

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-217**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Diane Beresford
Mr. Robert Malazdrewich

APPEARANCES: The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATES: September 21 and 23, 2010

ISSUE(S): Entitlement to Personal Injury Protection Plan Benefits beyond September 30, 2003

RELEVANT SECTIONS: Sections 84(1) and 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], was involved in a single vehicle rollover accident on June 4, 2001. As a result of this accident, the Appellant sustained a basal skull fracture and he suffered blunt chest injuries with a left pneumothorax. He was knocked out in the accident and afterwards had pain in his shoulders, neck, left leg and head. Due to the injuries which the Appellant sustained in this accident he became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

At the time of the accident the Appellant was employed as a security guard with the [text deleted]. Due to his motor vehicle accident related injuries, the Appellant was unable to return to work as a security guard and he became entitled to income replacement indemnity (“IRI”) benefits. The Appellant was classified as a temporary earner at the time of the accident. As a temporary earner, the Appellant was entitled to a 180-day determination of employment. This was completed on April 17, 2003 and the Appellant was determined as a general labourer.

The Appellant was referred for a rehabilitation assessment with [Rehabilitation (Rehab) Clinic] to provide physical findings, functional deficits, limitations, prognosis, work capacity and a treatment plan. In a report dated January 24, 2003, [Rehab Clinic] concluded that:

Conclusions

Diagnoses

The diagnoses are listed in rank order, with most prominent difficulties listed first.

1. Myofascial Neck & Shoulder Pain – severe
2. Myofascial Pain Lumbar Spine – Mild Severity
3. Myofascial Pain Gluteal – Mild Severity
4. Sleep Disorder – Severe

The subjective complaints are consistent with the objective findings. Symptom magnification was not evident.

Prognosis

The claimant’s prognosis for further resolution of pain complaints is poor to fair. The painful condition has now been present 1.5 years and multiple health professionals have tried to help. The claimant has not reached their Maximal Medical Improvement (MMI), and it is expected that further specific medical, and rehabilitative treatments may provide additional benefit. Specific such treatments will be listed under a subsequent heading called Treatment Recommendations.

The claimant’s prognosis for further restoration of function is fair due to long duration of symptoms, failure of all previous rehab, apparent motivation, and partial response to previous medications.

The over-all prognosis is fair due to the following factors:

- long duration of symptoms
- partial response to prior rehab
- apparent motivation
- partial response to previous medications

Work Capacity

The client is not capable of any work at the present time. This may change with the suggested interventions.

Summarized Recommendations

Diagnostic

I recommend the following:

1. X-Ray flexion-extension views of cervical spine to assess bone and joint mobility
2. Bone scan to assess for inflammation and healing
3. Medical consultation with [Appellant's Neurologist] is pending in February 2003.

Therapeutic

1. Myofascial Pain Syndrome. A series of 6 – 8 acupuncture treatments may assist in settling down the pain in his neck, shoulder and lumbar spine. Should this course of treatment provide little relief, I would then recommend a series of trigger point injections to the same areas. His neck pain may also improve with concurrent sustained neck-stretching exercises directed toward relaxing and loosening the myofascial tissues in the neck and shoulder region. The claimant could be educated in this regard via a video and supplementary literature (available at this clinic), or by a physiotherapist or athletic therapist.
2. Sleep Disorder. Tricyclic antidepressants may have therapeutic benefit for sleep disorders, however, as [the Appellant] is already taking **Elavil** 50 mg, p.o, hs, he may benefit from a trial of a supplemental course of **Zopiclone** 5mg, p.o, hs to assist in establishing a regular and restorative sleep cycle. He may also find it beneficial to receive education in relaxation techniques and sleep hygiene.

It may be advantageous to wait until [the Appellant] sees [Appellant's Doctor] and [Appellant's Neurologist] before he embarks upon treatment, so that all of the doctors involved in this gentleman's care are in agreement as to the most efficacious treatment path.

Subsequently arrangements were made for the Appellant to attend a two week intensive treatment program at [Rehab Clinic], which included daily passive modalities and education; injections, medication review and/or management by [Rehab Clinic's Doctor #1] and/or [Rehab

Clinic's Doctor #2]. The Appellant attended and progressed with his treatment plan. In May 2003, the Appellant was then transitioned into a work hardening program to help increase both his strength and workday tolerance. The Appellant proceeded with the work hardening program at [Rehab Clinic] and completed the program.

In a discharge report dated June 16, 2003, [Rehab Clinic] determined that the Appellant was fit for return to his pre-injury level of employment. [Rehab Clinic] also concluded that the Appellant had the demonstrated strength ability for a Heavy employment on an occasional and frequent basis. The report found that through the work hardening program, the Appellant had increased his physical strength to a Heavy demand level. A general labourer position is classified as Medium to Heavy demand level. In the Discharge Report, [Rehab Clinic] specifically concluded that:

During [the Appellant's] Work Hardening Program, he displayed increased function based on his objective test results and his clinical presentation. To date, [the Appellant] has displayed the ability to perform approximately 2-3 hours of active exercise with varying weight loads, in various positions and postures. [The Appellant] did require redirection on an occasional basis to keep focused on his activities. [The Appellant] would often not complete his prescribed exercises due to increased complaints of pain. No form of passive therapeutic intervention was helpful in controlling or reducing [the Appellant's] pain complaints.

[The Appellant] was also involved in a variety of educational seminars, including topics of biomechanics, posture, management of soft tissue injuries, and others relevant to his injury. During programming, [the Appellant] received acupuncture, and medication modification which did not provide significant pain relief. [The Appellant] underwent trigger point injection for his complaint and did not receive any pain relief with this form of treatment.

Occupational Therapy

Prior to discharge, [the Appellant] achieved a functional strength demand of HEAVY-occasional and frequent according to the Dictionary of Occupational Titles (D.O.T.), Fourth Edition.

As [the Appellant] was not employed at the time of his MVA, the rehabilitation goal was to achieve the physical demand level of a Labourer. The Dictionary of Occupational titles (D.O.T.), Fourth Edition was used for a generic description of a Labourer position.

The D.O.T. classifies a Labourer at a Medium-to-Heavy demand level. Based on [the Appellant's] clinical presentation and demonstrated ability on objective testing he demonstrates the ability to meet the full time demands of a Labourer.

In a decision dated September 29, 2003, MPIC's case manager advised the Appellant that:

Based on the medical information I have, you are functionally capable of being a general labourer, your determined employment. Therefore, as we discussed, you are no longer eligible for Income Replacement Indemnity payments as of September 30, 2003.

As we discussed, I continue to try to contact your employer to ascertain whether you have a job to return to. Once I have connected with [text deleted], I will contact you with a decision regarding benefits that you may still be entitled to.

On December 24, 2003, MPIC's case manager rendered a decision regarding the Appellant's entitlement to a continuation of IRI benefits pursuant to subsection 110(2) of the MPIC Act. The case manager found that at the time of the motor vehicle accident, the Appellant was employed in a temporary position with the [text deleted] as a security guard. This employment started in April 2001 and was to have lasted for approximately six months. Further the case manager determined that there was no indication that this temporary employment would have continued on a full-time basis, but rather all indications were that it was only during [text deleted]. The Appellant maintained that his temporary employment with [text deleted] would have continued indefinitely, without a break when his security guard job ended and he would have immediately began work as a carpenter building houses for [text deleted]. The case manager advised that MPIC received no documentation or information from [text deleted] confirming such ongoing employment and as such, MPIC was unable to consider the Appellant's claim for a temporary continuation of IRI benefits beyond September 30, 2003 pursuant to subsection 110(2) of the MPIC Act.

MPIC's case manager also advised that they had forwarded the Appellant's latest medical information and test results to the MPIC Health Care Services Team to determine if the Appellant's ongoing complaints were related to the motor vehicle accident and were limiting his ability to hold the determined employment of a general labourer. Once this review was complete, MPIC's case manager would contact the Appellant to discuss any further entitlement to IRI benefits.

An independent medical examination was then arranged for the Appellant with [Independent Doctor] on May 3, 2004. In his report dated May 10, 2004, based upon the examination of May 3, 2004, [Independent Doctor] concluded that:

There was no evidence of any definite patho-anatomic diagnosis to explain the current symptoms. He is currently approaching 3 years post-MVA. Resolution of any residual MVA-related injuries would have expected to have occurred long ago.

Causation

I could not be certain based on the medical file and the current examination if there is a casual (sic) relation between the examinee's current complaints and the reported injury.

Prognosis

I would expect the estimated prognosis for restoration of function would be good.

Impairment

According to the American medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, (1993), an impairment is *'the loss, loss of use, or derangement of any body part, system, or function.'* The presence of pain, in the absence of an identifiable somatic cause, is not an impairment in itself. Also, *'an individual who complains of pain but who has no objectively validated limitations in daily activities has no impairment.'*

Permanent impairment evaluation was performed in accordance with the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition.

Minor possible impairment may be present related to some deconditioning if his reported activity level and degree of current exercise activities is accurate.

Work Capacity

I would expect that he should be able to progress to a return to work his prior duties as Security. The Functional Capacity Evaluation on file suggested that he would be able to return to the physical demands of his prior duties which appear to be of a MEDIUM level.

[Independent Doctor's] report was referred to MPIC's Healthcare Services Team for review and comment. In an Inter-departmental memorandum dated June 30, 2004, [MPIC's Doctor] concurred with [Independent Doctor's] discussion and conclusion that there was no evidence of any definite patho-anatomic diagnosis to explain the current symptoms. [MPIC's Doctor] noted that:

Based on review of the complete file, I concur with [Independent Doctor's] discussion and conclusion that there is no evidence of any definite patho-anatomic diagnosis to explain the current symptoms. [Independent Doctor] came to these conclusions based on review of the MPI medical file, direct history review and physical examination. On page 10 and 11 of the independent medical report, [Independent Doctor] reviews the initial injuries and discusses the objective improvement of same, as well as identifying the absence of objective findings of an ongoing patho-anatomic diagnosis. [Independent Doctor] also commented on earlier references that the claimant had previously been assessed as capable of returning to physical demands of the pre-accident job which appeared to be at a medium level.

[Independent Doctor] advised that he could not be certain, based on the medical file and the examination, if a causal relationship between the claimant's current complaints and the reported injury existed. In the absence of objective findings and lack of diagnosis to explain the current symptoms, it is agreed that a cause and effect relationship cannot be substantiated at this time.

In a decision dated July 26, 2004, MPIC's case manager confirmed the decision not to pay any further benefits with respect to the June 4, 2001 motor vehicle accident. This decision was based on a lack of medical evidence linking the Appellant's current complaints with the motor vehicle accident. Additionally the case manager noted that [Independent Doctor] concluded that the Appellant was able to perform at a Medium level of physical demands which would meet the functional requirements of the determined position as a general labourer.

The Appellant sought an Internal Review of this decision. In a decision dated October 31, 2005, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the medical evidence failed to establish, on a balance of probabilities, that the Appellant was entitled to further IRI benefits. He found that the opinions of [Rehab Clinic's Doctor #1], [Independent Doctor] and [MPIC's Doctor] were supportive of the decision to terminate benefits.

The Internal Review Officer also reviewed the Appellant's appeal of the decision to deny a temporary continuation of IRI benefits beyond September 30, 2003 pursuant to subsection 110(2) of the MPIC Act. With respect to that issue, the Internal Review Officer found that the Appellant had not provided a reasonable excuse for not filing the Application for Review with respect to this issue within 60 days. Notwithstanding his decision that the Appellant's Application for Review was out of time and ought not to be considered, the Internal Review Officer assessed the merits of the Application for Review and found that he would have upheld the decision of December 24, 2003. He found that the information on the file was insufficient to overcome the indication that the Appellant's job was time limited or that he lost his employment because of the motor vehicle accident.

The Appellant has now appealed that decision to this Commission. At the hearing of this appeal, the Appellant withdrew his appeal respecting the issue of whether he was entitled to further IRI benefits pursuant to subsection 110(2) of the MPIC Act. Accordingly, the issue which requires determination on this appeal is whether the Appellant is entitled to further PIPP benefits beyond September 30, 2003.

Appellant's Submission:

The Claimant Adviser submits that the Appellant's symptoms have remained consistent since the motor vehicle accident of June 4, 2001 and he has never recovered from his motor vehicle accident related injuries. The Claimant Adviser maintains that the case manager relied solely on [Independent Doctor's] opinion regarding causation, even though the referral to [Independent Doctor] for an independent medical examination did not specifically request an opinion about causation.

The Claimant Adviser argues that [Independent Doctor's] opinion regarding causation set out in his May 10, 2004 report, was an insufficient basis upon which to terminate benefits. In his report of May 10, 2004, [Independent Doctor] stated that "I could not be certain based on the medical file and the current examination if there is a casual (sic) relation between the examinee's current complaints and the reported injuries". The Claimant Adviser claims that not enough medical information was provided to [Independent Doctor] for his review. Additionally she submits that his independent medical examination was insufficient to make an informed opinion on causation, especially since the case manager did not enquire as to whether the Appellant's symptoms were causally related to the motor vehicle accident. The Claimant Adviser argues further that [MPIC's Doctor's] opinion focused on the insufficient opinion from [Independent Doctor] regarding causation and that led to the termination of the Appellant's PIPP benefits. The Claimant Adviser claims that [MPIC's Doctor] disregarded [Independent Doctor's] recommendations regarding further treatment to resolve the Appellant's lower back injury.

The Claimant Adviser submits that given [Independent Doctor's] uncertainty with respect to causation, a functional capacity evaluation is required in order to determine if [the Appellant] is capable of performing the duties of a general labourer. The Claimant Adviser maintains that

[Independent Doctor] should have been provided with a physical demands analysis of this employment in order to provide an informed opinion as to whether the Appellant could hold employment as a general labourer. As a result, the Claimant Adviser argues that MPIC erred when they terminated the Appellant's PIPP benefits as of September 30, 2003 since there was an insufficient basis upon which to base that termination. Accordingly, the Claimant Adviser argues that the Appellant's PIPP benefits should be reinstated as of September 30, 2003.

MPIC's Submission:

Counsel for MPIC submits that the medical evidence on the Appellant's file establishes that there is no causal connection between the Appellant's ongoing symptoms and the motor vehicle accident of June 4, 2001 and further that the Appellant can hold the determined employment.

Counsel for MPIC relies upon [Rehab Clinic's Doctor #1's] opinion set out in the [Rehab Clinic] Discharge Report of June 16, 2003 that the Appellant has the demonstrated ability to hold a Medium to Heavy job demand level. Counsel for MPIC argues that the Appellant successfully completed the reconditioning and work hardening program at [Rehab Clinic] and based upon the objective findings in the discharge report, the Appellant was capable of a Heavy employment on an occasional and frequent basis. She maintains that through the reconditioning and work hardening program the Appellant increased his physical strength to a Heavy demand level. A general labourer position is classified at Medium to Heavy demand level and therefore the Appellant is capable of holding the determined employment.

Counsel for MPIC also relies upon [Independent Doctor's] report based upon his independent medical examination of the Appellant and [Independent Doctor's] testimony at the appeal hearing. At the appeal hearing, [Independent Doctor] testified that even though the Appellant's

complaints of pain have remained unchanged since the motor vehicle accident, his functional abilities have in fact improved since the motor vehicle accident. Further, [Independent Doctor] testified that it was impossible to make a causal connection between the Appellant's ongoing condition and the motor vehicle accident based solely on the Appellant's subjective complaints. [Independent Doctor] found that you could not take the Appellant's complaints at face value. Rather you have to take all of the medical reports and information into account in making a determination of causation. [Independent Doctor] found there was no objective diagnosis for the Appellant's condition and he was unable to establish a causal connection between the motor vehicle accident and the Appellant's ongoing complaints. Counsel for MPIC relies upon [Independent Doctor's] opinions that there is no relationship between the motor vehicle accident of June 4, 2001 and the Appellant's ongoing complaints.

In summary, counsel for MPIC submits that the Appellant has not established a causal relationship between his ongoing complaints and the motor vehicle accident and in any event, the Appellant can work at the determined employment. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and that the Internal Review Decision dated October 31, 2005 should be confirmed.

Decision:

Upon a careful review of all of the oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Advisor on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant has not established an entitlement to ongoing PIPP benefits beyond September 30, 2003.

Reasons for Decision:

Upon a careful review of all of the information before it, the Commission finds that:

1. there is a lack of medical evidence establishing that the Appellant's ongoing symptoms and complaints are connected to the motor vehicle accident of June 4, 2001; and
2. the Appellant had the functional ability to hold the determined employment of a general labourer as at September 30, 2003.

The Commission relies upon the opinion of [Independent Doctor], expressed in his testimony at the appeal hearing and in his report of his independent medical examination dated May 10, 2004 that at this point it is not possible to determine a causal connection between the Appellant's symptoms and the motor vehicle accident. Based upon [Independent Doctor's] opinion, the Commission finds that there are no specific links between the Appellant's symptoms and the motor vehicle accident. We find that [Independent Doctor] provided a complete and thorough report respecting his examination of the Appellant. Based upon all the information on the file and his independent medical examination, [Independent Doctor] was unable to make an objective connection between the Appellant's symptoms and the motor vehicle accident of June 4, 2001. The Commission accepts [Independent Doctor's] opinion and finds that there is insufficient evidence to establish an ongoing connection between the Appellant's ongoing symptoms and the motor vehicle accident of June 4, 2001.

Additionally, the Commission relies upon the discharge report of [Rehab Clinic] dated June 16, 2003, wherein [Rehab Clinic] concluded that the Appellant had the demonstrated strength and ability to meet the job demands of a general labourer position. The Commission finds that upon completion of the reconditioning and work hardening program at [Rehab Clinic], the Appellant objectively demonstrated the functional ability to meet the job demands of a Heavy demand

level. A general labourer position is classified as Medium to Heavy demand level and accordingly, the Commission finds that the Appellant was capable of holding the determined employment, despite his complaints of pain. Accordingly, the Commission finds that the Appellant has not established an entitlement to PIPP benefits beyond September 30, 2003.

As a result, the Appellant`s appeal is dismissed and the Internal Review Decision dated October 31, 2005 is confirmed.

Dated at Winnipeg this 30th day of November, 2010.

YVONNE TAVARES

DIANE BERESFORD

ROBERT MALAZDREWICH