

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-099**

PANEL: Mr. J. Guy Joubert, Chairperson
Ms Lorna Turnbull
Mr. Paul Taillefer

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Dan Joannis of the Claimant Adviser Office ('CAO'); Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.

INTERPRETERS: French interpreters for the Hearing were [text deleted].

HEARING DATE: October 26, 2017.

ISSUE: Whether the Appellant's lower back pain and left leg symptoms were causally related to the July 23, 2010 motor vehicle accident ('MVA') and if so, whether the Appellant is then entitled to an income replacement indemnity ('IRI').

RELEVANT SECTION: Section 70(1) "bodily injury caused by an automobile" of The Manitoba Public Insurance Corporation Act ('MPIC Act').

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

A. PRELIMINARY COMMENTS

During the pre-hearing Case Conference process, the parties agreed that the proceedings should be held in English and interpreted into either English or French depending upon the language used by a party during the Hearing.

At the beginning of the Hearing, the Commission confirmed with each of the parties their preferred language for the purposes of the proceedings. The Appellant indicated that his preferred language was French, whereas the representatives from the CAO and MPIC each indicated their preferred language was English. The Commission advised the parties that members of the panel were fluent in both English and French. A written decision of the Commission's findings would later be submitted to the parties in both English and French. The Appellant was encouraged by the Commission to take all necessary time with respect to his testimony and to request clarification at any point should he have difficulty understanding. The Commission was satisfied that the parties understood all stages of the proceedings in English or French as the same was competently translated by the interpreters.

Throughout the Hearing the parties and Commission were assisted by language interpreters who ably provided viva voce simultaneous translation into French or English. Interpretation covered examination-in-chief, cross-examination and re-examination, together with all submissions by the parties' representatives, and all questions and remarks by the Commission.

B. BACKGROUND

1. The Motor Vehicle Accident

At the time of the MVA, the Appellant was a standing passenger in a [text deleted] bus that suddenly stopped in order to avoid colliding with another vehicle. As a result, the Appellant fell forward in the bus and injured his back.

2. Application for Compensation - Personal Injury Protection Plan

A few months after the MVA, the Appellant filed an Application for Compensation - Personal Injury Protection Plan on September 22, 2010, wherein he made the following comments with respect to his pre-existing back injury:

javais eu un accident depuis le 17 janvier 2010 j'avais suivie les traitements s'allais tres bien jusqu'à le jour de 23.07.2010 lorsque l'autobus a stopée d'un seul coup qui a fracturée. et ceci encore plus grave qu'avent car la manière qui me fait mal ce nes pas come avent (sic)

English translation :

I have had an accident since January 17, 2010 [sic]. I had received treatment; I was doing very well until 23/07/2010 when the bus came to a sudden stop that fractured [sic] and it's even worse than before, as the way I hurt, it's not like before.

3. Case Manager Decision Letter

MPIC issued a Case Manager Decision Letter dated December 11, 2013 wherein she concluded the medical information on file did not support a relationship between the Appellant's injuries and the MVA.

Following a review of medical information on the file by a consulting physician with the Manitoba Public Insurance Health Care Services Department (MPIC's Health Care Services Consultant), the MPIC's Health Care Services Consultant opined in a report dated July 24, 2013 that "there is insufficient support for the claimant sustaining anything more than a temporary acute worsening of his pre-existing low back pain and left leg symptoms". As a result of that finding the Case Manager concluded that an entitlement to IRI did not apply.

The Appellant sought an Internal Review of the Case Manager's Decision.

4. Application for Review of Injury Claim Decision

In the Application for Review of Injury Claim Decision dated February 5, 2014, the Appellant stated that:

Car la gravité de ma blessure c'est aggravée pendent l'accident de 23 juillet 2010 dans le bus [text deleted], bien sûr j'avais la douleur au dos pendant le travail le 17 janvier 2010, c'était bien rétabli j'avais comencé les activités et sa marchait très bien, j'allait même pour m'inscrire, [text deleted] pour reprendre mes études quant j'ai eu l'accident dans le bus, il est belle et bien, mon accident dans le bus qui ai aggravée ma blessure, la preuve est que MRI avant le 23 juillet 2010, et après est tout à fait différent, la blessure est plus persistente, les documents vous montreras la vérité.

English Translation :

The seriousness of my injury has worsened since the July 23rd accident in bus [text deleted]. Yes I was having back pain at work on January 17, 2010. I had recovered and begun activities and things were going very well, I was even going to register at the [text deleted] to resume my studies when I had the bus accident. It is in fact the bus accident that aggravated my injury. The proof is that MRI before July 23, 2010, and afterward is completely different [sic]; the injury is more persistent, the documents will show you the truth.

The Appellant's position was that the MVA aggravated a pre-existing back condition (work-related injury) which had been resolved prior to the MVA. He claimed his lower back and left leg symptoms were now permanently worse and he was entitled to IRI as a consequence.

5. Internal Review of the Case Manager Decision Letter

As part of the Internal Review process by MPIC in this matter, a hearing took place on April 14, 2014. The Internal Review Officer then rendered his decision on July 2, 2014 which is reproduced in part as follows:

...

3. Your file was reviewed by MPI's Health Care Services medical consultant who provided the following opinion:

“At the time of the July 23, 2010 bus incident, the claimant had an open [text deleted] claim for lumbar injury of January 17, 2010. In this consultant’s opinion, there is insufficient support for the claimant sustaining anything more than a temporary acute worsening of his pre-existing low back pain and left leg symptoms. As time progressed after the July 2011 (should be 2010) bus episode, review documentation reflects that objective signs of lumbar radiculopathy eventually resolved but the claimant continued to report low back pain and left leg symptoms. On the balance of probabilities, persistent symptoms are not the result of the July 23, 2010 bus accident”

4. Based on the Health Care Services review, your case manager rendered a decision letter on December 11, 2013 indicating that your symptoms were not causally related to the motor vehicle accident.
5. You sought a review of this decision.
6. At the Internal Review hearing you indicated that the MVA aggravated your pre-existing condition, making it worse.
7. You provided a report from [Appellant’s doctor] which provided the opinion that the bus accident re-triggered low back pain which had been absent for several months following your initial presentation in March 2009, and that the back injury was further exacerbated by the bus accident of July 23, 2010.
8. Your file was reviewed once again by Health Care Services medical consultant who provided an opinion on June 16, 2014 which is attached to this decision.
9. Having reviewed the documentation, the health Care Services medical consultant’s opinion remained unchanged and concluded that causation with the MVA was improbable. As a basis for this decision, the consultant indicated that the objective data reflected no significant change in the objective signs related to your presentation with lumbar pain and left leg pain, in the acute post-accident period.

...

In reaching his decision, the Internal Review Officer stated that based upon a thorough review of the file and conclusions reached by the MPIC’s Health Care Services Consultant there was no objective information to indicate that the MVA caused anything more than a brief exacerbation of a pre-existing back injury which would have resolved after the accident. The Internal Review

Officer found that there was no causal connection between the symptoms experienced by the Appellant and the MVA.

The Appellant then appealed the Internal Review Officer's Decision to this Commission.

6. Prior Claim for [text deleted]

The Appellant's pre-existing back condition pertained to an earlier work-related injury which occurred on January 17, 2010 and which had been subject to a claim with [text deleted] under [text deleted] dated February 23, 2010. The [text deleted] Claim had been initially denied. However, the wage and medical loss benefits were later approved on November 30, 2010 almost four months following the MVA. At the time of the injury the Appellant was a homecare support worker who hurt his back while lifting a client. The injury manifested itself as pain to the lower back that radiated to the left gluteal and leg. In a letter dated September 9, 2011, the [text deleted] informed the Appellant that his benefits had been terminated effective September 1, 2011 ([text deleted] Decision'). The [text deleted] had reviewed the [text deleted] Claim file, together with video surveillance and related investigators' reports. Video footage and investigators' reports had shown some of the Appellant's depicted activities as being inconsistent with his injury complaints. The [text deleted] had then concluded that:

[y]our file was reviewed by a [text deleted] medical advisor September 9 2011 who has stated there is no indication for ongoing restrictions in relation to your January 17, 2010 workplace accident. Wage loss and medical benefits are therefore ended effective September 1 2011.

C. SALIENT MEDICAL EVIDENCE

1. Prior to the [text deleted] Claim (and MVA)

The clinical notes of the Appellant's family physician, [text deleted], indicated that the Appellant had been examined on two occasions on March 16, 2009 and May 4, 2009. During these two visits his physician had made the following notes: "leg swells off and on, back pain rad to left leg" and "cramps in leg for exertion".

2. Related to the [text deleted] Claim

The Appellant attended at [hospital #1] on January 22, 2010 and according to the Emergency Report Form he presented with back pain in the lumbar sacral area, sciatic-type radiating to the left leg. There were further notes but they were very difficult to decipher. An x-ray taken at the hospital noted that: "[a]lignment is normal. The disc spaces are maintained in height. No osseous or articular abnormality has been demonstrated".

On February 8, 2010 the Appellant attended at the [hospital #2]. The notes in the Emergency Report Form were difficult to decipher. The notes read in part that "L [left] back pain radiating to lateral proximal [?] limb after picking up heavy object on Jan 17/10". There was also a reference to "lower back pain NYD" [not yet diagnosed].

An MRI was taken on February 9, 2010 ("First MRI") on an out-patient basis. The radiologist [text deleted] noted that:

The patient was placed prone due to pain. Unfortunately, complete images could not be obtained as the patient could not tolerate the procedure.

On the limited images there appears to be no significant abnormality from the lower thoracic to L4-5.

At L5-S1 there is a moderately large disc protrusion most prominent on the left side. Likely this is compressing the left S1 nerve root. There is no central stenosis or foraminal narrowing.

The Appellant met with [Appellant's doctor] on February 12, 2010 who noted that "lifting bilat amputee client on jan 17 developed back pain radiating to left gluteal and to leg"; and "limping, difficulty w postural changes".

Subsequently during another visit with his physician on May 13, 2010, [Appellant's doctor] recorded in part:

slowly low back pain had decreased
left leg weak and tired
difficulty with walking 30 min due to back pain
not able to lift 5 kg of grocery
no history of back pain except march 2009 for few weeks, no back injury in past

At another examination on June 24, 2010 [Appellant's doctor] noted that:

left back pain
no pain in leg, no numbness in leg, no weakness in leg but 2 wks ago felt "tiredness" in left leg. diff w walking 15 min and must rest.
last week pt used atenolol for pain thinking it was demrerol
no side effects noted, no back pain if on t3

3. Related to the MVA

On the date of the MVA the Appellant was transported to the [hospital #1]. The Emergency Report Form indicated that the diagnosis was "L [left] lumbar strain". Again the handwritten notes were hard to read but there was also a reference to "o [no] L-spine tenderness".

The Triage Assessment Score Form dated July 23, 2010 noted the following:

hx [history] of chronic backpain X 6 months. mild language barrier. waiting for surgery in 2011. while on bus, same stopped quickly jarring pt back. c/o [complaining of] left lumbar pain radiating into left leg. was able to ambulate per ambulance.

The Appellant returned to the [hospital #1] on July 26, 2010. The Emergency Report Form indicated a diagnosis of “lower back pain? Sciatica”, and the Triage Assessment Score Form had the following notes:

c/o [complaining of] back pain, ongoing, chronic back pain, numbness on the left leg, able to stand/transfer, taking Tylenol #3 to manage his pain, and today ++ pain and unable to manage to walk. Injury on his lower back from work as a HCA [Health Care Aid]

The Appellant saw [Appellant’s doctor] on August 12, 2010 following the MVA. In his notes for that date the physician recorded: “back pain increase on June 23 after mva on bus”. Subsequently the Appellant saw [Appellant’s doctor] on a number of occasions for lower back pain and left leg symptoms. In a medical report dated April 4, 2014 [Appellant’s doctor] summarized his examinations for the period from March 16, 2009 through to February 25, 2014, and then concluded:

In my opinion, the work related injury of January 17, 2010 re-triggered the low back pain which was absent for many months after his initial presentation in March 2009. The back injury was further exacerbated by the bus accident of July 23, 2010.

The Appellant underwent another MRI on March 3, 2011 (“Second MRI”). The radiologist [text deleted] reported as follows:

Comparison is made to a limited study obtained February 2010. Again, on the current examination the patient was in pain and moving with images somewhat less than optimal.

At L3-4 there is mild central stenosis due to congenitally short pedicles.

At L4-5 there is a shallow diffuse disc bulge with congenitally short pedicles and this results in moderate central stenosis.

At L5-S1 there is again a moderately large left paracentral disc protrusion which does compress the left S1 nerve root. There is also moderately severe left foraminal narrowing for the L5 nerve root. Centrally there is moderate stenosis related to the disc, congenitally short pedicles and epidural lipomatosis. No significant change is suspected from the prior examination.

The First MRI and the Second MRI were later compared and reviewed by another radiologist, [Appellant's radiologist #2], who submitted a report dated June 21, 2016.

The concluding remarks of that report were as follows:

In conclusion, the first MRI obtained in February 9, 2010 is severely limited due to the fact that a single sequence was obtained and this single sequence is further degraded by patient motion artifact. The March 3, 2011 MRI is a much better study with sagittal and axial sequences. The large L5-S1 disc extrusions was present on both studies and is roughly similar in size on both studies. However, due to the extremely limited nature of the first MRI study subtle changes in the morphology and size of the extrusion cannot be excluded with certainty. The foraminal and central spinal stenosis appears unchanged between MRI studies as does the congenital spinal stenosis.

To answer the provided questions:

1. Is there progression at any of the visualized levels between the first study and the second study? It is impossible to exclude subtle changes in disc extrusion at L5-S1 and its impact on the left S1 nerve root due to the extremely limited nature of the first MRI study. The overall size of the disc extrusion is roughly similar. The foraminal and central spinal stenosis is similar in both studies. No new abnormality developed at the other lumbar spinal levels.
2. Is the progression (if any) consistent with [the Appellant's] report of increased symptoms affecting his lower back and left leg since the July 2010 bus accident? Unfortunately, subtle changes in the size and morphology of the disc extrusion at L5-S1 and its impact on the left S1 nerve root cannot be assessed because of the limited nature of the first MRI study. Therefore, although the size of the disc extrusion has not changed markedly between studies subtle changes in extrusion morphology that could result in a change in

the patients [sic] symptoms may have occurred but this cannot be assessed because of the poor quality of the first MRI.

D. POSITION OF THE PARTIES

1. Submission for the Appellant

The CAO's position is that the Appellant has made his case that his symptoms are causally related to the MVA. As a result MPIC is now required to assess the Appellant's entitlement to IRI.

In written arguments the CAO submitted that the Appellant's pre-MVA lower back and left leg issues had been "significantly alleviated and were not associated with the kind of chronic, disabling pain that has been the case since his fall on the bus in July 2010". In support of this position the CAO relied upon medical evidence (health care providers and diagnostics), together with the Appellant's subjective assessments.

In the alternative, the CAO argued that if the Commission found there was no organic or pathology to account for the Appellant's symptoms, it should still rely upon the Appellant's subjective assessments because the:

...subjective reports of increased pain following the July 23, 2010 motor vehicle accident are sufficient to trigger an entitlement to PIPP benefits because, as the Commission and MPI well know, pain is a compensable condition, even in the absence of underlying, organic pathology.

In support of this argument the CAO relied upon Decision AC-04-126 of this Commission wherein it had been held the appellant in that case had established on a balance of probabilities that he was physically incapable of returning to work as a truck driver due to a motor vehicle accident. The Commission had found that if it was in error and there was no physical basis for

the pain suffered, it nonetheless accepted the appellant's testimony regarding his pain as being real and severe, and caused by the motor vehicle accident. In that regard the Commission found the appellant to be a credible witness and stated that:

[t]he Appellant testified at the appeal hearing in a straightforward and direct manner, without equivocation, and the Commission finds him to be a credible witness and accepts his evidence on all issues in dispute between the Appellant and MPIC.

2. Submission for MPIC

MPIC's position is that the Appellant's current symptoms are not causally connected to the MVA. Counsel for MPIC reviewed the Appellant's pre and post MVA condition and concluded his symptoms were similar in both time frames. With respect to the Appellant's condition following the MVA it was argued that if anything, the Appellant's symptoms were variable depending upon what he was doing at the time. Furthermore counsel emphasized there is limited available medical evidence and it is certainly not conclusive. MPIC's ultimate position is that the Appellant had only suffered a temporary acute worsening of his pre-existing low back pain and left leg symptoms.

In addition, MPIC contends that credibility is at issue since the Appellant is relying upon subjective assessments of pain to support his position. In this regard, MPIC pointed to the termination of the [text deleted] Claim as a result of video evidence that showed the Appellant was engaging in activities inconsistent with his claims. Furthermore, MPIC indicated the Appellant continued to collect benefits from the [text deleted] post-MVA when his work-related injuries had allegedly resolved months prior to the bus incident. In addition, the Appellant never appealed the [text deleted] Decision. According to MPIC, the above, together with the Appellant's testimony during the Hearing clearly suggests that the Commission should not "take his self-reports uncritically".

E. DECISION – ISSUE UNDER APPEAL

Whether the Appellant's lower back pain and left leg symptoms are causally related to the MVA and if so, whether the Appellant is then entitled to an IRI?

The MPIC Act provides:

Definitions

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;

The onus is on the Appellant, on a balance of probabilities to show that the Internal Review Decision erred in concluding that there was no causal connection between the Appellant's symptoms and the MVA.

After considering all the evidence and submissions of the parties in these proceedings, and for the reasons set out in this Decision, we find that the Appellant has failed to meet the onus upon him in this case.

In reaching this decision we rely upon the opinion of the MPIC's Medical Services Consultant. That opinion was based upon many factors, including the chart notes made by [Appellant's doctor] who was the Appellant's own physician. As an important aside, those chart notes were

made contemporaneously, we have no reason to doubt their veracity and therefore, we also rely upon the same.

We accept the MPIC's Medical Services Consultant's findings that causation is improbable and we give considerable weight to that individual's reports dated July 24, 2013 and June 16, 2014 respectively. In particular we note in the latter report the following summary pertaining to the review of the pertinent medical documents:

[Appellant's doctor] submitted three investigation reports – all of which have been reviewed previously and commented on in my July 24, 2013 memorandum: April 1, 2009 lumbar spine and chest x-ray report; February 9, 2010 lumbar spine MR report and March 3, 2011 lumbar spine MR report. [Appellant's doctor] also submitted an April 4, 2014 narrative report addressed to: To Whom It May Concern, stating that he saw the claimant on March 16 2009 [for] low back pain that radiated into the left leg. [Appellant's doctor] chronicled the claimant's clinical presentation from March 2009 up to the time of the July 2010 bus incident. The information provided by [Appellant's doctor] has been summarized in my July 24, 2013 memorandum. [Appellant's doctor's] narrative and my review of his previously submitted clinic notes reflect that after June 24, 2010 the claimant was next seen on August 12, 2010 – three weeks post-collision. [Appellant's doctor] stated that the claimant reported an increase in pain since the bus incident. **Comment:** Objective examination signs documented in [Appellant's doctor's] clinic notes indicated the same neurological signs as were documented in the physician's (pre-collision) June 24, 2010 chart note.

Per his April 4, 2014 narrative, [Appellant's doctor] stated that March 3, 2011 lumbar spine MR imaging demonstrated disc prolapse at L5-S1 with compression of the left S1 nerve root. **Comment:** Per my July 24, 2013 memorandum, lumbar pathology demonstrated on March 3, 2011 MR imaging was the same as that demonstrated pre bus incident; MR imaging for February 9, 2010.

[Appellant's doctor] concluded his narrative by stating that he saw the claimant on a number of occasions for low back pain and left leg symptoms between April 8, 2011 and February 25, 2014. The physician opined that a January 17, 2010 work injury re-triggered low back pain that had been absent for several months and that the claimant's back injury was further exacerbated by the July 23, 2010 bus incident.

In formulating the opinion the MPIC Medical Services Consultant concluded in part that the MRI evidence and [Appellant's doctor's] clinical examination findings showed there were no significant changes in the Appellant's presentation with lower back pain and left leg symptoms pre and post MVA. The MPIC Medical Services Consultant concluded that:

Having had the opportunity to revisit the issue of causation between the claimant's lumbar back condition and the July 23, 2010 bus incident, I find that my opinion on causation remains unchanged. Causation is improbable. There is no way to objectively validate or refute the claimant's impressions that he has perceived worse low back pain following the bus incident. The objective data, notably pre and post-bus incident MRI findings and [Appellant's doctor's] pre and post-clinical examination findings (on June 24, 2010 and August 12, 2010 respectively) reflect that there was no significant change in objective signs relating to the claimant's presentation with lumbar pain and left leg radiculopathy.

In summary, having reviewed the recently submitted reports from [Appellant's doctor], my opinion on causation remains unchanged. Given my opinion, no comment is required regarding the claimant's ability to return to his pre-collision employment.

With respect to [Appellant's radiologist #2's] assessment regarding his comparison of the First MRI and Second MRI, we find that the same is by no means conclusive and we have as a result attached little weight to that evidence. The essence of [Appellant's radiologist #2's] assessment is reproduced below:

Unfortunately, subtle changes in the size and morphology of the disc extrusion at L5-S1 and its impact on the left S1 nerve root cannot be assessed because of the limited nature of the first MRI study. Therefore, although the size of the disc extrusion has not changed markedly between the studies subtle changes in extrusion morphology that could result in a change in the patients [sic] symptoms may have occurred but this cannot be assessed because of the poor quality of the first MRI.

Therefore, this Commission finds on a balance of probabilities the Appellant's current lower back pain and left leg symptoms are not causally connected to the MVA. The Appellant's

condition pre and post MVA are similar in both time frames. At most the MVA would have caused a temporary acute worsening of the Appellant's pre-existing low back pain and left leg symptoms. Consequently, this Commission also finds that the Appellant is not entitled to IRI.

The panel also considered the CAO's alternative argument that if the Commission finds there is no objective evidence to account for the Appellant's symptoms, it should then rely upon the Appellant's subjective assessment of pain. In this regard the Commission indicates that it read Decision AC-04-126 submitted by the CAO and finds the same not to be of any assistance in this matter because in that case the panel's alternative finding was based upon a positive assessment of the appellant's credibility. This is not the situation in the matter at hand.

This Commission carefully considered the Appellant's testimony during the Hearing, including his subjective assessments and comments made by him to health care providers (as recorded in their reports), and we are left with serious concerns about his credibility. We find that the Appellant was not always forthright in his testimony. At times he was dismissive and evasive to questions being asked by the CAO and MPIC, including questions relating to some of [Appellant's doctor's] chart notes, the non-disclosure to the [text deleted] about the allegedly pre-MVA significant improvement to his lower back pain and left leg issues, and why he continued to collect benefits from the [text deleted] until September 1, 2011 approximately one year after he filed the Application for Compensation – Personal Injury Protection Plan. As a result, the Commission places less weight on the Appellant's evidence overall, including his subjective assessment of pain.

In light of the foregoing, the Commission dismisses the Appellant's appeal and the Internal Review Officer's decision of July 2, 2014 is hereby confirmed.

Dated at Winnipeg this 20th day of December, 2017.

J. GUY JOUBERT



LORNA TURNBULL



PAUL TAILLEFER