (Worker's Compensation Board) v. Martin et al

[2003] S.C.J. No. 54 Mr. Justice Gonthier stated:

1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. . .

Decision
IRI Benefits

The Commission therefore finds that, having regard to the testimony of the Appellant and Dr. MacKay, the medical opinions of Dr. Singer and Dr. Daniels, the Appellant has established, on a balance of probabilities, that as a result of the injuries the Appellant sustained in the motor vehicle accident he developed a myofascial pain syndrome which resulted in chronic pain to the Appellant's neck and right arm which prevented him from continuing his employment since November 16, 2001. The Commission further finds that as a result of his inability to continue employment on November 16, 2001 he was entitled to IRI benefits and MPIC erred in denying him these benefits.

As a result the Commission rescinds the Internal Review Officer's decision dated October 1, 2003 and allows the Appellant's appeal in respect of IRI benefits.

Medication - Zopiclone

In this decision the Internal Review Officer stated:

At the hearing, you said that Zopiclone was a sleeping pill which had been prescribed by Dr. Daniels, and that she had suggested taking Advil (an over-the-counter analgesic) as well.

The Internal Review Officer in rejecting the Appellant's request for reimbursement of the cost of this medication, indicated:

The only evidence suggesting that the Zopiclone was prescribed for an accident-related purpose is the fact that Dr. Daniels wrote the prescriptions. She does not comment on the medical necessity for the medication in her reports. An entitlement to reimbursement under PIPP for the costs of this medication has not been established.

Discussion

The Commission rejects MPIC's decision not to reimburse the Appellant in respect of the cost of the Zopiclone medication. The Commission notes that MPIC wrote to Dr. Daniels and specifically requested information in respect of the Appellant's medical condition. In neither of the letters that MPIC wrote to Dr. Daniels did MPIC specifically request any information in respect of any medication that Dr. Daniels prescribed in respect of the Appellant's motor vehicle accident injuries. In response, Dr. Daniels wrote to MPIC and provided them with the information they had specifically requested. As a result, she did not comment on the medical necessity of medications in her report because she was never requested by MPIC to provide this information.

Dr. Daniels was treating the Appellant for myofascial pain syndrome, which the Commission has found was causally connected to the injuries the Appellant sustained in the motor vehicle accident. The Commission finds that the Appellant was a credible witness and accepts his testimony that Dr. Daniels prescribed Zopiclone in order to deal with his pain complaints arising out of his motor vehicle accident injuries.

Decision – Zopiclone Medication

For these reasons the Commission finds that the Internal Review Officer erred in rejecting the Appellant's request to be reimbursed for the cost of the Zopiclone medication. The Commission finds that the Zopiclone medication was prescribed by Dr. Daniels for the purpose of treating an injury the Appellant sustained in the motor vehicle accident. As a result, the Commission finds that, pursuant to Section 136(1)(a) of the MPIC Act, the Zopiclone medication was "medically required" in accordance with Section 5 of Manitoba Regulation M.R. P215-40/94. As a result, the Commission rescinds the Internal Review Officer's decision dated October 1, 2003 and allows the Appellant's appeal in respect of the Appellant's entitlement to be reimbursed for the cost of the Zopiclone medication.

Decision – Advil Medication

In respect of the Appellant's claim for reimbursement of the over-the-counter medication of Advil, the Commission, for the same reasons it found that the Internal Review Officer erred in rejecting the Appellant's application for reimbursement of the cost of the Zopiclone medication, finds that the Internal Review Officer erred in rejecting the Appellant's request for reimbursement of the cost of purchasing the Advil medication. As a result, the Commission rescinds the Internal Review Officer's decision dated October 1, 2003 and allows the

Appellant's appeal in respect of the Appellant's entitlement to be reimbursed for the cost of the Advil medication.

Decision – Robaxacet Medication

In respect of the Appellant's request for reimbursement of the cost of Robaxacet, the Commission agrees with the decision of the Internal Review Officer that the Appellant did not establish that there was an expense incurred in obtaining medications which were medically required in accordance with Section 5 of Manitoba Regulation P215-40/94. As a result the Commission dismisses the Appellant's appeal and confirms the Internal Review Officer's decision dated October 1, 2003 in respect of the Robaxacet medication.

**Entitlement to Assistance and Funding for Rehabilitation,
Job Training and Massage Therapy
Internal Review Officer's Decision**

The Internal Review Officer issued a decision dated November 17, 2004 in respect of the following issues:

1. In the June 3, 2004 decision letter, the case manager denied your claim for assistance and funding for rehabilitation and job retraining under PIPP on the basis that you were not, by virtue of the injuries sustained in the 1997 accident, prevented from performing the essential duties of the occupation you held at the time of that accident.
2. In the September 9, 2004 decision letter, the case manager denied your claim for PIPP coverage for massage therapy expenses on the basis that the treatments were not medically required to deal with the injuries sustained in the 1997 accident.

**Decision
Entitlement to Assistance and Funding for Rehabilitation and Job Training**

The Commission has determined that the injuries the Appellant sustained in his 1997 accident prevented him from continuing his employment after November 16, 2001 and, as a result, the

Commission finds the Internal Review Officer erred in concluding that there was no causal connection between the motor vehicle accident injuries and the inability of the Appellant to continue employment.

For the reasons set out herein, the Commission therefore finds that the Appellant has established, on a balance of probabilities, that MPIC erred in denying the Appellant's claim for assistance and funding for rehabilitation and job training under PIPP. As a result, the Commission rescinds the Internal Review Officer's decision dated November 14, 2004 and allows the Appellant's appeal in respect to the Appellant's claim for assistance and funding for rehabilitation and job training.

Entitlement to Massage Therapy

The Internal Review Office rejected the Appellant's claim for reimbursement for massage therapy for the following reasons:

You did not bring any massage therapy receipts with you to the hearing and you were unable to tell me whether your therapist was a physician, chiropractor, athletic therapist, or physiotherapist (as required for PIPP coverage). You called the next day to advise that she did not hold any of these professional designations and that you would therefore not be submitting any receipts from her.

...

I might also add that no receipts for the massage therapy have ever been provided. Furthermore, Section 8 of Manitoba Regulation P215-40/94 prohibits PIPP funding for massage therapy in this case.

Decision

The Commission finds that the Internal Review Officer was correct in this determination and, as a result, confirms the decision of the Internal Review Officer dated November 17, 2004 and dismisses the Appellant's appeal in respect of massage therapy.

Medication – Tramacet

On July 6, 2007 the Appellant made an application to MPIC to be compensated for the purchase of Tramacet, which he required for pain relief in respect of the accident related injury of July 28, 1997. In support of his application the Appellant provided a letter from Dr. Craig Haberman, dated July 6, 2007. Dr. Haberman is a pain management specialist at the pain management centre which is located at the Health Sciences Centre. In this report Dr. Haberman indicated that the Appellant suffers from a combination of both myofascial as well as facet joint related pain in his neck. Dr. Haberman further stated “the motor vehicle accident which he was involved in certainly may have contributed to some of his pain”. (underlining added)

Discussion

The Internal Review Officer, based on Dr. MacKay’s medical opinion, rejected the Appellant’s claim for reimbursement for the cost of purchasing Tramacet medication on the grounds that the Appellant’s complaints were not causally connected to the motor vehicle accident and that the Tramacet medication could not be viewed as medically required to address the medical conditions arising from the motor vehicle accident.

The Commission, in this decision, has rejected MPIC’s decision that there was no causal connection between the motor vehicle accident and the Appellant’s injuries.

As well, the Internal Review Officer in his decision found that Dr. Haberman was not convinced that all of the Appellant’s pain was related to his motor vehicle accident. The Internal Review Officer, relying on Dr. MacKay’s analysis and the medical reports on the MPIC file, determined that he was unable to conclude that the case manager had incorrectly

rejected the Appellant's claim for reimbursement of the Tramacet medication and dismissed the Appellant's appeal in this respect.

The Commission acknowledges that Dr. Haberman was unclear when he stated "*The motor vehicle accident which he was involved in certainly may have contributed to some of his pain.*" (underlining added) The Commission finds that Dr. Haberman's comments on causation were ambiguous and, as a result, it is unclear to the Commission whether or not Dr. Haberman was convinced that the Appellant's "pain" was related to his motor vehicle accident.

Section 150 of the MPIC Act states:

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The Commission determines that pursuant to Section 150 of the MPIC Act, MPIC, in order to ensure that the Appellant received the compensation he was entitled to in respect of costs incurred in purchasing the Tramacet medication, should have sought clarification from Dr. Haberman in respect of his ambiguous statement and he failed to do so. In these circumstances it would have been appropriate for the case manager to have written to Dr. Haberman and specifically requested whether or not, on the balance of probabilities, the motor vehicle accident in which the Appellant was involved in contributed to some of the Appellant's pain. Upon receipt of Dr. Haberman's clarification in respect of the issue of causality, MPIC's case manager would have been in a position to determine whether or not the Appellant was entitled to reimbursement of his expenses in respect of the Tramacet medication.

Decision – Tramacet Medication

For these reasons the Commission finds that MPIC erred in rejecting the Appellant’s claim for reimbursement of the Tramacet medication and refers this matter back to MPIC to obtain clarification from Dr. Haberman on the issue of causality prior to making any determination in respect of the Appellant’s entitlement to the Tramacet medication.

For these reasons the Commission rescinds the Internal Review Officer’s decision dated August 30, 2007 in respect of the Tramacet medication and allows the Appellant’s appeal.

Dated at Winnipeg this 21st day of August, 2008.

MEL MYERS, Q.C.

ROBERT MALAZDREWICH

LINDA NEWTON