

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by E.P.  
AICAC File No.: AC-06-65**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson  
Mr. Errol Black  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, E.P., was represented by Mr. Wayne Onchulenko, Levene Tadman Gutkin Golub LLP; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

**HEARING DATE:** March 19, 2009

**ISSUE(S):** Whether the Appellant is entitled to PIPP benefits and whether the current signs/symptoms were caused by the motor vehicle accident.

**RELEVANT SECTIONS:** Section 70(1), 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) 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 October 4, 1999, E.P. (hereinafter referred to as the "Appellant"), was a pedestrian that was struck by a motor vehicle in The City of Winnipeg. As a result of the motor vehicle accident, the Appellant sustained injuries to his left shoulder, left knee and left ankle, soft tissue injuries were also affecting his neck, mid and lower back.

The Initial Physiotherapist Report dated October 7, 1999, submitted by Mireille Frechette, indicated an impression of left shoulder AC sprain, left knee acute on chronic knee sprain, and left ankle (post-surgical) acute ankle sprain.

The Initial Chiropractic Report for examination dated November 9, 1999, provided by Dr. Doug Starodub, D.C., indicated a diagnosis of cervical, thoracic and lumbar joint dysfunction due to spinal whiplash, cervicogenic headache, left AC joint dysfunction and possible separation, as well as a left knee and left ankle sprain. In this report, the chiropractor recommended chiropractic treatments to commence at a frequency of two to three times a week and anticipated ongoing in-clinic care for approximately 12 to 15 months.

In a Chiropractic Treatment Plan Report dated December 13, 1999, Dr. Starodub advised of the Appellant's complaint of left lumbosacral and hip soreness after sitting for prolonged periods of time. A subsequent report for examination date of December 20, 1999, advised of the Appellant's acute lumbosacral pain. No aggravating factors were noted and the neurological examination was normal.

On January 11, 2000, the physiotherapist reported the Appellant's complaints relating to his left shoulder and left ankle pain.

In a Treatment Plan Report dated February 9, 2000, Dr. Starodub advised that the Appellant continued experiencing acute lower back pain varied with intensity making it difficult to walk or stand without pain.

On March 9, 2000, Dr. Eugenio Capitano, D.C., provided an initial health care report to MPIC indicating that he had assessed the Appellant's condition and provided a diagnosis of myofascial pain syndrome of the low back associated with L4/5 disc pathology and facet dysfunction and recommending acupuncture treatment.

At the request of MPIC, the Appellant attended a third party chiropractic evaluation with Dr. William J. Rothman on April 25, 2000. Dr. Rothman reported the following discussions he had with the Appellant:

#### **“Course of Events**

E.P. stated he had some initial neck and back symptoms following his accident, but these had subsided within a very short time of seeking treatment with Dr. Starodub.

By mid to late January of 2000, E.P.'s initial left shoulder, knee and ankle complaints had responded very well to the physiotherapy treatment. E.P. expressed that in his estimation, he was nearly at pre-accident status in early January of 2000 with respect to his extremity complaints. He had resumed his previous sporting activity of playing badminton and was very satisfied with his recovery. He was about to undergo a final assessment with the physiotherapist for the purpose of being discharged from care when he suddenly suffered a severe acute episode of left sided lower back pain while playing badminton...

#### **Current Complaints**

**Lower back pain** with radiating numbness and pins and needles to the left leg. Onset of this complaint occurred while playing badminton in mid to late January of 2000. E.P. experiences a constant ache in the left side of his lower back and pelvic area. There was radiating pins and needles and numbness that extends throughout his left leg to his toes...

#### **History of Past Health**

E.P. first began attending with Dr. Starodub approximately four years ago for reasons of incorporating chiropractic health care into his general health regimen...E.P. stated that in the time prior to his motor vehicle accident, he would attend with Dr. Starodub at a recommended maintenance care schedule of one visit

every three or four weeks. E.P. denied previously experiencing any lower back or left leg symptoms such as that he presently suffers from.

### **Impressions and Recommendations**

There is no compelling evidence on history or by examination, that E.P.'s left-sided lower back and leg complaints continue to be related to the accident of October 4, 1999. He did not initially sustain injuries from that accident similar to what he presently experiences. In mid to late January of 2000, nearly four months post accident, E.P. injured his back while playing badminton. This incident is sufficiently temporally removed from the event of the accident to imply that there is no cause and effect relationship between them...

By all indications, E.P. had recovered from any initial accidental injuries he may have sustained. I would not believe that there is a requirement for further chiropractic care pertaining to any ill effects that continue to stem from the accident and any ongoing treatment should be undertaken electively.” (underlining added)

On May 10, 2000, the Appellant attended at Victoria General Hospital where a CT scan was conducted in respect of his lumbar spine (L2/3 to L5/S1). The CT scan report of the same date stated that at L4/5 there is overall bulging of the posterior aspect of the L4/5 intervertebral disc with a likely localized disc protrusion in the intervertebral foramen at L4/5.

### **Case Manager's Decision**

The case manager wrote to the Appellant on May 12, 2000, stating:

“Enclosed for your convenience is a photocopy of Dr. W.J. Rothman's report of May 3, 2000. I would suggest you review the report with your caregiver(s).

Given Dr. Rothman's opinion that you had recovered from the injuries sustained in the above noted accident, the MPI will no longer fund expenses incurred to treat any ongoing complaints you have, effective on the date you receive this letter. This means you will be financially responsible for any expenses incurred thereafter.” (underlining added)

On June 22, 2000, Dr. Starodub wrote a report to MPIC's claims examiner criticizing Dr. Rothman's report of April 25, 2000. Dr. Starodub, in his letter:

“First, I would like to point out that Dr. Rothman was mistaken when he stated on page 2 of his report that “E.P. stated that he had some initial neck and back symptoms following his accident, but these had subsided within a *very short time of seeking treatment* with Dr. Starodub.” According to my clinical notes, E.P. continued to suffer from lower back and neck pain throughout December and early January until he suffered an acute exacerbation of his injuries in mid January.

Secondly, Dr. Rothman erred again in his report when he stated on page 3 that “he suddenly suffered a severe acute episode of left sided lower back pain *while playing badminton.*” In conversation with E.P. during care in January when he suffered the acute exacerbation of his original symptoms, he stated that the pain did not develop until 4 to 5 days after he had been playing badminton, and not during the game itself. A review of my clinical notes shows that E.P. was suffering from left leg numbness prior to the January “badminton” incident. My notes do not indicate an injury suffered while playing badminton...

Dr. Rothman states on page 7 of his report that “He did not initially sustain injuries from that accident similar to what he presently experiences. In mid to late January of 2000, nearly four months past the accident, E.P. injured his back while playing badminton.” This statement is clearly wrong based on our clinical notes, and E.P.’s statements that the pain did not occur until 4 or 5 days after playing badminton.”

On June 28, 2000, the Appellant made an application for the Internal Review Officers to review the decision of the case manager.

Dr. Conrad Hoy, a Physical Medicine and Rehabilitation Specialist, at the request of Dr. Starodub, assessed the Appellant on June 9, 2000, and provided a report to Dr. Starodub, dated July 17, 2000. In this report, Dr. Hoy stated that the Appellant had L4/5 disc protrusions and a possible dural irritation, secondary myofascial pain syndrome involving the left lumbosacral and gluteal musculature.

Dr. Hillel Sommer, a Coordinator for MPIC’s Claims Services, was requested by the case manager to determine whether there was a causal relationship between the motor vehicle accident of October 4, 1999, and a subsequent finding of a disc protrusion on the CT-scan in May 2000. As well Dr. Sommer was requested to determine that if a causal relationship was

determined whether the Appellant was entitled to permanent impairment entitlement and whether the treatment plans proposed by Dr. Hoy are reasonable and whether chiropractic care should continue concurrently.

Dr. Sommer was provided with a number of relevant medical reports. However, Dr. Sommer was not provided with Dr. Starodub's letter of June 22, 2000 to MPIC's claims examiner when Dr. Starodub was critical of Dr. Rothman's report dated April 25, 2000.

In his report dated August 18, 2000, Dr. Sommer stated: that:

“In order to establish a causal relationship between the motor vehicle/pedestrian collision and the Appellant's current status...it is necessary to demonstrate a probable cause, a probable effect, and an appropriate temporal relationship between the cause and the effect.

Dr. Sommer further stated:

“The mechanism of injury was a vehicle/pedestrian collision. The force of collision was sufficient to knock the claimant to the ground. However, the exact mechanism, as it relates to the forces imparted to the claimant's spine, is unknown. While it is biologically plausible for a vehicle/pedestrian collision to result in disc herniation, there is insufficient clinical information to conclude that the collision was the probable cause of his lumbosacral disc herniation.

Although there are some inconsistencies in the clinical presentation, the combination of unilateral low back and lower limb pain, sitting intolerance, intermittently positive dural tension signs and a probable disc herniation at L4-5 lend support to the diagnosis of L4-5 discopathy with dural tension. On balance, the effect, (e.g. the diagnosis) is probable.

The temporal onset of symptoms appears to be some time prior to Dr. Starodub's report of December 13, 1999 wherein he noted sitting intolerance at work. While low back pain is listed among the many clinical complaints in Dr. Starodub's initial report, there are no physical findings noted to indicate that the low back was symptomatic in the immediate post collision period. Had the claimant sustained an acute disc herniation as a result of the collision, it is probable that he would have had an acute onset of low back and lower limb pain at that time. It therefore appears that the first signs of lumbosacral discopathy began some time after the collision, and prior to December 13, 1999.

Dr. Rothman's report notes that the claimant was nearly at the pre-accident status in early January, 2000, only to sustain a marked deterioration/flare of symptoms later that month. Dr. Hoy's account is ambiguous as he notes an onset of symptoms in

January 2000, at the time of the collision. On balance, therefore, it appears that the claimant's low back discopathy began insidiously at sometime within the first 2 months following the collision and then deteriorated in late January 2000.

Therefore, based on the information currently available at the time of the preparation of this report, and with a reasonable degree of medical certainty, a cause and effect relationship between the vehicle/pedestrian collision of October 4, 1999 and the claimant's lumbosacral discopathy is improbable." (underlining added)

Dr. Sommer also concluded that having regard to the lack of a causal relationship between the Appellant's low back condition and the motor vehicle accident there is no need for treatment of a motor vehicle/pedestrian collision related condition. Dr. Sommer also suggested in his report that additional information including a copy of the CT scan films be reviewed to gain further clarity into the Appellant's condition

Pursuant to these instructions MPIC obtained further medical information and provided this information for Dr. Sommer's to review. In a report dated July 20, 2001 Dr. Sommer concluded that there was no clinical information presented of a nature that would alter his opinion as expressed in his memorandum to file dated August 18, 2000. Based on recommendations made by Dr. Hoy, Dr. Sommer agreed that the resumption of physiotherapy treatment for the purpose of instruction in a dynamic stabilization program could be supported, even if it isn't deemed that the collision is not causally related to E.P.'s current condition.

In a letter dated November 25, 2003, Dr. Berrington wrote to Dr. Werier, the Appellant's personal physician, and stated:

"E.P. returns for a follow up visit today after his MRI. His MRI does confirm degenerative disc disease of L4-5 and L5-S1 with a fairly large prolapsed disc of L4-5 on the left hand side."

In a letter dated January 23, 2004, Dr. Berrington wrote to Mr. Wayne M. Onchulenko, Legal Counsel for the Appellant, and stated that he had seen the Appellant on two occasions, August of

2003 and subsequently in November of 2003 following an MRI scan. In responding to Mr. Onchulenko's question as to causation, Dr. Berrington stated:

“He presents with MRI evidence of degenerative disc disease with a large prolapsed disc at level L4-5. It is entirely possible that this has been caused by trauma but it is difficult to prove this category due to the ubiquitous nature of lumbar disc disease.”  
(underlining added)

On June 8, 2005, Dr. Sommer reviewed the newly submitted clinical records as well as CT films dated May 10, 2000. Dr. Sommer concluded that the new clinical information did not alter his prior opinion regarding the causal link between the Appellant's motor vehicle collision and the disc herniation.

Dr. Timothy Pethrick, Chiropractic Consultant with MPIC's Health Care Services, reviewed the Appellant's medical file and advised MPIC there was no medical evidence to support the current need for chiropractic care as related to the motor vehicle accident of October 4, 1999.

### **Internal Review Officer Decision**

On April 11, 2006, the Internal Review Officer wrote to Mr. Wayne Onchulenko confirming the decision of the case manager dated October 13, 2005 and dismissed the Appellant's application for review. The Internal Review Officer reviewed all of the relevant medical reports and Dr. Starodub's clinical report and stated:

#### **“Discussion and Rationale for Decision**

There are two conditions which must be met before Manitoba Public Insurance becomes obligated to reimburse a claimant for expenses incurred for medical or paramedical care:

1. The expenses must have been incurred because of the accident (i.e. the treatment must have been directed towards an injury sustained in the accident) in accordance with Section 136(1)(a) of the Act (copy enclosed);

2. The treatment must have been “medically required” in accordance with Section 5 of Manitoba Regulation 40/94 (copy enclosed).

As noted by Dr. Sommer, when determining causality, one must take into account the nature and extent of the claimant’s injuries, the mechanism of the incident, the probability that such injuries could be sustained giving the purported mechanism, and, of course, also crucial is the temporal relationship between the onset of the complaints and the purported incident.

I can appreciate your very firm conviction that a causal relationship exists between E.P.’s motor vehicle accident of October 9, 1999 and the symptoms documented by his care providers in January 2000. E.P.’s file, however, continues to lack objective evidence supporting your view.

Based on the medical documentation on E.P.’s file, I must agree with both Dr. Sommer and Dr. Pethrick’s opinions and, therefore, conclude that Manitoba Public Insurance does not have an obligation to fund the cost of any further passive treatments or associated medical expenses relating to the treatment in question with respect to the accident of October 4, 1999.”

The Appellant filed a Notice of Appeal on May 9, 2006.

### **Appeal**

In respect of the issues of the Appeal the relevant Sections of the MPIC Act and Regulations are as follows:

**“Definitions:**

**70(1)** In this Part,

**"accident"** means any event in which bodily injury is caused by an automobile;

**"bodily injury"** means any physical or mental injury, including permanent physical or mental impairment and death;

**"bodily injury caused by an automobile"** means any bodily injury caused by an automobile...

**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.

**M.R. 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;”

The Appellant testified at the Appeal Hearing and stated that prior to the motor vehicle accident he was in very good physical condition, actively participated in a number of physical activities, including running, baseball and regularly attending at a gym. He further testified that prior to the motor vehicle accident he began seeing a chiropractor, Dr. Starodub, for chiropractic treatment to ensure his general health regime.

Dr. Starodub’s clinical notes from 1996 until November 10, 1999 were filed in the proceedings and indicate that the Appellant did see Dr. Starodub on a regular basis prior to the motor vehicle accident.

The Appellant further testified that:

1. He was struck by a mirror of a passing truck on October 4, 1999 and was initially seen by his physician, Dr. Werier, his chiropractor, Dr. Starodub, and a physiotherapist, Mireille Frechette.

2. The injuries he sustained in the motor vehicle accident involved his left shoulder, left knee, left ankle as well as his neck, mid and lower back.
3. His initial concern was for the pain to his shoulder, left knee and left ankle where he felt the greatest pain.
4. He fully recovered from the injuries to his shoulder, left knee and left ankle but the pain to the left side of his lower back increased over a period of time and made it difficult for him to walk or stand without pain.
5. He suffered from an acute episode of pain to the left side of his lower back in mid January 2000 approximately three months after the motor vehicle accident.
6. He was subsequently advised that he suffered from disc bulging of the left side L4/5 interspace which he believed was caused by the motor vehicle accident.
7. He did not recover from the injuries to his lower back that he sustained in the motor vehicle accident and appealed the decision by MPIC to terminate all funding in respect of his expenses incurred in treating his ongoing complaints in this respect.

No further witnesses were called by the Appellant or by MPIC.

### **Discussion**

The Appellant's legal counsel submitted that:

1. The Appellant was in good health without any back problems prior to the motor vehicle accident, but as a result of the motor vehicle accident, he sustained a disc herniation and that MPIC was unjustified in terminating the reimbursement of the Appellant's expenses in obtaining treatment in respect of this injury.

2. Dr. Starodub, the Appellant's chiropractor, who had treated the Appellant before and after the motor vehicle accident had concluded that the Appellant's back problems were caused by the motor vehicle accident.
3. Based on Dr. Starodub's clinical notes and his conversations with the Appellant, contrary to what Dr. Rothman had reported, the Appellant had not recovered from all of his motor vehicle accident injuries.
4. Dr. Rothman had erred in concluding that the Appellant suffered acute back injury while playing badminton in the middle of January and in fact the injury occurred several days after the Appellant played badminton.
5. Dr. Rothman's opinion should be rejected because he did not have the opportunity of examining Dr. Starodub's clinical notes which were filed in these proceedings and therefore didn't have the relevant information required to render an opinion as to causation.
6. The Internal Review Officer erred in relying on Dr. Rothman's opinion when dismissing the Application for Review.

The Appellant's legal counsel also was critical of Dr. Sommer's medical report and asserted that:

1. Dr. Sommer did not have the opportunity of examining Dr. Starodub's clinical notes and therefore did not have all of the relevant information he needed to render an opinion as to causation.
2. Dr. Sommer had relied essentially on Dr. Rothman's report to conclude that there was no causal connection between the motor vehicle accident and the Appellant's injuries.
3. Since Dr. Rothman's report was flawed one could not place any reliance on Dr. Sommer's report that there was no causal connection with the Appellant's back injuries and the motor vehicle accident.

The Appellant's legal counsel concluded his submission by asserting that the Commission should accept the testimony of the Appellant which was corroborated by the medical opinion of Dr. Werier and the chiropractic opinion of Dr. Starodub and requested that the appeal be granted.

The Commission rejects the Appellant's submission on the issue of causation and on the issue of further funding by MPIC of the Appellant's chiropractic treatments. The Commission finds that the Appellant has failed to establish on a balance of probabilities that there was a causal connection between the motor vehicle accident and the Appellant's disc herniation. As well, the Commission accepts the chiropractic opinion of Dr. Timothy Pethrick who reviewed the Appellant's file and in his opinion there was no medical evidence to support the current need for chiropractic care as related to the accident of October 4, 1999.

The Commission finds that the Appellant did suffer from a disc herniation to the Appellant's L4/5 disc and accepts Dr. Sommer's medical opinion that there was insufficient clinical information to conclude that the motor vehicle accident was a probable cause of the disc herniation. On the issue of causation, Dr. Sommer's opinion is consistent with the chiropractic opinion of Dr. Rothman and the medical opinion of Dr. Neil Berrington.

The Commission notes that a CT scan dated May 10, 2000, reported a suspected posterior disc bulging at the L4/5 interspace with a likely localized disc protrusion in the intervertebral foramen at L4/5. Dr. Sommer, in his report dated August 18, 2000, recommended a review of the CT scan film in order to clarify whether in fact there was a disc protrusion at L4/5.

On September 16, 2003, an MRI was conducted in respect to the Appellant's low back. Dr. Neil Berrington provided a report dated November 23, 2003 to Dr. Werier, the Appellant's physician,

wherein he indicated that the MRI did confirm degenerative disc disease of L4/5 and L5/S1 with a fairly large prolapsed disc of L4/5 on the left hand side.

Dr. Sommer, in his report dated August 18, 2000, stated that in order to establish a causal relationship between the motor vehicle accident and the Appellant's disc herniation it was necessary to demonstrate a probable cause, probable effect and appropriate temporal relationship between the cause and the effect and concluded there was insufficient critical information to find that a collision was the probable cause of lumbosacral disc herniation. Dr. Sommer concluded that in order for the Appellant to sustain an acute disc herniation as a result of the collision it is probable that he would have had an acute onset of low back and lower limb pain at the time of the motor vehicle accident. However, Dr. Sommer concluded that the first sign of lumbosacral discopathy began sometime after the collision and prior to December 13, 1999.

The medical reports of Dr. Werier and Dr. Starodub were reviewed by Dr. Sommer. These reports support Dr. Sommer's opinion as to causation. Dr. Werier, the Appellant's personal physician, in his initial report dated October 6, 1999, stated that the Appellant sustained head injury with no loss of consciousness, as well as injury to the left knee, left shoulder and left ankle. Dr. Werier did not report any complaint of lower back pain by the Appellant.

On the same day, the Appellant was examined by the chiropractor, Dr. Starodub, who indicated that the Appellant had cervical thoracic and lumbar spine pain as well as headaches and shoulder, knee and ankle pain. Dr. Starodub's recommendations included modified duties, a 12 to 15 month course of chiropractic treatment including stretching and manipulation. The initial recommendation was for two to three treatments per week. In respect to this report, Dr. Sommer found that while low back pain was listed among the many clinical complaints in Dr. Starodub's

initial report, there were no physical findings noted to indicate that low back was symptomatic in the immediate post-collision period.

Dr. Sommer also noted that on October 7, 1999, the Appellant was seen by Mireille Frechette, the physiotherapist who documented shoulder, knee and ankle pain as well as sleep disturbance but did not document any cervical lumbar or thoracic pain.

Dr. Sommer, in his report, also reviewed Dr. Starodub's reports of December 13, December 20, 1999 and February 7, 2000, and concluded that the temporal onset of significant pain to the Appellant's lower back commenced prior to Dr. Starodub's report of December 13, 1999.

Dr. Sommer stated:

“A Treatment Plan Report dated December 13, 1999 indicated the claimant had less pain since treatment had been initiated, but that he had complaints of left lumbosacral and hip soreness after sitting for prolonged periods at work. A subsequent report on December 20, 1999 indicated acute lumbosacral pain, with no aggravating factors, and a normal neurological exam. Decreased range of motion of the lumbar spine was documented, as well as positive straight leg test at 70° bilaterally. A subsequent report on February 7, 2000 indicated the claimant had acute low back pain of variable intensity.”

Dr. Sommer, in arriving at his conclusion on the issue of causation accepted the findings of Dr. Rothman who assessed the Appellant on April 25, 2000 and provided a third party evaluation to MPIC.

Dr. Sommer, in reviewing Dr. Rothman's report stated:

“Dr. Rothman's report indicated that the claimant “*expressed that in his estimation, he was nearly at pre-accident status in early January, 2000, with respect to his extremity complaints. He had resumed his previous sporting activity of playing badminton, and was very satisfied with his recovery*”. Dr. Rothman's report also indicated that the claimant “*suddenly suffered a severe acute episode of left sided lower back pain while playing badminton*”. Dr. Rothman's report states the current complaints included “*lower back pain with radiating numbness, and pins and*

*needles to the left leg. Onset of this complaint occurred while playing badminton in mid to late January, 2000”...*

Dr. Rothman concluded that *“there is no compelling evidence on history or by examination, that E.P.’s left sided lower back and leg complaints continue to be related to the accident of October 4, 1999”*. He noted that the claimant’s symptoms and leg atrophy were consistent with *“a neuropathic component”*...

Dr. Rothman’s report notes that the claimant was nearly at the pre-accident status in early January, 2000, only to sustain a marked deterioration/flare of symptoms later that month...On balance, therefore, it appears that the claimant’s low back discopathy began insidiously at sometime within the first 2 months following the collision and then deteriorated in late January 2000.”

Dr. Sommer, having regard to the medical reports of Dr. Werier, Dr. Starodub, Dr. Rothman and the physiotherapy report of Mireille Frechette concluded:

*“Therefore, based on the information currently available at the time of the preparation of this report, and with a reasonable degree of medical certainty, a cause and effect relationship between the vehicle/pedestrian collision of October 4, 1999 and the claimant’s lumbosacral discopathy is improbable.”*

It should be noted that Dr. Berrington, who is Professor at the University of Manitoba Neurosurgery Clinic, wrote to the Appellant’s legal counsel on January 23, 2004 and indicated that he had seen the Appellant on two occasions, initially in August of 2003 and subsequently in November of 2003 following the MRI scan. In response to the Appellant’s legal counsel’s questions, in respect to the issue of causation, Dr. Berrington indicated that he was uncertain as to the circumstances surrounding the Appellant’s accident and stated:

*“He presents with MRI evidence of degenerative disc disease with a large prolapsed disc at level L4-5. It is entirely possible that this has been caused by trauma but it is difficult to prove this category due to the ubiquitous nature of lumbar disc disease.”*

Dr. Berrington’s opinion is consistent with the medical opinions of Dr. Rothman and Dr. Sommer.

The Appellant’s legal counsel had argued that Dr. Sommer in arriving at his conclusion relied on the flawed report of Dr. Rothman and as a result, Dr. Sommer was in error and his report should

be rejected. As well, the Appellant's legal counsel submitted that neither Dr. Rothman or Dr. Sommer were provided with Dr. Starodub's clinical notes which were filed in the indexed material in these proceedings and that Dr. Sommer did not receive a copy of Dr. Starodub's rebuttal to Dr. Rothman's report dated June 22, 2000.

However, the Commission notes that on an examination of Dr. Sommer's report dated August 18, 2000, indicates that on page 3 of the report, Dr. Sommer did review Dr. Starodub's letter dated June 22, 2000 and stated:

“A letter from Dr. Starodub dated June 22, 2000 refuted a number of points made by Dr. Rothman, and concluded that *“the nature of the vehicle-pedestrian accident is certainly severe enough to cause disc injury which would explain the left leg numbness and varying symptoms of relief and aggravation suffered by E.P. throughout the treatment regime”.*”

Dr. Sommer rejected Dr. Starodub's conclusion that there was sufficient clinical information to conclude that the collision was a probable cause of the Appellant's lumbosacral disc herniation.

Dr. Starodub in his report dated June 22, 2000 stated:

“First, I would like to point out that Dr. Rothman was mistaken when he stated on page 2 of his report that “E.P. stated that he had some initial neck and back symptoms following his accident, but these had subsided within a *very short time of seeking treatment* with Dr. Starodub.” According to my clinical notes, E.P. continued to suffer from lower back and neck pain throughout December and early January until he suffered an acute exacerbation of his injuries in mid January.”

The reports of Dr. Rothman and Dr. Sommer agree with Dr. Starodub that the Appellant suffered an acute exacerbation of his left side L4/5 in the middle of January 2000 which was approximately three months after the motor vehicle accident. The occurrence of an acute onset of pain to the left lower back three months after the motor vehicle accident which was subsequently confirmed by an MRI to be an acute disc herniation does not support the

Appellant's position that the motor vehicle accident caused the acute disc herniation. The Commission agrees with Dr. Sommer's opinion that had the Appellant sustained an acute disc herniation as a result of the motor vehicle accident it was probable that the acute onset of the lower back pain would have been at the time of the motor vehicle accident on October 4, 1999 rather than in mid January 2000.

The Appellant relies on the medical and clinical reports of Dr. Starodub to support his position that the motor vehicle accident caused the Appellant's disc herniation. The Commission, after a careful review of the Appellant's testimony and Dr. Starodub's medical report and clinical notes finds that the Appellant's testimony and Dr. Starodub's medical reports support Dr. Sommer's position that the motor vehicle accident which occurred on October 4, 1999 did not cause the Appellant's disc herniation.

Appellant testified that the injuries he sustained in the motor vehicle accident resulted in pain to his neck, knee and ankle and he did not report initially any pain to the left side of his lower back to either Dr. Werier, his physiotherapist, Mireille Frechette or to Dr. Starodub. The Appellant further testified he did not note any pain to the left side of his lower back until after his neck, knee and ankle pain had subsided. The Appellant's testimony is consistent with:

1. Dr. Starodub's report dated December 13, 1999 where he noted the Appellant had a problem sitting while at work.
2. Dr. Starodub's report dated January 11, 2000, which indicated for the first time that the Appellant presented "to office in acute L/S pain".
3. Dr. Starodub's treatment plan report of February 9, 2000 which states "patient continues to experience acute lower back pain".

The Commission finds that the Appellant's testimony and Dr. Starodub's three medical reports support Dr. Sommer's opinion that the first signs of the Appellant's left sided disc herniation occurred sometime after the collision and prior to December 13, 1999 and continued until he suffered an acute episode of pain to his lower left back in mid January 2000. For these reasons the Commission concludes, having regard to the medical reports of Dr. Rothman and Dr. Sommers, that the Appellant's testimony and Dr. Starodub's three medical reports do not establish that the Appellant's disc herniation occurred as a result of the motor vehicle accident.

The Commission further finds that Dr. Starodub's clinical notes that were filed in these proceedings do not support Dr. Starodub's opinion that the Appellant's disc herniation occurred as a result of the motor vehicle accident on October 4, 1999. Dr. Starodub's clinical notes that were filed in these proceedings commenced in 1996 and continued until November 10, 1999. Unfortunately Dr. Starodub's clinical notes for the period following November 10, 1999 to the end of January 2000 were not filed in evidence nor did Dr. Starodub testify at the appeal hearing.

The clinical notes that were filed in evidence during the period of time from the date of the motor vehicle accident on October 4, 1999 to November 10, 1999, together with the Appellant's testimony indicate that the areas Dr. Starodub treated during this period of time included the Appellant's right sided L4/5. These clinical notes are consistent with the Appellant's testimony that prior to the motor vehicle accident he was actively involved in a number of physical activities including running, baseball and he regularly attended Dr. Starodub's office whenever as a result of these activities he was sore and felt his muscles tighten. The Appellant further testified that prior to the motor vehicle accident and thereafter Dr. Starodub treated only his right sided L4/5 and did not treat his left sided L4/5. The Commission notes there is no reference in

these clinical notes of any treatment by Dr. Starodub to the Appellant's left sided L4/5 where the disc herniation was located.

The Commission therefore finds that the clinical notes:

1. Do not establish Dr. Starodub's chiropractic opinion that the Appellant's disc herniation at his left sided L4/5 was caused by the motor vehicle accident on October 4, 1999.
2. Indicate the Appellant did not complain nor was he treated in respect of his left sided L4/5 between October 6, 1999 and November 10, 1999 but received treatment only to his right sided L4/5.
3. Corroborate Dr. Rothman's and Dr. Sommer's medical opinions that the Appellant suffered from low back and neck pain through December and early January, and did not suffer any acute pain to his left sided L4/5 until the end of January 2000.

Dr. Starodub, in his June 22, 2000 letter, stated that Dr. Rothman testified that the Appellant injured his back while playing badminton. Dr. Starodub, based on his clinical notes, asserted that Dr. Rothman was clearly wrong since the Appellant's pain did not occur until four or five days after playing badminton. The Commission notes that Dr. Starodub's clinical notes, during this period of time, were not filed in evidence, nor did Dr. Starodub testify to confirm the accuracy of these notes. As a result the Commission is unable to give any weight to any references to Dr. Starodub's clinical notes that Dr. Rothman erred. However, Dr. Starodub does state in his letter of June 22, 2000 that the Appellant's acute pain episode occurred in the latter part of January 2000 and supports Dr. Sommer's medical opinion that the disc herniation did not occur at the time of the motor vehicle accident but several months thereafter.

The Commission notes that the Appellant, in his testimony, did not contradict Dr. Rothman's report of his conversations with the Appellant. The Commission specifically asked the Appellant in the course of his testimony whether or not he had reported to Dr. Rothman that he suddenly suffered a severe acute episode of left sided lower back pain while playing badminton in the month of January. In response the Appellant testified that he was unable to recall his conversation with Dr. Rothman and as a result was unable to either support Dr. Starodub's statements or contradict Dr. Rothman's statements in this respect.

### **Decision**

The Commission finds, based on the initial report of Dr. Werier, the treatment plan reports and clinical notes of Dr. Starodub, the report of the physiotherapist, the testimony of the Appellant, together with the medical reports of Dr. Rothman, Dr. Berrington and Dr. Sommer, the Appellant failed to establish on a balance of probabilities a causal relationship between the motor vehicle accident and the Appellant's disc herniation. The Commission finds that MPIC was justified in terminating the Appellant's PIPP benefits and as a result the Appellant was not entitled to reimbursement of any chiropractic care in respect of his disc herniation.

The Commission finds that, having regard to the chiropractic opinion of Dr. Pethrick, the Appellant failed to establish on a balance of probabilities that it was a medical requirement pursuant to Section 5(a) Manitoba Regulation 40/94 for MPIC to continue to provide funding and to reimburse the Appellant for chiropractic care as it related to the Appellant's disc herniation.

The Commission therefore confirms the decision of the Internal Review Officer dated April 11, 2006 and dismisses the Appellant's appeal.

Dated at Winnipeg this 4th day of May, 2009.

---

**MR. MEL MYERS, Q.C.**

---

**MR. ERROL BLACK**

---

**MR. PAUL JOHNSTON**