

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by J.H.
AICAC File No.: AC-06-143**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Wilf De Graves
Ms Deborah Stewart

APPEARANCES: I.H. represented the Appellant, J.H., who did not attend the hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: July 3, 2008

ISSUE(S): Whether the Appellant suffered a 'relapse' within the meaning of Section 117 of the Manitoba Public Insurance Act

RELEVANT SECTIONS: Section 117 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

Background

The Appellant was initially injured in a rear-end motor vehicle accident on October 10, 1996. He sustained injuries to his lower back, as well as right lower limb pain extending as far as the foot. This injury aggravated pain in his lower back, which was partially sourced to a spinal stenosis condition predating the motor vehicle accident. While the Appellant was off work and recovering from the original motor vehicle accident, he was injured again in a subsequent motor vehicle accident on September 19, 1997. This accident worsened the conditions brought on by the October 10, 1996 accident, and introduced both neck pain and numbness in his right hand.

He also suffered from two (2) broken ribs and bruising to his back and shoulders as a result of the second accident.

Following the initial therapy by physicians and physiotherapists, the Appellant was referred to an anesthesiologist, Dr. Sutton, who provided treatment and has continued to work as one of the Appellant's treating caregivers.

Previous Commission Decisions

The Appellant had his Income Replacement Indemnity (IRI) benefits terminated on August 26, 1999 by MPIC. This decision was appealed to the Commission, and the Commission referred the Appellant for a Functional Capacity Evaluation (FCE). MPIC carried out the FCE, and determined that the Appellant was able to return to his former employment as a crane operator, and declined to determine a new employment for him.

On August 10, 2000, the Commission reviewed the FCE and determined, based on a "slender balance of probabilities" that the Appellant could not return to his former employment as a crane operator. For the purposes of the determination, the Commission concluded that the Appellant could perform the duties set out under category 1149 of Schedule C, of Manitoba Regulation 39/94, "Other Managers and Administrators, (not elsewhere classified)". The Commission determined that the IRI benefits were to be reinstated effective September 19, 1999, and terminate September 19th, 2000.

On October 4, 2002, the Appellant's Case Manager ended his entitlement to medication in relation to the accidents on the basis that there was no causal connection between the motor vehicle accidents and the ongoing need for medication. On review, the Internal Review Officer

upheld this decision, which was subsequently appealed to the Commission. The Commission allowed the appeal, and reinstated the entitlement to medication on the basis that the Appellant's "ongoing pain [was] related to the injuries sustained at the time of the motor vehicle accidents."

The Appellant informed the Case Manager on July 10, 2003 that he had begun following a medically required change of medication. This new and more powerful medication rendered him unable to work, and thus the Appellant sought reconsideration of his IRI benefits on the basis of new information, pursuant to s.171 of the *MPIC Act*. In response, the Case Manager wrote the Appellant informing him that the decision by the Commission on IRI benefits was final and MPIC would not render a new decision reinstating the IRI benefits. The Appellant requested a review of this decision, and the Internal Review Officer upheld the Case Manager's decision stating that there was no new information warranting reconsideration of IRI benefits pursuant to s.171 of the *MPIC Act*.

On October 12, 2004, the Case Manager informed the Appellant that a review by MPIC's Health Care Services (HCS) had been completed, and that his entitlement to medication had been terminated on the basis that the medication was not related to the motor vehicle accidents.

The Appellant had also sought a permanent impairment award pursuant to s.127 of the *MPIC Act* on the basis that a change in medication had rendered him unable to work. On November 15, 2004, the case manager issued a decision letter stating that the Appellant did not qualify for an award as there was no evidence that a pre-existing condition was enhanced, that there was no permanent neurologic damage, or any structural change to the spine that resulted in permanent damage.

The Appellant applied for a review of both the October 12, 2004 decision and the November 15, 2004 decision. The Internal Review Officer set aside the October 12, 2004 decision on the basis that there was no new information to support a reconsideration of the previous Commission decision. The Internal Review Officer upheld the November 15, 2004 decision stating that there was no basis for a permanent impairment benefit within the meaning of s.126 or s.127 of the *MPIC Act*.

The Appellant subsequently sought an appeal with the Commission concerning an Internal Review decision regarding the permanent impairment award as well as the reinstatement of IRI benefits.

In its February 3, 2006 decision, the Commission found that there was no new information contained within the seven (7) reports submitted by the Appellant which were sufficient to allow MPIC to make a fresh decision permitting reinstatement of the IRI benefits and a permanent impairment award.

Case Manager's Decision – Section 117 MPIC Act - Relapse

The original case manager decision letters dated March 3, 2006 and March 30, 2006 both indicated that MPIC was not in a position to re-instate IRI, nor was there sufficient medical information on file to support a reconsideration of these previous decisions. The Appellant subsequently filed an Application for Review of the case manager's decision in respect of the entitlement to IRI benefits pursuant to s.117 of the *MPIC Act*. The Appellant challenged this decision on the basis that the case manager and MPIC failed to consider s.117 of the *MPIC Act* with respect to the Appellant suffering a relapse.

Internal Review Officer's Decision

The Internal Review Officer confirmed the decision of the Case Manager on July 7, 2006 and found that there was insufficient evidence to establish that the Appellant suffered a relapse pursuant to Sections 117 and 118 of the MPIC Act. While the Internal Review Officer conceded that there was no definition of 'relapse' within the *Act* or regulations, he relied on a common usage of the word suggesting that a relapse was a recurrence, or a return to, a previous state of injury presumably after some state of recovery. The Internal Review Officer noted that:

1. the medical records did not indicate any regression or worsening of the injuries in the period of late 2002 to early 2003.
2. the medical reports remained consistent between the Commission's decisions of August 2000 and February 2006 and were not indicative of a relapse.

As a result, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision.

On July 7, 2006 the Appellant appealed the Internal Review Officer's decision on the basis that the Appellant did in fact suffer a relapse within the meaning of s.117 of the MPIC Act and, as such, would be entitled to IRI benefits.

Appeal

The relevant provisions in this appeal are:

Entitlement to I.R.I. after relapse

117(1) If a victim suffers a relapse of the bodily injury within two years
 (a) after the end of the last period for which the victim received an income replacement indemnity, other than an income replacement indemnity under section 115 or 116; or

(b) if he or she was not entitled to an income replacement indemnity before the relapse, after the day of the accident;
 the victim is entitled to an income replacement indemnity from the day of the relapse as though the victim had been entitled to an income replacement indemnity from the day of the accident to the day of the relapse.

Victim entitled to greater I.R.I.

117(2) The victim is entitled to an income replacement indemnity computed on the basis of the greater of

(a) the gross income used by the corporation immediately before the end of the period referred to in clause (1)(a); and

(b) the gross income of the victim at the time of the relapse.

Relapse after more than two years

117(3) A victim who suffers a relapse more than two years after the times referred to in clauses (1)(a) and (b) is entitled to compensation as if the relapse were a second accident.

The Appellant did not testify at the hearing and MPIC did not call any witnesses.

Submissions

I.H., appearing on behalf of the Appellant (her husband), argued that he did in fact suffer a relapse within the meaning of s.117(3) of the *MPIC Act*, and therefore should be entitled to IRI benefits. She submitted that:

1. the relapse occurred in February, 2001, which forced him to discontinue his determined employment.
2. up to that point the Appellant's condition was in a state of improvement, as noted in the case manager's memorandum dated April 26, 2000 which reported the following discussion with Marte Bachynski (Occupational Therapist):

Last week Marte advised me that she was in the middle of the FCE and was concerned about testing because of the stenosis. She did not want to force it too much because she was afraid of causing a flare up of the stenosis which was apparently in remission at this time.

As a result, I.H. submitted that:

1. the occupational therapist's comments in respect of spinal stenosis establishes a form of plateau or improvement in the Appellant's medical condition.
2. the chronic pain that followed in the subsequent years constituted a relapse and, as a result, a return to the Appellant's medical condition subsequent to the motor vehicle accident.
3. the remission of the stenosis followed by the associated back pain was consistent with the definition of 'relapse' pursuant to the Internal Review Officer's decision dated July 7, 2006.
4. the change in the Appellant's medical condition was consistent with the provisions of s.117(3) of the MPIC Act.
5. as a result the Appellant should be entitled to IRI benefits pursuant to the *MPIC Act* and Regulations.

In an alternative submission, I.H. challenged the Internal Review Officer's definition of 'relapse' and stated:

1. the July 7, 2006 Internal Review Officer's decision defined 'relapse' as "a recurrence of, or return to, a previous state of injury, presumably after some period of recovery (partial or complete)."
2. both the Appellant and MPIC agreed that the definition of 'relapse' was not included in either the *MPIC Act* or Regulations.
3. a relapse could also be defined as a worsening or deterioration of a medical condition having regard to a MPIC Claims Coverage Committee decision dated September 25, 2002, which defined 'relapse' as follows:

The Act itself does not specifically define “relapse”. We have adopted the procedural definition of “the recurrence or worsening of a disabling condition directly related to the original accident”.

4. the Appellant’s attempt to pursue work in September 2000 with the real estate industry working for [Text deleted], and his discontinuance in February 2001 due to the escalation of pain was indicative of a worsening of his medical condition.
5. under this definition a ‘relapse’ of the Appellant’s medical condition had occurred.

I.H. further submitted that:

1. the Appellant’s drug regime grew in potency subsequent to the original motor vehicle accident, requiring increasingly more powerful pain medication to offer relief of his symptoms and this corroborated that the Appellant had suffered a relapse.
2. in a June 30, 2003 conversation between the Appellant and his Case Manager, the Appellant indicated that “he is unable to work because he is too “drugged up” on meds and unable to function properly”.
3. the case manager in a note to file dated July 11, 2003 reported that the Appellant reiterated his complaint of the effects of the medication.
4. the increased requirement for pain medication could be correlated to a worsening in the Appellant’s symptoms, and this constituted a relapse pursuant to Section 117(3) of the MPIC Act.

Submission by MPIC

MPIC’s counsel submitted that the Internal Review decision of July 7, 2006 was correct and submitted that:

1. the generally accepted understanding of a relapse is an improvement (partial or complete) in one's condition, followed by a reversion back to the former symptoms.
2. in the Appellant's case there was no improvement, or even a plateau, of his condition and therefore he had not suffered a relapse within the meaning of s.117(3).
3. a worsening of the Appellant's symptoms did not constitute a relapse pursuant to Section 117(3) of the MPIC Act.
4. any worsening in the Appellant's condition was directly linked to his pre-existing condition of spinal stenosis.

MPIC's legal counsel further submitted that:

1. there was a lack of medical evidence between late 2002 and early 2003 that would indicate that the Appellant's condition regressed or worsened.
2. this lack of regression was supported by numerous medical reports dated between October 1999 and February 2006 which indicate that there had been no significant change in the Appellant's condition.
3. the reports by the Appellant's caregivers consistently indicated that there was no change in the Appellant's condition.

In response to the Appellant's claim that the new medication was indicative of a relapse, counsel for MPIC submitted that:

1. merely changing ones' medication was not supportive of a relapse.
2. both the new and the old medication were intended for relieving the same symptoms of the Appellant.
3. in order for medication to be indicative of a relapse, it would have to be required to alleviate new symptoms which arose from deterioration in the Appellant's condition.

4. alternatively, the medication could be an indication of a relapse if it was required as a result of a return of previous symptoms which had otherwise improved in part or in full.
5. in the first instance, the Appellant did not have any new symptoms which would be indicative of a relapse.
6. rather, his medical condition was unchanged subsequent to the motor vehicle accident.
7. this was supported by medical reports which consistently maintain that the Appellant's condition was static with respect to his injuries.
8. with regards to the second instance of a return of a previous condition, it would require some level of improvement which was not evident in this case.

Discussion

Upon hearing the submissions from both MPIC and the Appellant, and upon reviewing the documentary evidence filed in these proceedings, the Commission finds that the Appellant did not suffer a relapse within the meaning of s.117 of the *MPIC Act*, and therefore is not entitled to reinstatement of IRI benefits. The onus was on the Appellant to demonstrate on a balance of probabilities that he did suffer a relapse within the meaning of s.117 and we find that he failed to provide medical evidence which supports a relapse.

The medical information suggests that the conditions suffered by the Appellant remained predominately static following the motor vehicle accidents. The medical information is consistent with regards to a limited change in the Appellant's condition since the time of the motor vehicle accidents. Of particular note were Dr. Sutton's medical reports wherein he stated:

- Report of November 5, 2002:

He continues to get good relief and the last time we had an assessment was March 4, 2002. He continued to describe his pain as constant, aching pain worse with weight bearing...His x-rays do show degenerative changes. It appears that there was no problem at the time of the initial accident but constant pain since this. *His condition has not changed from that previous assessment* although he does obtain some relief from the injections. [emphasis added]

- Report of October 23, 2003:

He continues to have chronic back pain which limits his level of functioning...This is a permanent problem and is unlikely to resolve at this time.

- Report of July 13, 2004

Physical findings were unchanged from previous examinations [emphasis added]

- Report of December 6, 2004:

He gives a history that indicated he had no pain prior to the motor vehicle accident and has had persistent chronic pain [since] that time, therefore I would conclude that there is a [causal] relationship between his present condition and the motor vehicle accident. As he has limited improvement in his physical function as a direct result of this accident I would think that this is a permanent problem.

In the Appellant's own submissions, it was noted that his condition had not stabilized since the Commission decision of August 15, 2000. It was further indicated that between August 2001 and January 2002 the Appellant's condition had not stabilized, and there had not been any improvement in his physical condition. It was during this interim period of September 2000 and February 2001 in which the Appellant pursued employment in real estate with [Text deleted]. There was no medical evidence at any point between these dates where the Appellant's condition had stabilized or improved to a point which would have been indicative of a relapse. The Appellant stated that Dr. Sutton supported his decision to return to work at the time, however,

there was no medical information supplied at the time to support an improvement in the Appellant's condition.

In the Commission's decision *G.L. (Re)* [2004] M.A.I.C.A.C.D. No. 38 [*G.L.*] the Appellant was found to have suffered a relapse within the meaning of s.117(1) and subsequently had IRI reinstated. In that case, the Appellant (*G.L.*) was injured in a motor vehicle accident and injured his leg, which required him to discontinue working. The Commission noted that *G.L.*'s physician had treated him after the motor vehicle accident, and his leg had improved to the point where his physician could advise a return to work. *G.L.* worked for a number of months following the accident, until he began to feel a gradual increase of pain in his leg. He continued to work until his pain returned and escalated to a point where his physician advised an absence from work. The Commission found, at para. 32-34 of the decision, that the improvement in *G.L.*'s condition, followed by a deterioration to his previous condition of being unable to work, constituted a relapse within the meaning of s.117(1) of the *MPIC Act*. The Commission stated:

The Commission notes that the Appellant remained off work between January 21st to March 30, 2003 and, as a result thereof, *the Appellant was able to return to work thereafter without difficulty*. The Commission further notes that after the Appellant's return to work there is no evidence he missed any further periods of work due to his left calf pain. In the circumstances the Commission concludes that the medical advice provided by Dr. Eng was not unreasonable and, in fact, proved to be highly successful in the treatment of the Appellant's medical problems.

The Appellant honestly believed, based on the medical advice he received, that he would put his health at risk if he did not absence himself from work in order to ensure a complete recovery from his leg pain. The Commission finds that it was not reasonable in the circumstances that the Appellant should be required to work in extreme pain, placing his health at risk, when both his doctor and his physiotherapist advised him to remain off work.

...The Commission therefore determines that the Appellant, in these circumstances, has established, on the balance of probabilities, that he was unable to work during the period January 21st to March 10th, 2003 within the meaning of Sections 81(1) and 117(1) of the *MPIC Act* and is therefore entitled to receive IRI benefits for that period. [emphasis added]

The Commission finds that factually there is a distinction between G.L. and the current appeal. G.L. had a noticeable and objective improvement in his condition, as demonstrated by his ability to return to work and corresponding medical reports from his physicians. G.L.'s condition improved to the point where he was able to return to his pre-accident employment and was able to carry out the duties which he was unable to perform immediately after the motor vehicle accident. However, in this appeal the Appellant had no medically recognized improvement in his condition that would demonstrate an ability to return to his pre-accident employment or his determined employment. In addition, there was a noticeable decline in G.L.'s condition noted by his treating physicians after the initial improvement. However, in this appeal the Appellant has had no discernable change in his condition in the period of October 1999 and February 2008 which would be indicative of a relapse.

In the Commission's decision (J.E.F. (Re) [2004] M.A.I.C.A.C.D. No. 8) the Commission adopted the dictionary definition of 'relapse' as follows:

The Concise Oxford Dictionary, Tenth Edition defines a relapse as "a deterioration in [health] after a temporary improvement." From the medical evidence on the Appellant's file, it is not clear whether there has ever been a period of improvement of the Appellant's left knee problems, so as to come within the definition of relapse. In his report dated July 13, 2003, Dr. Craton notes that "Since my involvement with him, his left knee has never completely improved. He has had a continuum of difficulty associated with the left knee and required three surgical procedures to deal with recurring loose bodies and meniscal problems to the left knee".

A consideration of the meaning of relapse in J.E.F. suggests that there should be some evidence of improvement in order for the Appellant to be eligible for IRI.

A similar approach was adopted in *Murphy v. Saskatchewan Government Insurance* [2007] S.J. no.355 at para. 122-126, 2007 SKQB 238, 51 C.C.L.I. (4th) 184 [*Murphy*] where similarly ‘relapse’ was not defined in the governing legislation. The Appellant in the case (*Murphy*) returned to work after being injured in a motor vehicle accident. *Murphy* did work full time in spite of his pain, and maintained doing so until he was forced to discontinue due to not being able to withstand the pain and the Court stated.

“Relapse,” in the context of s.141 of the Act, must be interpreted in the context of a claimant’s entitlements based upon a reading of the Act in [its] entirety. “Relapse” in this context must be referable to a claimant’s basic entitlement pursuant to s.133 of the Act. Mr. *Murphy* was not able to continue in the employment which he held at the date of the accident as a result of the accident, that is to say, the injuries sustained in it including his development of CPD now diagnosed. In this sense, Mr. *Murphy*’s condition saw him “relapse” into the condition, as contemplated by subsection 141(2), where he was unable to hold his pre-accident employment as a result of the bodily injury (injuries and resultant CPD) sustained in the accident). That he did so (relapse) is supported by the substantial evidence of his attending physicians...”

In contrast to the *Murphy* decision the Appellant has failed to establish that there was a noticeable improvement in his medical condition. Moreover, there is a lack of evidence from the treating physicians of a relapse. While there is evidence that the Appellant is in pain and cannot return to his previous employment, this is not indicative of a relapse within the context of *Murphy*.

Another Commission decision which reiterates the definition of relapse is *D.L.M.(re)* [1998] M.A.I.C.A.C.D. No. 67 [*D.L.M.*]. In this case, the Appellant (*D.L.M.*) suffered a whiplash associated disorder through a motor vehicle accident which involved an injury to her neck. After a period of rehabilitation, *D.L.M.* returned to work and her file was closed by MPIC. There was acknowledgement that *D.L.M.*’s condition improved such that she could return to work. Some time after returning to work, she began experiencing similar pains to what was first encountered

after the motor vehicle accident. MPIC dismissed this claim as not being causally connected to the original motor vehicle accident. The Commission stated:

After reviewing and considering all of the evidence we are of the opinion, based on a balance of probabilities, that the Appellant's absence from work for the period of December 12th, 1996 to January 7th, 1997 was due to a relapse of the medical problems she received in the December 19th, 1995 auto accident. She is therefore entitled to receive IRI for this period at the same rate of her earlier compensation.

The Commission notes that the definition of 'relapse' is not stated in the *MPIC Act* or Regulations. However, there are a number of slightly varying definitions for relapse, including:

Concise Oxford Dictionary, 10th ed., s.v. "Relapse"

- 1) Deteriorate after a period of improvement 2) deterioration in health after a temporary improvement.

Hensyl, William R., *Stedman's Medical Dictionary*, 25th ed., (Baltimore, MD: Williams & Wilkins, 1990) s.v. "Relapse"

- Recurrence; return of the manifestations of a disease after an interval of improvement.

Schmidt, M.D., *Schmidt's Attorneys' Dictionary of Medicine*, 25th ed., (New York, NY: Matthew Bender and Company, 1995) s.v. "Relapse"

- The aggravation of a disease after a period of improvement. Also, the return of a disease after it has all but disappeared, or after it has actually disappeared.

Webster's New World College Dictionary, 4th ed., s.v. "Relapse"

- To slip or slide back into a former condition, esp. after improvement or seeming improvement.

The Appellant noted that the Claims Coverage Committee provided a procedural definition of a relapse as a "recurrence or worsening". However, the decisions by MPIC or its committees do not bind the Commission. When considering the dictionary definitions of 'relapse', Section 117

of the MPIC Act, and the previous judicial treatments of the meaning of ‘relapse’, the Commission finds that a relapse must constitute some form of improvement from a disabling condition, followed by a regression or recurrence of the condition some time after the improvement.

The Appellant noted the comments from Marte Bachynski as indicative of a relapse in the April 26, 2000 conversation with the Case Manager, as well as the Functional Capacity Evaluation of April 25, 2000. However, the Commission finds that:

1. “at [the time of the evaluation], the stenotic pain pattern appeared to be relatively settled.”
2. This remission in pain is not supported by any of the medical reports between October 1999 and August 2000, and given the consistency of the reports from Dr. Sutton, the Commission fails to find any indication of a relapse at this period.
3. Dr. Sutton, in his report of October 24, 1999, states that the Appellant’s pain was “[on the day of the exam] 2 out of 10 on visual analogue pain scale and at its worst it is 8 out of 10.”

The Commission therefore concludes that while the Appellant exhibited some occasional reduction of pain, it cannot be considered an improvement in his medical condition to constitute a relapse within the meaning of s.117 of the MPIC Act.

The Commission finds that if Section 117 intended that a relapse included the worsening or deterioration of a claimant’s medical condition, the MPIC Act would have expressly included such a definition but it does not. After a review of all of the documentary evidence filed in these proceedings, the submissions of the parties, and the Commission and Court decisions, the

Commission concludes that, on a balance of probabilities, the Appellant did not sustain a relapse within the meaning of s.117 of the MPIC Act. The medical evidence submitted indicates that there was no substantial improvement in the Appellant's condition, nor is there a period where the Appellant's condition reached a plateau and subsequently deteriorated. Any worsening in his condition is consistent with his diagnosed spinal stenosis, and is not reflective of a relapse. For these reasons the Commission confirms the decision of the Internal Review Officer dated July 7, 2006 and dismisses the Appellant's appeal.

Dated at Winnipeg this 27th day of August, 2008.

MEL MYERS, Q.C.

WILF DE GRAVES

DEBORAH STEWART