

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-13-081**

**PANEL:** Ms Laura Diamond, Chairperson  
Ms Leona Barrett  
Dr. Arnold Kapitz

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf;  
George Sotiriadis appeared as an interpreter;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Mr. Matthew Maslanka.

**HEARING DATE:** November 13, 2018

**ISSUE(S):** Whether the Appellant is entitled to Personal Injury  
Protection Plan (PIPP) benefits.

**RELEVANT SECTIONS:** Section 70(1), Section 81(1), Section 110(1)(a) and Section  
171(1) of the Manitoba Public Insurance Corporation Act  
(‘MPIC Act’).

**Reasons For Decision**

**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.**

**Background:**

The Appellant was injured in a motor vehicle accident (MVA) on April 30, 2011, when he was the driver of a pizza delivery vehicle. He attended at the emergency department and was discharged

with a diagnosis of neck strain. He reported his injuries to MPIC and completed an Application for Payment documenting injuries to his head, neck, shoulders and back.

On June 7, 2011, the Appellant attended for chiropractic treatment. On July 5, 2011, he attended for a physiotherapy examination which resulted in a diagnosis of cervical whiplash and lumbar strain. The chiropractor and physiotherapist submitted initial reports to MPIC.

The Appellant had continued working as a delivery driver but found alternative employment as a cook. Following a business slow down, he collected employment insurance (EI) benefits but resumed full-time work as a cook in June 2012.

On October 31, 2012, he contacted MPIC's claims department to advise he was unable to work due to an increase in pain and that his chiropractor had recommended he take time off work. On November 5, 2012, the Appellant confirmed for his case manager that he was no longer working.

Narrative reports obtained from his family physician indicated that the Appellant had reported subsequent MVAs to the doctor, but had not reported them to MPIC. MPIC records showed no documented reports of those MVAs. The Appellant indicated that he was only able to work one or two hours per day without overwhelming pain and weakness.

The Appellant's file was reviewed by MPIC's Health Care Services medical consultant who provided an opinion indicating that although the Appellant initially "developed symptoms involving the neck and back in keeping with a musculotendinous strain", other symptoms were not

causally related to the MVA. Nor had he been identified as having objective evidence of a physical impairment that developed secondary to the incident in question to the extent that he was not capable of performing the essential duties of a cook or delivery driver.

On January 31, 2013, the Appellant's case manager wrote to him to indicate that following a Health Care Services review, it had been concluded that there was no evidence to support a relationship between his reported complaints and the MVA of April 30, 2011, so there was no entitlement to benefits under PIPP in relation to his complaints.

An Internal Review Officer (IRO) considered the Appellant's Application for Review from the case manager's decision. She provided a decision on April 23, 2013, which concluded that following the MVA the Appellant had "sustained soft injuries to his neck and back". He continued to work for 18 months following the MVA and the medical evidence on file did not support a physical impairment developing secondary to this accident to the extent that he would be rendered incapable of performing the duties of a cook or delivery driver. Accordingly, she concluded that he was not experiencing symptoms as a result of a medical condition which were causally related to the MVA of April 30, 2011.

It is from this decision of the IRO that the Appellant now appeals.

**Preliminary Matters:**

The Appellant filed his Notice of Appeal on August 10, 2013. Through the Commission's case management process, counsel for MPIC advised the Commission and the Appellant that an MPIC

Health Care Services report dated March 12, 2014 had been located which had not previously been disclosed to the Commission or the Appellant. This report addressed causation as well, concluding that the Appellant's neck symptoms were causally related to the MVA to some extent. Accordingly, counsel undertook to refer this matter back to the Appellant's case manager for an investigation to be conducted regarding entitlement to PIPP benefits.

As a result, the case manager, following further investigation, issued a new decision dated November 29, 2016. This decision also took the position that the Appellant was not entitled to Income Replacement Indemnity (IRI) benefits as the medical information on file did not indicate that he exhibited objective physical impairments that would prevent him from performing his pre-motor vehicle accident work duties on a full-time basis.

The Appellant took issue with this decision. Counsel for MPIC indicated that MPIC would waive the requirement to seek an internal review of this decision. Accordingly, both parties agreed that the case manager's decision of November 29, 2016 would be dealt with as part of the present appeal and that decision was included in the documents in the Appellant's indexed file before the panel of the hearing of the appeal.

**Issue:**

The issue to be determined by the Commission is whether the Appellant developed a physical impairment secondary to the MVA which would render him incapable of performing his pre-motor vehicle accident duties and entitle him to PIPP (specifically IRI) benefits. Following a review of the documentary evidence on file, the testimony of the Appellant and the submissions of the

parties, the panel finds that the Appellant has not met the onus upon him of showing that he is entitled to such benefits.

### **Documentary Evidence:**

The panel reviewed documentary evidence from the accident and emergency reports following the MVA. Chiropractic, physiotherapy and medical reports were also provided.

#### Chiropractic and Physiotherapy

In June 2011, the chiropractor noted headaches, stiffness of lower back, shoulder and arm pain, with decreased range of motion and indicated the Appellant was not and should not be currently at work as a delivery driver/cook.

A physiotherapy report dated July 6, 2011, diagnosed cervical whiplash and lumbar strain as a result of pain in the Appellant's neck, upper back and shoulder. However, this report indicated that the Appellant was currently at work as a delivery driver and that his condition did not preclude travel to and from the workplace or result in an inability to perform required tasks. It was indicated that he should avoid heavy lifting.

Further lumbar complaints were documented by the physiotherapist and chiropractor through the fall of 2011. The chiropractor reported again in October of 2012, noting similar symptoms, indicating that the Appellant was currently at work as a delivery driver/cook but that the condition resulted in an inability to perform required tasks.

Family Physician

The Appellant's family physician, [text deleted], provided a report dated January 2, 2013. He described seeing the Appellant a few weeks after the April 30, 2011 MVA and prescribing Toradol for inflammation, after reviewing the emergency room notes. He saw the Appellant again on June 2, 2011, when the Appellant reported a second MVA to him. The Appellant was attending for chiropractic treatment, and back at work.

[Appellant's family physician] saw the Appellant again in July 2011, where he indicated he was doing physical therapy. However, on his next visit of September 26, 2011, [Appellant's family physician] noted the Appellant said he was no longer working deliveries or cooking "because his body couldn't take it anymore".

On January 26, 2012, the Appellant told [Appellant's family physician] he could only work 4-5 hours a day. On March 5, 2012, he told the doctor that he had been in a third MVA. He was using crutches and indicated he could only work 3-4 hours a day. He was prescribed Tylenol No. 3 and Zopiclone to help with his symptoms and sleep.

According to this report, the Appellant indicated to his doctor that he had not reported the second and third MVAs to MPIC. [Appellant's family physician] encouraged him to do so. When he saw the Appellant again in October 2012, the Appellant stated he now "could only work 1-2 hours a day without overwhelming pain and weakness preventing further work".

### Specialists

The Appellant provided a report from [text deleted] (physiatrist) dated June 25, 2013. This report evaluated hand, hip and thigh pain. He also commented upon the Appellant's neck pain, recommending interventional Botox injections, but did not comment upon causation.

A report from [text deleted], a neurologist, was dated November 5, 2013. [Appellant's neurologist] noted:

Thank you for asking me to see this [text deleted] year old patient with complaints of neck and lower back pain. He had a motor vehicle accident 2011. The vehicle in which he was travelling was cut off by another car and his vehicle ended up flipping onto its roof. He lost consciousness and woke up still in the vehicle. Following that he developed neck and low back pain which was exacerbated by 2 further road traffic accidents much less severe than the first. He has received chiropractic manipulation and physiotherapy with questionable benefit. He states that Autopac is no longer paying for either and is no longer receiving either.

[Appellant's neurologist] noted "normal muscle bulk in arms and legs without fasciculations, normal strength with the exception of upper limb related pain, tenderness in the trapezius, cervical paraspinal, infraspinatus and scalene muscles and thoracic paraspinal muscles bilaterally". He indicated that the Appellant had "no definite evidence of a cervical or lumbosacral radiculopathy or myelopathy" and diagnosed a "fairly diffuse myofascial pain syndrome".

A Magnetic Resonance Imaging (MRI) requested by the neurologist, [Appellant's neurologist#2], and dated October 11, 2014 showed "relatively mild degenerative changes in the cervical spine as described".

[Appellant's neurologist#2] reported on November 3, 2014, indicating that the MRI of the cervical spine showed evidence of some mild osteophytic formation with some foraminal stenosis, but the central spinal canal was well maintained. He indicated:

I rediscussed with [the Appellant] the clinical presentation and radiological findings. Most of the discomfort he is experiencing is essentially musculoskeletal. I cannot detect any obvious signs of frank ongoing radiculopathy and myelopathy. I would recommend the patient pursue some physiotherapy with a goal of stabilizing and reconditioning the cervical segment.

#### Health Care Services Reviews:

Four opinions were provided by [text deleted], a sports medicine doctor and Health Care Services medical consultant.

- 1) On January 24, 2013, [MPIC's sports medicine doctor] reviewed the Appellant's file and concluded that the Appellant had developed symptoms involving his neck and back, in keeping with a musculotendinous strain, as a result of the MVA. Other symptoms such as nightmares, loss of memory, headaches, etc. were not found to be causally related to the incident in question. [MPIC's sports medicine doctor] went on to conclude that the medical evidence did not indicate that the Appellant had been identified as having objective evidence of a physical impairment that developed secondary to the MVA to the extent that he was not capable of performing the essential duties of a cook or a delivery driver.
- 2) On March 12, 2014, [MPIC's sports medicine doctor] opined that the Appellant's neck symptoms were causally related to the MVA in question. However, he opined that Botox injections were not medically required in the management of conditions developed secondary to the incident. Further, he stated that the medical evidence did not support the

position that the Appellant had been identified as having a physical impairment in function preventing him from performing the required demands of a cook/restaurant worker.

3) A review completed on August 24, 2016 considered the Appellant's new employment as a full-time cook. In the absence of a Physical Jobs Analysis report, [MPIC's sports medicine doctor] relied upon an assumption that the Appellant's work duties would involve light to medium strength demands. The file did not contain evidence indicating the Appellant had been identified as having objective physical impairments causally related to the accident, which would prevent him from performing light to medium work duties on a full-time basis.

4) A further review dated November 15, 2016 considered additional medical documentation including an X-ray and MRI of the cervical spine which revealed some narrowing and evidence of mild degenerative changes at that level. [MPIC's sports medicine doctor] noted:

... Based on this it is reasonable to opine the degenerative changes affecting the cervical spine did not develop as a direct result of the incident in question. It is well known that cervical degenerative disc disease can contribute to the development of neck symptoms in individuals that participate in regular day-to-day and work activities.

[MPIC's sports medicine doctor] further pointed out that the documents did not contain evidence indicating that a health care professional advised the Appellant to stop working or reduce his workload as a result of an identified physical impairment. He concluded that while the Appellant suffered symptoms in keeping with a musculotendinous strain secondary to the incident in question, there was no medically probable cause and effect relationship between the incident in

question and the Appellant's continuing symptoms. After the MVA, his condition improved with treatment in the passage of time. The Appellant was able to continue working following the incident in question and his condition later deteriorated.

Once again, [MPIC's sports medicine doctor] emphasized that the file did not contain evidence supporting the position that the Appellant was noted to have objective physical impairments causally related to the incident in question which would adversely effect his ability to work as a delivery driver. He also noted that the Appellant had already received appropriate physiotherapy and chiropractic care.

**Evidence and Submission for the Appellant:**

The Appellant testified at the hearing into his appeal. He explained that the problem is his pain. He was a healthy man before the MVA, who had never had any problems with his back, neck or his head. Now, he feels he can't work like he used to, because of his pain.

The Appellant described 47 years of working without any problems, owning his own business, then working as a delivery driver. After the MVA, he had trouble climbing stairs to deliver in apartments and began to work as a cook at [text deleted] restaurant. Working in that restaurant, cooking meats and breakfast items on the grill, caused him to be in a constantly bent over position, which was painful.

The Appellant then found work in the [text deleted], running a pizza place. He explained that he works 7 or 8 hours a day, sometimes less depending on what kind of shape he is in. He does

everything, running the pizza restaurant and supervising the restaurant and lounge. He does all of the cooking, including making dough and pizzas. He also takes orders and payment. In the lounge and bar he supervises the waitresses. He explained that this job is easier because of the position of his body. When making pizza he doesn't have to bend over as much. It is not as demanding as cooking on the grill making breakfast or climbing stairs to make deliveries.

The Appellant explained that he only works in the [text deleted] about 7 or 8 months a year and then returns to [text deleted], where he does not work. When asked on cross-examination why he doesn't work in the [text deleted] all year, he indicated that it is too much for him. He gets tired and can't work the full year round. When asked whether there is a job for him there all year round, he indicated that if he can do it there is work for him.

On cross-examination, the Appellant also admitted that one of the reasons he stopped work as a delivery driver was because his doctor told him that it was too dangerous for him to be driving at night. He also admitted that he kept working full-time delivering pizzas until he went to work at the [text deleted] restaurant, where he worked approximately 4 to 5 hours at a time for two weeks. After two weeks, there was a work slow down but he still needed to work more hours. He did not have good recall as to whether he had stopped working there because work slowed down and he was laid off from the restaurant, indicating that it was a long time ago and he did not remember very well.

However, the Appellant explained that before the MVA he had never had to go and apply for EI benefits, as he did after the accident. He explained that he had worked all his life, liked to work

and was not afraid to work. The Appellant submitted that MPIC's Internal Review Decision (IRD) was wrong because they cut off his treatments while he was still suffering. He had no problem working until the MVA, and after the MVA he could not work as much as he used to.

He goes to work with pain. Before the MVA he had no issues with pain nor anything else in his back but after the MVA everything started and he didn't have any improvement.

The Appellant submitted that his pain was not a result of degenerative deterioration in his back. He stated that if the doctor who wrote the report pointing that out had gone through what he'd gone through, with all the pills he takes, he would not conclude that the Appellant was able to work in a medium to light strength job. His suffering had not stopped.

Although his doctors had not told him to stop working and had always encouraged him to go to work, he now takes pain killers in order to continue with his work and his life. He could not point to a specific medical report that attributed his pain to the MVA although, he believed that [Appellant's family physician] supported this position.

**Submission for MPIC:**

Counsel for MPIC submitted that the Appellant had suffered a soft tissue injury in his neck and back in the MVA. The evidence shows that he continued to work following the MVA and maintained full-time hours. The Appellant admitted this on direct evidence, and in documents on the Appellant's indexed file (including the Application for Payment dated June 3, 2011) where the Appellant denied being required to miss time from work because of his injuries. The application

also indicated that the Appellant had not missed any time from work as a delivery driver as a result of the accident, and was then employed at [text deleted] restaurant on a full-time basis. The Appellant confirmed that he signed this document with the help of his son-in-law, who assisted with the English.

The evidence showed that after his doctor advised him that it was too dangerous to work nights, the Appellant switched to cooking. He worked full-time as a cook, reduced to 2-3 hours a day when the work slowed down. The Appellant had a break in employment between October 11, 2011 and June 1, 2012, when he collected EI, as the [text deleted] restaurant had no work for him.

Following the MVA, the Appellant was provided with chiropractic treatment and physiotherapy support to assist with the soft tissue injuries he was experiencing related to the MVA. He received 40 sessions of chiropractor treatment, which he discontinued early, and 24 sessions of physiotherapy. He was discharged from physiotherapy on September 29, 2011, with the indication that his condition was much improved and that there were no issues with working. That is consistent with both initial chiropractor and physiotherapy reports, as well as progress reports which indicated that the Appellant was at work and able to continue working.

The Appellant's file was reviewed on four separate occasions by MPIC's Health Care Services medical consultant. On all four occasions, the medical consultant came to the conclusion that the Appellant had not developed a physical impairment from the MVA that would have stopped him from working. Counsel reviewed these reports, and noted that in the last report, the medical

consultant had pointed out that no health care professional had told the Appellant that he should stop working or reduce his workload due to his reported physical impairment.

Counsel submitted that from an objective standpoint, there was no physical impairment that prevented the Appellant from working. The objective evidence and the Appellant's own testimony show that he was able to work following the MVA and continues to do so. He was able to continue as a delivery driver until his doctor suggested he change jobs because night time delivery was too dangerous.

Counsel submitted that the evidence on these documents was provided and signed by the Appellant much closer in time to the MVA and as such, is more reliable than his testimony at the hearing. He addressed the Appellant's position that he was healthy before the MVA but had problems after it. Counsel submitted that the evidence from the months following the MVA indicates that the specific injuries suffered by the Appellant in the MVA were not preventing him from working and were improving.

That, he submitted, is consistent with [MPIC's sports medicine doctor]'s opinion. [MPIC's sports medicine doctor] noted that a diagnosis of strain is very favourable to a natural history of recovery, even in the absence of supervised treatment intervention. The Appellant had continued to work in the period immediately following the MVA, with no sign of his condition getting worse. His condition was much improved with treatment, although he did have other underlying conditions which could contribute to neck and back symptoms. These conditions of degeneration and osteoarthritis did not develop as a result of the MVA. [MPIC's sports medicine doctor] concluded

that there was a lack of evidence that the Appellant had developed a medical condition secondary to the MVA that would result in a permanent impairment or chronic symptoms.

Therefore, although counsel for MPIC indicated he sympathized with the Appellant's pain, the issue before the Commission is whether his pain resulted from a MVA related condition which translated into an ability to work. The evidence we have does not show that the pain from injuries in the MVA prevented him from working and the Appellant has not shown, on a balance of probabilities, that the MVA led to a condition which impaired his ability to work.

**Appellant's reply:**

The Appellant queried why, if deterioration was the reason for his pain, he had been able to work before the MVA and not now. He submitted that he was willing to work until he dies but he can only work as much as his condition allows.

**Discussion:**

The relevant provisions of the MPIC Act are as follows:

**Definitions**

70(1) In this Part,

"**accident**" means any event in which bodily injury is caused by an automobile;  
(« accident »)

"**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 ...

**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;

(b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;

(c) the full-time earner is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

**Events that end entitlement to I.R.I.**

**110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

**Corporation may reconsider new information**

**171(1)** The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to further PIPP benefits, such as IRI, because he has an inability to work due to injuries sustained in the MVA. The panel has reviewed the documentary evidence on the Appellant's indexed file, along with the testimony of the Appellant and the submissions of the parties.

In considering the reasons why the Appellant stopped working as a delivery driver, the panel has reviewed the somewhat contradictory evidence. The Appellant indicated that he changed jobs because he couldn't climb the stairs due to his injuries but he later acknowledged that his doctor had told him to change jobs because it was dangerous to be driving around at night.

Further, the Appellant's evidence was that his doctor never told him to stop working or that he couldn't work.

The Appellant changed jobs, working as a cook. His application for compensation indicated that he then went on EI due to a lack of work in the fall and winter. At the hearing, he took the position that, by June 2012, more than a year after the MVA, he could no longer work full time. His position was that when his EI benefits ended, he could not work full-time hours due to his pain and problems with his hearing. Although the Appellant continues to work in the [text deleted] for part of the year, he said that he could not work year-round because it was too hard for him.

The panel notes that there is no medical evidence supporting that position. The Appellant saw three specialists and has provided three reports in this regard.

[Appellant's physiatrist] saw the Appellant for an evaluation of his hands and did not comment upon the effects of the MVA.

[Appellant's neurologist] discussed the Appellant's injuries in the MVA (as well as two subsequent MVAs for which MPIC has no record of reporting). The diagnosis of "fairly diffuse myofascial pain syndrome" was provided but without commentary connecting it to the MVA and inability to work.

Finally, [Appellant's neurologist#2] noted MRI findings of spinal degeneration, and concluded the Appellant's discomfort was essentially musculoskeletal.

The panel finds that these reports do not meet the onus upon the Appellant to show on a balance of probabilities that an injury arising from the MVA is causing his continued symptoms and preventing him from working.

The Appellant did not submit any doctor's reports saying that he could not work year-round and, a review of the medical evidence on file shows that there is no doctor's report stating that he cannot work due to the MVA. As a result, the panel agrees with the submission of MPIC. That submission reflected [MPIC's sports medicine doctor]'s review of the medical evidence, on November 15, 2016 where he stated:

... it is reasonable to opine the degenerative changes affecting the cervical spine did not develop as a direct result of the incident in question. It is well known that cervical degenerative disc disease can contribute to the development of neck symptoms in individuals that participate in regular day-to-day and work activities.

The documents do not contain evidence indicating a health care professional advised [the Appellant] to stop working or reduce his work load as a result of a physical impairment he was identified as having. From an objective stand point, the evidence obtained from the documents does not identify a physical impairment [the Appellant] was noted to have that might prevent him from working...

The panel agrees with the conclusions of [MPIC's sports medicine doctor] that the Appellant developed symptoms involving the neck and back, in keeping with the musculotendinous strain, secondary to the MVA. We further agree with [MPIC's sports medicine doctor]'s conclusion however that "a medically probable cause and effect relationship does not exist between the incident in question and the symptoms [the Appellant] might be experiencing at this time". Nor does the evidence support the position that the Appellant was noted to have objective physical impairments causally related to the incident in question which would adversely effect his ability to work as a delivery driver or cook.

Accordingly, the panel agrees with MPIC that the Appellant has failed in the onus upon him to show, on a balance on probabilities, that he suffers from physical impairments related to the MVA which would prevent him from working or entitle him to further PIPP benefits.

The decision of the Internal Review Officer dated April 23, 2013 and of the case manager dated November 29, 2016 are thereby upheld. The Appellant's appeal is dismissed.

Dated at Winnipeg this 18<sup>th</sup> day of December, 2018.

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**LAURA DIAMOND**

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**LEONA BARRETT**

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**ARNOLD KAPITZ**