

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-178**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Mr. Les Marks

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

HEARING DATE: December 20, 2007

ISSUE(S): Entitlement to Income Replacement Indemnity benefits and
physiotherapy treatment expenses.

RELEVANT SECTIONS: Sections 81(1) and 136 of The Manitoba Public Insurance
Corporation Act ('MPIC Act') and Section 5 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 January 10, 2003. Although the medical information on his file indicated that within days of the motor vehicle accident he was back at work performing all duties, he continued to see his physician and physiotherapist, who agreed that he was back at work with some symptoms.

The Appellant was discharged from physiotherapy treatment on September 30, 2003 after his physiotherapist advised that he had been provided with a home exercise program and was at work, full functioning with symptoms, capable of working full duties.

However, on May 12, 2004, the Appellant contacted his case manager and advised that he had been to see his doctor and was advised to take time off work for approximately six (6) to eight (8) weeks. He complained that his neck was sore after reading for one-half (1/2) hour, had limited movement without pain and he was having difficulty with left knee pain.

His physician diagnosed a cervical strain. The Appellant sought Income Replacement Indemnity ('IRI') and further physiotherapy benefits.

However, the Appellant's case manager believed that the medical information on the Appellant's file confirmed that he had sustained only a minor strain to the cervical spine as a result of the motor vehicle accident and that it was not medically probable that any symptoms reported in 2004 were a direct result of the motor vehicle accident. Rather, it was her view that it was medically probable that his symptoms were a by-product of his general day-to-day work activities. IRI benefits and funding for physiotherapy treatment expenses were denied, as they were not found to be a direct result of the motor vehicle accident.

The Appellant sought Internal Review of his case manager's decision. On September 13, 2004 the Internal Review Officer found that it was medically probable that his symptoms were a by-product of his general day-to-day work activities, and that it was not medically probable that any of the Appellant's symptoms reported in 2004 were a direct result of his motor vehicle accident.

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

Evidence and Submission for the Appellant

The Appellant described his work history and the demands of his job, which involved lab work, with research and a lot of reading.

He described the motor vehicle accident and his return to work following the accident, during a very busy time at his lab, working on the [text deleted] issue. He testified that he had pain in his neck but was able to do a variety of work including lab work, reading, computer work and tests. Despite the pain he was suffering, he continued working, because, due to previous experience with motor vehicle accidents, he expected that his whiplash symptoms would disappear within a short time frame.

In May 2003 he noticed a tingling in his fingers, but he attributed this to the gloves that they were using at work. It was only later, when an MRI found a disc herniation, that it occurred to the Appellant that this could be a cause of tingling in his hand.

In the summer of 2003 the Appellant took a new job as a laboratory manager. He was still suffering from pain in his neck, but was able to vary his tasks and hoped that the pain would go away.

Then, in January of 2004 he began a major review project for a grant application. This involved quite a bit of sitting at a desk and reading. The Appellant testified that he just could not do this work because of neck pain.

Around the same time he began to suffer an exacerbation of his knee problems; he now wears a knee brace for that issue.

In May 2004, the Appellant found that he could not work at his job any more due to the pain.

He saw [Appellant's doctor #1], his general practitioner, who referred him to [Appellant's doctor #2]. He also saw [Appellant's doctor #3]. He was prescribed Tylenol 3 and physiotherapy. However, he found that he could not take sufficient dosages of the medication to kill the pain and still be able to perform his duties at the same time. Therefore, he was off work from his job from May 2004 to March 2005. He testified that he needed this time for his neck to recover.

The Appellant also saw [Appellant's doctor #4], and [Appellant's physical medicine and rehab specialist], who requested an MRI which disclosed the herniated disc.

Reports from [Appellant's doctor #1] and [Appellant's physical medicine and rehab specialist] were submitted. Both were of the view, the Appellant submitted, that the Appellant's neck pain stemmed from his motor vehicle accident. [Appellant's physical medicine and rehab specialist] indicated that the Appellant suffered a chronic whiplash disorder (WAD) grade 2 and that on a balance of probabilities, the major motor vehicle collision played a significant role in his symptoms.

The Appellant testified that he went back to work on a graduated return to work program in March 2005. However, he still has difficulty with reading at a desk job.

The Appellant submitted that although he had returned to work immediately following the motor vehicle accident, due to the demands upon his workplace at the time, he did return with pain, which he had at the time hoped would go away. He put his job ahead of his own health at that time, but eventually, was forced to stop work due to the neck pain arising out of the motor vehicle accident. He also required further physiotherapy treatment to deal with that pain.

Evidence and Submission for MPIC

Counsel for MPIC submitted that the Appellant's symptoms were not related to the motor vehicle accident of January 10, 2003 and that he should not be entitled to IRI benefits and physiotherapy treatment expenses. She referred to a review completed by [text deleted], Medical Consultant to the MPIC Health Care Services Team, and dated July 31, 2007. [MPIC's doctor] concluded:

The information obtained from the reports submitted by [Appellant's physical medicine and rehab specialist] and [Appellant's doctor #4] does not indicate [the Appellant] has been noted to have objective physical findings of a physical impairment that might prevent him from performing his work duties. It is noted in [Appellant's doctor #4's] report that [the Appellant] states he cannot return to work based on subjective complaints. In other words, it is not medically probable that either health care professional would advise [the Appellant] not to return to work if [the Appellant] requested medical clearance to do so.

Counsel for MPIC also referred to a further review by [MPIC's doctor] dated December 10, 2007. [MPIC's doctor] concluded that:

Information obtained from the above noted reports does not lead me to change the opinions previously rendered.

It should be noted that the reports do not contain objective medical evidence indicating [the Appellant] has been identified as having a physical impairment of function that might negatively affect his ability to perform his pre-accident employment duties on a full-time basis.

The information leads me to conclude that [the Appellant's] reluctance to return to work is a byproduct of his subjective complaints and not secondary to a physical impairment he developed secondary to the incident in question.

Counsel for MPIC submitted that it was not sufficient to find that the motor vehicle accident had “possibly” caused the Appellant’s symptoms. Both MPIC and the Commission apply the test of the balance of probabilities, in determining whether the injuries complained of were caused by the motor vehicle accident. She submitted that the correct question which must be answered is whether it is probable that the Appellant’s current symptoms were caused by the accident, which occurred almost five (5) years ago. She submitted that it was not.

Counsel for MPIC also submitted that even if it were to be determined that the accident was the cause of the Appellant’s current symptoms, the Appellant had failed to establish that physiotherapy was medically required.

Discussion

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

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;
- (b) the purchase of prostheses or orthopedic devices;

- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

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;
- (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The onus is on the Appellant to establish, on a balance of probabilities, that his neck pain was and continued to be a result of the motor vehicle accident.

The Appellant presented credible evidence that he continued to experience neck pain from the date of the motor vehicle accident until the present time. He went back to work with pain, thinking that the pain would improve or go away, as had been his previous experience.

However, the Appellant found that his neck pain was exacerbated by certain work duties. His job required a lot of sitting and reading in a neck forward position. Such duties, (in particular, conducting an extensive literature review which required a great deal of reading in that position) caused him severe neck pain. He continued to perform the duties of his job, with more and less pain at different periods, depending upon his duties. However, in May of 2004, the Appellant's neck pain became sufficiently exacerbated to the point where he could no longer perform the duties of his job.

The panel has reviewed the evidence of the Appellant's general practitioner, [Appellant's doctor #1]. On June 7, 2004, he provided a report describing the Appellant's ongoing neck pain and sub-occipital pain. He described the treatments which had been attempted and noted the Appellant's neck problems were aggravated by some of his work duties in January and February of 2004. He stated:

In summary, [the Appellant] continues to experience chronic mechanical neck pain, which on balance of probabilities is related to the motor vehicle accident of January 10, 2003. Treatment do (sic) date has not been helpful.

On June 13, 2005, [Appellant's doctor #1] again reported, concluding that:

In summary, this gentleman has ongoing partial disability due to a soft tissue neck injury as a direct result of the motor vehicle accident sustained on January 10, 2003.

[Text deleted], a specialist in physical medicine and rehabilitation, saw the Appellant on May 29, 2007 and reviewed the results of a cervical/thoracic MRI. The MRI demonstrated a central and right C6-7 disc herniation. When asked for his opinion regarding the role of the motor vehicle accident with the Appellant's neck pain, [Appellant's physical medicine and rehab specialist] stated:

He asked regarding my opinion on the role of a motor vehicle collision that occurred approximately 4 years ago. In terms of the disc herniation I advised him not it was possible that the collision resulted in the disc herniation, but at this point in time I cannot be more definitive. Regarding his "mechanical" neck pain, he describes an appropriate temporal relationship with onset of symptoms immediately following the motor vehicle collision. Based on the history provided to me he did not have any similar neck symptoms prior to the collision and these symptoms have been persistent. His symptoms and physical findings would be consistent with a chronic whiplash associated disorder (WAD) grade 2. Based on the history provided to me, on a balance of probabilities the motor vehicle collision played a significant role in these symptoms. At this point in time his symptoms have been stable and in terms of prognosis I would expect much the same.

Both [Appellant's doctor #1], the Appellant's general practitioner, and [Appellant's physical medicine and rehab specialist], had the opportunity to examine the Appellant and assess his credibility. [Appellant's physical medicine and rehab specialist] had the added benefit of reviewing an MRI scan of the Appellant's neck. Both were of the view that the Appellant's neck pain stemmed from the motor vehicle accident, with [Appellant's physical medicine and rehab specialist] stating that it was possible that the disc herniation was a result of the motor vehicle accident and that on the balance of probabilities, the motor vehicle collision played a significant role in the Appellant's symptoms.

On the other hand, [MPIC's doctor], MPIC's Health Care Consultant, did not have an opportunity to assess the Appellant's subjective complaints of pain. He was of the view that there was a lack of objective physical findings of impairment in the Appellant's case. He stated on July 31, 2007:

The information obtained from the reports submitted by [Appellant's physical medicine and rehab specialist] and [Appellant's doctor #4] does not indicate [the Appellant] has been noted to have objective physical findings of a physical impairment that might prevent him from performing his work duties. . . .

However, the panel finds that [MPIC's doctor] did not give a great deal of weight to [Appellant's physical medicine and rehab specialist's] findings of a disc herniation and chronic whiplash associated disorder.

The panel prefers the evidence of the Appellant's caregivers, which are consistent with the Appellant's credible evidence of continuing neck pain following the motor vehicle accident. We find that the Appellant has met the onus upon him of showing, on a balance of probabilities, that his neck symptoms related to the motor vehicle accident of January 10, 2003.

Accordingly, we find that the Appellant shall be entitled to IRI benefits from May 2004 to April 2005. We hereby overturn the decision of the Internal Review Officer dated January 10, 2003 regarding IRI benefits and refer the Appellant's IRI benefits back to his case manager or to the IRI calculation unit for calculation of benefits, with interest pursuant to Section 163 of the MPIC Act.

In regard to the entitlement to physiotherapy treatment benefits, the panel notes that the Internal Review decision did not address the issue of whether such benefits were medically required by the Appellant. However, based upon the Appellant's testimony that physiotherapy only provided him with temporary relief, counsel for MPIC argued at the appeal hearing, that this treatment was not medically required. The Appellant argued that such treatments had been prescribed in the reports of [Appellant's doctor #3] and [Appellant's doctor #4].

The Commission finds that the Internal Review Officer erred in concluding that the Appellant was not entitled to physiotherapy benefits because his condition was not caused by the motor vehicle accident. We refer the question of whether physiotherapy treatments are medically required by the Appellant for his condition, back to the Appellant's case manager to obtain a professional medical assessment of that issue.

The Commission retains jurisdiction should the parties be unable to arrive at a mutually satisfactory arrangement regarding the Appellant's entitlement to IRI benefits and physiotherapy treatment expenses for the period from May 2004 to April of 2005.

Dated at Winnipeg this 26th day of February, 2008.

LAURA DIAMOND

NEIL COHEN

LES MARKS