

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-26**

PANEL: Ms Laura Diamond, Chairperson
Mr. Paul Johnston
Ms Carole Wylie

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

HEARING DATE: June 14, 2007 and September 5, 2007

ISSUE(S): Was the Appellant's entitlement to Income Replacement Indemnity benefits properly terminated under Section 110(1)(a) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act')

RELEVANT SECTIONS: Section 110(1)(a) of the MPIC 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 was injured in a motor vehicle accident on January 2, 2002.

At the time of the accident the Appellant was employed as a long-haul truck driver on a full time basis. He had held this employment since December of 2000. The injuries which he sustained in the motor vehicle accident interfered with his ability to return to his pre-accident employment

and he was in receipt of Income Replacement Indemnity ('IRI') benefits from MPIC for approximately twenty (20) months.

The Appellant's pre-accident medical history included incidents of back pain as well as compensable accidents under the *Workers Compensation Act of Manitoba*.

On September 16, 2003, the Appellant's case manager wrote to him indicating that, although the Appellant was of the view that he was unable to return to long-haul truck driving because of the pain medication he was taking due to his injuries, as well as ongoing sleep problems, MPIC was of the view that the Appellant's back pain had returned to his pre-motor vehicle collision status and that he no longer required medication pertaining to his injuries from the motor vehicle accident. As well, the case manager relied on video surveillance evidence to conclude that the Appellant had provided false or inaccurate information in regard to his physical abilities, and that a medical condition arising from the motor vehicle accident had not been identified which prevented him from returning to his pre-accident employment.

The Appellant sought an Internal Review of the case manager's decision. On December 17, 2004, an Internal Review Officer for MPIC reviewed the Appellant's pre-accident medical history and Workers Compensation benefits. He noted that after these incidents, the Appellant pursued retraining and obtained employment as a long-distance truck driver for [text deleted]. He also reviewed the Appellant's pre-existing medical problems with obesity, diabetes and back and neck injuries. He reviewed medical information received from the Appellant's physician, [text deleted], his physiatrist, [text deleted], the results of an independent examination by [text deleted] (an orthopaedic specialist), the videotape evidence, and opinions of [MPIC's doctor #1] and [MPIC's doctor #2], MPIC's Health Care Consultants who viewed the videotapes.

The Internal Review Officer concluded:

In my view, the totality of the medical evidence supports the assertion that twenty months of IRI benefits would adequately address the disabling effect of any soft tissue injuries arising out of the accident of January 2, 2002. The responsibility for any ongoing problems which could interfere with his ability to resume his employment would rest, on a balance of probabilities, with his significant pre-existing conditions. The nature of those pre-existing conditions confirm that [the Appellant] would have continued to have problems therefrom in the future.

Therefore, for the reasons outlined herein, I am dismissing the Application for Review and upholding M[text deleted's] decision of September 16, 2003.

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

Evidence for the Appellant

The panel heard evidence from the Appellant and from [Appellant's physiatrist].

The Appellant testified regarding his previous work history, explaining that before being employed as a truck driver, he had worked as a wood product shift supervisor and for [text deleted].

He described an injury he sustained to his back while improperly stacking wood as a wood product shift supervisor. He also described an injury in 1989 which occurred when he was working for [text deleted] and a cooler fell, causing him to twist and hurt his back.

The Appellant then decided to take up long-distance truck driving. He went through the training process and found that it did not cause him back problems. He described the duties involved in long-haul trucking, which included unloading the trailer by hand, and performing safety checks

requiring him to get down under the truck to check the nuts on the wheels. He also had to crawl around the truck and under it checking axles, etc. He indicated that the job required he fill out paper work to prove he had done all the various inspections.

The Appellant testified that he started employment as a truck driver at the end of December 2000. He loved being a truck driver.

He then described the accident of January 2002, when he was driving his personal van and it was hit by a semi-trailer truck. He described his injuries, which included pain in his knees, arms and wrists, as well as a very sore back, burning fingers, burning knees, headaches and neck pain. He was treated at the [hospital], and also received physiotherapy treatment for the pain in his lower back, which he described as intense, like knuckles pushing into his lower back.

He described difficulty sleeping and indicated that at one time he took six (6) to eight (8) Tylenol #3's a day plus two Vioxx. He indicated that he now takes approximately eight (8) Percocet a day, as Vioxx was no longer available.

The Appellant indicated that he would like to return to truck driving, as he loved that job, but due to his pain (which he experiences while sitting, walking and standing), and due to drowsiness (from sleep difficulties and the medication he takes), he could not work as a truck driver.

The Appellant was asked to review, both on direct and cross-examination, the list of medication he was taking, as well as the videotape surveillance evidence taken of him building a fence at his home. He was also asked to comment on the difficulties that his weight caused, including sleep apnea and resulting drowsiness.

[Appellant's physiatrist] testified that he had examined and treated the Appellant in his capacity as a physician with expertise in rehabilitation medicine. He described the Appellant's injuries in the motor vehicle accident as potentially more severe than he often sees in low velocity accidents. He reviewed the Appellant's problems with sleep apnea and drowsiness, as well as back pain. It was his view that the Appellant's difficulties were a result of motor vehicle accident related injuries. His prognosis was that the Appellant's ability to have no pain or low pain was poor. While it might be possible for him to return to his pre-motor vehicle accident condition, he did not believe it was probable. He was of the view that the truck driver duties which the Appellant had described would be beyond his abilities.

On cross-examination, [Appellant's physiatrist] was asked to comment upon the video surveillance tapes which depicted the Appellant building a fence in May of 2003, and compare these with the reports of pain which the Appellant had made to his caregivers. [Appellant's physiatrist] agreed that the Appellant's presentation on the video surveillance seemed inconsistent with his presentation to his physician, physiotherapist and MPIC, and that the level of function observed in the video was consistent with an average man in his [text deleted] weighing [text deleted]. He showed no signs of disability and could be capable of returning to work as a truck driver.

Submission for the Appellant

Counsel for the Appellant submitted that the Appellant's IRI benefits had been improperly discontinued by MPIC. The Appellant, who had been employed as a truck driver at the time of his motor vehicle accident in 2002, had described his enjoyment of the job. Following the significant motor vehicle accident of January 2002, the Appellant could not work, and has not been able to work since.

Counsel for the Appellant submitted that MPIC's conclusion that there is no causal link between the motor vehicle accident and the Appellant's inability to return to work was not correct. He submitted that the Appellant is not in a condition to return to his pre-motor vehicle accident employment. The physical demands of the duties of a truck driver could not be met by the Appellant, who would not be able to crawl under a truck, lift the hood, hook-up a trailer or load and unload it. All of this would place significant demands upon his back. It was submitted that these demands are far in excess of the activities shown on the surveillance tapes, where the Appellant builds a fence, assisted by his daughter.

Counsel noted that there was no evidence of the weight of any of the objects which were depicted in the video tape, how long the Appellant was able to work at the tasks, and how often and how long his breaks were. It was clear from the video tape evidence that the Appellant moved slowly, and hardly ever lifted anything far off the ground. Any significant bending was done by his daughter.

Counsel for the Appellant also reviewed the Appellant's pain and the effect it has had on his ability to sleep. He described the Appellant as being "constantly sleep deprived" which would make him perpetually driving impaired.

He also reviewed the pain medications which the Appellant takes, describing them as opiates. One of those medications, Percocet, causes drowsiness and potentially impairs people, preventing the Appellant from working as a truck driver.

Counsel reviewed the evidence of [Appellant's physiatrist] and the Appellant's family physician, concluding that it had been established that the Appellant cannot return to his pre-accident work. Counsel for the Appellant also reviewed the question of causation, and reviewed case law, including a Supreme Court of Canada decision on this issue. It was his position that any pre-existing history which the Appellant had with back problems had long since resolved, as he had clearly been working without pain prior to the motor vehicle accident. Since the motor vehicle accident that had not been the case. He submitted that [Appellant's physiatrist] has never deviated from his position that the Appellant's pain was caused by the motor vehicle accident.

Counsel for the Appellant also addressed MPIC's position that it was the Appellant's weight related sleep apnea which was preventing him from sleeping and that this had nothing to do with the motor vehicle accident. Counsel submitted that the Appellant's weight and sleep apnea condition did not change after the motor vehicle accident and that these did not prevent him from working before the motor vehicle accident.

What has changed, he submitted, is that the Appellant is now taking Percocet because of his motor vehicle accident injuries and this interferes with his ability to work as a truck driver.

Counsel for the Appellant concluded, that in weighing the evidence, the Appellant has demonstrated, on a balance of probabilities, through "incredible, clear common sense evidence" that he is unable to return to work as a truck driver as a result of his motor vehicle injuries, and that his IRI benefits should be restored and reimbursed.

Evidence for MPIC

[MPIC's doctor #2], MPIC's Medical Director, testified regarding the high rate of recidivism of low back pain, citing a ninety (90%) percent change of recurrence in a lifetime, and sixty (60%) percent annually.

[MPIC's doctor #2] testified that he had reviewed the medical evidence on the Appellant's file, as well as [MPIC's doctor #1's] opinion that there was not a probable causal relationship between the Appellant's ongoing back pain and the motor vehicle accident. He agreed with [MPIC's doctor #1].

In [MPIC's doctor #2's] view, the Appellant was able to return to work, and his review of the video surveillance footage supported this view.

[MPIC's doctor #2] reviewed some of the reported complaints of pain and symptoms which the Appellant had expressed to his caregivers and noted that they did not seem completely consistent with the type of activities which were depicted in the video tape surveillance of the Appellant constructing a fence.

[MPIC's doctor #2] reviewed the Appellant's reported difficulties with sleep apnea and obesity, as well as his pain medication records. It was [MPIC's doctor #2's] view that the need for this medication was not attributable to the motor vehicle accident. With respect to the ability to drive and consume Percocet, [MPIC's doctor #2] testified that this assessment would be the responsibility of a patient's treating doctors, in their discretion after assessing the drug's impact on the individual.

[MPIC's doctor #2] concluded that as far as the Appellant's motor vehicle related injuries were concerned, the Appellant was able to return to work as a truck driver.

Submission for MPIC

Counsel for MPIC submitted that the evidence unequivocally showed that the Appellant was capable of returning to work. She noted that the issue of causation was only a secondary issue which might need to be decided by the Commission as an alternative.

Counsel reviewed [Appellant's physiatrist's] evidence, as well as the evidence of [MPIC's doctor #2]. It was her submission that both were of the view, after reviewing the video surveillance, that the Appellant was capable of returning to work as a truck driver. She submitted that this was the overwhelming view of the majority of the medical specialists who had examined the Appellant or reviewed his file, with the exception of his family doctor, [text deleted], the least specialized of all these physicians in regard to that type of assessment.

Counsel submitted that although the Appellant's back had been aggravated by the motor vehicle accident, after twenty (20) months of IRI benefits, he was sufficiently recovered to be able to return to work.

Counsel for MPIC also submitted that, in the event that the panel were to find that the Appellant was not capable of returning to work, this was not due to the motor vehicle accident. The panel must take into account, she submitted, the Appellant's other pre-existing conditions of sleep apnea, diabetes, morbid obesity for at least fifteen (15) years, chronic back pain for almost twenty (20) years, and possible hypertension and hypercholesterolemia. MPIC submitted that

the motor vehicle accident had not caused the multiple health problems the Appellant suffers from and therefore, the motor vehicle accident does not preclude him from returning to work.

She reviewed two (2) previous workplace injuries the Appellant had suffered, as well as an earlier diagnosis of osteoarthritis, disc degeneration, and muscular pain. Earlier medical reports regarding his early Workers Compensation Board injuries indicated the Appellant felt he had never fully recovered and he had been diagnosed with chronic back pain and sciatica.

She pointed out the similarity of symptoms in his pain in 1999 and 2000, to his complaints in 2003, when his case manager terminated his IRI benefits.

Counsel for MPIC also pointed to a CT scan in 2004 which demonstrated advanced to mild degenerative discal disease, moderate posterior facet disease, and other non-trauma issues. She noted that both [Appellant's physiatrist and MPIC's doctor #2] had testified that these image findings were not caused by trauma, but rather, by age and genetics.

She also reviewed the Appellant's lengthy history with obesity and its possible contribution to his low back pain and sleep apnea. She emphasized that the Appellant's sleep apnea and alleged daytime drowsiness were pre-existing conditions and not caused by the motor vehicle accident.

In reviewing his pharmaceutical records, counsel for MPIC noted that the Appellant was prescribed Percocet and Trazodone. For both medications, pharmaceutical information only cautions one not to drive until they know how they will react to the medicine. In any event, she noted that the Appellant's use of these medications was not medically required in relation to injuries arising out of the motor vehicle accident in question.

Rather, counsel submitted that the Appellant had suffered an increase of back pain and other symptoms following the motor vehicle accident, but this was temporary, and now resolved. Any need for Percocet he might have now and since September 2003, was not caused by the motor vehicle accident. In any event, MPIC submitted that Percocet did not preclude the Appellant from driving. She submitted that the Commission should adopt the opinions of [Appellant's physiatrist, MPIC's doctor #2 and MPIC's doctor #3] that the Appellant is not precluded from returning to work as a truck driver simply by reason of his continued consumption of Percocet.

She submitted that there was no causal connection between the Appellant's recent symptoms and the motor vehicle accident. He did sustain some injuries from the motor vehicle accident but these healed over time, and by September 2003 he was capable of returning to work.

Counsel for MPIC urged the Commission to uphold the decision of the Internal Review Officer and find that the Appellant was not precluded from performing the essential duties of a truck driver due to any physical injury caused by the motor vehicle accident.

Discussion

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;

Manitoba Regulation 37/94:

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The onus is on the Appellant to show, on a balance of probabilities, that he is unable to return to work as a truck driver due to his motor vehicle accident injuries.

The panel has reviewed the information on the Appellant's file, including several medical reports, and the videotape evidence shown at the hearing. We have also reviewed the evidence of the Appellant, [Appellant's physiatrist and MPIC's doctor #2], and the submissions of counsel.

The panel finds that the Appellant has failed to establish, on a balance of probabilities, that he could not work as a truck driver after September 2003.

It is our view that the bulk of medical evidence to support his claim of inability to work, from [Appellant's physiatrist] and [Appellant's doctor], was largely based upon subjective complaints of the Appellant. On the other hand, the video tape evidence demonstrates a level of physical ability that would be consistent with an ability to perform the duties of a truck driver, or at least, some eighteen (18) months or more after the motor vehicle accident, with an ability to undertake the rehabilitation necessary to condition the Appellant to do that job.

The panel notes, for example, the report of the Appellant's physiotherapist, [text deleted], dated March 14, 2003. The impairments of function preventing the Appellant from performing his full time regular job duties at that time are set out:

[The Appellant's] history of diabetes, obesity and previous back and neck injuries are likely contributing to his current chronicity and delayed recovery. [The Appellant] has also recently separated with his wife.

The impairment of function which prevents [the Appellant] from performing his full time regular job duties include:

- limited sleep pattern – 3 ½ hours per night
- daily medication use: 8 percocet, 2 Vioxx
- limited sitting tolerance – 20 minutes
- limited walking tolerance – 20 minutes

It is the panel's view that these complaints are related, not to the motor vehicle accident, but to other factors.

This was emphasized by [independent orthopedic specialist], in his report dated March 25, 2003, where he stated:

This patient has multiple pre-existing conditions—diabetes mellitus, morbid obesity, degeneration of cervical, dorsal and lumbosacral spine, degeneration of spinal discs, and history of previous low back pain.

He was involved in a motor vehicle accident on January 8, 2002, and sustained multiple bruises, and soft tissue strain to his neck and low back.

His progress has been prolonged. He has now no impairment due to this accident. I expect no permanent impairment and no sequelae from the effects of this accident.

Nor is the panel of the view that the Appellant's consumption of Percocet alone prevents him from being able to drive a truck. There is no evidence from a medical practitioner which indicates that the Appellant is not able to drive.

Even if the panel had any doubts about the Appellant's ability to perform the duties of a truck driver, the panel could not find that the Appellant has established, on a balance of probabilities, that such difficulties are due to the motor vehicle accident.

His condition may be complicated by factors such as weight and sleep apnea, which are significant causes or contributors to any drowsiness he may experience, but he has failed to establish that motor vehicle accident related pain factors are the reason for his sleep problems.

The Appellant has not established, on a balance of probabilities, that any ongoing damage to his back resulted from the motor vehicle accident. The only medically verified condition the Appellant suffers from in regard to his back is degenerative in nature, due to normal wear and tear, aging, and the strain of carrying excess weight.

[Appellant's physiatrist] indicated that when he provided his reports of July 21, 2005, he was not aware of the Appellant's previous incidents of back pain. However, the Appellant had previously suffered from back pain as far back as 1986, and has suffered from various perturbations of that condition since that time. On cross-examination, the Appellant indicated that he had suffered from chronic low back pain, off and on, for a period of twenty (20) years.

While the motor vehicle accident may have exacerbated that pain for a period of time, now, and at the time of the case manager and Internal Review decisions, over eighteen (18) months after the motor vehicle accident, there is no medical evidence to show that any back pain he was or may still be suffering from is different from his previous experience of back pain prior to the motor vehicle accident. The panel accepts [MPIC's doctor #1's] view, as expressed in his report of July 28, 2003 that "on the balance of probabilities, [the Appellant's] low back pain has returned to his pre-motor vehicle collision status. Ongoing symptoms are not attributable to the January 8, 2002 motor vehicle collision".

The panel cannot find that in September 2003, the Appellant's back was in a different state than it was in prior to the motor vehicle accident.

Accordingly, the Commission finds that the Appellant has failed to meet the onus of showing, on a balance of probabilities, that the Internal Review Officer erred in deciding that the Appellant was not able to return to his pre-motor vehicle accident duties as a result of injuries resulting from the accident. Accordingly, the Commission finds that the Appellant's entitlement to IRI benefits was properly terminated.

The Appellant's appeal is hereby dismissed and the decision of the Internal Review Officer dated December 17, 2004 confirmed.

Dated at Winnipeg this 22nd day of October, 2007.

LAURA DIAMOND

PAUL JOHNSTON

CAROLE WYLIE