

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by L.H.  
AICAC File No.: AC-04-222**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Ms Mary Lynn Brooks  
Dr. Sharon Macdonald

**APPEARANCES:** The Appellant, L.H., was represented by Ms Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

**HEARING DATE(S):** January 7, 2009 and February 9, 2009

**ISSUE(S):** Whether Appellant's benefits were properly terminated pursuant to Section 160(a) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act')

**RELEVANT SECTIONS:** Section 160(a) of the 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.H., was involved in a motor vehicle accident on January 29, 2000. As a result of that motor vehicle accident, the Appellant complained of pain and stiffness in the lower neck to mid-thoracic spine and was diagnosed with strained cervicothoracic spine. The Appellant underwent physiotherapy treatment for management of those injuries. The Appellant also complained of headaches and dizziness. As a result of difficulties with his balance, the Appellant underwent further investigations with Dr. Mark Young, a neurologist, who found him to be neurologically intact and Dr. Garber, an otolaryngologist. Dr. Garber diagnosed the

Appellant with left vestibular hypo-function, most likely related to his motor vehicle accident. He made a referral for vestibular rehabilitation at the Health Sciences Center.

At the time of the motor vehicle accident, the Appellant had just been laid off from his employment with [text deleted] on or about December 19, 1999. Subsequently, he had applied for and was collecting regular employment insurance benefits while awaiting commencement of employment as a steel worker with [text deleted] in [text deleted]. Due to the injuries which the Appellant sustained in the motor vehicle accident, he was unable to commence the promised employment as a steel worker and he became entitled to Income Replacement Indemnity (“IRI”) benefits.

On or about August 2001, the Appellant advised his case manager that he was intending on pursuing a business interest in [text deleted], involving the acquisition of a machine shop business. A letter dated August 1, 2001 from R.M.. was provided. That letter indicated that:

L.H. of Manitoba Canada has agreed to purchase family business in [text deleted], [text deleted]. The business entails machining and tooling equipment with in house contracts. We will work together for first year with L.H. handling sales and marketing of the company. I will retire at the end of the year with L.H. assuming full control of operation. We presently employ three machinists with a capacity of 10 in full production. Please call if any other information is required.

The Appellant continued to receive IRI benefits following his move to [text deleted]. On January 8, 2002, the Appellant advised his case manager that the business was not doing well and that he was still having trouble with his neck which required him to attend for physiotherapy treatment twice.

On March 28, 2003, the Appellant advised his case manager that:

- he continued to experience pain between his shoulder blades, with reduced range of motion;
- when he over-extended the range of motion of his neck, he developed headaches;
- his sleep was disturbed as a result of the pain between his shoulder blades;
- he had not consulted any medical professionals, either in Manitoba or in [text deleted] for the last year and a half; and
- he was taking in excess of 100 Motrin per week for pain control.

Subsequently, the Appellant returned to Manitoba on or about September 29, 2003. On October 7, 2003, the Appellant met with his case manager at the Selkirk Claims Office. At that time, the Appellant advised that he was not sleeping, had a stiff neck, he could not lift his arms past his shoulders due to pain in the shoulder area. The Appellant also advised that he did not receive any treatment and did not seek any medical care while he was in [text deleted].

On or about March 1, 2004, the case manager received a letter dated February 18, 2004 from J.M. of [text deleted] in [text deleted]. In that letter, J.M. indicated that:

1. At no time was L.H. to assume control of [text deleted]. He worked from July 2001 until April 2002. He made a few contacts regarding new business, but there was no response from those calls.
2. L.H. was provided room and board in lieu of wages. I have no check stubs, agreements or contracts.
3. L.H. worked as needed. His work schedule was based on the jobs as they came in and when they were due. He operated a turret lathe and a Bridgeport mill. These machines are used to drill holes in various parts and remove shavings. He never complained of pain or any physical injury.
4. L.H. was not involved in management of the company. The majority of his duties were to run the lathe and mill.

5. He never indicated that he could not work due to pain or injury.

On March 8, 2004, the Appellant underwent an assessment with Dr. Gregory Chernish. As a result of the assessment, Dr. Chernish recommended that the Appellant undergo 10 to 14 athletic therapy sessions, two to three times per week for functional restoration.

Arrangements were then made by MPIC for an investigation to be carried out on the Appellant's level of activity. That investigation is set out in the investigative report of Data Probe Investigations dated May 14, 2004 and the accompanying videotape. The videotape investigation covered the period from May 6 to May 8, 2004. The videotape evidence shows the Appellant carrying out a wide range of activities over a number of days. These activities include:

1. Driving (including reversing the automobile);
2. entering and exiting a vehicle on a number of occasions;
3. walking;
4. loading and unloading household contents into a utility trailer;
5. carrying and lifting numerous items, including chairs, mattresses, boxes, etc.;
6. walking up a flight of stairs backwards while carrying (with another individual) a chest of drawers, a full size refrigerator and a couch;
7. carrying a washing machine on a trolley; and
8. climbing into the back of a van.

Following completion of the investigation, the Appellant's file was referred to MPIC's Health Care Services team by the Special Investigation Unit for review of the submitted videotapes of May 6, 7, and 8, 2004 and to provide comment with respect to the activity observed. That

referral resulted in Dr. Shrom's Inter-departmental memorandum of June 23, 2004. Having had the opportunity of reviewing all the medical information on the Appellant's file, together with the videotapes, Dr. Shrom noted that:

The activities observed on March (*sic*) 6, 7 and 8 demonstrate capability of frequent heavy lifting and carrying. The claimant was observed to be moving furniture and appliances out of one home and into another. Examples of heavy activity included the co-lifting of a fridge, chest of drawers; table and couch as the lead carrier (walking backwards) up a narrow stairway of twelve steps. While demonstrating this ability of heavy lifting, no overt difficulty with balance was observed. As well, the claimant demonstrated full bilateral cervical rotation in the course of carrying these items. Fluid and full cervical rotation was also observed on frequent occasions while driving and while walking and talking to other people. When not lifting, the claimant was observed to demonstrate capability of fluidly and at times briskly, walking up and down the twelve-step stairway without requirement for support or assistance from the rail. Other solo lifting and carrying was also demonstrated (i.e. table saw, microwave).

- \* The activities observed on May 6, 7, and 8, 2004 demonstrate frequent capability of heavy lifting and carrying, fluid and functional cervical range of motion and capability of performing such tasks/motion without overt, functional balance difficulties.

In a letter dated July 15, 2004, MPIC's case manager advised the Appellant that his Personal Injury Protection Plan ("PIPP") benefits ended as of May 6, 2004 based upon Section 160(a) of the MPIC Act. The case manager found that:

Investigative evidence from May 2004 of your activities in [text deleted], clearly supports that you have an unimpaired functional ability, which is totally contradictory to what you have consistently reported to Manitoba Public Insurance (MPI). Such inaccurate advise (*sic*) from you regarding the level of your functional ability contravenes section 160(a) of *The Manitoba Public Insurance Corporation Act*, which says:

**Corporation may refuse or terminate compensation**

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

- (a) knowingly provides false or inaccurate information to the corporation;

The Appellant sought an Internal Review of that decision. In the Internal Review Decision dated December 17, 2004, the Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the Appellant's benefits were properly terminated pursuant to Section 160(a) of the MPIC Act. The Internal Review Officer stated that:

While carrying out of all of these activities on the videotape, I was unable to observe any sign of injury or disability. In my view, the activities you were observed carrying out and the manner in which you carried them out, are wholly inconsistent with your self-described level of injury as communicated to your caregivers and the Case Managers from time to time. Based upon my review of your file, I am in agreement with Ms. Kupchik's decision that you knowingly provided false or inaccurate information to the Corporation when you communicated the severity of your injury. In this particular case, your false statement is clearly connected to the basic nature of your claim as a Claimant's physical condition is one of the most material factors in the management of a claim for benefits based upon personal injuries brought under the Personal Injury Protection Plan.

The Appellant has now appealed from that decision to this Commission. The issue which requires determination in this appeal is whether the Appellant's PIPP benefits were properly terminated pursuant to Section 160(a) of the MPIC Act.

### **Relevant Legislation**

Section 160(a) of the MPIC Act provides as follows:

#### **Corporation may refuse or terminate compensation**

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation;

**Appellant's Submission:**

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant did not provide false information to MPIC and did not fail to advise MPIC of a change in his functional ability. The Claimant Adviser maintains that the videotape evidence does not establish that the Appellant was able to return to work or that his functional abilities were greater than what he was reporting to MPIC. She argues that the Appellant had a reasonable explanation for the videotape evidence. In that regard, she notes that the Appellant testified that he moved the furniture over three days precisely because he knew he would need three days to spread out the move due to his functional limitations. Additionally, she refers to the Appellant's testimony that, after moving furniture each day, he was required to lie down and rest for several hours and take painkillers in order to recuperate from the physical exertion. She also points out that the Appellant had help in carrying the heavier items. Accordingly, the Claimant Adviser submits that videotaped evidence does not establish that the Appellant's functional abilities were greater than what he was reporting to MPIC. Rather, the Claimant Adviser submits that the Appellant was consistently in contact with MPIC throughout the duration of his claim and was forthcoming with MPIC with respect to his functional condition throughout the period of his claim. As a result, the Claimant Adviser submits that the Internal Review decision dated December 17, 2004 should be rescinded and that the Appellant's PIPP benefits should be reinstated as of May 6, 2004.

**MPIC Submission:**

Counsel for MPIC submits that the Appellant did provide inaccurate information about his functional ability and accordingly the termination of his PIPP benefits pursuant to Section 160(a) was appropriate in the circumstances. Counsel for MPIC notes that the Appellant repeatedly advised his case managers that he continued to suffer from pain in the shoulder area, a stiff neck, that he could not work due to pain, that he didn't have balance and that he could not walk

straight. Counsel for MPIC contrasts this evidence with the videotape evidence which shows that the Appellant was capable of frequent heavy lifting and carrying, that the Appellant raised his arms past his shoulder and that the Appellant demonstrated full and fluid movement. Counsel for MPIC argues that the videotape evidence demonstrates that the Appellant's level of functioning was far more than what he was reporting to his case managers at MPIC. Accordingly, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated December 17, 2004 confirmed.

**Decision:**

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary and videotape evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant's PIPP benefits were properly terminated pursuant to Section 160(a) of the MPIC Act as of May 6, 2004.

**Reasons for Decision:**

Based upon a careful review of the documentary evidence and the videotape evidence, the Commission finds that the Appellant provided inaccurate and incomplete information about his functional capabilities to MPIC, as evidenced by the activities shown on the videotape. We find that the activities observed on May 6, 7 and 8, 2004 demonstrate frequent capability of heavy lifting and carrying, fluid and functional cervical range of motion and capability of performing these tasks without overt, functional balance difficulties. This is directly contradictory to the reports that the Appellant was providing to his case managers at MPIC. As a result, we find that Section 160(a) of the MPIC Act was properly applied in this case to terminate the Appellant's entitlement to PIPP benefits as of May 6, 2004.

In coming to its decision, the Commission is also mindful that the Appellant did not meet the onus of establishing his case, on a balance of probabilities. The Commission finds that the Appellant's testimony was unreliable and undependable. The Appellant had an extremely poor recollection as to dates and events. An example of this was his failure to recall his own father-in-law's first name – an individual with whom he had been fishing buddies and from whom he intended to purchase the machine shop business. Such a complete lapse in memory was never explained or addressed by the Appellant.

Additionally, the Commission finds that there were inconsistencies in the Appellant's testimony when compared with the documentary evidence on the file. His version of events surrounding the possible purchase of Mallet's Machine Shop directly conflicts with that provided by J.M. in the letter of February 18, 2004. The Appellant did not bring forward any independent evidence to challenge the letter dated February 18, 2004 from J.M. regarding his duties at [text deleted]. Nor did he call any witnesses to corroborate his functional status throughout the period of time relevant to his claim. Having determined that the Appellant's evidence was unreliable, we prefer the information provided in the letter of February 18, 2004 by J.M., to that provided by the Appellant.

Lastly, the Appellant's sporadic and poor recollection of events continued to the recent past. His testimony surrounding his personal and business affairs since July 2004 was very vague and general. He provided very little detail to support any ongoing entitlement to PIPP benefits beyond the date of termination (May 6, 2004). Taking into consideration the totality of the evidence before us, the Commission finds that the Appellant's testimony was insufficient to

refute the documentary and videotape evidence filed in this appeal. Accordingly, he failed to establish, on a balance of probabilities, that he did not provide false information to MPIC.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated December 17, 2004 is confirmed.

Dated at Winnipeg this 20th day of May, 2009.

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**YVONNE TAVARES**

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**MARY LYNN BROOKS**

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**SHARON MACDONALD**