

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-05-019**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Janet R. Frohlich
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.

HEARING DATE: February 13, 2013

ISSUE(S): Entitlement to Income Replacement Indemnity benefits.

RELEVANT SECTIONS: Section 81(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 Appellant, [text deleted], was involved in a motor vehicle accident on April 1, 1997. He was proceeding through an intersection, when a vehicle, which failed to stop at a stop sign, hit the passenger side of his car. In his Application for Compensation, the Appellant indicated that he sustained injuries to his neck, back, knees, jaw, shoulder, headaches and pain in his eyes.

The Appellant attended upon his family physician, [Appellant's Doctor #1] on April 11, 1997. [Appellant's Doctor #1] referred the Appellant to physiotherapy for treatment of his motor vehicle accident related injuries.

The initial physiotherapy report dated May 16, 1997 indicated that the Appellant had cervical and lumbar regional pain, headaches/dizziness and nausea, as well as sleep disturbance. The report indicated that the Appellant had mechanical neck and back problems, but could work modified duties. In a report dated May 26, 1997, the physiotherapist noted that the Appellant continued to improve but still complained of central lower back pain and tightness of neck musculature. The Appellant also complained of dizziness and nausea, but the physiotherapist could not find any cause for those complaints. The physiotherapist further indicated that the Appellant had resumed all work and extracurricular activities.

In a report dated May 27, 1997, [Appellant's Doctor #1] indicated that the Appellant continued to complain of neck and back muscle spasms. Although he was improving, his back was still stiff. [Appellant's Doctor #1] diagnosed him with a cervical and lumbar strain and indicated that the Appellant could work full duties at that time.

The Appellant was discharged from physiotherapy on April 17, 1998. The discharge report from [text deleted] Physiotherapy dated May 15, 1998 indicated that the Appellant's symptoms had plateaued or there was no further benefit from treatment.

[Appellant's Doctor #1] referred the Appellant to [Appellant's Doctor #2] for review of his bilateral neck and shoulder girdle pain and right knee pain. In a report dated July 29, 1998, [Appellant's Doctor #2] opined that:

My impression is that this patient's neck pain is mechanical. He has a significant amount of myofascial restriction about the neck including the scalenes and the pectoralis muscles. His exercise program is not addressing these. Furthermore his exercise program appears to be emphasizing anterior neck structures rather than posterior. I think he would benefit greatly from a scapular stabilization program emphasizing the retractors and inferior scapular stabilizers. Some basic myofascial release techniques may be instituted

primarily but eventually he can be discharged on a basic home stretching program with these techniques as well.

With respect to the knee, it appears that most of his pain is patella-femoral. This may be associated with some mild chondromalacia after his dashboard impact. I have requested an x-ray with skyline views to document this. He has already purchased a knee sleeve and I agree with this. I think it is reasonable for him to use this daily while he is driving to minimize his symptoms. I think he would also benefit from modifications to his closed kinetic chain program. This may include exercises to recruit the hip abductor in addition to the quadriceps muscle. I think if he is using the knee on a regular basis emphasizing strength and range of motion, that there is very little risk of dependence on his knee sleeve.

On October 13, 1998, the Appellant called his case manager to advise him that he couldn't work and wanted to claim income replacement indemnity ("IRI") benefits. The case manager's note from that telephone call indicated that the Appellant's work history consisted of doing mechanical repairs to motorcycles, he worked the summers at [text deleted] and the rest of the year as a driver. The Appellant signed a statement on November 4, 1998 which stated that since April 1, 1997 he had not worked because of his injuries from the accident. He further stated that he had not reported this before because he was living off his savings. He indicated that his funds had now run out and he was now claiming IRI benefits.

[Appellant's Doctor #1] provided a report dated November 4, 1998 which stated that:

As you know, [the Appellant] was involved in a motor vehicle accident on April 1, 1997. He was initially seen in [Hospital]. He presented to our clinic on April 4, 1997 and was seen by [Appellant's Doctor #3]. His injuries at that time included facial abrasions, jaw pain, neck strain and injuries to his left thumb, stomach and right knee. His knee apparently struck the dashboard of his car in the MVA. [Appellant's Doctor #3's] examination showed a decreased range of motion of the right knee and a 4x5cm contusion to the upper tibial area...

At this time, it appears that [the Appellant's] worsening knee pain is related to his continued working (driving) as braking appears to be the main aggravating factor.

[The Appellant] states this discomfort is too great to continue driving to the extent that he does. He also requires a neoprene pataller stabilizing knee sleeve for which I have given him a prescription.

In a narrative medical report from [Appellant's Doctor #2] dated November 25, 1998, [Appellant's Doctor #2] advised:

At the time of my assessment, the claimant advised me that he was self-employed and working as an entertainment agent. He reported that he had minimal time loss up to that date (approximately 15 months since his accident). As such, I did not get a history that he was having difficulty with his occupation because of his injuries.

MPIC's Health Care Services reviewed the file and provided an interdepartmental memorandum to the case manager dated January 21, 1999. [MPIC's Doctor] who prepared the memorandum determined that:

There is no documentation of occupational disability arising from the medical conditions [the Appellant] developed as a result of the April 1, 1997 motor vehicle collision. The specific demands of [the Appellant's] pre-collision occupation could not be determined from the information obtained from the various documents reviewed. It appears that [the Appellant's] work as an entertainment agent involved driving a vehicle. It is my opinion that the mild, temporary impairment of physical function that developed from the medical conditions arising from the collision would not prevent [the Appellant] from driving motor vehicle.

MPIC's case manager issued a decision dated March 12, 1999 wherein he denied the Appellant's claim for IRI benefits. Specifically the case manager found that:

As I had indicated to you, your primary caregiver, [Appellant's Doctor #1], did not document any symptoms involving the right knee in his initial and subsequent reports to Manitoba Public Insurance. It was only in his narrative report of November 4, 1998 that he stated you mentioning that frequently your right knee was bothersome. [Appellant's Doctor #1's] obligation to report all findings as they became available in his prior reports would have documented these complaints from the date of accident onward, but did not.

Due to the late reporting of right knee pain, I had our Medical Services team review all the reports on file. It is the reviewer's opinion, "that [the Appellant's] right knee pain cannot be causally related to the motor vehicle collision based on the absence of clinical documentation of abnormalities involving the right knee until April 1998. The emergency physician who assessed [the Appellant] identified limited flexion and abrasion, but no evidence of swelling. [Appellant's Doctor #3] documented that [the Appellant] had contused his tibia. [The Appellant] was assessed on multiple occasions by various physiotherapists and there is no documentation of symptoms until October 1997 and no documentation of clinical findings until April 1998. Considering [the Appellant] was very active in recreational/extra-curricular activities and was capable of fully functioning at his previous occupation, which placed demands on his knee, it is my

opinion that other factors separate from the collision contributed to the development of his right patellofemoral pain.”

Due to the inconsistencies of your claim that you were/were not working after the accident, your file was referred to our Special Investigations Unit. They have confirmed through your employer, [text deleted], that you worked eight months between the date of accident to September 1998. They confirmed that you made a low of \$12.00 to a high of \$62.00 per month during this time. You provided a statement to myself indicating that you had not worked since the accident. Our investigator requested that you provide a further statement, but you declined.

The medical evidence does not support a claim for Income Replacement Indemnity benefits. As I have indicated, there is contradictory evidence regarding your right knee symptoms...

As I indicated to you earlier, the medical evidence does not support your inability to continue employment.

The Appellant sought an Internal Review of the case manager’s decision. The Internal Review Officer, in a decision dated November 5, 2004, dismissed the Appellant’s Application for Review and confirmed the case manager’s decision. The Internal Review Officer agreed with [MPIC’s Doctor’s] opinion set out in his interdepartmental memorandum of January 21, 1999. She found that the right knee symptoms were not related to the motor vehicle accident and as a result, the Appellant was not entitled to IRI benefits due to his inability to hold employment arising from his right knee problems.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to IRI benefits as a result of the motor vehicle accident of April 1, 1997.

Appellant’s Submission:

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant did sustain a right knee injury in the motor vehicle accident of April 1, 1997 which has affected his ability to carry

out his employment duties. As a result, the Claimant Adviser submits that the Appellant is entitled to IRI benefits.

The Claimant Adviser maintains that there were complaints of a right knee injury immediately following the motor vehicle accident. In support of her position, the Claimant Adviser relies upon:

- the Emergency Record of [Hospital] from April 1, 1997 which identifies right knee pain;
- the short form Application for Compensation dated April 11, 1997 completed by the Appellant, which identifies an injury to the knee;
- [Appellant's Doctor #1's] Health Care Provider Progress Report dated May 27, 1997 which indicates that the Appellant sustained a cervical strain and a lumbar strain;
- initial physiotherapy report dated October 10, 1997 which identifies lower limb pain/numbness/weakness;
- subsequent physiotherapy report dated July 10, 1998 which notes that the Appellant continued to report pain in the areas of his neck, back, right knee, as well as headaches;
- a report dated July 29, 1998 from [Appellant's Doctor #2] who examined the Appellant for review of his bilateral neck and shoulder girdle pain and right knee pain on July 28, 1998. [Appellant's Doctor #2] opined that the Appellant's knee pain was patella femoral pain.
- X-ray report of the right knee dated July 28, 1998; and
- [Appellant's Doctor #1's] letter dated January 19, 2011 summarizing the chronic medical conditions of the Appellant including injuries to his knee.

The Claimant Adviser submits that the Appellant's injuries have affected his ability to carry out his employment duties. She maintains that the Appellant was involved in "cash businesses" prior to the motor vehicle accident which made it difficult to establish an income and collect IRI benefits. The Claimant Adviser claims that MPIC had an obligation to undertake a 180-day determination of the Appellant and determine whether the Appellant could do that job. In conclusion, the Claimant Adviser argues that the injuries which the Appellant sustained in the motor vehicle accident of April 1, 1997 prevent him from working and he is entitled to IRI benefits.

MPIC's Submission:

Counsel for MPIC submits that the Appellant's evidence throughout the file is inconsistent and therefore his evidence cannot be relied upon. Counsel for MPIC argues that at the time of the motor vehicle accident, the Appellant told the physiotherapist, [Appellant's Doctor #1], [Appellant's Doctor #2], [Appellant's Doctor #4] and his case manager at MPIC that he was a driver. However, he changed his story when he sought IRI benefits from MPIC. The Appellant also changed his story again during his oral testimony at the appeal hearing. Counsel for MPIC submits that the Appellant modified his story in a manner that was most suitable and advantageous to his circumstances.

Counsel for MPIC contends that there is no concrete medical evidence of substantive right knee injuries which would preclude the Appellant from working as a driver, which she submits is a sedentary occupation. Counsel for MPIC maintains that the Appellant continued working after the motor vehicle accident of April 1, 1997 until November 1998 when he filed his Application for Compensation with MPIC. She argues that it defies credibility that he would not have claimed IRI benefits at the time of the accident in April 1997 if he could not work due to that

accident. As a result, counsel for MPIC argues that there is no causal relationship between the Appellant's inability to work and the motor vehicle accident of April 1, 1997.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal and after hearing the submissions of the Claimant Adviser and of counsel for MPIC, the Commission finds that the Appellant is not entitled to IRI benefits as a result of the motor vehicle accident of April 1, 1997.

Reasons for Decision:

There are a number of inconsistencies between the written evidence filed with the Commission and the Appellant's oral testimony provided at the appeal hearing. At the appeal hearing, the Appellant testified that as of April 1, 1997 he was self-employed as a "backyard mechanic" and planning on setting up a garage in order to repair vehicles. In his oral testimony, the Appellant was adamant that at the time of the accident his job was fixing motorcycles and he was not a driver. He maintains that driving was more of a hobby. That evidence contradicts with the written evidence in the file that the Appellant was working as a driver for [text deleted] at the time of the motor vehicle accident. There are also several notes from the Appellant's caregivers pertaining to his employment at the time of the motor vehicle accident. Upon a review of all of the testimony and evidence before it, the Commission finds that the Appellant's testimony at the appeal hearing was not credible. Rather, we find that the Appellant worked as a driver from the day of the motor vehicle accident until November 1998. There was simply no mention at any time prior to November 1998 that the Appellant was intending on opening up a service garage in order to repair vehicles. As a result, the Commission is unable to accept the Appellant's oral

testimony that he was not employed as a driver at the time of the motor vehicle accident and had intentions of establishing his own business.

Additionally, the Commission finds that the Appellant was not prevented from working due to any injuries resulting from the motor vehicle accident prior to November 1998 or thereafter. We are unable to causally relate any of his conditions following November 1998 to the motor vehicle accident of April 1, 1997. The Commission agrees with the assessment of MPIC that the medical evidence simply does not support an inability to continue employment for the Appellant due to motor vehicle accident related injuries.

Accordingly, the Commission finds that the Appellant is not entitled to IRI benefits as a result of the April 1, 1997 motor vehicle accident. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated November 5, 2004 is confirmed.

Dated at Winnipeg this 16th day of April, 2013.

YVONNE TAVARES

JANET R. FROHLICH

PAUL JOHNSTON