



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-44

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Barbara Miller
Mr. Wilson MacLennan

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

HEARING DATE: April 5, 2004

ISSUE(S): 1. Entitlement to reimbursement for medical expenses
2. Entitlement to Permanent Impairment benefits for L4-L5
disc herniation

RELEVANT SECTIONS: Sections 127 and 136(1)(a) of The Manitoba Public Insurance
Corporation Act ('MPIC Act') and Section 5(a) of Manitoba
Regulation 40/94

**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 October 13, 2000. He was operating a [text deleted] ½ ton truck at the intersection of [text deleted] and [text deleted]. Traffic had been stopped at a light. A semi in front of the Appellant had started up through the intersection and he followed the semi. The semi stopped and when the Appellant stopped his vehicle he advised the Commission that he was thrown forward as he braked to avoid the semi in front of him and then was pushed back into extension and was struck from behind.

As a result of the injuries the Appellant sustained in the motor vehicle accident, he attended at the office of [text deleted] Physiotherapy and was initially treated by [text deleted], a physiotherapist, on October 19, 2000. [Appellant's physiotherapist #1] provided an Initial Health Care Report to MPIC which indicated that the Appellant reported cervical and thoracolumbar pain and limited lifting tolerance. As a result of his examination, the physiotherapist diagnosed moderate cervical-lumbar-thoracic strain which he circled to be consistent with a WAD 2 injury. [Appellant's physiotherapist #1] recommended exercise and physiotherapy treatment.

After two additional physiotherapy treatments from [Appellant's physiotherapist #1] in November 2000, the Appellant continued physiotherapy treatments with [Appellant's physiotherapist #2]. [Appellant's physiotherapist #2] produced an Initial Health Care Report to MPIC in respect of his examination of the Appellant on December 21, 2000. This report indicated that the Appellant complained of neck and shoulder pain, as well as stiffness. [Appellant's physiotherapist #2] diagnosed the Appellant's injury to be that of a cervical paravertebral muscle consistent with a WAD 2 injury. However, [Appellant's physiotherapist #2] considered the Appellant to be at full function but symptomatic and capable of carrying out the full duties of his employment.

The Appellant was next treated by [Appellant's physiotherapist #2] on January 29, 2001 and in a Treatment Plan Report to MPIC of that date the physiotherapist indicated that the Appellant complained of back and neck pain "especially low back stiffness", diminished trunk flexion as well as a normal neurological examination. [Appellant's physiotherapist #2] diagnosed cervical

and lumbar spine dysfunction consistent with a WAD 2 and non-WAD 2 injury respectively and recommended further physiotherapy treatment to deal with the Appellant's complaints.

In a further report to MPIC dated February 21, 2001 [Appellant's physiotherapist #2] reported that:

1. the Appellant continued to suffer from low back pain;
2. indicated that some of the pain was tingling and radiating along his left leg into his foot;
3. recommended the Appellant take some time off work.

In addition to continuing to receive physiotherapy treatment the Appellant at this time commenced treatment by a chiropractor.

The Appellant was referred by MPIC to [text deleted], an orthopaedic surgeon, for an independent assessment. [independent orthopaedic surgeon] referred the Appellant for a number of investigations including CT, chiropractic x-rays, EMG and Nerve Conduction. On May 6, 2001 [independent orthopaedic surgeon] provided a report to MPIC and stated that:

1. the Appellant had been experiencing symptoms consistent with lower limb radiculopathy in mid-December 2000;
2. as a result of this assessment, he diagnosed a disc herniation and recommended a surgical consultation;
3. having regard to causality, based on the history of leg symptoms evolving in mid-December 2000, he noted that temporally there was a separation of a few months between the motor vehicle accident and the Appellant's clinical expression of a left sided disc herniation;

4. raised the possibility that the herniation occurred at the time of the motor vehicle accident collision and progressed over subsequent months.

The Commission notes that [independent orthopaedic surgeon] stated that the Appellant began experiencing symptoms consistent with lower limb radiculopathy in mid December 2000. However, the Commission further notes that [independent orthopaedic surgeon's] statements are inconsistent with the reports of the Appellant's physiotherapist, [Appellant's physiotherapist #2], who indicated that the Appellant first complained about this matter to him on February 21, 2001.

At the request of MPIC, [Appellant's physiotherapist #2] provided MPIC with his clinical notes for the approximate period of January and February 2001. The physiotherapist reported that:

1. the Appellant had some general low back pain through January which was gradually increasing and that on January 31st the pain was described as "more sore" with stiffness after a full day's work;
2. on February 5, 2001 the Appellant complained that the pain was severe and the symptoms started to radiate into the Appellant's legs;
3. at that point the Appellant exhibited signs and symptoms of developing disc protrusion during this period of time.

MPIC requested its chiropractic consultant, [text deleted], to conduct an assessment and [MPIC's chiropractor] provided a physiotherapy report to MPIC dated May 31, 2001. [MPIC's chiropractor] indicated in his report that:

1. the Appellant suffered a sprain/strain type injury without a component of radiated symptoms as a result of the motor vehicle accident;

2. the documentation supported that the Appellant developed a sudden onset of radiated symptoms between the end of January and the first week of February 2001;
3. “it is difficult to understand how an injury of 3 ½ months prior could change so dramatically in this time period without external trauma”.

MPIC referred the Appellant’s medical files to [text deleted], MPIC’s Medical Consultant. [MPIC’s doctor], after reviewing the medical reports on file provided an Inter-Departmental Memorandum to MPIC dated September 4, 2001. In this Memorandum [MPIC’s doctor] indicated that MPIC sought a medical opinion from her in regards to whether there was a causal relationship between the Appellant’s diagnosis of lumbar discopathy. [MPIC’s doctor] further stated:

DISCUSSION

There is documentation in the Initial Health Care Report of October 19, 2000 that the claimant suffered from lumbar region pain immediately following the motor vehicle collision. His pain was considered to be consistent with a strain type injury to the lumbar region. The next medical document to file, the aforementioned December 21, 2000 report from the claimant’s physiotherapist, failed to document lumbar region symptoms or clinical assessment abnormalities for the lumbar region/lower limbs. The diagnosis as of December 21, 2000 were limited to the cervical spine region and the claimant was considered at full function.

For this claimant potentially more insightful information relates to examining the potential mechanisms of disc herniation. Typically, the support of the occupant’s seat back provides protection for the lumbar region. A rear impact accelerates the torso along with the car because of the opposition of the torso with the seat back. Conversely, the absence of a functional headrest can result in a hypertension injury to the neck. The risk of disc herniation to the lumbar region is typically associated with a lateral occurring force as opposed to a rearend collision.

OPINION

Based on the documentation on file at the time of this review, on the balance of probabilities, the claimant’s current status with regards to the diagnosis of an L4-L5 disc herniation is not related to the October 13, 2000 episode.

Case Manager's Decision

On October 29, 2001 the case manager wrote to [the Appellant] and stated that he had reviewed all of the medical information, and the totality of the medical evidence indicates that the diagnosis of L4-L5 disc herniation is not related to the accident of October 13, 2000. As a result, the case manager advised the Appellant that MPIC could not consider any further entitlement to Personal Injury Protection Plan benefits which includes Income Replacement Indemnity, medical expenses and personal assistance/home assistance expenses.

On November 25, 2001 the case manager provided [MPIC's doctor] with several surveillance tapes prepared on behalf of MPIC. The surveillance period on tapes reflected videotape activity of the Appellant on September 2, 3, 4, 6, 11 and October 18, 19, 20, 2001. In addition to the tapes, [MPIC's doctor] was provided with a Treatment Plan Report prepared by [text deleted], the Appellant's chiropractor, dated September 18, 2001. [MPIC's doctor] was requested to review the contents of the surveillance tapes and the report of [Appellant's chiropractor] and provide a medical opinion to MPIC as to whether the personal care/home assistance is a medical necessity, whether the Appellant is disabled from performing heavy lifting activities associated with his employment and whether further therapeutic intervention is a necessity.

In reply, [MPIC's doctor] provided the case manager with an Inter-Departmental Memorandum dated November 9, 2001. In this Memorandum [MPIC's doctor] reviewed the contents of the surveillance tapes and [Appellant's chiropractor's] Treatment Plan Report, and stated:

OPINION

1. As opined in the "Editor's Comments" above, there is no evidence of functional disability with performance of the various duties depicted in the three surveillance tapes. The work duties demonstrated in the tapes, suggest physical tasks of a

moderately demanding nature. The tapes demonstrate that the claimant is capable of performing the duties demonstrated in the tapes. With regards to your request for an opinion on heavy lifting activities, an opinion cannot be provided on work of a heavy nature as this was not demonstrated in the tapes.

2. It is this writer's opinion that the physical demands of the duties depicted on the surveillance tapes exceed the physical requirements that would be involved in performing activities such as making dinner, housecleaning or performing laundry duties. It is this writer's opinion that personal care/home assistance is not a necessity.
3. Review of the three surveillance tapes fails to indicate that the claimant suffers from any functional deficits. Based on tape review, further therapeutic treatment is not a necessity. With regards to the Treatment Plan Report from [Appellant's chiropractor] for her assessment of September 27, 2001, mild trunk range of motion deficits were noted. Range of motion deficits during dynamic active exercise as depicted on the tapes was not present.

Internal Review Officer's Decision

On November 11, 2001 the Appellant filed an Application for Review of the case manager's decision. Appearing on December 12, 2002 the Internal Review Officer conducted a hearing and advised the Appellant by letter dated December 18, 2002 that the case manager's decision of October 29, 2001 was confirmed and the Appellant's Application for Review was rejected.

In respect of the Appellant's claim for IRI benefits, the Internal Review Officer stated:

At the hearing, you argued that you had only pleaded guilty to the charge because you could not afford to defend it. You said the guilty plea was part of a plea bargain by which the Crown Attorney submitted to the court that you had only defrauded MPI of Income Replacement Indemnity benefits in the "last two months". By this, I understood you to mean September and October 2001. You said that you had returned to work on advice received from your chiropractor, [text deleted], to the effect that it was about time that you tested yourself in the workplace because she felt that you were "substantially capable" of your pre-accident work. Nevertheless, you insisted that you were still not doing all of the essential duties of your pre-motor vehicle accident employment. You pointed to the fact that prior to your car accident you had had no employees, whereas you employed two in September and October 2001.

The Internal Review Officer further stated:

A guilty plea to a charge of fraud is less conclusive than a conviction after a full trial. Nevertheless, it remains compelling evidence that you were receiving IRI when you were not entitled to it. That in itself is more than sufficient for me to confirm the portion of the October 29, 2001 decision denying you IRI.

In respect of treatment benefits, the Appellant was requesting reimbursement of the cost of acupuncture treatments provided by [Appellant's acupuncturist] and the cost of chiropractic treatments provided by [Appellant's chiropractor].

In respect of the Appellant's claim for reimbursement of chiropractic treatments, the Internal Review Officer noted the Appellant was not out-of-pocket for chiropractic treatments. The Appellant acknowledged to the Commission panel that he had informed the Internal Review Officer at their meeting that he had not paid for the chiropractic treatments to [Appellant's chiropractor] and thought that [Appellant's chiropractor] may have absorbed the cost of these treatments.

In respect of the cost of acupuncture treatments provided by [Appellant's acupuncturist], the Internal Review Officer rejected the Appellant's request for reimbursement on the grounds that an assessment by one of MPIC's medical consultants concluded that "*further therapy is not a [medical] necessity*". As a result, the Internal Review Officer rejected the Appellant's entitlement to reimbursement for medical expenses for acupuncture treatments.

The Appellant also made a claim for a permanent impairment benefit for a disc protrusion at L4-L5 level. The Internal Review Officer, in his decision, indicated that the Appellant's medical file contained three medical opinions from [MPIC's doctor], dated September 4, 2001, October 12, 2001 and November 9, 2001. These medical opinions concluded that the Appellant's L4-L5 disc

herniation was unrelated to the Appellant's motor vehicle accident of October 13, 2000. Accordingly, the Internal Review Officer accepted the medical opinion of [MPIC's doctor] who determined that the Appellant was not entitled to a permanent impairment benefit for that claim.

The Appellant filed a Notice of Appeal dated April 3, 2003.

Appeal

The appeal hearing took place before the Commission on April 5, 2004. The Appellant represented himself and MPIC was represented by legal counsel. At the commencement of the hearing the Appellant advised the Commission that he was withdrawing his appeal in respect of the entitlement to Income Replacement Indemnity benefits beyond October 28, 2001, but was pursuing the appeal in respect of the entitlement for reimbursement of medical expenses and his appeal in respect of his entitlement to Permanent Impairment benefits for L4-L5 disc herniations.

The relevant provisions of the MPIC Act and regulations governing these appeals are:

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.

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;

Manitoba Regulation 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 further submitted that:

1. prior to the motor vehicle accident he never had a back or neck problem but that very shortly after the accident he visited [Appellant's doctor] at the [text deleted] Medical Clinic complaining of a sore lower back and neck;
2. he was unable to obtain these reports from [Appellant's doctor];
3. there does not appear to be any report on MPIC's file from [Appellant's doctor];
4. the back and neck problems were caused by the motor vehicle accident and, as a result, he attended several physiotherapists for the purpose of obtaining treatment in respect of these injuries;
5. he was not benefiting greatly from this treatment and on the advice of his physiotherapist, [text deleted], he commenced seeing a chiropractor three times per week;
6. he commenced receiving acupuncture from [Appellant's acupuncturist];
7. on the advice of [Appellant's acupuncturist], he commenced receiving chiropractic treatments from [Appellant's chiropractor], which he submitted were very effective over time;
8. the condition of his back and neck have significantly improved.

In a written submission to the Commission the Appellant stated that:

1. he is almost totally better and is feeling strong and healthy;
2. the only lingering physical issue is the disc protrusion;

3. he needs to see [Appellant's chiropractor] about once per month to maintain his "low amount of irritation";
4. he still must be very careful when lifting and working as he presently has less flexibility than prior to the accident.

The Appellant further submitted to the Commission that:

1. MPIC's medical consultants were in error as to when he initially complained about his low back pain;
2. his initial complaint in respect of his low back pain was to [Appellant's doctor] but MPIC does not have [Appellant's doctor's] reports in this respect;
3. that [Appellant's physiotherapist #1's] clinical note dated October 19, 2000 indicates that he was complaining about pain to his upper and lower back;
4. as a result of the back injury caused by the motor vehicle accident, the Appellant submits that this back injury developed into a disc herniation which had a traumatic effect on his life;
5. as a result of the constant pain caused by the disc herniation, he was unable to continue the business that he was operating and was required to commence a new business operation;
6. prior to the motor vehicle accident he had no pre-existing back injury and after the motor vehicle accident he was diagnosed with a disc herniation;
7. the motor vehicle accident injuries to his back directly caused the disc herniation.

In reply, MPIC's legal counsel submitted that there was no medical evidence to support the Appellant's submission that the motor vehicle accident caused the Appellant's disc herniation. To the contrary, MPIC's legal counsel submitted [text deleted], MPIC's medical consultant, after

reviewing all of the relevant medical reports contained in the Appellant's medical file, concluded that there was no causal connection between the motor vehicle accident and the Appellant's disc herniation to L4-L5. MPIC's legal counsel indicated that [MPIC's doctor] concluded that the Appellant's initial pain was consistent with a strain type injury to the lumbar region and that the initial reports from the Appellant's physiotherapist failed to document lumbar region symptoms to the lower region or lower limbs.

MPIC's legal counsel further submitted that the first evidence of the Appellant's complaint consistent with a disc herniation is the sudden onset of radiated symptoms at the end of January or the first week of February 2001. MPIC's legal counsel referred to [MPIC's chiropractor's] report of May 31, 2001 where [MPIC's chiropractor] concluded it was difficult to understand how a sprain/strain type injury resulting from the accident could, three and one-half months later, change so dramatically in that period of time without external trauma. MPIC's legal counsel concluded, having regards to the medical opinions from [MPIC's doctor] and [MPIC's chiropractor], that the medical evidence clearly established that the L4-L5 disc herniation was unrelated to the motor vehicle accident.

In respect to the Appellant's request for reimbursement of chiropractic treatments, MPIC's legal counsel submitted that the Internal Review Officer had noted that the Appellant admitted that he was not out-of-pocket in respect to the chiropractic treatments and believed that [text deleted], the chiropractor, had absorbed these costs. The Appellant did acknowledge to the Commission that up to the time the manager had terminated his IRI benefits on October 28, 2001 he had not incurred any chiropractic treatment expenses in respect of the motor vehicle accident.

In respect of the Appellant's request for reimbursement of the cost of acupuncture treatments, MPIC's legal counsel submitted that these treatments commenced subsequent to the second car accident the Appellant was involved in on December 5, 2001. As a result, the Appellant's claim for reimbursement of acupuncture treatments arose in respect of the second car accident on December 5, 2001 and not in respect of the motor vehicle accident which had occurred on October 13, 2000. MPIC's legal counsel therefore submitted that the Appellant's claim for reimbursement for the cost of acupuncture treatments may be relevant in respect of the second accident which occurred on December 5, 2001 and not the first accident which occurred on October 13, 2000. MPIC's legal counsel further submitted that there is no requirement for MPIC to reimburse the Appellant in respect of any costs he incurred for either chiropractic treatments or acupuncture treatments arising out of the motor vehicle accident on October 13, 2000.

Decision

The Commission accepts the submission of MPIC's legal counsel set out herein, that having regard to the reasons set out in the medical reports of [MPIC's doctor] dated September 4, 2001, October 12, 2001 and November 9, 2001 and [MPIC's chiropractor's] report dated May 31, 2001, the Appellant has failed to establish, on a balance of probabilities, that the disc herniation at L4-L5 was caused by the motor vehicle accident. The Commission further accepts the medical opinions of [MPIC's doctor] and [MPIC's chiropractor] that, subsequent to the motor vehicle accident, the Appellant developed a disc herniation to L4-L5 which is unrelated to the motor vehicle accident. The Commission therefore finds that, pursuant to Section 127 of the MPIC Act, the Appellant has not established, on the balance of probabilities, that the disc herniation was a physical impairment caused by the motor vehicle accident on October 13, 2000 and, as a result, the Commission confirms the decision of the Internal Review Officer and dismisses the Appellant's appeal in this respect.

In respect of the Appellant's appeal relating to reimbursement of chiropractic treatment costs, the Appellant has admitted that in respect of the treatment expenses relating to the first motor vehicle accident on October 13, 2000, he did not incur any expense for chiropractic treatments. Accordingly, the Appellant has failed to establish, on a balance of probabilities, that pursuant to Manitoba Regulation 40/94, Section 5(a), he is entitled to any reimbursement in respect of chiropractic treatments since he did not incur any expense in respect of these treatments.

The Commission further finds that the Appellant has not established, on the balance of probabilities, that subsequent to the case manager's decision to terminate the chiropractic treatment expense on October 28, 2001, chiropractor treatments were medically required pursuant to Manitoba Regulation 40/94, Section 5(a). The Appellant acknowledges that the chiropractic treatments provided by [Appellant's chiropractor] have materially assisted him in resolving his neck and back problems but at a certain period of time these chiropractic treatments had resulted in maximum therapeutic benefits to the Appellant and thereafter these treatments were for maintenance purposes only and not medically required in accordance with Manitoba Regulation 40/94, Section 5(a). The Commission finds the evidence is unclear as to when the chiropractic benefits were no longer medically required. As a result, the Commission finds that the Appellant has not established, on the balance of probabilities, his entitlement to reimbursement to any chiropractic treatments on the grounds that they were medically required.

In respect of the appeal relating to reimbursement of acupuncture treatments, the Commission finds that the Internal Review Officer was correct in determining that the entitlement to acupuncture treatments following the second motor vehicle accident on December 5, 2001 related to this motor vehicle accident and did not relate to the motor vehicle accident of October

13, 2000 upon which the Appellant's appeal is based. Accordingly, the Appellant has not established, on the balance of probabilities, that he is entitled, pursuant to Manitoba Regulation 40/94, Section 5(a), to have MPIC reimburse him in respect of any acupuncture treatment costs.

The Commission therefore finds that MPIC correctly applied the provisions of Section 127, 136(1)(a) of the MPIC Act, and Section 5(a) of Manitoba Regulation 40/94 when rejecting the Appellant's claim for a permanent impairment award relating to a disc herniation and for the costs of reimbursement of chiropractic and acupuncture treatments. As a result, the Commission confirms the decision of the Internal Review Officer dated December 18, 2002, and as a result thereof the Appellant's appeal is dismissed.

Dated at Winnipeg this 30th day of April, 2004.

MEL MYERS, Q.C.

BARBARA MILLER

WILSON MACLENNAN