

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-78**

PANEL: Ms Laura Diamond, Chairperson
Mr. Wilf DeGraves
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], was represented by Ms Darlene Hnatyshyn of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATE: January 19 and 20, 2011

ISSUE(S): Entitlement to permanent impairment benefits as a result of trauma sustained to Appellant's nose.

RELEVANT SECTIONS: Section 127 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 was injured in a motor vehicle accident on September 28, 2004. He sustained soft tissue injuries to his left wrist, left shoulder, neck and back, as well as a chipped tooth and nose pain. MPIC provided the Appellant with permanent impairment awards for the damage to his teeth. However, his case manager wrote to him on December 14, 2005 indicating that he did not qualify for a permanent impairment award for the injury to his left shoulder, left wrist and nose. The Appellant disagreed and sought an Internal Review, submitting that his nose was broken in the motor vehicle accident.

Following review by MPIC's Health Care Services Team, and in particular an opinion provided by [MPIC's Doctor], an Internal Review Officer for MPIC found, on May 19, 2006 that the deviation of the Appellant's nasal septum was not a bi-product of the motor vehicle accident, and that he was not entitled to a permanent impairment award as a result of trauma sustained to his nose. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence for the Appellant:

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident. Along with injuries to his hand, wrist and shoulder, he recalled that his nose and teeth jammed into the steering wheel. He testified that he was not aware that his nose was bleeding following the motor vehicle accident until the driver of the other car pointed it out to him. He said that he wiped his nose and there was a little bit of blood, a slow leak, which he described as a minor nose bleed, and a bit of blood on his shirt. After time passed, if he would touch his nose, a bit of blood and mucous discharge would result.

The Appellant testified that there was a bite mark on the steering wheel cover and his teeth were damaged.

He described reporting the accident to his case manager, during a cell phone conversation from his driveway. He does not recall the case manager asking if there was any bruising to his face or nose at that time.

The Appellant described some discoloration under his eyes in the few days following the motor vehicle accident (which he did not consider as "huge black eyes") and some swelling to his nose.

He did not attend at the hospital initially, but, upon the suggestion of his case manager that he “memorialize” his injuries, he went to [Hospital], leaving without seeing a doctor, after a five hour wait. He then went to a walk-in clinic [text deleted], but was not able to see a doctor there either.

Finally, he contacted his family doctor and, although it usually would take 4-6 weeks to see him, he explained that he simply wanted to “memorialize” his injuries and asked for the doctor to fit him in for five minutes. He then attended at the doctor’s office and spoke to him briefly, with no examination, and the doctor asked the Appellant to submit a letter, for his signature, recording his complaints.

The Appellant testified that the first medical person who examined him following the motor vehicle accident was a dentist, [text deleted], who he saw ten days after the motor vehicle accident. The Appellant described this examination, which was the first time he had ever seen [Appellant’s Dentist]. The Appellant testified that he had trouble breathing during the dental examination and needed the dentist to take breaks, so [Appellant’s Dentist] suggested to him that he get some medical attention for the injury to his nose.

The Appellant also testified that he did not have a history of nose problems. For a number of years prior to the accident he had experienced some burning in his eyes during the night, accompanied by a dripping nose on one side and headaches. His doctors had been examining the possibility that he had some allergies as a result, but he did not have the substantive issues with his nose that occurred after the motor vehicle accident. After the accident, he continued to have issues with his nose and problems breathing from one nostril. He experienced snoring and sleeping difficulties and problems with air passage on the right side.

On cross-examination, the Appellant admitted that he had not told [Appellant's Dentist], during his examination, that he broke his nose, and admitted that the black eyes or swollen face that he had noted had not been documented by any of the doctors who examined him after the motor vehicle accident.

The Appellant also submitted reports from [Appellant's Doctor #1]. [Appellant's Doctor #1], in a report dated January 10, 2006, noted the Appellant's complaints of a left shoulder strain, left wrist strain, and chipped right first incisor tooth as well as development of mucous and runny nostrils secondary to a contusion of his nose. He described the Appellant's complaints in 2005 of chronic nasal congestion and lack of improvement and his referral to an ENT specialist, [text deleted], who noted a deviated nasal septum causing left sided nasal obstruction. [Appellant's Doctor #1] stated:

“It is quite conceivable, in my opinion, that [the Appellant] could have easily displaced his nasal septum and causing chipping of his first incisor tooth during the same injury, namely, facial impaction on the steering wheel of his car.”

Reports from the [Appellant's Dentist], were also provided. On March 13, 2006, [Appellant's Dentist] reported:

“I am writing to you at the request of [the Appellant]. On Oct. 8th, 2004 I saw [the Appellant] in my office as he had been in a car accident. At that time it was noted that he had sustained Dental and facial trauma to his mouth and nasal area. As reported to MPIC at that time he required attention to tooth #11 as it had sustained a DIL fracture as well as a distal marginal ridge fracture on tooth #46 which he was referred to [Appellant's Endodontist]. At that time I suggested to [the Appellant] that he seek Medical attention for his facial/nasal trauma.”

In August of 2005, after several delays and rescheduling of appointments for various reasons, the Appellant saw [Appellant's ENT Specialist], [text deleted].

[Appellant's ENT Specialist] provided a report dated September 19, 2005 diagnosing the Appellant's deviation of the nasal septum with resulting nasal obstruction.

On September 28, 2005 he reported nasal obstruction symptoms and a deviated nasal septum.

He stated:

“Regarding [the Appellant's] motor vehicle accident, it is possible that the deviated septum is a result of his facial injury that occurred at the time of the motor vehicle accident. He describes signs and symptoms such as a swelling on the face and periorbital ecchymosis that could definitely be related to a nasal fracture. The nasal fracture could cause a deviated nasal septum...”

Finally, on January 9, 2009, [Appellant's ENT Specialist] reported the patient's presentation with left-sided nasal obstruction, describing the motor vehicle accident including facial injuries, dental injuries, black eyes and facial swelling.

In regard to whether a nasal fracture would always be accompanied by the same objective signs, such as swelling, bruising and bleeding, [Appellant's ENT Specialist] indicated that nasal trauma is often not associated with these findings:

“Patients can dislocate their septum with minimal external trauma. It would certainly be more likely if they have had other significant trauma in that area such as what [the Appellant] describes.

Based on all of the above, the likelihood that [the Appellant's] deviated septum occurred at the time of his accident would be a high probability of such an occurrence...

I have reviewed my letter that stated that it was possible that the deviated nasal septum was the result of his facial injury in this motor vehicle accident. Now that I have reviewed more of the notes, I would say that it is now highly probable.”

The Appellant also provided photographs of his nose both before and after the motor vehicle accident and measurements and impressions of a physiotherapist were also included with the Appellant's file.

The panel also heard evidence from the Appellant's brother, who testified that he had seen the Appellant a couple of days prior to the motor vehicle accident and had not noticed any signs of facial or nasal trauma. He learned of the motor vehicle accident when he went to his brother's place to visit and noted some discoloration of his face and swelling to his nose, and asked his brother what had happened. He stated that the Appellant's nose looked kind of swollen and that he was having a hard time breathing, as though he was stuffed up like when you have a cold.

The panel also heard evidence from the Appellant's friend, who saw him approximately two weeks prior to the motor vehicle accident and did not notice any physical signs of facial or nasal trauma. He believed he saw the Appellant fairly soon after the motor vehicle accident, perhaps a week or a little bit more after the event. He testified that he noticed the Appellant's eyes were a little puffy with some discoloration underneath. His nose and upper lip were puffy, and the Appellant's breathing sounded laboured and obvious.

Submission for the Appellant:

Counsel for the Appellant reviewed the motor vehicle accident events, noting that the Appellant's face struck the steering wheel and that he suffered dental injuries and facial and nasal trauma. She noted that MPIC had accepted that the motor vehicle accident was the cause of the Appellant's multiple dental injuries. She submitted that as the Appellant's nose was in close proximity to those teeth (particularly his upper right chipped incisor), it was reasonable to expect that the injury to his teeth could also affect more of his face, especially his nose.

Counsel noted that the file contained ample documentation of the Appellant's complaints of nasal problems, beginning with his complaining to his case manager of his symptoms, and then his complaints to [Appellant's Doctor #1] and to [Appellant's Dentist].

She submitted that the Appellant and the witnesses provided frank, forthright testimony regarding the physical evidence of the Appellant's nasal and facial trauma and the changes in appearance to his nose after the motor vehicle accident. The Appellant testified that the other driver noted a minor nosebleed at the time of the motor vehicle accident which did not seem significant to him at the time and which was not documented because he had never been asked by his case manager or a medical professional whether he had a nosebleed at the time of impact. Evidence from prior to the motor vehicle accident from [Appellant's Doctor #2] who had been investigating a frontal sinus issue, indicated that he had not found previous evidence of a deviated septum prior to the motor vehicle accident.

Although [MPIC's Doctor] reviewed the file and was of the opinion that the motor vehicle accident had not caused the deviation in the Appellant's septum, counsel submitted that [MPIC's Doctor] had not been privy to the information shared by the witnesses and the Appellant at the time of the hearing regarding the discoloration and bruising to the Appellant's nose and face which occurred after the motor vehicle accident.

Counsel noted that both the photos and the assessment of the [Appellant's Physiotherapist] showed the Appellant's nose concaving to the right and narrowed moderately. These are conspicuous changes in form and symmetry.

Counsel also noted that [MPIC's Doctor] had only undertaken a paper review and had not had an opportunity to take an oral history from the Appellant, examine him or assess his credibility. Further, he was not a specialist in the field of ENT medicine.

In contrast, [Appellant's ENT Specialist], who is a respected specialist in the field of ENT medicine had seen the Appellant a number of times. He examined and interviewed him.

[Appellant's ENT Specialist's] reports, particularly his most recent report of January 9, 2009, were quite clear that it was highly probable that the Appellant's deviated nasal septum was a result of his facial injury in the motor vehicle accident.

Counsel also relied upon the previous decision of the Commission in *AC-97-20* which recognized that causation is not always based upon exact scientific principles and one must apply experience and conventional wisdom along with proof, based on a balance of probabilities. Not all complaints reported by Appellants are always documented and a matter may not be reported when it is already under treatment by another specialist. Yet, a delay in the complaint does not necessarily negate the relationship between the trauma and the injury.

Counsel also referred to the Appellant's decision in *AC-07-70* which recognized that not all complaints are always immediately documented and that the Commission is not required to determine the sole cause of an injury with scientific precision. A definitive scientific answer is not required before the Commission can find the Appellant's symptoms are connected to the motor vehicle accident.

Evidence and Submission for MPIC:

Counsel for MPIC relied upon the reports and testimony of [MPIC's Doctor] [text deleted]. [MPIC's Doctor] testified that symptoms of a deviated septum occurring temporally to a motor vehicle accident normally include a fracture, as well as swelling and bruising of the eyes and

nose. A bloody nose would be common, as well as persistent pain, difficulty breathing, some blood hardening and deformity in the shape of the nose. He indicated that one must look at the alignment of the nose and the nostrils for a change, as well as tenderness and trauma to sinuses. Teeth may also be involved. He indicated that within seven days after the motor vehicle accident one would see bruising, with perhaps a minor bump on the front of the nose, although if it was a minor injury there would not be much bleeding.

[MPIC's Doctor] indicated that he had reviewed the Appellant's file but had been unable to identify evidence on the file that a fracture of the Appellant's nose had taken place at the time of the accident. Since later, more detailed assessments showed a deviated septum, with an absence of significant clinical findings close to the time of the motor vehicle accident, it was his view that there was a low probability that the deviation was connected to the accident.

Counsel for MPIC submitted that the evidence of the Appellant's brother and friend contrasted with the medical evidence documented on the file. He submitted that it was at the hearing that, for the first time, the Appellant testified he had a bloody nose. This had not been mentioned in any of his medical reports to his doctors. His brother and friend had not provided corroboration that he had a swollen nose and bruising under the eyes, until the hearing.

Counsel contrasted this with the report of [Appellant's Doctor #1], who saw the Appellant eight days after the motor vehicle accident and noted, in a report dated January 26, 2009 that "I did not notice any superficial facial bruising or swelling, which I would otherwise have noted in my chart." when he saw the Appellant eight days after the accident.

Counsel suggested that the written medical reports of a treating physician who was trained to observe and note important medical details should be preferred to the contradictory evidence of the Appellant's witnesses. He highlighted the Appellant's failure to express to [Appellant's Doctor #1] that his nose had been hit or that his face and eyes were bruised.

Counsel pointed out that it was not until December 1, 2004 that the Appellant first stated that he had broken his nose in the motor vehicle accident, claiming that he had discovered this while in the dentist's chair getting his damaged tooth assessed.

It is this failure to identify the symptoms to his nose early on or to ever discuss or complain of a bleeding nose until more than six years after the motor vehicle accident which seriously undermines the Appellant's credibility, he submitted.

Counsel also suggested that it is possible that [Appellant's ENT Specialist], in concluding that the deviated septum was a result of the motor vehicle accident, was relying upon signs and symptoms (including a swollen face and periorbital ecchymosis) described by the Appellant. Although the Appellant described the symptoms at that late date to [Appellant's ENT Specialist] and stated that they occurred at the time of the motor vehicle accident, this information is in stark contrast to the chart notes of [Appellant's Doctor #1] and [Appellant's Dentist] could not document this kind of trauma.

Counsel relied instead upon the opinion of [MPIC's Doctor] who had reviewed all of the material in the file and concluded that there was not likely a probability that the Appellant's fractured nose was as a result of the motor vehicle accident of September 28, 2004. Had the Appellant suffered a blow to his nose to the extent that he had complained regarding swelling,

bruising and a bloody nose to his case manager and the care providers that saw him after the motor vehicle accident, that would have supported his claim at the appeal that he had suffered injury to his nose in the motor vehicle accident which deviated his septum.

However, the Appellant did not do so and the evidence before the Commission does not tip the scales in his favour, on the balance of probabilities. The Appellant had failed to meet the necessary standard of proof based upon the documentary medical evidence and had provided insufficient information to show that his injury was related to the motor vehicle accident. Counsel submitted that the appeal should be dismissed.

Discussion:

The MPIC Act provides:

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.

The onus is on the Appellant to show, on a balance of probabilities, that the impairment he complains of, a deviated septum, was a result of injuries sustained in the motor vehicle accident.

The panel has reviewed the evidence of the Appellant and other witnesses, the evidence of [MPIC's Doctor] and the submissions of counsel for both MPIC and the Appellant.

The panel has carefully considered the report of [Appellant's Dentist], dated March 13, 2006. [Appellant's Dentist] recounts his examination of October 8, 2004 when he saw the Appellant in

his office. He noted that the Appellant had sustained “dental and facial trauma to his mouth and nasal area”. He also documented, as the Appellant testified, that:

“At that time I suggested to [the Appellant] that he seek Medical attention for his facial/nasal trauma.”

Eventually, the Appellant did see a specialist regarding this problem. [Appellant’s ENT Specialist] saw him on August 15, 2005. He examined and assessed the Appellant, and was later given the opportunity to review the medical information on the Appellant’s file.

[Appellant’s ENT Specialist] provided three reports. In each of these reports he accepted *a possible, and then a probable connection* between the deviated septum and the motor vehicle accident. On September 28, 2005 he stated:

“Regarding [the Appellant’s] motor vehicle accident, it is possible that the deviated septum is a result of his facial injury that occurred at the time of the motor vehicle accident. He describes signs and symptoms such as a swelling on the face and periorbital ecchymosis that could definitely be related to a nasal fracture. The nasal fracture could cause a deviated nasal septum...”

On January 9, 2009, [Appellant’s ENT Specialist] concluded that the connection between the injury and the motor vehicle accident was highly probable. After reviewing [MPIC’s Doctor’s] reports, he stated:

“Based on all of the above, the likelihood that [the Appellant]’s deviated septum occurred at the time of his accident would be a high probability of such an occurrence.”

Further he stated:

I have reviewed my letter that stated that it was possible that the deviated nasal septum was the result of his facial injury in this motor vehicle accident. Now that I have reviewed more of the notes, I would say that it is now highly probable.”

[Appellant’s ENT Specialist] is a well regarded, accepted specialist in the field of Ear, Nose and Throat medicine. He had the opportunity to examine the Appellant and to evaluate him. He had

access to information on the Appellant's file. As a result of his conclusion that it is highly probable that the Appellant's deviated nasal septum was a result of his facial injury in this motor vehicle accident, the panel finds that the Appellant has met the onus upon him of showing, on a balance of probabilities, that this injury was caused by the motor vehicle accident.

Accordingly, the decision of the Internal Review Officer dated May 19, 2006 is hereby overturned and the Appellant's appeal is allowed. The Commission finds that the Appellant's deviated nasal septum was, on a balance of probabilities caused by the motor vehicle accident, and the question of PIPP benefits, and in particular permanent impairment benefits resulting from this injury, will be referred back to the Appellant's case manager for determination.

Dated at Winnipeg this 15th day of February, 2011.

LAURA DIAMOND

WILF DEGRAVES

LINDA NEWTON