

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-113**

PANEL: Ms Laura Diamond, Chairperson
Dr. Sheldon Claman
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Phil Lancaster of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: June 13, 2011

ISSUE(S): Whether the Permanent Impairment benefit was correctly assessed and calculated

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 a pedestrian when struck by a motor vehicle on January 7, 2008. As a result of the accident, he sustained a right humeral fracture which was minimally displaced. A report from the [hospital], based on his attendance of January 7, 2008, documented a fractured right humerus, bruising and a small laceration to the left eyebrow area.

On February 26, 2008, an assessment at [hospital] documented the Appellant's complaints to both shoulders, greater on the right than on the left, with increased stiffness and weakness to both shoulders.

The Appellant underwent physiotherapy treatments. Physiotherapy clinical notes on May 28, 2008 noted that the patient was progressing well, but was unable to actively externally rotate on the left shoulder.

An MRI report following an examination of July 29, 2008 documented a massive left rotator cuff tear with moderate associated muscle atrophy.

A medical opinion concluded that the rotator cuff tear could not be repaired with surgery.

A subsequent MPIC assessment for permanent impairment benefits included measurements of range of motion to the Appellant's right shoulder, right elbow and measurements of a facial scar.

Following a review by MPIC's Health Care Services Consultant, MPIC concluded that there was not a cause and effect relationship between the motor vehicle incident and the rotator cuff tear and that the Appellant was not entitled to Permanent Impairment benefits for a rotator cuff tear.

The Appellant's case manager issued a decision on May 21, 2009. That decision detailed the Appellant's entitlement to a Permanent Impairment award totalling 9%. The benefit was provided with respect to the following impairments:

- Right humerus fracture 1%
- Right shoulder range of motion 6%
- Right elbow range of motion 1%
- Left eye scarring 1%
- **Total 9%**

The Appellant sought an Internal Review of the case manager's decision. On August 25, 2009, an Internal Review Officer for MPIC reviewed the Appellant's medical file, including information obtained from [MPIC's Doctor], of MPIC's Health Care services Team. The Internal Review Officer had discussed the possibility, with [MPIC's Doctor], that the rotator cuff tear was overlooked due to the significant right humeral fracture sustained. However, [MPIC's Doctor] was of the opinion that the Appellant had pre-existing problems with his left rotator cuff and if it had been torn during the accident he would have experienced excruciating pain and loss of function. Accordingly, the Internal Review Officer upheld the case manager's decision.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident, the pain in his right arm and his attendance at the hospital. He explained that he was in shock and cannot say whether he mentioned any other injuries besides his right arm, which was extremely painful. When he got home he went to bed. When he had to get up in the night, he thought he would use his left arm to push him up. However, he then realized he had no power in left arm and his wife needed to help him up. This continued for a few weeks.

He went to see [Appellant's Doctor #1], who put a sling on his right arm. He saw [Appellant's Doctor #1] on January 22, 2008 and explained that he was not healing and that his ribs and arm were very sore. The doctor told him that it was natural to be sore all over and he did not do anything about the Appellant's left arm, or document it. The Appellant believed that this would heal, but it didn't.

The Appellant was attending for physiotherapy but missed two appointments in February because the physiotherapist was sick. He testified that in March he mentioned to the physiotherapist that his left arm was sore and that it was difficult for him to do some of the exercises she had given him. Still, everybody concentrated on his right arm and he testified that although he mentioned his left arm, nobody seemed to do anything about it.

In May, 2008 the physiotherapist concluded that there was something wrong with his left arm and asked him to obtain a referral from his doctor for an MRI on his left shoulder. After the MRI, a left rotator cuff tear was diagnosed.

The Appellant testified that his right arm has now healed, but it is his left arm that is still giving him problems, because of his shoulder. He has problems with everyday movements, including showering, dressing, taking anything out of the fridge, opening the car door, changing light bulbs above his shoulders and playing the guitar, which he had previously enjoyed. He testified that he has no power with his left hand and can't hold the steering wheel with his left arm. Nor can he play golf, wash his car or even lay on his left shoulder, because of the ache.

Counsel for the Appellant defined the issue before the panel as an issue of whether the motor vehicle accident caused the left shoulder rotator cuff tear or the loss of range of motion in that shoulder, or both. Counsel noted that the Appellant had been seeing [Appellant's Doctor #2] for 35 years and that no prior problems with the left shoulder had ever been noted.

Counsel submitted that the question of causation on the balance of probabilities did not require scientific precision, but rather was a matter of practical, common sense. He pointed to the Appellant's lack of previous symptomatology and ability before the motor vehicle accident to do all kinds of home maintenance, play guitar and other things. Since the motor vehicle accident, the Appellant could not do those things and he still cannot. As the Appellant's dominant right arm injury healed, the injury to the left arm became clearer.

Although the paramedics failed to document comments regarding the Appellant's left arm, counsel pointed to [Appellant's Doctor #1's] preliminary report of January 22, 2008 which noted:

“On examination his right arm is maintained in the sling. He is mildly tender about the shoulder girdle...”

Counsel believed this referred to the left shoulder.

The report of the [hospital] dictated March 11 and 12, 2008 focused on the Appellant's right humerus injury but noted damage to rib cartilage on the left and soreness in both shoulders, greater on the right than on the left and complaints of increased stiffness to both shoulders and weakness as well.

The physiotherapy reports documented deficiencies in both the left and right range of motion. The physiotherapy progress notes indicate that on February 21, 2008 the physiotherapist assigned the Appellant exercises involving external rotation with a cane and internal stretch rotation.

When the Appellant completed his Application for Compensation on February 26, 2008, he noted that he was hit on the left side and his left shoulder was sore, in addition to his broken right arm. The Personal Care assessment tool later completed indicated that the Appellant required some assistance with feeding himself as well as with other personal grooming tasks.

Counsel also pointed to a letter from [Appellant's Doctor #2] dated March 12, 2008 which indicated that the Appellant did not have any pre-existing or unrelated conditions which would delay his recovery.

When the Appellant continued with physiotherapy on March 7, 2008, the notes of the physiotherapist indicated that he was improving slowly but that the ranges of motion measurements in his left shoulder were very low. Something had worsened, counsel noted, in the condition of his left shoulder in that one month of exercises.

Although counsel for MPIC questioned the Appellant regarding a planned camping trip following the motor vehicle accident, counsel for the Appellant noted that the Appellant had clearly testified that no such camping trip had ever occurred. He continued to have complaints regarding his left shoulder through to May and very restricted range of motion both for external and internal rotation in that shoulder.

Following an MRI, a report from [Appellant's Doctor #3] dated August 28, 2008 noted that:

“The MRI has shown a massive rotator cuff tear involving the infraspinatus and supraspinatus with moderate associated muscle atrophy.”

[Appellant's Doctor #3] also noted:

“...He has ongoing problems with weakness and loss of motion of his left shoulder and an MRI has confirmed a massive rotator cuff tear on the left. He had no prior problems with this shoulder before the accident and once must assume that this is as a result of that incident...”

Counsel submitted that [Appellant’s Doctor #3] had reached this conclusion following an examination of the Appellant and a review of his medical history.

A letter from [Appellant’s Doctor #3] dated November 15, 2010 considered [MPIC’s Doctor’s] opinion that the tear was not caused by the motor vehicle accident. He indicated that it was impossible for him to determine exactly when the rotator cuff tear occurred and noted that it may have indeed even been a prior rotator cuff tear which was asymptomatic and which was exacerbated by the motor vehicle accident resulting in symptoms. He could not rule out the possibility that the motor vehicle accident did, if not cause the original tear, at least exacerbate a pre-existing tear, although it was certainly also possible that he had previous subclinical pathology which was exacerbated by overuse of that arm in his preferential use of it versus the fractured right humerus. He emphasized that the shoulder had only become symptomatic sometime following his right shoulder injury.

Counsel therefore submitted that, whether the motor vehicle accident caused the tear, or exacerbated it, but for the motor vehicle accident, the Appellant’s left rotator cuff tear and loss of range of motion would still not have troubled the Appellant and [Appellant’s Doctor #3] was clear that one must assume this was caused by the motor vehicle accident.

Counsel submitted that the motor vehicle accident was the cause of the tear and/or exacerbation of it as well as the accompanying loss of range of motion, and that the Appellant’s appeal should be allowed.

Evidence and Submissions for MPIC:

[MPIC's Doctor] testified at the hearing into the Appellant's appeal. He reviewed his curriculum vitae and explained his experience with MPIC file reviews and in clinical practice.

[MPIC's Doctor] had reviewed the Appellant's file to assess whether he was entitled to a permanent impairment benefit based upon a causal connection between his left shoulder injury and the motor vehicle accident. He reviewed for the panel the two different permanent impairment sections in the legislation which could be relevant to a rotator cuff tear. However, it was his view that the Appellant is not entitled to either permanent impairment benefit because the rotator cuff tear and accompanying loss of range of motion were not attributable to the motor vehicle accident. He reviewed the Appellant's initial presentation following the motor vehicle accident. In his view, a massive rotator cuff tear such as the Appellant had suffered was a very significant injury which would have presented very quickly after the motor vehicle accident, had it occurred at that time, with significant pain, and loss of function and mobility right away.

[MPIC's Doctor] reviewed several of the reports which he had previously provided in regard to the Appellant's file and noted that he had reviewed several pertinent reports from other health care professionals including the police report, ambulance report and hospital reports.

In his view, if the rotator cuff had been torn at that massive level in the motor vehicle accident, this would have presented with significant pain, similar to that suffered in the right shoulder. It would also have presented with loss of function and loss of power similar to that in the right arm. Although [MPIC's Doctor] believed it was possible that this left side injury could have been overlooked because of the fracture in the right arm, he noted he thought that the Appellant would have at least reported some symptoms. By a day or two after the motor vehicle accident, the

problem would be sufficient for the symptoms to kick into high gear and be reported by the Appellant. A caregiver assessing both arms, comparing one to the other to see the level of function, would have also noted the problem.

In [MPIC's Doctor's] view this injury was not caused by the motor vehicle accident, but had occurred over time and he believed the Appellant had some underlying problems in the past in that regard.

[MPIC's Doctor] also noted that academic literature indicated that a large percentage of individuals in the Appellant's [text deleted] age group have asymptomatic rotator cuff tears. Over 60% of that age group have some degree of tearing as they get older.

In [MPIC's Doctor's] view, had there been symptoms in the left shoulder and abnormal findings at the relevant time, this would have been noted by [Appellant's Doctor #1], who assessed the Appellant within the first month following the motor vehicle accident. No such notation was made. The discovery of the problem by the physiotherapist in May does not fall within the time frame which relates to the motor vehicle accident. The problem may have become more evident by that time, because the Appellant was performing exercises meant to address the right arm injury and perhaps using his left arm to assist with those exercises.

[MPIC's Doctor] referred to his report of April 29, 2009, wherein he concluded that based upon the initial ambulance and hospital report, as well as the reports of [Appellant's Doctor #1] and the physiotherapist's notes, there was no cause and effect relationship between the motor vehicle accident and the rotator cuff tear.

He reached the same conclusion in a report dated July 3, 2009, and indicated that he does not agree with [Appellant's Doctor #2's] and [the Appellant's Doctor #3's] reports that the injury must be connected to the motor vehicle accident. In his view, the temporal relationship here is not strong. Although the caregivers had indicated that it was possible the motor vehicle accident had caused or exacerbated the left shoulder tear, [MPIC's Doctor] indicated that while anything is possible, that does not sound probable. Even if the exercises had made an underlying asymptomatic condition symptomatic, there still was no evidence of a permanent impairment as to the left shoulder as a result of the motor vehicle accident.

[MPIC's Doctor] did indicate that it is possible that other benefits might flow to the Appellant under the legislation, including an enhancement factor where there is injury to one extremity and it aggravates a pre-existing problem with the other extremity.

Counsel for MPIC submitted that the onus is on the Appellant to show that he is entitled to a permanent impairment benefit because the left shoulder injury was caused by the motor vehicle accident. This must be shown in accordance with the legislation and not by linking the dots of possibilities.

For example, counsel for MPIC cited Appellant's counsel's review of [Appellant's Doctor #1's] report of January 22, 2008 where [Appellant's Doctor #1] stated:

“On examination his right arm is maintained in the sling. He is mildly tender about the shoulder girdle...”

In his submission, counsel for the Appellant maintained that this referred to the left shoulder, but counsel for MPIC noted that it would involve a quantum leap to suggest that there is any reference at all to the left shoulder in that quotation.

The same criticism applied to counsel for the Appellant's review of the Personal Care Assessment's reference to difficulties with ribs and right shoulder and his assumption that this somehow incorporated the left shoulder.

The physiotherapy reports, it was submitted, also referred to the right shoulder and not to the left shoulder.

The best assessment, he submitted, when looking at those notes, is that other than some mild reference to the left shoulder discomfort, it was not until May 28, 2008 that the physiotherapist came to the conclusion that there was something wrong with the Appellant's left shoulder.

Counsel for MPIC submitted that if the panel concludes that the rotator cuff tear was not caused by the motor vehicle accident, it is not open to the panel to find that the difficulties with the range of motion in this shoulder were caused by the motor vehicle accident. One must look to the cause of the symptoms, he submitted. There is clear evidence in the Appellant's file that in the months following the motor vehicle accident, things were improving. Then, later in May, the rotator cuff tear was discovered.

Counsel submitted that the conclusions of [Appellant's Doctor #2] and [Appellant's Doctor #3] regarding causation were overly simplistic. [MPIC's Doctor] reviewed numerous reasons, in detail, which lead to the conclusion that the accident did not cause the tear. There were no signs of the tear until the latter part of May, rotator cuff tears are common in an aging population. Having regard to the massiveness of this tear, one would expect that had it occurred in the motor vehicle accident there would have been significant symptoms along with expressions of pain and discomfort at a much earlier point in time. That is not seen in the Appellant's file, even when

looking at the police report, ambulance report, hospital report, [Appellant's Doctor #1's] report and the initial physiotherapy assessment. None speak to the motor vehicle accident causing that massive rotator cuff tear.

Counsel submitted that, as [MPIC's Doctor] noted, even if the therapy following the motor vehicle accident made the underlying rotator cuff tear symptomatic, this does not give rise to a direct permanent impairment benefit if the rotator cuff injury was not caused by the motor vehicle accident. While it could give rise to other benefits, the permanent impairment benefit does not follow as a result.

However, counsel undertook to investigate the application of Sections 1-4 of Manitoba Regulation P215-RM 41/94 regarding the possible enhancement awards provided by the Regulations and their application to the Appellant's situation.

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 he is entitled to a permanent impairment benefit because the rotator cuff tear and resulting loss of range of motion in his left shoulder were caused by the motor vehicle accident.

The panel has reviewed the evidence of the Appellant and [MPIC's Doctor] as well as the documentary evidence on the Appellant's indexed file and the submissions of counsel.

The panel finds that the loss of range of motion suffered in the Appellant's left shoulder was caused by the rotator cuff tear. If the rotator cuff tear was caused by the motor vehicle accident, the Appellant would be entitled to a permanent impairment for both the tear and the loss of range of motion.

However, the panel finds that the rotator cuff tear was, on a balance of probabilities, not caused by the motor vehicle accident and that the Appellant is not entitled to a permanent impairment benefit in that regard.

The panel has considered the evidence of [Appellant's Doctor #2], who indicated that the Appellant did not have a rotator cuff tear before the motor vehicle accident and therefore, it was caused by the motor vehicle accident. We have also reviewed the opinion of [Appellant's Doctor #3] that it was possible that the tear was caused by the motor vehicle accident and that one must assume it is a result of the motor vehicle accident or an exacerbation resulting from overuse of that arm due to the fracture in the Appellant's right arm.

[MPIC's Doctor], however, pointed out that such a massive tear would have shown up with sudden symptoms and, especially, with loss of mobility and power, if not immediately at the time

of the motor vehicle accident, then certainly within the first week following the accident. He acknowledged that it was possible that due to overuse and use of the left arm through treatment, there could have been an exacerbation of a pre-existing underlying asymptomatic condition, in the period following the motor vehicle accident. The way he described this possible scenario was that “the exercise program may have woken up the underlying rotator cuff tear”.

However, he maintained that based upon the medical documentation on file, including the police report, ambulance report, hospital emergency room report and early assessment reports of [Appellant’s Doctor #1] and the physiotherapist, it was not probable that the rotator cuff tear was caused by the motor vehicle accident. The temporal connection, with the first clear notation of rotator cuff symptoms some five months post-motor vehicle accident, was not there.

The panel has also considered the progression of the Appellant’s shoulder condition, which showed a pattern of improvement in range of motion, with some fluctuation, between March and August of 2008 and some deterioration in August of 2008. There was a marked, severe deterioration in April of 2009. Such a pattern, the panel finds, is not consistent with a rotator cuff tear occurring at the time of the accident.

For these reasons, the panel agrees with [MPIC’s Doctor’s] analysis. We find that the Appellant has failed to show, on a balance of probabilities, that the rotator cuff tear and left shoulder loss of range of motion were caused by the motor vehicle accident, in a manner entitling the Appellant to a permanent impairment benefit for a rotator cuff tear and loss of range of motion. Accordingly, the Appellant’s appeal for a further permanent impairment benefit in this regard is dismissed and the decision of the Internal Review Officer dated August 25, 2009 is upheld.

However, through the appeal process, MPIC has acknowledged that the Appellant is entitled to a further permanent impairment benefit based upon the enhancement factor set out in Sections 1-4 of Manitoba Regulation P215–RM 41/94. Counsel for MPIC has indicated that this question has been referred to MPIC’s Claims Department for calculation and that that department will be proceeding to issue a decision confirming the further permanent impairment entitlement based upon an enhancement factor of 3.25%.

Dated at Winnipeg this 19th day of July, 2011.

LAURA DIAMOND

DR. SHELDON CLAMAN

LINDA NEWTON