

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-44**

PANEL: Ms Laura Diamond

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

HEARING DATE: September 28, 2010

ISSUE(S): Whether the Appellant is entitled to a Permanent Impairment Award for his lost range of motion regarding neck rotation.

RELEVANT SECTIONS: Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Division 1, Subdivision 3, Section 1(d) and (g) of Manitoba Regulation 41/94.

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 was involved in a motor vehicle accident on August 29, 2006. As a result of the accident, he sustained pain in his neck, mid-back and left shoulder. He attended for chiropractic treatment, physiotherapy treatment and athletic therapy treatment, as funded by MPIC.

The Appellant sought a Permanent Impairment Award for impaired neck range of motion as a result of injuries sustained in the motor vehicle accident. He indicated to his case manager that he did not have any osteoarthritis prior to the motor vehicle accident and that osteoarthritis set in as a result of the accident, causing him to lose range of motion regarding neck rotation.

The Appellant's case manager wrote to him on January 14, 2009 indicating that based on the information on file, and in accordance with the MPIC Act and Regulations, it was MPIC's position that he did not sustain an injury as a result of the above noted accident that would qualify him for a Permanent Impairment Award.

The Appellant filed an application for review with MPIC. On February 27, 2009, an Internal Review Officer for MPIC reviewed the Appellant's file and the medical reports and opinions on the file. She agreed with the case manager that the Appellant did not sustain an injury as a result of the accident that would qualify him for an impairment payment and confirmed the case manager's decision.

It is from this Internal Review Decision that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He explained the difficulties he has with range of motion in his neck. He described difficulty turning over in bed or even turning his neck to speak to people. He said that this has been a long-standing problem since the accident, for approximately four years, and that he had never had any such long-standing problems before the accident.

The Appellant described the treatment he sought following the accident. He attended for approximately 40 chiropractic treatments, which did not help him. He then sought treatment from a physiotherapist, which gave him some relief, until the next day, when it might even hurt

more than it had before. The Appellant also went to an athletic therapist for approximately 23 visits.

The Appellant's family doctor had noticed some restriction of range of motion to the cervical spine and obtained X-rays which showed underlying mild degenerative disc disease at the C5-C6 and C6-C7 levels.

The Appellant's athletic therapist, [text deleted], had provided a discharge report which included range of motion measurements for neck rotation. The therapist provided an opinion dated April 28, 2009 that stated:

“X-rays obtained by [the Appellant] have shown Degenerative Disk Disease and Osteoarthritic changes at multiple levels of his cervical spine. Since the patient reports being asymptomatic before the accident, I feel that these changes may be a result of the injuries sustained in the crash.”

The Appellant then described his attendance for an independent examination and assessment with [Independent Orthopaedic Surgeon]. He acknowledged that the report that [Independent Orthopaedic Surgeon] subsequently provided, dated June 28, 2010, indicated that [Independent Orthopaedic Surgeon] did not think that the trauma of the motor vehicle accident caused or exacerbated the development of osteoarthritis.

However, the Appellant submitted that soft tissue damage is not provable by an X-ray and that he had not had any other radiographic tests. The Appellant stated that [Appellant's Doctor] and the athletic therapist believed that his problem in turning his head from side to side was caused by the motor vehicle accident. He submitted that [Independent Orthopaedic Surgeon] only said that he did not think that the trauma had caused the osteoarthritis but he did not say that he knows that it was not the cause.

The Appellant submitted that he would not have gone through all these treatments if he did not have a problem. He recognized that he had not suffered a fracture or ligamentous injury following the motor vehicle accident, but that he had a soft tissue injury that still caused loss of motion. He had never had any long-standing neck problems before the motor vehicle accident and did not recall an example put to him by counsel for MPIC, where he had complained to [Appellant's Doctor], in approximately 2001, of neck pain for two months.

It was the position of the Appellant that he had not had any neck problems of a long-standing nature prior to the motor vehicle accident and that the motor vehicle accident was causing his permanent disability, which could not be fixed. Accordingly he was entitled to a Permanent Impairment Award.

Submission for MPIC:

Counsel for MPIC noted, and confirmed upon cross-examination of the Appellant, that he suffered soft tissue injuries to his neck in the motor vehicle accident and did not suffer any fracture or damage to the ligaments.

Following the Internal Review Decision of February 27, 2009, the Appellant's Athletic Therapist had opined, on April 28, 2009 that the degenerative disc disease and osteoarthritis in the Appellant's cervical spine may have been a result of injuries sustained in the crash.

As a result, the Commission asked [Independent Orthopaedic Surgeon] to provide an opinion as to whether the trauma of the motor vehicle accident either caused or exacerbated the development of osteoarthritis or exacerbated a pre-existing condition in the Appellant's neck.

Counsel for MPIC noted that [Independent Orthopaedic Surgeon] is an orthopaedic surgeon with expertise in the spine and as such, his medical opinion must be respected.

MPIC took the position that the Appellant was not entitled to a Permanent Impairment Award simply for limitations to his range of motion upon rotation of his neck. An examination of the MPIC Act and Regulations showed that there is no Permanent Impairment Award available simply for a limitation in rotation of the neck, without other conditions being present.

Counsel reviewed Regulation 41/94, Division 1, Subdivision 3, Section 1(d), dealing with permanent impairment. That Regulation provides for a permanent impairment of 2.5% for impaired active range of motion following a fracture or ligamentous injury. The Appellant did not suffer a fracture or ligamentous injury and did not qualify for an Award under this Section.

Nor did the Appellant's limitation to range of motion qualify for a Permanent Impairment Award under Division 1, Subdivision 3, Section 1(g), which provides for a Permanent Impairment Award of 2% for excessive active range of motion of C3-C7 following a ligamentous injury.

The Appellant had suffered a soft tissue whiplash type injury to his neck, and the Regulations do not provide for a Permanent Impairment Award for this type of injury, in this type of situation.

Counsel for MPIC then moved on to consider whether the Appellant was entitled to a Permanent Impairment Award on the basis that the motor vehicle accident had caused or exacerbated the osteoarthritis in the Appellant's cervical spine.

Although the athletic therapist had noted that this might be a possibility, counsel submitted that [Independent Orthopaedic Surgeon's] opinion was clear that he did not believe that the motor vehicle accident caused or exacerbated development of osteoarthritis in the Appellant's neck. He had reviewed the records of [Appellant's Doctor] and noted complaints by the Appellant in November 2001 of neck pain for two months. The Appellant had felt cracking with movement, no change with chiropractic treatment, no neural change and no radiation. On examination, [Appellant's Doctor] found a tender diffuse cervical spine with cervical spine spasm. [Independent Orthopaedic Surgeon] stated that this clinical examination, plus radiographs performed in 2001 which showed mild facet arthropathy at the C6-C7 level, confirmed the existence of neck pain and osteoarthritis of the cervical spine prior to the motor vehicle accident.

In [Independent Orthopaedic Surgeon's] view, at best, he could conclude that the Appellant had an exacerbation of a pre-existing condition based upon [Appellant's Doctor's] notes and the current complaints. He stated that he did not think that the trauma of the motor vehicle accident caused or exacerbated the development of osteoarthritis.

Accordingly, counsel for MPIC submitted that the Appellant had failed to meet the onus upon him of showing that he was entitled to a Permanent Impairment Award. He had not brought forward any medical evidence to support or suggest that there was a permanent impairment in accordance with the MPIC Act and Regulations, which should be compensated with a Permanent Impairment Award. He had failed to show that the continuing difficulty in moving his neck was caused by the motor vehicle accident and had failed to meet the onus upon him of providing medical evidence to show that the Appellant was entitled to a Permanent Impairment Award.

Counsel for MPIC submitted that the Appellant's appeal should be dismissed.

Discussion:

MPIC Act:

Lump sum indemnity for permanent impairment

[127](#) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

Manitoba Regulation 41/94:

DIVISION I: THE MUSCULOSKELETAL SYSTEM**Subdivision 3: The Spine**

In the following sections 1 to 4, a reference to fusion denoted by "*" includes bony fusion using an internal fixation device or bone graft material.

1. Cervical spine

(d) impaired active range of motion of the atlanto-axial joint (C1 and C2), following a fracture or ligamentous injury, as documented by evidence of range of motion restriction in rotation (inclinometer method) 2.5%

(g) excessive active range of motion of C3-7 following a ligamentous injury as documented by radiographic instability on flexion extension views (as per Table 1.1), per inter-space. 2%

The Commission has reviewed the evidence of the Appellant at the hearing, as well as the information on the Appellant's file and the submissions of both the Appellant and counsel for MPIC.

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to a Permanent Impairment Award for an impairment of his range of motion, or osteoarthritis caused or exacerbated by the motor vehicle accident.

The Commission concludes that the Appellant has failed to meet the onus upon him in this regard and has failed to provide evidence which supports, on a balance of probabilities, an entitlement to a Permanent Impairment Award.

The Appellant confirmed, and the medical evidence on file showed that the Appellant did not suffer a fracture or ligamentous injury in the motor vehicle accident.

The Appellant testified that he experienced limitations in the range of motion in his neck which he had not suffered before the motor vehicle accident. His Athletic Therapist opined that since the patient was asymptomatic before the accident his osteoarthritic changes may have been a result of injuries sustained in the crash. However, [Independent Orthopaedic Surgeon] did not agree with this opinion.

[Independent Orthopaedic Surgeon] was specifically asked the following question:

“Did the trauma of the motor vehicle accident either cause or exacerbate the development of osteoarthritis or exacerbate a pre-existing condition in [the Appellant’s] neck?”

Following his examination and assessment of the patient and review of the Appellant’s medical records, [Independent Orthopaedic Surgeon] stated:

“[The Appellant] is a [text deleted]-year-old male who was involved in a motor vehicle collision in 2006. His complaint is that of neck pain and decreased range of motion. He self reports that he did not have neck pain prior to this incident. The radiographic findings performed around the time of his accident do reveal degenerative change at the C5-C6 and C6-C7 levels. In addition, there are x-ray reports from November 2001 concerning mild facet arthropathy at the C6-C7 level. Evaluating the notes from [Appellant’s Doctor’s] office, there is an entry dated November 23, 2001 complaining of neck pain for two months. He felt cracking with movement, no change with chiro treatment, no neural change, and no radiation. It continues to say on exam tender diffuse cervical spine with cervical spine spasm. This clinical examination plus the radiographs performed in 2000 confirmed the evidence of neck pain and osteoarthritis of the cervical spine.

It would be thereby concluded that at best [the Appellant] did have exacerbation of a pre-existing condition based upon [Appellant's Doctor's] notes and [the Appellant's] current complaints. I do not think that the trauma of the motor vehicle accident caused or exacerbated the development of osteoarthritis as there are radiographic findings which are similar between the 2006 x-rays and those of 2008 (i.e. the motor vehicle accident did not accelerate osteoarthritis of the cervical spine).

I agree with counsel for MPIC that, absent evidence of fracture or ligamentous injury, the Appellant is not entitled to an award under Subdivision 3, Section 1(d) or(g). Further in light of [Independent Orthopaedic Surgeon's] opinion, the Appellant has not provided sufficient evidence to support his argument that the motor vehicle accident caused or exacerbated the development of osteoarthritis or a pre-existing condition in the Appellant's neck which would entitle him to a Permanent Impairment Award.

Accordingly, the Commission finds that the Appellant is not entitled to an Award for Permanent Impairment benefits.

The Appellant's appeal is dismissed and the decision of the Internal Review Officer dated February 27, 2009 is hereby confirmed.

Dated at Winnipeg this 13th day of October, 2010.

LAURA DIAMOND