



## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]**  
**AICAC File No.: AC-04-131**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Ms Deborah Stewart  
Dr. Patrick Doyle

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Ms Kathy Kalinowsky.

**HEARING DATE:** March 30, 2005

**ISSUE(S):** Entitlement to Income Replacement Indemnity benefits  
beyond April 18, 2004

**RELEVANT SECTIONS:** Section 110(1)(a) of The Manitoba Public Insurance  
Corporation Act ('MPIC Act')

**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 February 19, 2001 and attended at the office of [Appellant's doctor] who, in a report to MPIC, dated May 10, 2001, stated:

I saw [the Appellant] on February 27<sup>th</sup>, 2001. He stated he had been rear ended on February 19<sup>th</sup> and went to [hospital] for x-rays. X-rays of his cervical spine did not reveal any new bone injury. They did reveal longstanding degenerative changes in his lower cervical discs and joints. He stated he had injured his neck previously (ski-doo accidents). At this visit he complained of neck and low back pain.

On examination, he had demonstrated tenderness to palpation over his neck and low back and a general decrease in range of motion in all directions.

[Appellant's doctor] further stated:

In summary, [the Appellant] had pre-existing degenerative changes in his neck and back that could account for his delayed recovery. He is likely to have ongoing recurrent pain in his arthritic neck and back. I am unaware of his pre-injury employment activities. I would expect a man with arthritis in his neck, back, hips and knees to have difficulty climbing, bending, lifting and crawling any length of time. At the time of his injury (February 19<sup>th</sup>), I am sure he was incapable of doing any of these activities. I would think that by the end of May, he could begin to resume his previous employment activities on a gradual basis.

The Appellant had been self employed for many years in the home renovation business as a sales consultant. This work involved preparation of drawings and layouts, and estimating home renovations including roofs. The Appellant testified that often he was required to climb ladders onto roofs in order to estimate costs of repairing or replacing roofs on structures. As a result of the injuries the Appellant sustained in the motor vehicle accident, he was unable to return to his employment, and was in receipt of benefits including Income Replacement Indemnity ('IRI') benefits, physiotherapy, occupational therapy, psychotherapy, medication and travel expenses.

On July 11, 2001 [text deleted], the Appellant's Physiotherapist, provided a report to MPIC wherein he stated:

. . . Due to the difficulties with his back, [the Appellant] strained his shoulder when he attempted to lift at home. Unable to flex his spine, he bent his knees and lifted a load using only his arms. [Appellant's doctor] suspects he may have torn his right rotator cuff and he is having [the Appellant] consult [text deleted] (an orthopaedic surgeon). This further complicates his ongoing rehabilitation. (underlining added)

The Appellant was referred to [rehab clinic] by MPIC for a Multidisciplinary Rehabilitation Assessment, which assessment took place on October 9, 2001. In its report to MPIC, [rehab clinic] states that:

1. the Appellant complained of lower back pain, right neck pain, shoulder pain and lower extremity pain
2. [Rehab clinic's] diagnosis was as follows:
  1. Myofascial Pain Syndrome – Neck – Mild to Moderate Severity
  2. Myofascial Pain Syndrome – Right and Left Shoulder – Mild to Moderate Severity
  3. Myofascial Pain Syndrome – Lower Back – Mild to Moderate Severity
  4. Total Right Knee Replacement
3. [Rehab clinic's] prognosis:
  - a) the resolution of the Appellant's pain complaints is fair.
  - b) the Appellant had not reached maximum medical improvement and the Appellant was not yet capable of resuming his pre-accident employment, but with proper physical rehabilitation management [rehab clinic] saw no physical reason why the Appellant would be precluded from returning to his pre-accident occupation as a sales consultant.

The Appellant was referred by his family physician to [text deleted], an Orthopaedic Surgeon, who saw the Appellant on February 21, 2002. In his report [Appellant's orthopedic surgeon] stated that the Appellant was complaining about right shoulder pain which had "onset last summer" and which had persisted and that therapy was of little help. [Appellant's orthopedic surgeon] diagnosed a rotator cuff tear and suggested that he avoid lifting or carrying as well as elevation over 90 degrees forward or sideways. [Appellant's orthopedic surgeon] concluded his report by stating that further recommendations would follow after the Appellant had an MRI.

MPIC consulted with [text deleted], Medical Consultant, a member of MPIC's Health Care Services Team. In an Inter-Departmental Memorandum dated April 18, 2002 from [MPIC's doctor] to the case manager, [MPIC's doctor] stated:

I have the opportunity to discuss the claimant's medical condition with his treating physician, [Appellant's doctor]. The length of the conversation was approximately five minutes.

[Appellant's doctor] indicated that the claimant recently had an exacerbation of neck and back pain. When asked the etiology of this pain, he indicated that it was likely an exacerbation of mechanical neck and back pain. I asked if the pain would be related to the motor vehicle collision in question or would be an exacerbation of his preexisting arthritic cervical and lumbar condition. [Appellant's doctor] indicated that he would not be able to probably determine the exact cause of pain in this case.

[Appellant's doctor] recommended that the claimant attend a physiotherapist for treatment of his neck and back at this time. . . .

The Appellant did attend at the office of [Appellant's physiotherapist #2], a Physiotherapist, who provided a report to the case manager at MPIC, dated July 3, 2002. [Appellant's doctor] also provided an undated report to MPIC in respect of the Appellant. In an Inter-Departmental Memorandum dated May 1, 2003 [MPIC's doctor] reviewed the reports of [Appellant's physiotherapist #2] and [Appellant's doctor] and stated:

The report from [Appellant's physiotherapist #2] indicated that the claimant continued to have a constant dull ache and sharp shooting pains in an undefined region. The claimant also continued to have headaches and episodic right arm numbness and tingling. [Appellant's physiotherapist #2] documented that the claimant had decreased cervical, thoracic, lumbar and right shoulder ranges of motion. There was pain and tenderness in the thoracic spine with spasms of right scapular muscles and segmental restriction in the lumbar spine. Diagnoses included a whiplash injury to the cervical, thoracic and lumbar spines and a suspected right rotator cuff tear. Treatment included the use of medications, range of motion stretching and gradual strengthening exercises. A duration of in-clinic care of eight to twelve weeks was recommended.

The undated letter from [Appellant's doctor] to [text deleted] indicated that the claimant had a history of longstanding arthritis affecting his hips, lumbar and cervical spines. [Appellant's doctor] reported the claimant was improving from his motor vehicle injury when in late June; he strained his back working at his cottage. The claimant also aggravated his pre-existing right hip arthritis at that time. He recommended continuation of physiotherapy and indicated the claimant was incapable of returning to his employment based upon his physical limitations.

The letter from [Appellant's physiotherapist #2] indicated that the claimant would have been able to begin work with modified duties if it were not for his right rotator cuff injury and his recent flare in back pain. [Appellant's physiotherapist #2] indicated he was not sure as to the cause of the claimant's increased back pain but would continue to treat him

using multiple modalities. He indicated the claimant would be assessed by [text deleted], an orthopedic surgeon, to determine what further therapy was required for the right shoulder.

The letter from [text deleted] documented a meeting which took place on July 11, 2002. In this report, the claimant reportedly had improving low back pain but that his right shoulder pain had not changed. It was reported that he may require a surgical repair of the rotator cuff tear in the future. The claimant also reported frustration with his current situation and a referral to a psychologist was recommended based on this meeting.

....

#### DISCUSSION

Based upon the newly submitted medical documentation, it appeared that the claimant would have been functionally able to return to modified work duties prior to his June 2002 symptom exacerbation per [Appellant's physiotherapist #2]. The claimant's shoulder condition was also listed as an impediment to his returning to work. According to [Appellant's doctor], the low back pain exacerbation was related to the claimant working at his cottage, which would indicate that an interceding event occurred which led to a deterioration of the claimant's condition. As the claimant likely would have been able to return to some form of modified duties in his pre-collision employment prior to this exacerbation, it would have been likely that this exacerbation was the greatest cause of further ongoing functional impairment and work disability. (underlining added)

[MPIC's doctor] was specifically requested by the case manager to indicate whether the Appellant had recovered from his motor vehicle accident injuries of neck and low back pain.

[MPIC's doctor], in his Inter-Departmental Memorandum dated May 1, 2003, stated:

. . . Based on the natural history of acute exacerbations of neck and back pain associated with traumatic events, it would have been reasonably assumed that the claimant would have experienced improvement in these symptoms over time. However, the claimant had a worsening of his symptoms and function a significant time after the collision. The worsening was attributed to a separate injury by [Appellant's doctor]. Thus, the most likely cause of ongoing disability after June 2002 was likely related to the back injury which occurred while working at a cottage and thus, any spinal disability thereafter would not be related to the motor vehicle collision in question but to the claimant's interceding injury. (underlining added)

[MPIC's doctor] was also asked by the case manager whether, in his opinion, the Appellant would be able to return to his employment with restrictions and, if there were restrictions,

whether they related to the motor vehicle accident. [MPIC's doctor] in his Inter-Departmental Memorandum stated:

In this case, it would be difficult to determine what the ongoing cause of the claimant's work restrictions would have been. The most likely cause would be related to the claimant's ongoing degenerative cervical, lumbar and hip pain, as well as injuries sustained in the exacerbation of June 2002. Any restrictions related to the claimant's neck and back would be related to these conditions and not related to any alteration in spinal function from the motor vehicle collision, in my opinion. (underlining added)

[MPIC's doctor] also suggested in his Inter-Departmental Memorandum to the case manager that further information in respect to the Appellant's right shoulder should be sought from the Appellant's treating family physician and [Appellant's orthopedic surgeon].

In a report by [Appellant's doctor] to MPIC, dated October 21, 2003, he stated:

I believe [the Appellant] has chronic rotator cuff tendonitis following an injury in July 2001 lifting a rail.

I saw him July 9, 2001, August 1, 2001 and September 10, 2001 and prescribed Vioxx and strengthening exercises as well as a cortisone injection to the sub acromial space. He returned November 27, 2001 and still was having problems so I referred him to [Appellant's orthopaedic surgeon]. He saw him on February 21, 2002, and agreed with the diagnosis and arranged for a MRI. I have not seen the results of that MRI.

I know [the Appellant] injured his neck and back in the MVA of February 19, 2001; however I was not aware of an injury to his right shoulder. [Appellant's orthopedic surgeon] may have more information regarding this matter. (underlining added)

[Appellant's orthopedic surgeon] also provided a report to MPIC dated January 25, 2004. [Appellant's orthopedic surgeon] had initially examined the Appellant on February 21, 2002, approximately one year after the February 19, 2001 motor vehicle accident. [Appellant's orthopedic surgeon] in his report states that when he examined the Appellant on February 21<sup>st</sup> his notes indicate that the Appellant informed him that the pain "began last summer" and persisted and that therapy was no help. [Appellant's orthopedic surgeon] further states that as of

September 5, 2002 he had an opportunity of examining the Appellant for ongoing shoulder problems and he had an opportunity of viewing the MRI findings and concluded that the Appellant's shoulder complaints could not be related to the accident in question. [Appellant's orthopedic surgeon] concludes his report by stating:

Based on the information made available to me I cannot convincingly relate his shoulder complaint to the accident in question. Perhaps [Appellant's doctor's] notes can be helpful. (underlining added)

[MPIC's doctor] was requested by MPIC to review the Appellant's medical documentation and determine whether there is an association between the Appellant's right shoulder condition and the motor vehicle accident of February 19, 2001. In an Inter-Departmental Memorandum to MPIC, dated February 24, 2004, [MPIC's doctor] stated:

In reviewing the medical documentation on file and paying special attention to letters dated July 11, 2001 from [Appellant's physiotherapist #1], the claimant's treating physiotherapist, a letter dated October 21, 2003 from [text deleted], the claimant's treating family physician and a handwritten letter dated January 25, 2004 from [text deleted], the claimant's treating orthopedic surgeon, the claimant's condition developed at a time distant from the motor vehicle collision. [Appellant's orthopaedic surgeon] was of the opinion that the claimant's shoulder complaints could not be related to the accident in question once he was able to review the pertinent medical documentation on file and examine the claimant. [Appellant's doctor] stated in his October 21, 2003 letter that he was unaware that any injury occurred to the claimant's right shoulder which (sic) at the time of the motor vehicle collision.

The Appellant had been treated by a psychologist, [text deleted], who had provided reports to MPIC from time to time. [Appellant's psychologist] provided a report to the case manager dated November 14, 2003. [Text deleted], MPIC's Psychological Consultant, Health Care Services, reviewed [Appellant's psychologist's] report and stated:

#### Comments

In [Appellant's psychologist's] recent report of November 14, 2003 he indicates that based on his review of the claimant on November 5, 2003 the claimant remained depressed, but had yet to start taking antidepressant medication despite having a

prescription for this. [Appellant's psychologist] indicates that the claimant should partake in pharmacological treatment as he feels this would be of benefit to the claimant.

[Appellant's psychologist] also indicates in his report that "in my opinion [the Appellant] is not totally disabled from a psychological perspective from his pre-accident occupation". Furthermore, he notes "it is my opinion that his psychological symptoms would not be significant barriers to his returning to his pre-accident occupation. From a psychological perspective, returning to work would be therapeutic".

[Appellant's psychologist] also indicates that in terms of the causal relationship between the claimant's depressive symptoms and the MVA "there is a direct relationship between these symptoms and the motor vehicle accident only to the extent that it can be demonstrated that he is being prevented from returning to his pre-accident occupation by injuries sustained in the motor vehicle accident". As noted, [Appellant's psychologist] does not feel the claimant's psychological condition would prevent him from working, but that his physical injuries might.

#### Opinion

Based on the review of the information contained within [Appellant's psychologist's] report, it is the writer's opinion that the claimant does continue to have some depressive symptoms which are possibly, but not probably related to the MVA in question. Furthermore, these symptoms would not currently be a barrier to his returning to his pre-accident vocation as clearly stated by [Appellant's psychologist] in his report.

On March 11, 2004 the case manager wrote to the Appellant and stated that:

1. an extensive review of the Appellant's medical file had been undertaken for the purpose of determining whether the injuries the Appellant received in the motor vehicle accident of February 19, 2001 was affecting his ability to return to work.
2. MPIC's review considered any unrelated conditions and the effect that those conditions have on the Appellant's return to work.
3. based on the file review the Appellant had the following conditions not related to the motor vehicle accident of February 19, 2001:
  - Bilateral knee arthritis
  - Right knee replacement surgery
  - Bilateral shoulder arthritis
  - Right hip arthritis
  - Right hip replacement surgery
  - Arthritis of the spine and fingers

The case manager also reviewed the reports of [MPIC's doctor], [Appellant's doctor] and [Appellant's orthopedic surgeon], as well as the report of [MPIC's psychologist], and stated:

The medical information states that there is no physical or psychological reason that would prevent you from returning to work as a result of the injuries sustained in the motor vehicle accident of February 19, 2001. The medical information also states that your inability to return to work would therefore be a result of the many degenerative changes that include your arthritic conditions. Therefore, you no longer qualify for Income Replacement Indemnity. To allow you an opportunity to adjust to this change, we will continue to process your IRI entitlement until April 18, 2004.

### **Internal Review Officer's Decision**

The Appellant made an Application for Review of the case manager's decision, dated May 25, 2004. The Internal Review hearing took place on July 20, 2004 and the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision.

In his decision, the Internal Review Officer noted that at the Internal Review hearing the Appellant had informed the Internal Review Officer that [Appellant's doctor], was mistaken when he advised MPIC that he did not injure his right shoulder in the motor vehicle accident. In rejecting the Appellant's Application for Review the Internal Review Officer provided the following reasons for her decision:

### **REASONS FOR REVIEW DECISION**

The information attached to your Application for Review shows that you visited the [hospital] Emergency Room May 10, 1998. I am sorry that I cannot quite make out the writing on the report, but I understand that something on the left hand side was injured. You have supplied this medical information to advise that you were not injured in July of 2001 at your cottage as [Appellant's doctor] has pointed out, but rather you were injured in 1998. I do understand that point, but I do not think that it helps you in convincing me that the injuries that you now suffer from are related to your motor vehicle accident. I know you have stated that [Appellant's doctor] was incorrect in advising what was injured right after your motor vehicle accident, but there is still no medical information on the file to show that your complaints are related to your motor vehicle accident. As a result, I am confirming your Case Manager's decision and dismissing your Application for Review.

The Appellant appealed the Internal Review Officer's decision, dated July 21, 2004, to the Commission.

### **Appeal**

The relevant provision of the MPIC Act in respect of this appeal is Section 110(1)(a):

#### **Events that end entitlement to I.R.I.**

**110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

At the appeal hearing the Appellant testified that:

1. [Appellant's doctor] had erred in his undated report to MPIC when he had stated that the Appellant was improving from the motor vehicle accident injury when sometime in late June 2002 he strained his back working at his cottage.
2. he denied that he had strained his back working at his cottage in June 2002.
3. the injuries to his back occurred in 1998 and did not happen at his cottage and he provided a medical report to support his position.
4. he wasn't at his cottage in the month of July when the alleged injury was supposed to have occurred.
5. [Appellant's doctor] erred in his report dated October 21, 2003 wherein he stated that he was aware that the Appellant injured his neck and back in the motor vehicle accident of February 19, 2001 but he was not aware of an injury to his right shoulder.

The Appellant submitted that he did suffer a significant injury to his right shoulder as a result of the motor vehicle accident which prevented him from returning to his pre-accident employment and, therefore, the IRI benefits should not have been terminated by MPIC.

MPIC's legal counsel, in his submission, indicated that the Appellant had failed to establish, on a balance of probabilities, that the Appellant's complaints of right shoulder pain, which prevented him from returning to his pre-accident employment, was caused by the motor vehicle accident on February 19, 2001.

MPIC's legal counsel, in his submission, referred to the medical report of [MPIC's doctor] dated May 1, 2003 who, after reviewing the reports of the [Appellant's physiotherapist #2] who also suspected a right rotator cuff tear, and the undated letter of [Appellant's doctor] who indicated that the Appellant had strained his back working at his cottage in late June 2002, concluded that the Appellant's inability to return to work did not relate to the motor vehicle accident but related either to his pre-existing physical problems or the separate injury he had suffered in the month of June 2002, after the motor vehicle accident had occurred.

MPIC's legal counsel also submitted that:

1. as a result of [MPIC's doctor's] comments in his Inter-Departmental Memorandum of May 1, 2003 further medical reports were obtained from [Appellant's doctor] and [Appellant's orthopedic surgeon].
2. [Appellant's doctor], in his report dated October 21, 2003 indicated that the Appellant did not complain about right shoulder pain when he saw the Appellant on February 27, 2001, approximately eight (8) days after the motor vehicle accident.
3. [Appellant's orthopedic surgeon], in his report dated January 25, 2004, concluded that, as a result of several examinations of the Appellant, and after reviewing an MRI, there was no connection between the right rotator cuff complaint of the Appellant and the motor vehicle accident.

[MPIC's doctor], after reviewing all of these medical reports, advised MPIC in a report dated February 24, 2004, that the Appellant's shoulder complaints could not be related to the motor vehicle accident in question.

MPIC's legal counsel objected to the Appellant's submission that [Appellant's doctor] had erred in failing to note the Appellant's complaints in respect of his right shoulder pain when he was examined by [Appellant's doctor] on February 27<sup>th</sup>, approximately eight (8) days after the motor vehicle accident. MPIC's legal counsel submitted that [Appellant's doctor's] observation that the Appellant did not complain about right shoulder pain at the time of his examination is corroborated by [Appellant's orthopedic surgeon], who in his several reports states that he was informed by the Appellant that the right shoulder pain commenced in the summer following the February 19, 2001 motor vehicle accident. As a result, MPIC's legal counsel submitted that [Appellant's doctor] was correct and that the Appellant's submission in this respect should be rejected.

MPIC's legal counsel submitted, having regard to the totality of the medical information, the Appellant failed to establish that as a result of the injuries he sustained in the motor vehicle accident, he was unable to return to his pre-accident employment. MPIC's legal counsel therefore submitted that the decision of the Internal Review Officer, dated July 21, 2004, should be confirmed and the Appellant's appeal dismissed.

### **Decision**

The Commission recognizes the physical difficulties the Appellant has in respect of his arthritis to his knees, shoulders, hip, spine and fingers and is aware that, as a result of these problems, it is

extremely difficult for the Appellant to carry out his pre-accident employment. However, the Commission agrees with the submissions made by MPIC's legal counsel as set out herein and finds that the Appellant has failed to establish, on the balance of probabilities, that due to the injuries he sustained in the motor vehicle accident of February 19, 2001 he was unable to return to his pre-accident employment and, as a result, MPIC erred in terminating his IRI benefits. As a result, the Commission dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated July 21, 2004.

Dated at Winnipeg this 9<sup>th</sup> day of May, 2005.

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**MEL MYERS**

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**DEBORAH STEWART**

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**DR. PATRICK DOYLE**