

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-151**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Dr. Patrick Doyle

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

HEARING DATE: April 11, 2007

ISSUE(S): Entitlement to permanent impairment benefits for lumbar disc condition

RELEVANT SECTIONS: Section 1 of Manitoba Regulation 41/94 and Section 21, Part 1, Division 1, Subdivision 3 of Manitoba Regulation 41/94 (Schedule A)

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] has been involved in several motor vehicle accidents since 1993. These include motor vehicle accidents on August 25, 1994, January 15, 1996, January 17, 1997, October 16, 1998, February 2, 1999 and February 13, 1999.

CT scans taken in November 1998 and January 2000, identified some disc degeneration in the Appellant's spine.

The Appellant is claiming a permanent impairment award for a disc herniation to her lumbar spine. MPIC has taken the position that the Appellant does not suffer from a condition, caused by the motor vehicle accidents, that justifies an impairment benefit.

The Appellant's Application for Review was heard by an Internal Review Officer who issued an Internal Review decision on October 20, 2000. The Internal Review Officer reviewed evidence from CT scans of the Appellant's spine. He noted that in November 1998 there was a left lateral bulge at L4-L5, while in January of 2000 there was little of significance at that level described. The CT scan report of January 2000 described only degenerative changes at L3-L4. The Internal Review Officer stated that:

. . . we must doubt whether the condition shown on the CT scans (whatever that condition may actually be) results from any of [the Appellant's] automobile accidents since August 1994. Degenerative changes in the spine are endemic in the population at large. There is no clear relationship between the changes in [the Appellant's] spine, whatever they actually are, and her symptoms in any event.

. . .

Even if all of these causal hurdles could be cleared, however, there would remain a conclusive reason for denying [the Appellant] a Permanent Impairment benefit for her low back. There is no evidence of disc herniation, spinal stenosis, or nerve root compression. There is, therefore, nothing that justifies an impairment benefit under Sections 20 and 21 of Part 1, Division 1, Subdivision 3 or Regulation 41/94, Schedule A.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Submission for the Appellant

The Appellant did not give oral evidence at the hearing, but rather relied upon documented evidence on her file. Counsel for the Appellant took the position that, as a result of her accidents, the Appellant has a valid claim for a permanent impairment benefit pursuant to

Sections 21(a)(iii) of Manitoba Regulation 41/94 (alteration following the herniation of an intervertebral disc without discectomy or chemonucleolysis, including any functional limitations, per space) and Section 21(e) (alteration of a spinous process, a transverse process or of a lamina following a fracture, a chip fracture or pseudoarthrosis).

He relied upon medical reports filed by the Appellant's caregivers; [Appellant's family doctor] [text deleted], [Appellant's chiropractor] [text deleted], and [Appellant's sports medicine specialist] [text deleted].

[Appellant's family doctor] reviewed the Appellant's chart and her CT scans. In a report dated December 17, 2002 he noted that there was no suggestion of a herniated disc on January 2, 2000, although there was note of a significantly degenerative L3-L4 disc with subsequent vacuum in phenomena at that time. He noted that her previous CT scan in November 1998 showed left lateral disc bulging at the L4-L5 level and stated:

These degenerative changes may have resulted as a consequence of a significant axial force sustained in [the Appellant's] previous MVA's.

He notes:

Degenerative changes often develop subsequent to preceding trauma and is certainly possible that this indeed happened to [the Appellant] following her motor vehicle accidents, although there is no documentation of a herniation of her disc directly following her MVA.

In looking at the MPIC Act and Regulations, [Appellant's family doctor] noted that the Appellant's injuries would be closest in description to Section 21(a)(iii). In regard to facet joint degenerative changes, he noted that although there was no evidence of fracture at the time, there

may have been microfractures that subsequently led to degenerative changes. However, no bone scan had been done to include or exclude this possibility.

Counsel for the Appellant also referred to reports by [Appellant's chiropractor], including reports dated January 11, 2006 and September 28, 2006. [Appellant's chiropractor] reviewed [Appellant's family doctor's] report and agreed with his conclusions.

He noted that although no bone scan was performed to make a definitive diagnosis, there is ample medical research to consider the probability of this to be high. X-ray reports dating back to March 22, 1996 supported no spinal degenerative or arthritic findings. After referring to research and reports in the area of whiplash and disc disruption, he concluded:

Therefore, in considering [the Appellant's] x-ray reports, onset and chronology of the symptoms as well as research regarding these types of injuries, I consider [Appellant's family doctor's] conclusions to be highly probable.

[Appellant's sports medicine specialist] provided a report dated December 2, 2002, with an addendum dated December 27, 2002.

On December 2, 2002 he stated:

. . . I do not believe anybody disagrees that [the Appellant] has injured her lumbar spine during the motor vehicle accidents and there has been progressive degenerative changes on her CT scans particularly at the L3, 4 level. The question is how do these changes relate to the motor vehicle accidents. These types of changes can occur without inciting trauma and do not necessarily correlate directly with the patients degree of symptoms or level of function. . . .

Upon review of the MPI permanent impairment award schedule for the lumbar spine [the Appellant] does not fit into any of the specific categories of subdivision 3 subheading 20. The degenerative disc disease seen in the January 2000 CT scan is not an unusual finding seen in her age group and is frequently seen in people that have successful recoveries from exacerbations and return to a functional life style. These people frequently have intermittent exacerbation but adapt coping mechanisms to allow them to persevere.

Given the fact that there were no immediate findings on CT suggesting an acute disc herniation immediately following her motor vehicle accidents it is not immediately evident that the accidents are the cause of the degenerative change and that this may simply be the natural degenerative process occurring in her lumbar discs. Alternatively, it is also reasonable to suggest the trauma has enhanced this process. Unfortunately there is not an objective means to evaluate the cause of the degenerative process.

On December 27, 2002, [Appellant's sports medicine specialist] stated:

. . . I do not feel the existence or lack there of (sic) of radiographic findings necessarily equates to the presence of an injury from her motor vehicle accidents. A person could sustain soft tissue injuries including disc injuries which do not show up on initial CT (excluding disc herniations or fractures) and subsequently create degenerative change. The schedule of impairment awards is designed to reflect objective measures of injuries such as fractures or disc herniations and unfortunately this does not represent the entire gamut of injuries which can occur and cause persisting symptoms. . . The progress of degenerative change seen on her CT scans could be suggestive of a subtle disc injury which was not evident on initial CT.

...

I hope this additional information is of value to you in what is a very difficult process to prove causation of lumbar degeneration post trauma.

Counsel for the Appellant submitted that these reports provide evidence from three (3) doctors who have had extensive contact with the Appellant over the years and establish that the injuries to her lumbar spine are a result of the motor vehicle accident.

Accordingly, he submitted that the Appellant should be entitled to a permanent impairment award for her lumbar disc condition.

Submission of MPIC

Counsel for MPIC noted that even the medical evidence put forward by the Appellant as supportive of her entitlement to a permanent impairment award contains qualifications which recognize the weakness of a causative link in this case.

She noted that [Appellant's sports medicine specialist] was unable to say whether the Appellant's disc herniation was attributable to the motor vehicle accident or not. He recognized the possible lack of causation and was unable to fit the Appellant's condition into any category of permanent impairment under Schedule A of Regulation 41/94. She quoted from [Appellant's sports medicine specialist's] opinion that:

Given the fact that there were no immediate findings on CT suggesting an acute disc herniation immediately following her motor vehicle accidents it is not immediately evident that the accidents are the cause of the degenerative change and this may simply be the natural degenerative process occurring in her lumbar discs. Alternatively, it is also reasonable to suggest the trauma has enhanced this process. Unfortunately there is not an objective means to evaluate the cause of the degenerative process.

Counsel for MPIC noted that [text deleted], the Appellant's family doctor, had only stated that:

These degenerative changes may have resulted as a consequence of the significant axial force sustained in [the Appellant's] previous motor vehicle accidents (emphasis added).

He was not able to fit the condition in to the other spinal impairment under Part 1, Division 1, Section 21.

Having regard to the evidence of [text deleted], the Appellant's chiropractor, counsel for MPIC reviewed his opinion that the Appellant is entitled to a permanent impairment for a spinal impairment, particularly alteration following the herniation of an intervertebral disc. She noted several problems with his appeal.

The articles cited by [Appellant's chiropractor] in support of his view dealt with cervical whiplash and not lumbar injuries. He also referred to an article which stated that whiplash injuries predisposed patients to cervical degenerative osteoarthritis, although lumbar

degeneration is not synonymous with osteoarthritis and there was no indication on the CT scans that there was any osteoarthritis in the Appellant's lumbar spine.

[Appellant's chiropractor] had also indicated in 1997 that the Appellant had pre-existing degenerative changes to her lower back with a poor back condition due to the cumulative effects of motor vehicle accidents which occurred prior to 1994.

Counsel for MPIC noted, most importantly, that in spite of [Appellant's chiropractor's] views, the Appellant did not suffer from a disc herniation; which is the only ground for a permanent impairment under the statutory provision is Section 21. [Appellant's chiropractor] agreed with [Appellant's family doctor] that the Appellant's back condition would be closest to item 21, yet there was no disc herniation, which is a requisite for an award under Section 21(a).

Counsel for MPIC relied upon a report submitted by [text deleted], Medical Director for MPIC's Health Care Services Team. [MPIC's doctor], after reviewing the material, noted, on May 11, 2000, that the Appellant had been attending for chiropractic treatment since 1993 and had been considered totally disabled as a result of this low back and other pain since that time.

A review of this material, indicates that prior to the collision in question, the patient had significant cervical spine pain, thoracic spine pain, lumbar spine pain, as well as headaches. She was described as having a chronic pain syndrome.

He concluded there was insufficient evidence

to indicate that the patient's identified discopathy on CT scan is

a) related to her pain complaints or

b) related to the condition in question. Therefore, it would not entitle her to a permanent impairment award.

Counsel also relied upon an opinion provided by [text deleted], Chiropractic Consultant for MPIC, who noted on April 26, 2000 that:

. . . there is little literature relating minor motor vehicle trauma to disc injury and subsequent spinal degenerative changes, nor is the relationship between these changes in the patient's syndrome clear. There is literature suggesting that many degenerative changes, including disc bulges and herniations, are normal concomitants of the normal spine and are not necessarily problematic or related to specific events.

Counsel for MPIC submitted that in order to establish a medically probable cause and effect relationship between the motor vehicle accident and the Appellant's disc degeneration, it would be necessary to demonstrate

- ◆ A medically probable cause;
- ◆ A medically probable effect; and
- ◆ A medically probable temporal relationship between the cause and effect.

Counsel for MPIC submitted that the Commission should rely upon the written evidence of [Appellant's sports medicine specialist], [MPIC's doctor] and [MPIC's chiropractor], who are experts in the area, that there is a lack of probable cause and effect connecting the motor vehicle collisions after 1994 to the lumbar spine condition of the Appellant.

Discussion

The onus is on the Appellant to show that, on a balance of probabilities, she suffers from a condition, caused by the motor vehicle accident, which entitles her to a permanent impairment award. The Appellant is seeking a permanent impairment award under Section 21, Part 1, Division 1, Subdivision 3 of Regulation 41/94 (Schedule A).

Compensation for permanent impairment based on Schedule

1 Compensation for permanent impairments shall be determined on the basis of Schedule A.

21. Other spinal impairments

- | | |
|--|---------|
| (a) Alteration following the herniation of an intervertebral disc: | |
| (i) with disoidectomy, including any ankylosis following a graft, functional limitation and chemonucleolysis; per space: | 6 to 8% |
| (ii) with discoideotomy but without ankylosis, including any functional limitations and chemonucleolysis; per space: | 5% |
| (iii) without discoideotomy or chemonucleolysis, including any functional limitations, per space: | 3 to 5% |
| ... | |
| (e) Alteration of the spinous process, a transverse process or of a lamina following a fracture, a chip fracture or pseudoarthrosis: | 0.5% |

The panel has carefully reviewed the evidence and submissions of the Appellant and MPIC.

On balance, the evidence of a number of doctors, including the radiologists who interpreted the Appellant's CT scans, [MPIC's doctor], [MPIC's chiropractor] and [Appellant's sports medicine specialist] have identified degenerative changes in the Appellant's lumbar spine.

However, there is no objective evidence to show, on a balance of probabilities, that the Appellant suffers from a lumbar spine disc injury caused by the motor vehicle accident and not by degenerative and normal processes, such as aging. We find that the Appellant has failed to establish, on a balance of probabilities, that there is a causal connection between the motor vehicle accident and the Appellant's condition.

The panel agrees with counsel for MPIC that the Appellant has not met the onus of establishing that she is entitled to a permanent impairment award for the lumbar disc conditions identified in her CT scans in 1998 and 2000.

The panel is also of the view that there is insufficient evidence of a compensable injury resulting from the motor vehicle accident which would fall under the permanent impairment schedule contained in the MPIC Act and Regulations. There is no evidence of any reported disc herniation pursuant to Section 21(a) and no evidence of a fracture or alteration to the spinous process caused by the motor vehicle accident, in accordance with Section 21(e) of the Regulations.

Accordingly, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that she is entitled to a permanent impairment benefit under the MPIC Act and Regulations. Accordingly, we hereby dismiss the Appellant's appeal and confirm the Internal Review decision dated October 20, 2000.

Dated at Winnipeg this 7th day of June, 2007.

LAURA DIAMOND

NEIL COHEN

DR. PATRICK DOYLE