

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-108**

PANEL: Ms. Yvonne Tavares, Chairperson
Mr. Wilson MacLennan
Dr. Patrick Doyle

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: January 15, 2003

ISSUE(S):

- 1. Entitlement to vocational retraining; and**
- 2. Entitlement to additional Permanent Impairment Benefits.**

RELEVANT SECTIONS: Section 127 and 138 of The Manitoba Public Insurance Corporation Act (the "MPIC Act"), and Subsection 10(1)(e) of Manitoba Regulation 40/94 and Section 2 and Schedule A of Manitoba Regulation 41/94.

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 was involved in a motor vehicle accident on January 10, 1996, wherein he sustained injuries to his neck, left shoulder, knee, hip and lower back. As a result of those injuries, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act. The issues which arise in this appeal are:

1. Entitlement to vocational retraining; and
2. Entitlement to additional Permanent Impairment Benefits.

1. Entitlement to Vocational Retraining

At the time of the motor vehicle accident, the Appellant was an [text deleted] salesman at [text deleted]. As a result of the motor vehicle accident, the Appellant suffered a disc herniation and underwent surgery on March 25, 1997. After his recuperation, he returned to his employment on June 1, 1997. He was able to continue with that employment until April 1, 2000, when he accepted a severance package and voluntarily resigned from his position with [text deleted].

At the appeal hearing, the Appellant advised that he has not returned to full-time employment since leaving his position with [text deleted]. He has worked on a casual basis, mainly doing odd jobs, but has not found a position which would allow him the flexibility which he feels he requires to work on a full-time basis.

The Appellant advises that since the accident, his back has never improved to pain free status. He related that from June 1997 to April 2000, he took pain killers as required and did whatever was necessary in order to get through the day. Additionally, his job was such that he could change positions regularly, shift from standing to sitting and move around as required. His employer was also very accommodating, allowing him sick leave as he needed. He maintains that the combination of all of these factors enabled him to continue to work after the surgery for as long as he did.

The Appellant claims that he has not been able to secure a new sales position which is as flexible as the position which he held with [text deleted]. Additionally, he asserts that the condition of his back has never improved to the extent that would allow him to return to full functional capacity. He therefore contends that he has suffered a permanent functional impairment as a result of the motor vehicle accident of January 18, 1996, and the subsequent surgery, and is unable to

continue to work as a salesperson. As a result, the Appellant seeks vocational retraining for a new occupation in keeping with his current functional limitations.

The Internal Review Decision dated August 28, 2000, determined that there was no medical evidence to indicate that the Appellant had sustained a measurable impairment of function which would require vocational retraining.

Counsel for MPIC submits that there is very little evidence to confirm that the Appellant has sustained a work related disability as a result of the motor vehicle accident which would necessitate retraining. He argues that there is nothing in the material to indicate that the Appellant required any particular education or formal, structured training to be able to do his job at [text deleted]. Further, counsel contends that there is no indication that the Appellant's skills are not transferable to a sales position (which would not require prolonged standing or heavy or repetitive lifting) at [text deleted], or elsewhere.

In addition, counsel for MPIC maintains that the Appellant's testimony establishes that he is capable of working, even though he has not found suitable employment to date. He contends that the issue to be addressed is the Appellant's ability to work, not the availability of work. Accordingly, counsel for MPIC submits that the evidence does not support the position that the Appellant is permanently incapable of performing retail sales duties and, therefore, there is no need for vocational retraining of any kind. As a result, counsel for MPIC submits that the appeal should be dismissed and the Internal Review Decision dated August 28, 2000 should be confirmed.

An Appellant may be entitled to vocational retraining if, as a result of a motor vehicle accident, he is unable to return to the employment which he held at the time of the motor vehicle accident.

The applicable provisions of the MPIC Act and Regulations are as follows:

Section 138 of the MPIC Act:

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

Section 10(1)(e) of Manitoba Regulation 40/94:

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (e) funds for occupational, educational or vocational rehabilitation that is consistent with the victim's occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence.

Pursuant to Section 138 of the MPIC Act, MPIC has the discretion to take such measures as it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

In carrying out its duties pursuant to Section 138, MPIC is subject to Subsection 10(1)(e) of Manitoba Regulation 40/94. Accordingly, MPIC may exercise its discretion where it considers it necessary or advisable for the rehabilitation of a victim, to provide the victim with funds for occupational, educational or vocational rehabilitation that is consistent with the victim's

occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence.

After his surgery on March 25, 1997, the Appellant was able to return to his previous employment and indeed was capable of continuing with that employment until April 2000, albeit with some difficulty. At that time, it appears that there was no need for vocational rehabilitation, since the Appellant was able to resume his pre-accident occupation. In this regard, we find that the Internal Review Decision dated August 28, 2000 should be confirmed, since at that time there was no medical evidence to indicate a measurable impairment of function which would require vocational retraining for the Appellant.

A new issue arises however as to whether the Appellant's condition has progressively deteriorated to the point where he is no longer capable of performing his duties as a salesperson. We are mindful that the Appellant has been left with certain limitations as a result of the motor vehicle accident, including limited heavy lifting, limited repetitive bending and limited standing endurance which may affect his ability to work as a salesperson. However, there was a lack of sufficient evidence before the Commission which would allow us to make such a finding at this stage. As a result, we find that an appropriate investigation into the Appellant's functional limitations should be undertaken.

This matter shall therefore be referred back to MPIC's case manager for a determination of the Appellant's functional capacity. This may involve a functional capacity evaluation, an independent medical evaluation and/or a physical demands analysis of a salesperson's occupation, whatsoever may be required in order to properly assess the Appellant's capabilities.

Once the Appellant's functional capacity has been properly assessed, in light of his current capabilities, a fresh determination can then be made as to whether or not the Appellant requires any occupational or vocational rehabilitation.

2. Entitlement to Additional Permanent Impairment Benefits

As a result of the injuries which the Appellant suffered in the motor vehicle accident of January 10, 1996, the Appellant sustained permanent physical impairments which, pursuant to Section 127 of the MPIC Act, entitle him to a lump sum indemnity in accordance with the Regulations to the MPIC Act. The Appellant is appealing the Internal Review Decision, dated April 8, 2002, with respect to the amount of the lump sum indemnity as calculated by MPIC.

Section 127 of the MPIC Act provides that:

Lump sum indemnity for permanent impairment

127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

The Regulations set out the amount available for each type of permanent impairment as a percentage of the total amount available.

The Internal Review Decision, dated April 8, 2002, confirmed the case manager's decision of July 31, 2001, which had determined a permanent impairment benefit of 2% based upon calf muscle atrophy. This impairment benefit was assessed pursuant to Part I, Division I, Subdivision 2, Item 11(q)(ii) of Manitoba Regulation 41/94, which provides as follows:

- (q) Loss of function of the thigh or leg:
 - (ii) loss of function of the leg of 1.5 cm or more,

measured 15 cm below the lower pole of the patella,
including any resulting muscular weakness: 2%

The total of 2% when applied against the \$101,400.00 maximum impairment benefit payable, resulted in a total impairment benefit in the amount of \$2,028.00.

The Appellant had also received the following permanent impairment benefits prior to July 31, 2001:

| | | |
|----|--|----------------|
| 1. | Surgical scarring | .8065% |
| 2. | Herniation of a intervertebral disc with discectomy, but without ankylosis | 5.0000% |
| 3. | S1, sensory impairment | <u>1.0000%</u> |
| | TOTAL: | 6.8065% |

$$6.8065\% \times \$101,400.00 = \$6,901.79$$

To date, the Appellant has received permanent impairment benefits in the total amount of \$8,929.79. In this appeal, he is not contesting the awards he has received to date. Rather, the Appellant submits that he is entitled to additional permanent impairment benefits for the epidural scarring around the left S1 nerve root. He feels that the epidural scarring is the source of a great deal of his pain and consequently limits his daily activities and his functional capacity.

Counsel for MPIC submits that in this case, there are no permanent impairment benefits payable to the Appellant as a result of the epidural scarring. He notes that “scarring” *per se* is only compensable if it constitutes a disfigurement under Part 2 of the Schedule of Permanent Impairments. Scarring around a nerve root is not considered disfigurement. It does not affect the skin nor is it visible on inspection. Counsel for MPIC further submits that the only form of permanent impairment benefit to which epidural scarring could give rise would be for the

permanent loss of objective sensory or motor function. Counsel for MPIC contends that there is no evidence of motor or sensory loss along the S1 root distribution and, therefore, no further entitlement to a permanent impairment benefit is justified by the evidence.

Upon a careful review of the Schedule of Permanent Impairment Benefits, we find that there is no further entitlement to a permanent impairment benefit arising out of the epidural scarring for this Appellant. We agree that the epidural scarring would only be compensable with a permanent impairment benefit if there was permanent loss of clinically objective sensory and motor function. As a result, the Commission dismisses the Appellant's appeal with respect to an entitlement for a permanent impairment benefit for epidural scarring and confirms the decision of MPIC's Internal Review Officer, bearing date April 8, 2002.

At the hearing of this appeal, the Appellant related that he had ongoing problems with his left foot, which he attributed to the motor vehicle accident. In a report dated February 18, 2002, the Appellant's chiropractor, [text deleted], noted that:

[The Appellant] had a compensatory gait with his left foot externally rotated, and his left toes in dorsiflexion. Instruction to place his toes on the floor did not change his position.

No additional evidence was available to the Commission at the hearing to assess whether this condition would attract a permanent impairment benefit. Accordingly, this matter shall be referred back to MPIC's case manager for an assessment and determination of whether or not a permanent impairment benefit is applicable for this Appellant with respect to impairment of his left foot.

Dated at Winnipeg this 21st day of February, 2003.

YVONNE TAVARES

WILSON MACLENNAN

DR. PATRICK DOYLE