

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-023**

PANEL: Mr. Mel Myers, Chairperson
Ms Mary Lynn Brooks
Dr. Sheldon Claman

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

HEARING DATE: August 10, 2011

ISSUE(S): Entitlement to Personal Protection Injury Plan ("PPIP") benefits.

RELEVANT SECTIONS: Sections 70(1) and 71(1) 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 Commission notes that the Appellant was involved in 4 motor vehicle accidents between November 1994 and September 1997. Two Internal Review Officer decisions were issued by MPIC dated December 1, 2004 and February 27, 2008 respectively. The first Internal Review decision dated December 1, 2004 was not appealed by the Appellant to the Commission.

However, the second Internal Review Officer's decision dated February 27, 2008 was appealed to this Commission. In respect of the second Internal Review Officers decision, dated February

27, 2008, the Internal Review Officer in his decision, indicated that the Appellant's primary concerns relate to the accident of April 5, 1995.

On this date, the Appellant was driving a vehicle which was struck from the rear by a 3 ton truck while stopped at a red light. The Appellant sustained back and neck injuries and complained of severe headaches. At the time of the accident, the Appellant was [text deleted] years of age and had been working as a [text deleted] with [text deleted] for almost three years. In this position, she was paid a salary plus commissions. As well, the Appellant was working part-time with [text deleted] as a [text deleted] at sporting and other events.

In order to understand the Appellant's appeal to the Commission in respect to the Appellant's accident of April 5, 1995, it is necessary for the Commission to review the Appellant's claims and the manner in which MPIC has dealt with these claims over the last 17 years. As a result, the Commission reviewed the Internal Review Officer's decision dated December 1, 2004 that was not appealed to this Commission as well as the Internal Review Decision dated February 27, 2008, which was appealed to this Commission.

In 1994 the Appellant made Application for Compensation to MPIC seeking Income Replacement Indemnity ("IRI") benefits dating back to 1994. As well the Appellant was seeking permanent impairment benefits for various scars resulting from arthritis surgeries that she had undergone and was also seeking reimbursement for various medications that she was taking.

Case Manager's Decision August 5, 2004:

The case manager rejected these claims in a decision dated August 5, 2004 on the basis there was no probable causal relationship between the motor vehicle accident and the Appellant's current medical difficulties.

The Appellant made Application to have the case manager's decision reviewed by the Internal Review Officer.

Internal Review Officer's Decision Dated December 1, 2004:

The Internal Review Officer rendered his decision on August 5, 2004 confirming the case manager's decision and rejecting the Appellant's Application for Review. The Internal Review Officer, in arriving at his decision, reviewed all of the medical reports in the file and concluded that there was no objective medical evidence to support the Appellant's complaints and that the Appellant was capable of returning to work. The Appellant returned to work but was laid off in the month of October 1996.

In September of 1998 the Appellant attended upon the case manager and indicated that she had undergone right knee surgery on April 24, 1998, had developed arthritis in both knees due to fibromyalgia from the 1995 accident and developed lupus as a result of that accident. The Appellant's request for reimbursement for the cost of medications and the cost of a [text deleted] course was rejected by the case manager on March 15, 1999. The Commission notes no Internal Review of that decision was ever initiated by the Appellant.

The claim file then remained dormant for 4 years. On May 20, 2003 the Appellant called the case manager indicating she wanted to re-open the file. In a meeting arranged on May 27, 2003,

the case manager was provided with the Appellant's written statement setting out the history of her health concerns. She advised the case manager that:

1. Since 1999, her fibromyalgia had been exacerbated and she had developed arthritis in her spine, hands, elbows, feet and hips.
2. She was firmly of the view the arthritis had been caused by the 1995 accident and also stated she had undergone bilateral carpal tunnel syndrome surgery in 2001 and that the surgery was going to be repeated shortly.

The Internal Review Officer in his decision December 1, 2004 reviewed a report from [MPIC's Doctor #1], a member of the MPIC's Health Care Services Team dated June 29, 2004. In this report [MPIC's Doctor #1] stated that:

1. The Appellant's right knee symptoms were first reported and diagnosed in 1998.
2. If these symptoms were accident related, then they would have been evident after the events of April and May 1995.
3. The right knee condition was unlikely to be accident related.
4. The surgeon who operated on the Appellant indicated that a causal relationship did not exist and the family physician was unable to confirm any injury from the accident.
5. The Appellant's left knee symptoms were reported for the first time in 1998 and surgery was performed in early 2003.
6. In his view, the left knee symptoms were not accident related.

In respect to the Appellant's Carpel Tunnel Syndrome, [MPIC's Doctor #1] stated:

1. The Appellant had two neurological examinations in 2001 and both were reported to be normal.
2. One of the neurologists, [Appellant's Neurologist] found that it was "biologically improbable" that the accident was implicated in the onset of this condition.
3. The Appellant's family physician confirmed that the degenerative condition of the Appellant's hands were not accident-related.

In respect to the Appellant's low back problems, [MPIC's Doctor #1] noted that:

1. The physicians involved in the Appellant's case, confirmed there was a lack of a causal connection between the low back problems and the accident.
2. The Appellant's complaints of bilateral "tennis elbow" were not accident related.

During the hearing with the Internal Review Officer on October 20, 2004, the Appellant reported that she expected to be compensated for the scarring from her various surgeries as well as for her fibromyalgia which is now severe, very painful and sore.

The Internal Review Officer in his decision, relying on the medical reports, concluded there was no probable causal relationship between the motor vehicle accidents in question and the Appellant's current medical difficulties. The Commission notes that the Appellant did not appeal the Internal Review Officer's Decision of December 4, 2004.

As noted earlier in this Decision, the Appellant made a further Application for Compensation to MPIC in respect of her accident of April 5, 1995 which is the subject matter of this appeal.

Case Manager's Decision Dated November 26, 2007

On November 26, 2007 the case manager issued a decision to the Appellant regarding entitlements to the Appellant under the Personal Injury Protection Plan ("PIPP"). In her decision the case manager stated:

"Your file was reviewed with a member of our Health Care Services Team to determine if the recent medical information has changed our previous medical review decisions on March 16, 2006 and a decision of July 7, 2004.

The recent review of the medical indicates the following:

Based upon my review of the medical evidence present, I am unable to determine a direct cause and effect relationship between the development of the claimant's lumbar spinal stenosis and the motor vehicle collision in question. There is no specific indication that

the claimant's spinal stenosis occurred as an aggravation of any injuries sustained in the motor vehicle collision in my opinion.

The conditions associated with the motor vehicle collision consisted of "non-specific soft tissue injuries" to the cervical, thoracic and lumbar spine. These conditions were complicated by the development of a pain magnification condition proposed by some of her caregivers to be Fibromyalgia.

Therefore we are unable to consider any entitlements under the Personal Injury Protection Plan. I have attached copies of the Health Care Service reviews for your information."

The Appellant filed an Application for Review dated January 1, 2005. The Internal Review Officer conducted a hearing with the Appellant on January 30, 2008 and issued a decision February 27, 2008 confirming the case manager's decision and dismissing the Application for Review.

Internal Review Officer's decision dated February 27, 2008:

The Internal Review Officer's decision dated February 27, 2008, succinctly sets out the history of the Appellant's claim since the first Internal Review Officer's decision dated December 1, 2004. In this decision the Internal Review Officer states:

1. The first contact following the December 1, 2004 Internal Review decision was your telephone call to the case manager seven months later – on July 6, 2005. You indicated that you had a new doctor ([Appellant's Doctor #1]) who said that your back condition was accident-related. The case manager advised that you would need to provide a medical report to support your position.
2. The next contact was three months later – on October 11, 2005. You advised the case manager that your recent CT Scan results were "not good", and you again stated that your doctor was of the view that your back problems were accident-related. You were again told that you would need to provide a medical report to support your position.
3. Further documentation was received by the case manager in early November, 2005. [Note: The cover letter is dated "October 31, 2004", but this appears to be a minor clerical error as it is date-stamped November 5, 2005 and includes material which post-dates October, 2004.]

You submitted a prescription for eyeglasses, a letter requesting a reconsideration of your Income Replacement Indemnity ("IRI") entitlement back to 1994, an MRI

report dated September 15, 2005, and a handwritten note from [Appellant's Doctor #1] stating that your back problems were from the 1995 accident. [Note: You later indicated that the eyeglass prescription had been submitted in error.]

4. On January 26, 2006, [MPIC's Doctor #1] – the member of the MPI Health Care Services Team who had reviewed the file in the past – asked the case manager to obtain the radiographic reports mentioned in the various medical reports on the file.
5. On February 13, 2006, you met with the case manager and provided a copy of an MHSC print-out back to 1995 and print-out of the medications you had been taking during the same time period. An x-ray report dated April 5, 1995 was received a short time later.
6. [MPIC's Doctor #1] completed a very detailed review on March 7, 2006. This was his second review of the medical package. The specific issues he addressed were described as follows:

‘[W]hether the medical information on file substantiates that a spondylolisthesis at L4-5 had been aggravated by the motor vehicle accident (of 1995), with compression of the right L-4 nerve root, and whether [the Appellant] has been unfit to perform her pre-accident duties as salesperson on account of same.’

The salient points to be gleaned from his memorandum are:

- a. A further review of the medical records did not cause [MPIC's Doctor #1] to change the opinions expressed in his memorandum dated June 29, 2004. His conclusion at that time was that the medical information did not establish a probable causal relationship between the motor vehicle accidents and the degenerative process in your lower back.
- b. The medical records generated in the period 1995 to 1997 did not support the concept of “an accident provoked spinal stenosis”. In fact, the evidence strongly suggested the absence of a spinal stenosis during that time period.
- c. The medical records do not support the concept of an accident-induced ‘compression of the exiting right L4 nerve root and/or displacement of the right S1 nerve root’. He noted that while there were complaints of left leg complaints in 1995, there were none relating to the right leg at that time. In fact, in November, 1995, you demonstrated an essentially normal right straight leg raise, which would indicate the absence of right lower lumbar nerve root compromise at that time (which was 7 months post-accident). [Note: [MPIC's Doctor #1] made the same observation regarding an examination which took place on September 15, 1997, a few days after one of the accidents in question, and an examination on which took place on August 20, 2003, in connection with an episode of severe back pain during the summer of 2003, following some vacuuming activity. He also noted that your neurological examinations on March 19, 2001 and June 24, 2003 (with [Appellant's Neurologist]) were essentially normal.]

- d. [MPIC's Doctor #1], and the other members of the MPI Health Care Services Team who considered the matter, were firmly of the view that the findings on the September 13, 2005 CT Scan had "not likely occurred as a consequence of the motor vehicle accidents".
- e. "Long term imposition of restrictions on [the Appellant's] pre-accident duties as a salesperson would neither have been required nor recommended in relation to the [motor vehicle accident] she was involved in."

In support of this conclusion, [MPIC's Doctor #1] noted that you had returned to selling [text deleted] at [text deleted] by January, 1996, that you had returned to your sales duties in May, 2006 but were laid off due to a lack of work in February, 2007, that you had the physical capacity to sit through approximately 900 hours of training in [text deleted] (July, 1997 to May, 1998), and that you were able to work 4-6 hours per day as a [text deleted] (March, 2002 to October, 2002), stopping only when you injured your back a result of slipping and falling on ice. [Note: In your written submission, you state that your husband helped with the [text deleted] sales, that the course was actually 825 hours (and that you were given a special chair), and that the [text deleted] position was not at all physically demanding. This appears to be the first time these limitations on your activities were mentioned.]

- 7. On March 16, 2006, the case manager sent you a letter advising that her earlier decision (August 5, 2004) "remains unchanged with regards to your entitlement to benefits under [PIPP]".
- 8. The next records of contact from you was about six months later – when you called the case manager on September 5, 2006 to advise that you would be going for back surgery shortly. You said that "everyone at the [text deleted] 'Clinic'" believed your back pain was related to the motor vehicle accidents, and that you had also developed bursitis in your right hip.
- 9. Seven months later, on April 17, 2007, you called the case manager to reiterate that your doctors believed your back condition to be accident-related. You said you would submit a report to this effect. You advised further, that your surgery had not yet taken place, but you had been receiving injections. You mentioned that you had fallen and broken your wrist in December, 2006, an event which you attributed to your back problems.
- 10. A few weeks later, a report from [Appellant's Doctor #2] dated April 24, 2007 was received. [Appellant's Doctor #2] works at the [text deleted]. He stated that you had first become a patient of his in May 2006, at which time you described a lengthy history of pain in your head, neck, shoulders, hands, legs, and lower back. The remainder of the report simply described the injections he had been providing to you. There are no comments in the report regarding causation (from a medical perspective), and there is no indication that [Appellant's Doctor #2] had reviewed the medical information generated prior to his involvement in your care.
- 11. You and the case manager spoke again on May 11, 2007. You said you would be receiving "disability from Revenue Canada dating back to 1995", that you were then

walking with a cane, and that you were on a medication (Topirmate) for lesions on your brain.

12. This meeting was followed by your letter to the case manager dated May 15, 2007. You included several referral forms prepared by [Appellant's Doctor #1], and described in detail the difficulties you were experiencing on a daily basis.
13. You underwent back surgery, described as 'an instrumented spinal fusion from L2 to L5/6', on June 12, 2007. The pre-operative clinical notes from the [Appellant's Surgeon], indicate that an MRI revealed 'seven spinal stenosis at L4,5 level'. Several follow-up MRI's taken between June, 1997 and January, 2008 did not disclose any concerns with the fusion.
14. You wrote to the case manager again on July 3, 2007. This letter states that you now have brain lesions which are 'from the whiplash'. You also included a detailed list of the medications you are taking daily.
15. The medical package was then reviewed by [MPIC's Doctor #2], another member of the MPI Health Care Services Team. In his memorandum dated November 13, 2007, [MPIC's Doctor #2] noted that a number of your medical conditions (knee problems carpal tunnel syndromes, arthritis in the hands, tennis elbow, and lumbar spinal stenosis, could not be casually-related to the motor vehicle accidents, based on the available medical evidence. He also concluded that the development of the spondylolisthesis at L4-5 was not associated with the accidents because:
 - a. None of the examinations which took place during the first few years following the accidents disclosed any symptoms or findings consistent with a probable diagnosis of spinal stenosis.
 - b. The spondylolisthesis was described as being degenerative in nature. That fact, combined with the absence of concurrent medical records indicated an injury at L4-5, made it "improbable for the degenerative spondylolisthesis and spinal stenosis to be directly related to the motor vehicle collision(s) in question".
 - c. None of the other symptoms noted are indicative of the presence of a spinal stenosis, although the other unrelated conditions noted above could certainly account for many of your symptoms.
16. I have read your 10-page submission. There are a number of assertions made in the document which do not accord with the other records on the file. In no particular order of importance:
 - a. You say that [Appellant's Doctor #3] claims to have taken x-rays when, in fact, none were taken by him. His report of December 5, 1995 does not actually say he took x-rays. He indicated on Page 1 that you told him x-rays had been taken at the walk-in clinic (which they were), and on Page 2 he indicates that you told him that you had been told that the x-rays were normal (which they were).

- b. You insist that the brain lesions diagnosed by [Appellant's Neurologist] are related to the accidents, and that his reports confirm this relationship.

There is only one report from [Appellant's Neurologist] on the file, dated July 28, 2003. He says that he first saw you on March 19, 2001, and that he 'did not explore the details of [your] motor vehicle accident'. Your complaints at that time were described as 'residual electric shock-like feelings'. He next saw you on June 24, 2003, in relation to complaints of facial numbness.

In terms of a causal relationship between your symptoms and the accidents, [Appellant's Neurologist] wrote:

'As implied above, I don't see any residual problem from her motor vehicle accident. The symptoms that she describes in the face are unrelated and not yet diagnosed. I don't anticipate any significant neurological diagnosis, unless she has Multiple Sclerosis, which would be a surprise, but [the Appellant] could present with isolated facial numbness and the electric shock like feelings that she has been describing. To my knowledge, there is no time-linked relationship between her symptoms and her motor vehicle accident and I would highly doubt that there is any organic basis to make a connection between her current symptoms and the accident.' (Emphasis added.)

There is no mention at all in the report of 'brain lesions'. In fact, I could not find any reference in the medical package to 'brain lesions' (apart from the letters from you mentioning the conditions).

- c. On page 8, you wrote: 'MPIC claims that I was born with these disabilities...' I could not find anything in the file where this assertion is made by, or on behalf of, MPI'.

The Internal Review Officer concluded, that based on the the (sic) medical reports of [MPIC's Doctor #1] and [MPIC's Doctor #2], both members of the MPIC's Health Care Services Team, there was no causal relationship between the Appellant's complaints in respect to her spinal stenosis, knee problems, carpal tunnel syndrome, arthritis in her hands, tennis elbow, and the motor vehicle accident.

The Appellant filed a Notice of Appeal dated March 6, 2008 in respect to the Internal Review Officer's Decision.

Appeal:**Relevant provisions of the MPIC Act in respect to this appeal are:**

[71\(1\)](#) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

[70\(1\)](#) In this Part,

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused

(a) by the autonomous act of an animal that is part of the load, or

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile;

"victim" means a person who suffers bodily injury in an accident.

Appeal Hearing

The Appellant testified at the appeal hearing and indicated that prior to the motor vehicle accident she was very healthy and active. The Appellant confirmed in her testimony, the statement she provided to MPIC on January 29, 2008 where she stated:

- I coached Ringette at [text deleted] for seven years.
- I was Conveyor in Chief for Ringette.
- I was Referee in Chief for [text deleted].
- I was Convener in Chief for [text deleted].
- I coached Hockey for [text deleted] for eight years.
- I coached Soccer and started the Soccer program at [text deleted] for eight years.
- I volunteered on many committees in the Community for fifteen years, I even have a [text deleted].
- I picked blueberries, strawberries, which I cannot do anymore.

As well the Appellant held both a full-time and part-time job. In addition, the Appellant stated that since the motor vehicle accident she cannot participate in physical activities such as

swimming or walking and is unable to continue her employment. She also testified that all of her physical problems were a result of the motor vehicle accident.

Discussion:

The Commission was impressed with the sincerity and honesty of the Appellant and the manner in which she was able to cope with the many significant physical difficulties that she had experienced since the motor vehicle accidents.

During the course of the hearing, the Commission advised the Appellant that the Commission accepted her testimony that she suffers from the physical problems she had described, but that the issue that the Commission had to determine, is whether or not it established, on a balance of probabilities, that the complaints she made were causally connected to the motor vehicle accidents. The Commission, through a thorough review of the indexed material, could not find any medical reports to support the Appellant's position that her physical complaints were causally connected to the motor vehicle accidents. The Commission notes that the Appellant did not provide any medical reports to contradict the medical reports in MPIC's file on the issue of causality. The Commission finds that since the numerous medical reports on the file consistently rejected the Appellant's complaints that the physical symptoms were due to the motor vehicle accident, the Commission must give greater weight to these medical opinions than it does to the testimony of the Appellant.

Section 70(1) of the MPIC Act indicates that the Appellant's entitlement to benefits under Part 2 of the MPIC Act are available to her if she can establish that her bodily injuries she complains about, were caused by a motor vehicle accident. The standard of proof to achieve these benefits

is not if there was a “possible” connection between her complaints and the motor vehicle accident, but that there was a “probable” connection.

The onus is upon the Appellant to establish, on the balance of probabilities, that there is a causal connection between the motor vehicle accident and her physical complaints, and she has failed to do so. In this decision, the Commission has set out in detail the medical report of [MPIC’s Doctor #1] dated March 7, 2006 and the report of [MPIC’s Doctor #2] dated November 13, 2007 which clearly do not establish that there was a causal relationship between the Appellant’s complaint of lumbar spinal stenosis and the Appellant’s accident of April 5, 1995. The Commission agrees with the medical opinions of the two doctors in the issue of causality.

For these reasons, the Commission dismisses the Appellant’s appeal and confirms the Decision of the Internal Review Officer dated February 27, 2008.

Dated at Winnipeg this 7th day of September, 2011.

MEL MYERS, Q.C.

MARY LYNN BROOKS

DR. SHELDON CLAMAN