

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-74

PANEL: Mel Myers, Q.C., Chairman
Colon Settle, Q.C.
Wilson MacLennan

APPEARANCES: The Appellant, [text deleted], represented herself and participated in the hearing via telephone conference call;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Keith Addison.

HEARING DATE: March 30th, 2001

ISSUE(S): Whether the Appellant was entitled to income replacement indemnity in circumstances where the Appellant was unable to continue full-time employment.

RELEVANT SECTIONS: Sections 81(1) of the MPIC Act ('the Act') and Section 8 of Manitoba Regulation 37/94.

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

[The Appellant] appealed a review decision of MPIC dated February 16th, 2000, wherein MPIC denied [the Appellant] income replacement indemnity benefits on the grounds that [the Appellant] was unable to establish that the low back injury (sciatic pain) that she

sustained in the accident on October 21st, 1997, rendered her unable to substantially continue her full-time employment.

At the time of the accident [the Appellant] was employed as an accounting clerk with [text deleted]. After the accident [the Appellant] was off work for a few days and when she returned to work she had significant ongoing difficulty in continuing to work. [The Appellant] testified that her back pain became so excruciating that she was ultimately unable to continue to work and permanently left employment on May 22nd, 1998.

The Internal Review Officer, [text deleted], in rejecting the Application for Review, states in his report dated February 16th, 2000, as follows:

"As indicated above, your entire file together with [Appellant's doctor #1's] narrative report was provided to MPI Health Care Services Team for comment upon which resulted in [MPIC's doctor's] inter-departmental memorandum of November 9, 1999. After reviewing all of the medical evidence on your file it was his indication that:

"Disability

After reviewing the various documents contained in [the Appellant's] file, it is my opinion that a medical condition arising from the October 21, 1997 motor vehicle collision, which in turn entirely or substantially disabled [the Appellant] from carrying out her employment duties has not been objectively identified. It is also my opinion that the information obtained from the documents indicates that [the Appellant's] disability stems from medical conditions that are not causally related to the motor vehicle collision in question....."

[MPIC's Internal Review Officer] concludes:

"I am in total agreement with the above conclusion reached by [MPIC's doctor] that "your disability stems from medical conditions that are not causally related to the motor vehicle accident in question. Therefore I am dismissing your

Application for Review and upholding the decision of [text deleted] dated February 22, 1999."

In a previous appeal to this Commission, [MPIC's doctor] in a report to MPIC stated as follows:

"If the Appellant was experiencing chronic back pain prior to the motor vehicle collision and the collision exposed her back to a load of some type, it is reasonable to conclude that the pre-existing back symptoms might have been exacerbated to some degree. The absence of documentation identifying an exacerbation of a back condition leads me to conclude that the Appellant's back was not exposed to a force that would have comprised her pre-existing back condition." [text deleted]

In our view if it was reasonable to conclude that the absence of documentation identifying an exacerbation of a back condition led [MPIC's doctor] to conclude that there is no connection between the low back problem and the accident, then the presence of documentation identifying an exacerbation of a back condition may lead a person to reasonably conclude that the Appellant's back in this case was exposed to a force which would have compromised her pre-existing back condition.

Prior to the accident of October 21st, 1997, [the Appellant] had sustained serious injuries in previous accidents on December 11th, 1981, and February 11th, 1986. [text deleted], medical consultant to MPIC Claims Services Department, in his Inter-Departmental Memorandum dated November 9th, 1999, notes that the medical documents he reviewed indicating that [the Appellant] had the following medical conditions prior to the motor vehicle accident:

- "
1. severe osteoarthritis and ligamentous instability involving right knee;
 2. mild osteoarthritis involving the left knee;
 3. severe degenerative arthritis involving the lower apophyseal joints of the lumbar spine;
 4. degenerative arthritis involving the small joints of the hands and wrists;
 5. hypertension."

[Text deleted], [the Appellant's] family physician, in a medical report to MPIC dated September 12th, 1999, indicated that [the Appellant] had experienced left sciatic pains to her low back in 1986. He first assessed her on November 3rd, 1997, and saw her on several occasions thereafter in respect to the injuries she sustained in the accident of October 21st, 1997. He indicates in a letter to MPIC dated October 10th, 1998, that [the Appellant] suffered sciatic pain to her left lower back as a result of the motor vehicle accident in 1986 and that these pains had largely settled. [Appellant's doctor #1] further reported that [the Appellant] did not have any significant problems in the intervening years with the exception of some left sciatic pains reported at the time of her visit to [Appellant's doctor #1] on April 15th, 1994.

[The Appellant] in her testimony before the Commission confirmed that she had suffered from left sciatic pain as a result of the motor vehicle accident in 1986 but was relatively pain-free thereafter and the only time she suffered any sciatic pain was in the month of August 1997 when she rolled over in bed while sleeping. Since that time [the Appellant]

testified that she suffered no sciatic pain to her left lower back until the accident which occurred on October 21st, 1997.

[The Appellant] testified at the hearing that she suffered left lower back sciatic pain immediately after the accident. An MPIC Adjuster reports that on October 29th, 1997, he telephoned [the Appellant] who advised him that she had missed a half day of work on October 21st, 1997, and three full days of work on October 22nd, 23rd and 24th, 1997. The Adjuster further reported that [the Appellant] advised him that she was suffering from neck, lower back pain, upper back pain, headaches and difficulty in sitting for long periods of time and as a result she was having difficulty at work and did not feel she could continue working.

There is also a written report dated November 26th, 1997, from an MPIC Adjuster who attended at [the Appellant's] workplace and had a discussion with her in respect of her injuries. [The Appellant] again reported injuries to her neck, upper and lower back, headache and that she was attending physiotherapy.

It is therefore clear that [the Appellant] complained, shortly after the accident, that she was experiencing back pain to her lower left back. This back pain resulted in [the Appellant] missing several days of work. Although she returned to work, she continued to complain to the Adjusters and to her doctor about her back pain.

[Appellant's doctor #1] in his report dated October 10th, 1998, indicates that he first assessed [the Appellant] on November 3rd, 1997, and she complained about the difficulty she had sitting because of her lower back and left sciatic type pains. He further states that as a result of that physical examination on November 3rd, 1997, he found:

"Palpation over the upper thoracic spine in the region of T1-T4 revealed tenderness. Tenderness also existed on palpation over the lower part of the lumbar spine and the sacroiliac region."

[the Appellant] also indicated to [Appellant's doctor #1] that she was working her normal duties and that she was doing so with ongoing discomfort in the aforementioned areas and she frequently had to get up and move around and she was not able to sit for more than 20-30 minutes at the time.

On November 10th, 1997, [Appellant's doctor #1] provided [the Appellant] with a written referral to a physiotherapist and indicated on the referral document "constant lower back pain since the motor vehicle accident, pains radiating into the posterior, left thigh and into the left foot, complaints of headache and upper thoracic back pain".

[Appellant's doctor #1] completed an attending physician report in support of [the Appellant's] claim for long term disability with the [text deleted]. [Appellant's doctor #1] in this report dated September 5th, 1998, described [the Appellant's] medical problems which included left sciatic pain.

[Appellant's doctor #1] also completed a medical report dated September 5th, 1998, for [text deleted], in which he stated that the pain and stability and giving way of [the Appellant's] right knee have been gradually progressing since March of 1992. At the same time he also indicated that [the Appellant's] low back pains have also been gradually progressing but that they became "significantly worse" following her motor vehicle accident of October 21st, 1997.

On November 26th, 1997, [the Appellant] made an application to MPIC for compensation and in this application indicated that the injuries she sustained at the time of the accident were "neck, upper & lower back, headache, various bruises".

[Appellant's doctor #1] in his narrative report dated October 10th, 1998, states:

"Her next assessment occurred on February 5, 1998. The Diclofenac which had been prescribed at the time of the previous visit resulted in stomach cramps and she had been switched back to Naproxen 375 mg taken BID PRN for ongoing lower back and left sciatic type pains. [the Appellant] was tender to palpation over the left trapezius muscle as well as the left scapular region at the time of this examination. Range of motion of the left shoulder and arm were normal but discomfort occurred in the left scapular region on movement. Left lumbar and left sciatic pains continued since the time of her earlier visit without any significant change. The patient was next assessed on April 21, 1998. She indicated that she had been attending physiotherapy on an ongoing basis and that lower back as well as right scapular and infrascapular pains continued unabated. [The Appellant] complained of numbness in the left scapular region but I could not detect any definite sensory changes."

[Appellant's doctor #1's] report dated October 10th, 1998, indicates that he had further visits from [the Appellant] on May 22nd, 1998, June 12th, 1998, July 16th, 1998, and August 27th, 1998. On September 12th, 1999, he states:

"The patient indicated that her back and left sciatic pains continued to be severe at the time of her most recent assessment on August 27, 1998. On reviewing this issue with her and noting that she had previous complaints of back pain, which predated the accident in question, [the Appellant] indicated that prior to this motor vehicle accident she had experienced intermittent nocturnal lower back pain. She specifically indicated that she did not experience any sciatic pains prior to the accident. The motor vehicle accident of October 21, 1997, therefore, left her with more constant lower back pain than she had experienced previously as well as new left sciatic pains which had persistent (sic) from the time of the injury in question."

"In summary, [the Appellant] has two major problems which underlie her current state of disability. It is my assessment that the severe osteoarthritis affecting her back and knees is the major determinant of her disability. She has suffered from increased lumbar and new left sciatic pains which date from the date of the motor vehicle accident in question. It is the sum of these problems which results in her current state of disability for any form of work. [The Appellant] indicates that her inability to sit for even short periods of time due to lumbar and left sciatic pains prevents her from performing even lighter duties. I await [Appellant's doctor #2's] assessment and I will forward this report when it is available.

Clearly, the basis of her disability for work is multifactorial in nature with the lumbar and left sciatic pains being one factor contributing to her overall disability."

[Appellant's doctor #1] referred [the Appellant] to see [Appellant's doctor #2].

[Appellant's doctor #2] examined [the Appellant] on October 26th, 1998, and reports to

[Appellant's doctor #1] as follows:

"My impression is that this patient has signs of left L5 or S1 root encroachment. This may be on the basis of degenerative changes resulting in stenosis. I have recommended a CT scan and to stop her Tylenol #3 and Naproxen. In its place I have put her on Naproxen E500 mg bid and Amitriptyline 25 mgs at hs. I will update you on her progress upon follow-up.

The CT scan that [Appellant's doctor #2] ordered was done on December 3rd, 1998, and this report indicates

"CT Lumbar Spine:

Multiple 5 mm axial cuts were obtained from L3 to the sacrum and sagittal reformatting performed. The L3-4 disc and facets were moderately degenerative. At L4-5, the canal is developmentally of borderline size. The disc and facets are degenerative. No convincing disc herniation is seen, but there is combined stenosis with disc, ligamentous and bony prominence. The L5-S1 disc is degenerative as are the facets here, but there is again no evidence of disc herniation.

Impression:

There is mid and lower lumbar spondylosis. No convincing disc herniation is seen, but the canal is a little stenosed at the L4-5 level.

In [Appellant's doctor #1's] narrative report dated September 12th, 1999, he accepts [Appellant's doctor #2's] medical opinion and states:

"Clearly, this is a complex case with multiple, determinants of ongoing disability. Although [the Appellant] had previous left sciatic pains, which related to the accident of 1986, she maintains that these pains had essentially resolved prior to the accident of October 21, 1997. It was the most recent accident that resulted in a renewal of more severe left sacroiliac and left sciatic type pains. These pains have been a major determinant on her ongoing disability. In terms of her overall ability to function, she is also troubled by severe osteoarthritis of the knees, a finding which was taken into consideration in my reports to [text deleted] detailing the total nature of her disability for work....."

[The Appellant] who was unable to attend the appeal hearing, testified under oath by telephone. Upon completion of her examination, [the Appellant] was cross-examined by MPIC counsel. In her testimony, she asserted that although she may have experienced some left sciatic pain, after the car accident in 1986, this pain settled down and caused

her no major problems in attending work prior to the accident in question. She further testified that immediately after the accident in question, she experienced left sciatic pains which increased in intensity over time and ultimately inhibited her inability to continue working as an accounting clerk with [text deleted].

[The Appellant] further testified that after the accident of 1986, she regularly attended at work and the left sciatic pain did not thereafter prevent her from regularly attending at work.

[The Appellant] filed a statement with the Commission entitled "Sick Leave Entitlement" which states as follows:

"	Hours	Days
1998	612.625	84.5
1997	235.625	32.5
1996	123.250	17.0
1995	65.250	9.0
1994	50.750	7.0
1993	39.875	5.5
1992	68.875	9.5
1991	192.125	26.5
1990	47.125	6.5
1989	83.375	11.5
1988	<u>50.750</u>	<u>7.0</u>
	1569.625 Hours	216.5 Days"

With the exception of the sick leave in 1991, there is no significant absence from work by [the Appellant] until 1997 and this statement corroborates her testimony in respect of her absence from work prior to the car accident in 1997.

A review of [MPIC's doctor's] reports indicates that [MPIC's doctor] failed to give sufficient weight to:

1. the complaints that [the Appellant] made to the Adjuster immediately after the accident;
2. her consistent complaints to [Appellant's doctor #1] about her lower back pain;
3. the assessment of [Appellant's doctor #2] who examined [the Appellant] upon referral from [Appellant's doctor #1].

[MPIC's doctor] in arriving at his decision did not personally examine [the Appellant]. However, [Appellant's doctor #1], [the Appellant's] personal physician, on numerous occasions after the accident of October 21st, 1997, met personally with and assessed [the Appellant] with respect to the injuries she sustained in her accident. We accept [Appellant's doctor #1's] medical opinion that there was a renewal of the left sciatic pain as result of the accident of October 21st, 1997, and that this pain was a significant contributing factor to the inability of [the Appellant] to continue to work after May 22nd, 1998.

The Internal Review Officer in his report of November 9th, 1999, relied solely on [MPIC's doctor's] findings in rejecting [the Appellant's] Application for Review. In arriving at his decision, the Internal Review Officer failed to give sufficient or any weight to:

1. the complaints made by [the Appellant] to the Adjusters;

2. [Appellant's doctor #1's] medical assessments;
3. the medical report of [Appellant's doctor #2] which indicated that [the Appellant] had signs of left L5 or S1 root encroachment that may be the basis of degenerative changes resulting in spinal stenosis;
4. the CT scan obtained on December 3rd, 1998, by [Appellant's doctor #2] which demonstrated mid and lower spondylosis of the lumbar spine. Although there was no convincing evidence of disc herniation, the CT scan indicated that the canal was a little stenosed at L4-5 level.

The Commission finds that the testimony of [the Appellant] was straight-forward and credible and we accept her evidence on all material issues in the dispute between [the Appellant] and MPIC. We find that:

1. the left sciatic pains that [the Appellant] suffered in 1986 had largely settled before her accident of October 21st, 1997;
2. the pain [the Appellant] experienced as a result of the accident in 1986 did not prevent [the Appellant] from attending at her work;
3. after the accident of October 21st, 1997, the sciatic pains returned and increased in intensity; and
4. after the accident of October 21st, 1997, [the Appellant] attempted to work until the back pain became so excruciating and unbearable that she was unable to continue to work and left her employment permanently on May 22nd, 1998.

DECISION

For the above-mentioned reasons, the Commission finds that [the Appellant] on a balance of probabilities has established, that as a result of the motor vehicle accident of October 21st, 1997, she suffered an injury to her lower back which caused a renewal of her left sciatic pain and that these pains were a significant contributing factor in her inability to substantially perform the essential duties of her employment as an accounting clerk with [text deleted] from May 22nd, 1998.

[The Appellant] also complained that MPIC has denied her therapeutic interventions of chiropractic treatments, massage treatments, home care and membership at the [text deleted]. These issues are not formally before the Commission and we do not have jurisdiction to direct MPIC to reinstate these services and benefits to [the Appellant]. However, in light of the findings we have made above, if we did have the jurisdiction to deal with these matters, we would have directed the Corporation to reinstate the appropriate therapeutic interventions.

By authority of Section 184(1) of the Manitoba Public Insurance Corporation Act, the Commission therefore orders that:

- (a) for the period from May 22nd, 1998, [the Appellant] was substantially unable to perform the essential duties of an accounting clerk with [text deleted] by reason of injuries sustained in the motor vehicle accident which occurred on October 21st, 1997, and is therefore entitled to income replacement indemnity from May 22nd,

1998, together with interest at the prescribed rate from May 22nd, 1998, to the date of actual payment;

- (b) the decision of MPIC's Internal Review Officer bearing date February 16th, 2000,

is therefore rescinded and the foregoing substituted for it.

Dated this 24th day of April 2001.

MEL MYERS, Q.C.

COLON SETTLE, Q.C.

WILSON MACLENNAN