

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-149

PANEL: Ms Laura Diamond, Chairperson
Mr. Wilf De Graves
Ms Sandra Oakley

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

HEARING DATE: February 21, 2012

ISSUE(S):

1. Entitlement to Income Replacement Indemnity benefits for time away from work on:
 - September 8, 2005 to September 25, 2005
 - November 27, 2005 to December 15, 2005
2. Entitlement to further physiotherapy treatment benefits.

RELEVANT SECTIONS: Section 81(1) and 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation 40/94.

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on January 18, 2005. As a result of his injuries, the Appellant saw his doctor, complaining of low back pain and restricted lumbar range of motion. His doctor indicated that he was at work and no restrictions were indicated and recommended that he attend for physiotherapy treatment for a six week period.

The Appellant began attending for physiotherapy treatment on January 24, 2005.

He attended at physiotherapy until March 2, 2005 and then discontinued treatment attendance.

On November 29, 2005 he re-attended for additional therapy, citing the motor vehicle accident as the probable cause of his condition.

The Appellant sought entitlement to further physiotherapy treatment benefits as well as entitlement to Income Replacement Indemnity (“IRI”) benefits for time away from work from September 8, 2005 to September 25, 2005 and from November 27, 2005 to December 15, 2005.

[MPIC’s doctor], a medical consultant with MPIC’s Health Care Services reviewed the Appellant’s file on January 3, 2006 and opined that a separate medical condition had developed subsequent to the motor vehicle collision and that the clinical findings and diagnoses in November of 2005, differed from the findings immediately following the collision and were not an outcome of the motor vehicle accident. It was his view that these signs and symptoms could not be causally related to the motor vehicle accident.

The Appellant’s case manager wrote to him again on January 16, 2006, confirming that the medical evidence did not support the position that his current symptoms were causally related to the collision. The lack of entitlement to an IRI benefit was confirmed and the case manager also stated that there was no entitlement to physiotherapy treatment for the Appellant’s condition.

The Appellant sought an Internal Review of this decision. On June 26, 2006, an Internal Review Officer for MPIC reviewed the Appellant’s file, which included reports from the Appellant’s doctor and from [MPIC’s doctor]. The Internal Review Officer was unable to conclude that the motor vehicle accident injuries rendered the Appellant entirely or substantially unable to perform

the essential duties of his employment or that time away from his job was a result of the motor vehicle accident. She concluded that the medical information on the Appellant's file provided conflicting information and lacked objective substantiation in support of his claim for IRI benefits.

Further, based on the totality of information on his file, the Internal Review Officer concluded that MPIC does not have an obligation to fund further physiotherapy treatment relating to the accident in question.

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, when he was rear-ended at a red light on his way to work. He explained that he went to work feeling a little dizzy and sore in his right leg, but that he believed nothing much had happened. Then the pain started to intensify and he asked his supervisor to dismiss him to go home. He visited his doctor and was under the impression that the problem was not serious. However, he was suffering from pain and unable to work. He did not work between January 19, 2005 and January 26, 2005. This was then extended to February 6, 2005 and extended once more until February 16, 2005.

The Appellant explained that he was employed as a labourer [text deleted]. His duties included using a high pressure water washer, collecting dirt, operating wheelbarrows and collecting garbage. He did not describe the job as involving heavy lifting, but indicated that he had to squat

or bend from time to time for several minutes at a time when shovelling dirt and undertaking similar duties.

The Appellant testified that he tried to keep working, but felt that something was not as usual. He visited [Appellant's doctor #1] again in September and was given a sickness certificate to be off work between September 8 and September 20, 2005. He later received another certificate excusing him from being at work between September 21 and September 25, 2005, and November 27, 2005 to December 3, 2005, December 4, 2005 to December 11, 2005 and December 12, 2005 to December 15, 2005.

The Appellant testified that he attended for physiotherapy treatment which had been recommended by [Appellant's doctor #1]. However, he was still suffering from pain. Although he testified that the physiotherapy treatment did not help with his pain, he indicated that he had paid for it himself and deserved to be reimbursed for this treatment by MPIC. He also sought IRI benefits for the time when he had been unable to work.

On cross-examination, the Appellant denied that he had been experiencing back pain for a number of years before the motor vehicle accident, although he did admit that sometimes he felt a mild tiredness in his back, legs or hands, after working.

When asked about the difference between the symptoms he had reported in February 2005 and in September 2005 (reporting more low back pain after the motor vehicle accident), the Appellant noted that sometimes doctors are in a rush and do not record all the complaints which are expressed to them. He indicated that nothing else had happened since the motor vehicle accident which would cause him to hurt himself again in a different way in September of 2005.

The Appellant submitted that he suffered physically as a result of the motor vehicle accident. He needed his wages and his company pension plan and so he tried to stay at work. However, sometimes he had difficulty getting into his car and even going to buy a couple of bags of groceries. He described his financial difficulties and struggles.

The Appellant also provided reports from [Appellant's doctor #2] dated March 1, 2011 and May 5, 2011. [Appellant's doctor #2] indicated that the motor vehicle accident of January 2005 was probably adequate to produce a transient flare-up/progression of the Appellant's discomfort. However, he noted that this statement was made in light of the fact that the patient had been experiencing chronic, recurrent low back pain for a number of years. He stated that his comment that the motor vehicle accident of 2005 was probably adequate to produce a transient flare-up/progression was "exclusively based on the history given by the patient and the fact that the patient had experienced a rearend MVA and was complaining of low back pain. Generally, the pain has a transient character."

The Appellant also filed a report from [Appellant's doctor #3] dated April 7, 2010, reviewing a CT scan of February 20, 2005 [sic] following an examination of January 25, 2005. The doctor had diagnosed lumbago with tenderness to L4, S1 at 50 degrees flexion and indicated that the findings on the CT scan were consistent with a low back injury. He stated:

"...The material in the chart is clear and there is cause and effect related to the MVA, lumbago and abnormality on CT scan of lumbar spine and is consistent with his neuropathic pain that has already resolved."

The Appellant submitted that the problems with his back were only due to the motor vehicle accident of January 2005 and submitted that the opinion of MPIC's doctors should not be taken into account.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant was not dishonest in his beliefs, but rather, that the medical evidence on file did not support a causal link between the Appellant's complaints following the motor vehicle accident and in the fall of 2005.

Counsel pointed to the markedly different symptoms set out in the early medical reports following the motor vehicle accident. [Appellant's doctor #1's] report, based upon an examination of January 21, 2005, reported low back pain, lumbar tenderness and limited lumbar range of motion. He noted a normal neurological examination with no leg, thigh or gluteal pain. The initial diagnosis was one of lumbago, low back pain, with limited lumbar range of motion and tenderness and cervical spinal strain.

This was supported by the Appellant's Application for Compensation which noted low back pain with some pain to the neck.

However, reports from November 2005 described different symptoms. The physiotherapist's report from an examination of November 29, 2005 noted right-sided low back pain, gluteal pain, leg and thigh pain with limited sitting tolerance, tender and tight gluteals, piriformis, hamstring and peri-lumbar region and documented neuro-motor deficits at S1.

[MPIC's doctor] reviewed and compared the reports of the doctor and physiotherapist following the motor vehicle accident in January and the reports from the fall of 2005. He noted:

“In reviewing the initial two reports that documented the injuries which occurred in the motor vehicle collision, the claimant had been given a diagnosis of lumbago. According to [Appellant’s doctor #1], the claimant had low back pain with limited lumbar range of motion and tenderness. The claimant was at work at the time of his injury and continued to be at work thereafter. There was no indication that the claimant would not have been able to continue to work, per [Appellant’s doctor #1]. [Appellant’s physiotherapist #1’s] report differed from [Appellant’s doctor #1’s] in that she also documented cervical spinal strains. She specifically stated that the claimant’s injuries placed him the primary care category with regards to physiotherapy treatments. She did not indicate that the claimant was at work but indicated that there were limitations in work based on her assessment. The next report on file was dated November 29, 2005. In this report, the claimant had an alteration in his clinical findings insofar as there was a positive straight leg raise now demonstrated with marked decrease in lumbar flexion and an S1 motor deficit.”

Counsel submitted that, as reported by [MPIC’s doctor], it is clear that the symptoms in September and November were different than the symptoms that had been reported in January and that the later symptoms were not consistent with the Appellant’s original injury in the motor vehicle accident.

In further reports dated June 8, 2006 and August 25, 2011 [MPIC’s doctor] considered additional medical information, including a report from physiotherapist [Appellant’s physiotherapist #2], a report dated April 7, 2007 from [Appellant’s doctor #3] and reports from [Appellant’s doctor #2] dated March 1, 2011 and May 5, 2011.

[MPIC’s doctor] noted significantly different clinical findings identified by the physiotherapist, [Appellant’s physiotherapist #2], in the examination of November 29, 2005. While there had not been any indication of neurological abnormalities in examination reports following the motor vehicle accident, the November 29, 2005 assessment identified a finding of a positive straight leg raise test with pain radiating down the right leg and neurological impairment. The initial

symptoms reported by the Appellant after the accident documented only left-sided neck and low back pain.

From this, [MPIC's doctor] concluded that the clinical findings documented in November of 2005 indicated a significant difference in clinical presentation and a different diagnostic entity.

As well, radiological findings from X-ray and CT scans showed evidence of a left convex scoliosis at lumbosacral segment, osteoarthritic degeneration of zygapophyseal joints at multiple levels, narrowing of the L4-5, L5-S1 disc spaces and right posterolateral disc herniation at L4-6.

In reviewing the reports from [Appellant's doctor #2] and [Appellant's doctor #3], [MPIC's doctor] noted that the actual date of the CT scan reviewed by [Appellant's doctor #3] was not February 20, 2005, but rather was February 20, 2006, a time subsequent to the symptom development of September 2005. As such, he noted that the CT scan could not speak to the post-collision condition, but rather to the condition that occurred subsequent to the development of the later low back pain.

[MPIC's doctor] also noted [Appellant's doctor #2's] comment that the Appellant had a history of recurring low back pain for a number of years. In [MPIC's doctor's] view, [Appellant's doctor #2] was reporting a pre-collision low back pain syndrome manifested by recurrent flares of low back pain, with the collision being sufficient to cause a transient increase in symptoms. [MPIC's doctor] agreed that this was supported by the clinical documentation on the file between January and April 2005 when the character of the pain was mechanical in nature and described as a low back strain or lumbago indicating a mechanical back pain syndrome.

[MPIC's doctor] noted that in individuals with chronic recurrent back pain, the pain flares recur spontaneously from time to time and specific traumatic events do not need to occur to be a

trigger for an episode of back pain in individuals with this condition. Based on his review of this documentation, [MPIC's doctor] concluded that a direct cause and effect relationship between the later back pain and the motor vehicle accident could not be determined.

Counsel for MPIC submitted that only [MPIC's doctor] had undertaken a complete forensic review of the contents of the Appellant's file and correlated the opinions of the different practitioners. As such, his opinion that the low back pain suffered by the Appellant in the fall of 2005 was not causally related to the motor vehicle accident should be given a great deal of weight.

Counsel for MPIC submitted that the Appellant had failed to meet the burden upon him of showing, on a balance of probabilities, that his symptoms were related to the motor vehicle accident, and as such, he submitted that the appeal should be dismissed and the decision of the Internal Review Officer should be upheld.

Discussion:

The MPIC Act provides:

Entitlement to I.R.I.

[81\(1\)](#) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

Reimbursement of victim for various expenses

[136\(1\)](#) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act,

to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Manitoba Regulation 40/94 provides:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

The onus is on the Appellant to show, on a balance of probabilities, that he was unable to work during the relevant periods and that he had a medical requirement for further physiotherapy treatments, due to injuries arising out of the motor vehicle accident.

The panel has reviewed the evidence and submission of the Appellant, as well as the documentary evidence on his file and the submission of counsel for MPIC.

The panel finds that the Appellant was credible in his belief that the motor vehicle accident was the cause of his pain in the fall of 2005. We also find that following the motor vehicle accident, the Appellant was credible and consistent in his early reporting of symptoms to his caregivers and on his application for compensation. We note the consistent reports of the physiotherapist and doctors involved regarding the Appellant's reports of symptoms in his lower back and neck.

In the fall of 2005, the caregivers' reports documented different symptoms in the Appellant's legs and gluteal region, with some neurological signs. A year later, in February of 2006, a CT scan demonstrated the presence of a suspected compression of the right L5 nerve root. Between the early reporting of the lower back and neck symptoms in January and February of 2005 and the reporting of these leg and gluteal symptoms with neurological signs in the fall of 2005 and early 2006, there was no evidence of any complaints to the Appellant's caregivers.

The Commission has reviewed the reports provided by [Appellant's doctor #2] on March 1, 2011 and May 5, 2011 which described the Appellant's symptoms and the radiological findings. There were osteoarthritic degeneration of zygapophyseal joints found at multiple levels in the Appellant's spine with narrowing of the L4-5, L5-S1 disc spaces and evidence of right posterolateral disc herniation at L4-5. [Appellant's doctor #2's] letter of May 5, 2011 described the Appellant's pain as a transient flare-up. There was no comment to support the finding of exacerbation or re-exacerbation of the Appellant's condition as a result of the motor vehicle accident, in the fall of 2005.

The panel is left to conclude that the Appellant suffered from a pre-existing degenerative condition which was temporarily aggravated by the motor vehicle accident in the form of a "transient flare-up" which resolved, allowing the Appellant to return to work.

The Appellant then presented with a different and new set of symptoms in September of 2005. The May 5, 2011 report still describes his pain as a "transient flare-up/progression of the discomfort", based upon the Appellant's experience of "chronic, recurrent low back pain for a number of years". This does not provide objective evidence linking the Appellant's later incidents of pain to the motor vehicle accident.

The panel is of the view that there is not sufficient evidence linking the symptoms experienced by the Appellant in January of 2005 to the symptoms he experienced in September of 2005 which would lead us to conclude, on a balance of probabilities, that the Appellant's symptoms in September were caused by the motor vehicle accident. The panel agrees with the comments of [MPIC's doctor] in his report dated August 25, 2011, when he reviewed the reports of [Appellant's doctor #3] and [Appellant's doctor #2]. The evidence before the panel does not include any evidence of visits to his caregivers or information regarding the Appellant's status between April and September 2005 that would link the different symptoms he was experiencing in September to the motor vehicle accident. There is no documentation of consistent or evolving symptoms during that period, or of reports from his caregivers showing doctor or physiotherapy visits with complaints of increasing pain.

As [MPIC's doctor] indicated:

“The letter spoke of a chart review that supported the association between the collision related back pain and the later development of back pain. However, no specific information was presented in the letter (other than the results of the CT scan) that documented consistent symptoms or evolving symptoms that would allow a third party reviewer to independently conclude an association. For these two reasons, this report would not answer the question at hand which is [the Appellant's] status between April 2005 and September 2005 and how this condition could probably lead to the later development of a separate pain condition.”

Accordingly, the panel finds that the Appellant has failed to provide sufficient persuasive evidence that would establish, on a balance of probabilities, that the symptoms which the Appellant experienced in the fall of 2005 were caused by the motor vehicle accident. Accordingly, the decision of the Internal Review Officer dated June 26, 2006 is upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 29th day of March, 2012.

LAURA DIAMOND

WILF DE GRAVES

SANDRA OAKLEY