

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by L.S.  
AICAC File No.: AC-07-31**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Ms Linda Newton  
Ms Mary Lynn Brooks

**APPEARANCES:** The Appellant, L.S., was represented by Mr. Michael Mahon and participated in the Appeal Hearing via teleconference call;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

**HEARING DATE:** June 18, 2008

**ISSUE(S):** Whether Appellant's Personal Injury Protection Plan benefits were properly terminated.

**RELEVANT SECTIONS:** Sections 71(1) and 86(1) 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**

The Appellant, L.S., was involved in a motor vehicle accident on March 10, 2001, when he lost control of the vehicle he was driving after hitting a patch of ice. The vehicle rolled several times while traveling at highway speed. On April 25, 2001, the Appellant contacted MPIC in order to initiate a bodily injury claim. He presented to his case manager as being very stiff, with pain in his lower back and left hip, along with headaches. The Appellant had first attended a doctor's office in relation to these complaints on March 24, 2001. As a result of the injuries which the

Appellant sustained in the motor vehicle accident, he became entitled to Personal Injury Protection Plan ('PIPP') benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was unemployed and in receipt of employment insurance benefits. He was determined as a non-earner for purposes of the MPIC Act. MPIC's case manager undertook an investigation to determine the Appellant's entitlement to IRI benefits as of the 181<sup>st</sup> day after the motor vehicle accident and his on-going entitlement to treatment benefits.

In an Inter-departmental memorandum dated November 28, 2001, Dr. Baydock, Medical Consultant with MPIC's Health Care Services Team indicated that there was insufficient information on the Appellant's file to derive a direct cause and effect relationship between his ongoing symptoms and physical findings and the motor vehicle accident of March 10, 2001. As a result, Dr. Baydock recommended that a multidisciplinary assessment be undertaken to provide an account for the Appellant's symptomatology.

In a decision letter dated December 5, 2001, MPIC's case manager advised the Appellant as follows:

Income Replacement Indemnity

Your determined employment as a body shop technician yields a Gross Yearly Employment Income (GYEI) of \$21,580.69. This translates into a bi-weekly amount of \$576.15 effective on the 181<sup>st</sup> day of your motor vehicle accident, that being September 7, 2001.

Your medical file was reviewed by our Health Care Services team on November 28, 2001. The medical information reviewed did not provide enough information to derive a direct cause and effect relationship between your present symptoms, physical findings, and the motor vehicle accident in question. Therefore, this will end your entitlement to income replacement as of November 29, 2001. Your Income Replacement Indemnity is payable as follows:

September 7, 2001 to November 29, 2001 = 12 weeks  
 $\$576.15 \times 12/2 = \$3,456.90$

Dr. Baydock of our Health Care Services Team recommended a multidisciplinary assessment to be undertaken in order to account for your present symptomology. Arrangements have been made with Corey Kooy of Northern Rehabilitation Consulting Services to co-ordinate the assessment. Therefore, we encourage you to cooperate with Mr. Kooy in scheduling this assessment.

S.T.A.R. Rehab provided a report dated January 10, 2002 with respect to the multidisciplinary assessment conducted on the Appellant. The assessment concluded that there were so many clinical inconsistencies and so much pain behaviour present, that the rehabilitation facility was unable to determine a specific organic diagnosis. The report further indicated that while the Appellant appeared to have muscular symptoms, they were very much out of proportion to objective findings. The treatment team, which included a rheumatologist, an orthopedic surgeon, a chiropractor, and a physiotherapist indicated that although they could not define a specific diagnosis to account for the Appellant's symptoms, they were satisfied that no major or specific/significant physical ailment was missed either by them or by health care providers who had examined the Appellant previously. Recommendations for further treatment included a twelve (12) week tertiary level treatment program. This tertiary treatment would include a multidisciplinary rehab program involving a number of approaches with various professionals including physiotherapy, exercise therapy, education, further psychological assessment, work simulation, back school and periodic one-on-one sessions with appropriate counselors. It was indicated that the reason for recommending this program was to treat the Appellant's psychological condition.

The file was then reviewed again by Dr. Baydock. In an Inter-departmental Memorandum dated April 2, 2002, Dr. Baydock provided the following conclusions:

## ANSWERS TO QUESTIONS

1. Are there any indications of an impairment of function that would preclude the claimant from working as a bodyman?

Despite the differences in opinion regarding disability forwarded by the claimant's caregivers, my interpretation of the body of medical evidence present within the file would indicate that the claimant was (*sic*) possibly be able, on a physical basis, to perform many of the essential duties required as a bodyman. However, the involvement of psychological conditions in this case would make it difficult to determine with any certainty, the exact level of physical impairment present. It is likely that the claimant's perceived level of disability is out of keeping with his actual functional abilities. The reason for this (either subconscious or volitional) needs to be further determined as indicated by Dr. Pancyr. Thus, I would like to reserve final judgment on the claimant's functional abilities until further psychological or psychiatric assessments can be undertaken to attempt to provide specific diagnoses to account for the claimant's pain.

2. What recommendations do you have regarding a treatment program?

As stated above, I feel that further psychological or psychiatric assessments would be required in this case. I am concerned about the message of disability provided to the claimant by the consulting neurologist as this may lead to reinforcement of the claimant's perceived disability in this case. Therefore, while the claimant is awaiting further psychological or psychiatric assessment, I would recommend that he be involved in some form of active therapy to attempt to motivate/educate him regarding his functional abilities.

The Appellant subsequently underwent a psychological assessment with Dr. Larry Shepel on April 20, 2002. The purpose of the evaluation was to assess the Appellant's emotional functioning and personality and their relationship to his motor vehicle accident. In a report dated June 8, 2002 based on this assessment, Dr. Shepel concluded the following:

**Conclusions.** The referral requested a short review of history and this was presented earlier. The present discussion addresses the other referral questions. It should be noted that the requested DSMIV-TR categorization used does not imply

the absence of a physical injury. The presence and severity of his physical injury and inconsistencies between objective findings and pain complaints is left up to his medical practitioner and specialist. It was this examiner's impression that physical discomfort exists, that [L.S.] is not consciously malingering, but that his overall and long-term response to injuries is and will be influenced by psychosocial and financial issues as well as medical factors and conditions.

With respect to specific referral questions:

1. DSMIV-TR diagnosis
  - Axis I: 307.89 Pain Disorder with Both Medical and Psychological Factors, Chronic
  - Axis II: 301.9 Personality Disorder NOS
  - Axis III: deferred to medical specialist
  - Axis IV Problems with Social Environment
  - Axis V GAF = 65
2. Does [L.S.] have a chronic pain disorder? Yes  
Is [L.S.'s] chronic pain disorder associated with his MVA? Yes
3. Does this disorder identify a measurable impairment of function preventing [L.S.] from performing his occupational duties as a bodyman?

I can only speak to the psychological component as it relates to functioning and not to the physical component. [L.S.'s] medical specialist can best determine any medical and physical restrictions resulting from his injuries.

Pain is subjective experience and its quantification is relegated at this time to self-report with an attempt to relate this self-report to objective, physical findings. Clearly at this point in time, [L.S.] is focused on his pain, rates it at a relatively high and level, views it as constant, and is inclined to perceive the presence of symptoms as needing physical intervention (surgery or some other medical procedure). He is dependent on passive interventions (medication or medical treatments) for pain management and is inclined to limit his active efforts to become more functional out of concern about causing "more damage" or injury to himself. Until medical assessment supports and promotes his involvement in more active, functional restoration rehabilitation programming, [L.S.] is not likely to move in that direction. As well until financial matters and his beliefs or expectations in this regard are resolved, he is unlikely to be oriented toward active and functional restoration efforts and to accept that he can become more functional and satisfied from a personal and perhaps even a career/employment perspective despite experiencing on-going symptoms. Rather, practical, financial concerns dominate his attention at the moment.

There may be subtle factors based on his history and certain aspects of his present circumstances as well as his cognitive potential that contribute to a perception of disability that is determined to exceed objective medical findings. Within the context of his medical condition, these factors would be

most apt to influence his recovery rate and ultimately contribute to his degree of perceived disability. The latter will affect his motivation to seek rehabilitation programming designed to maximize his function and to perhaps permit alternate employment if the medical consensus is that he would physically be unable to meet the physical demands of his occupation as a bodyman.

Upon receipt of Dr. Shepel's psychological assessment, the file was referred to Dr. Andrew Jones of MPIC's Health Care Services Team for review. In an Inter-departmental Memorandum dated December 30, 2002, Dr. Jones concluded as follows:

#### Summary and Response to referral questions

Based on the information provided in the medical file, it is my opinion that the claimant does have a chronic (*sic*) pain disorder which is causally related to the MVA. This disorder likely does prevent him from performing his duties as a bodyman at the present time but is unlikely to do so if he received proper treatment. As stated in the STAR rehab report "it would be very unlikely that he would successfully return to work without therapy".

As such, I would recommend that you contact Dr. Wine to get an update on his opinion regarding the claimant attending a tertiary level treatment program. It is noted that Dr. Wine was to see the claimant 2 weeks after his March 19, 2002 report. As indicated by Dr. Shepel, the claimant is unlikely to attend such a program unless Dr. Wine supports this. If Dr. Wine is in agreement with the claimant attending such a program, I would recommend this be set up ASAP as the further we get from the MVA the more entrenched his pain behavior and beliefs are likely to be.

Over the next few years the Appellant continued to attend various health care professionals in relation to his physical and psychological complaints. Attempts at involving the Appellant in a multidisciplinary treatment program were unsuccessful. The Appellant continued to be in receipt of PIPP benefits from MPIC.

On July 10, 2006 an independent medical examination was arranged for the Appellant with Dr. Thomas Lesiuk. In a report dated September 18, 2006, Dr. Lesiuk noted the following:

### **Summarized Recommendations**

#### **Diagnostic**

There does not appear to be the requirement for any further diagnostic testing with respect to his symptomatic complaints. There does not appear to be any physical component related to the reported MVA. The claimant has had extensive assessments, evaluations, and diagnostic evaluations with no identified MVA-related component with these.

#### **Therapeutic**

There does not appear to be the requirement for any further therapy related to any potential MVA-related components. The claimant has received extensive therapy, including physical therapy and multi-disciplinary rehabilitation programming.

As a general recommendation for the population, the claimant should be increasing his day-to-day physical activities, fitness activities and adding a regular general fitness and aerobic fitness activity on a regular basis on his own. This would be best as a home exercise program.

There does not appear to be any MVA-related evidence that the claimant requires the medications including Codeine, Diazepam, Naproxen, Amitriptyline, Cephalex, Ibuprofen, Durogesic patches, Clyco-benzaprine. There is no indication that he requires Arthrotec or any other medication related to the MVA. There does not appear to be any requirement for the claimant utilizing Effexor or Amitriptyline related to the MVA. However, the claimant may require these for pre-existing difficulties. This may need to be clarified by psychologist / psychiatrist input.

Unrelated to the MVA, Atenolol treatment for his hypertension appears to be required.

### **Summary and Additional Comments**

In summary, there was no objective physical diagnoses identified on the current clinical examination or file review as related to his reported MVA of March 10, 2001. He is now at the point 5½ years post-MVA. At most, with the initial MVA reported mechanism the claimant had potentially a seat belt related soft tissue contusion. This and any other potential minor irritation of the soft tissues would be expected to have resolved. The claimant's sister who was a passenger reportedly did not have any injuries either.

There was no evidence for any further treatment. He has had extensive assessments and evaluations by specialists, therapists, and courses of treatment including multidisciplinary rehabilitation programming. There is no evidence that he requires any further specific treatment related to any potential MVA-related components.

There does not appear to be any evidence that the claimant will have any permanent impairment related to the MVA either.

There was no evidence that the MVA would be responsible for any change in the claimant's work abilities. He would be expected to be able to return back to his prior employment duties if available.

The file review questions the claimant's veracity. The examination and as per the multiple documentations suggest the presence of secondary gain, specifically that the claimant was seeking financial compensation for pain and suffering from MPI. With no MVA related physical cause for pain identified.

In a letter dated November 3, 2006, MPIC's case manager wrote to the Appellant to advise of the termination of his PIPP benefits, as follows:

This letter will serve notice of the termination of your entitlement to benefits under the Personal Injury Protection Plan (PIPP). As I am unable to reach you by telephone, I have outlined our decision for you below.

You attended an independent medical examination on July 10, 2006 at the request of Manitoba Public Insurance. We are now in receipt of Dr. Thomas Lesiuk's report, dated September 18, 2006 based on that examination.

Dr. Lesiuk's report concludes that there is insufficient evidence to support a causal relationship between your current signs/symptoms and the motor vehicle accident of March 10, 2001. This will end your entitlement to all PIPP benefits including the recently submitted prescription receipts.

The Appellant sought an Internal Review of that decision. In a decision dated March 7, 2007, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer agreed with the case manager and found that there was insufficient evidence to support a causal relationship between the Appellant's current sign/symptoms and the motor vehicle accident of March 10, 2001. She concluded that the case manager's decision to terminate all entitlement to PIPP benefits, including Income Replacement Indemnity and reimbursement of medical prescriptions was correct. The Internal Review Officer found the inconsistencies in the presentation of the Appellant to various care

givers to be inconsistent and to be lacking in credibility. As a result, she upheld the case manager's decision.

The Appellant has now appealed from that Internal Review Decision to this Commission. The issue which arises on this appeal is whether the Appellant's PIPP benefits were correctly terminated effective November 24, 2006.

### **Appellant's Submission**

Counsel for the Appellant submits that there continues to be a causal connection between the motor vehicle accident and the Appellant's symptoms and therefore the Appellant continues to be entitled to PIPP benefits. He maintains that the Appellant's pain condition can only be attributed to the motor vehicle accident. He argues that there is no other basis to account for the Appellant's symptoms. No other causal factors are present. Therefore he maintains that a causal connection has been established between the motor vehicle accident and the Appellant's symptoms. Counsel for the Appellant submits that the Appellant's pain is real, it was caused by the motor vehicle accident and therefore the Appellant is entitled to a continuation of PIPP benefits.

### **MPIC Submission**

Counsel for MPIC submits that the Appellant is not entitled to any PIPP benefits beyond November 24, 2006. She submits the Appellant has not established, on a balance of probabilities, that his on-going symptoms relate to the motor vehicle accident of March 10, 2001. In that regard, she relies on the Internal Review Decision of March 7, 2007 which found that there was insufficient evidence to support a causal relationship between the Appellant's current sign/symptoms and the motor vehicle accident of March 10, 2001. Additionally, counsel for

MPIC relies on Dr. Lesiuk's report dated September 18, 2006, wherein Dr. Lesiuk concluded that, "*there was no presence of any significant motor vehicle accident related injury on a physical basis, and that the claimant would not be expected to have any medical impairment related to the motor vehicle accident*". As a result, counsel for MPIC submits that the Internal Review Decision dated March 7, 2007 should be confirmed and the Appellant's appeal dismissed.

### **Discussion**

Upon hearing the testimony of the Appellant and after a careful review of all the reports and documentary evidence filed in connection with this appeal and after hearing the submissions of counsel for the Appellant and of counsel for MPIC the Commission finds that the Appellant's PIPP benefits should not have been terminated as of November 24, 2006. In his report dated September 18, 2006, Dr. Lesiuk concluded that, "*there were no objective physical diagnoses identified on the current clinical examination or file review as related to his (the Appellant's) reported MVA of March 10, 2001*". While there may not have been any physical medical impairments related to the motor vehicle accident, the Appellant's psychological condition was still present. The Commission finds that there was no evidence that the chronic pain disorder had been treated or no longer prevented the Appellant from working.

The Internal Review Officer concluded that there was insufficient evidence in the Appellant's file to support a causal relationship between the Appellant's current sign/symptoms and the motor vehicle accident of March 10, 2001 and based her decision to confirm the case manager's decision on that basis. However, the Internal Review Officer failed to consider the Appellant's psychological chronic pain disorder. Dr. Jones, in his Inter-departmental Memorandum dated December 30, 2002 had determined that the Appellant's chronic pain disorder was causally

related to the motor vehicle accident. There was no evidence presented to the Commission to establish that the Appellant's psychological condition no longer existed, had been appropriately treated, or no longer prevented the Appellant from working. Rather, based upon the material before us and the Appellant's own testimony, we find that the Appellant's pain behaviour has indeed become more entrenched with the passage of time. As a result, the Commission finds that the Appellant's PIPP benefits were improperly terminated since there was evidence to establish that his motor vehicle accident-related injuries, and in particular his chronic pain disorder, continue to prevent him from working and returning to a normal life. Accordingly, the Commission finds that the Appellant's PIPP benefits shall be reinstated as of November 25, 2006 and shall continue until such time as his benefits may be terminated in accordance with the provisions of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review decision dated March 7, 2007 is therefore rescinded.

Dated at Winnipeg this 29<sup>th</sup> day of September, 2008.

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**YVONNE TAVARES**

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**LINDA NEWTON**

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**MARY LYNN BROOKS**