

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-06-57**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson  
Mr. Les Marks  
Ms Linda Newton

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Ms Dianne Pemkowski.

**HEARING DATE:** August 19, 2009

**ISSUE(S):** 1. Entitlement to Personal Injury Protection Plan benefits  
2. Whether the Appellant was correctly classified as a non-  
earner, therefore, entitling him to a 180-day determination  
as of March 12, 2005.

**RELEVANT SECTIONS:** Sections 70(1) and 85(1) 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**

[The Appellant] was involved in a motor vehicle accident on February 16, 2003. The Appellant was stopped at a Yield sign on [text deleted] when he was hit from behind by another vehicle. There was no damage to either vehicle.

The Appellant did not file an injury claim with Manitoba Public Insurance until November of 2003 (nine months after the motor vehicle accident). In his application, the Appellant claimed he had injured his neck in the accident.

**Entitlement to Personal Injury Protection Plan (“PIPP”) Benefits:**

The Appellant’s physician, [Appellant’s doctor #1], saw the Appellant on May 8, 2003, three months after the motor vehicle accident. [Appellant’s doctor #1] stated that he was advised by the Appellant that he had an accident four years previously when he had apparently fallen down a staircase and injured his neck and had experienced pain ever since.

In his initial health care report to MPIC, based on an examination dated March 4, 2004, [Appellant’s doctor #1] noted the diagnosis as cervical strain (whiplash) with radiculopathy.

On September 12, 2004 the Appellant was involved in a subsequent motor vehicle accident. He was rear-ended while stopped at a red light on [text deleted] and his vehicle sustained \$1,850.00 in damage. As a result of this accident, the Appellant sustained a soft-tissue injury to his neck and back, along with headaches.

The Appellant’s medical file was reviewed by [MPIC’s doctor], a Medical Health Consultant with MPIC’s Health Care Services Team. In his memorandum to MPIC dated January 26, 2005, [MPIC’s doctor] noted the following:

“The purported effects that have taken place as a result of the February 16, 2003 collision were not consistent. The Initial Health Care Report from [Appellant’s doctor #1] have documented a diagnosis of WAD 3a which is neck complaints and neurological signs. These neurological signs included a documented C5/C6 dermatomal deficit. This initial report was some 13 months post-collision. The earliest clinical note on file on May 8, 2003 documents no objective evidence of neurological deficit. It does note left periscapular and midthoracic tenderness. The subsequent clinical notes document an objective sign of left hand grip weakness in one clinical visit. All others note tenderness among the periscapular, midthoracic and trapezius

muscles. The diagnoses given during these visits include spondylosis, osteoarthritis, cervical radiculopathy, and chronic neck pain. According to the medical evidence on file the claimant appeared to suffer from a WAD 3a injury some 13 months after the first collision.

The purported effects of the second collision on September 12, 2004 were documented by [Appellant's doctor #1] as aggravation of cervical spondylosis with lumbar strain. Unfortunately, no objective measurements of range of motion or neurological deficit were noted. The emergency report from the accident documents neck and low back pain. The examination documented notes full range of motion in the back and neck with no neurological deficits including grip strength. The medical evidence on file appears to support a diagnosis of WAD 1 of the neck which is defined as neck complaint of pain, stiffness, or tenderness only.

Given the information on file, I conclude that this patient had a probable diagnosis of Whiplash-Associated Disorder 1 as a result of the September 12, 2004 collision.

There is insufficient evidence to support the WAD 3a diagnosis as a result of the motor vehicle collision of February 16, 2003." (underlining added)

#### **Case Manager's Decision - Re PIPP benefits:**

On February 16, 2005 MPIC's case manager rejected the Appellant's claim for PIPP benefits in respect of the February 16, 2003 motor vehicle accident. The case manager set out the following grounds for rejecting the Appellant's PIPP benefits claim:

- "You did not contact our office to report an injury until 9 months following the date of the incident.
- There is no damage on the vehicle in which you claim to have been driving. Nor is there any damage to the other vehicle involved in the accident.
- There is no medical documentation of this incident.
- The earliest clinical note available was May 8, 2003 which indicates you had suffered from upper left back pain for 4 years, which predates the February 16, 2003 incident.'

**Internal Review Officer's Decision - Re PIPP Benefits:**

The Appellant in an application for review dated April 6, 2005 sought to have the case manager's decision reviewed by an Internal Review Officer. On August 24, 2005 an Internal Review Hearing took place. [Text deleted], the Appellant's legal counsel, attended the hearing.

In arriving at her decision dated March 1, 2006, the Internal Review Officer stated:

'...I also agree with [MPIC's doctor's] opinion that there is insufficient evidence to support the WAD 3a diagnosis as a result of the February 16, 2003 accident. Considering that there was no damage to either vehicle or the fact that [the Appellant] waited nine months to report his injuries to Manitoba Public Insurance (when he claims that he missed work), I am having a hard time being convinced that [the Appellant] was even injured in the February 2003 accident.'

As a result the Internal Review Officer confirmed the case manager's decision of February 16, 2005 and dismissed the Appellant's application for a review relating to PIPP benefits.

**Whether the Appellant is Correctly Classified as a Non-earner therefore entitling him to a 180 Day determination as of March 12, 2005:**

In a report to file dated April 19, 2004 the case manager reported that:

1. The Appellant had worked for Anco Lumber from 1998 to 2003 off and on, two or three days a week, as a driver.
2. The Appellant no longer worked for Anco Lumber after November 28, 2003.
3. The Appellant had been employed on a casual basis and when the company was short of drivers, he would be called upon to work between two to four hours.
4. The Appellant was paid in cash with no record kept of these payments and no deductions for taxes, employment insurance or Canada Pension Plan; nor were T4 slips issued.

The Appellant claimed that he was not working at the time of the second motor vehicle accident on September 12, 2004 because of the injuries he sustained in the first motor vehicle accident on February 16, 2003.

**Case Manager's Decision re Non-earner Classification:**

On February 22, 2005 the case manager issued a decision to the Appellant advising him that at the time of the September 12, 2004 motor vehicle accident the Appellant was not working and therefore MPIC was classifying him as a non-earner. The case manager further advised the Appellant that because he was a non-earner, he was entitled to a 180 day determination as of March 12, 2005. The case manager further stated:

“We must determine the employment that you could have held prior to the accident based on your work history, education, training, and experience. We have reviewed the information you provided for the 5 year reference period. You confirmed that all the positions you referred to were on a casual basis where you were paid cash. You also confirmed that you did not receive T4's for any income nor did you report any of the income earned to Revenue Canada. As you were unable to provide any documentation supporting the information provided, you have not established a 5 year work history. You advised you had a grade [text deleted] education.”

The Commission notes that the effect of this decision was that MPIC determined that the Appellant was not entitled to IRI for the first 180 days after the September 12, 2004 motor vehicle accident.

**Application for Review – Re Non-earner Classification:**

On April 6, 2005 the Appellant made an application for review of the Internal Review Officer's Decision. The application was filed on behalf of the Appellant by his legal counsel. One of the reasons provided by the Appellant's legal counsel for making the application for review was that the case manager's decision letter stated that at the time of the accident the Appellant was not working. The Appellant's legal counsel asserts:

“In fact the claimant was working. The fact that the Claimant was paid in cash is not a good reason to deny I.R.I. payments.”

The Internal Review hearing took place on August 24, 2005.

**Internal Review Officer – Re: Non-earner Classification:**

The Internal Review Officer issued a decision dated March 1, 2006 rejecting the Appellant’s application for review and confirmed the case manager’s decision of February 22, 2005 which classified the Appellant as a non-earner. In her decision, the Internal Review Officer commented on the submission of the Appellant’s legal counsel and stated:

‘...While you agree that [the Appellant] was not working at the time of his second accident – September 12, 2004, you dispute the fact that he was classified as a non-earner. You claim the reason [the Appellant] was not working at the time his second accident is because of the injuries sustained in his first accident (February 16, 2003).’

The Internal Review Officer concluded, based on [MPIC’s doctor’s] opinion, that there was insufficient evidence to support a WAD 3a diagnosis as a result of the February 16, 2003. The Internal Review Officer further stated:

“...Considering that there was no damage to either vehicle or the fact that [the Appellant] waited nine months to report his injuries to Manitoba Public Insurance (when he claims that he missed work), I am having a hard time being convinced that [the Appellant] was even injured in the February 2003 accident.”

As a result, the Internal Review Officer confirmed the case manager’s decision dated February 22, 2005 and dismissed the Appellant’s application for review.

**Travel Expenses – Appeal:**

The Commission notes that the third appeal made by the Appellant was a claim that the Appellant was entitled to travel expenses prior to the September 12, 2004 motor vehicle accident (his second accident).

The Internal Review Officer stated in her decision that on December 24, 2005 the Appellant's legal counsel provided her with a fax confirming that the Appellant "is dropping his claim for travel expenses to see [Appellant's doctor #2] (3 trips, May & June, 2005)". As a result, the Internal Review Officer noted that the Appellant was withdrawing his application for review dated June 29, 2005.

The Commission notes that the Appellant provided the Commission with a copy of [Appellant's doctor #1's] letter dated January 20, 2006 which was unsigned. The Commission's Appeal Officer wrote to [Appellant's doctor #1] on February 25, 2009 requesting that he confirm that he was the author of this report.

In a note to the Commission [Appellant's doctor #1] confirmed that he was the author of this report.

In this letter [Appellant's doctor #1] wrote that the Appellant's first visit was on May 8, 2003 and he noted that:

"At his first visit, he notified me that he had an accident (4) four years previously when he had apparently fallen down a staircase and injured his neck, and he had experienced pain ever since."

[Appellant's doctor #1] further stated:

"On the February 17, 2004 visit, the patient mentioned that the accident of six (6) years ago had damaged two discs in his neck and caused arthritis in his (L) shoulder. X-rays demonstrated osteoarthritis of the (L) AC joint.

At his first visit on May 8, 2003, some three months after his alleged MVA of February 16, 2003, the patient provided no history that he had been in a motor vehicle accident...

Cervical spine x-rays taken on May 8, 2003 (first visit) and September 14, 2004 showed advanced cervical spondylosis and degenerative spurring, which had been

present for years. These findings on x-ray were pre-existing and were consistent with the patient's symptoms of chronic neck pain."

The case manager had written to [Appellant's doctor #1] on January 14, 2004 and asked the following question:

"Do you feel [the Appellant's] current complaints are related to the above noted motor vehicle accident?" (underlining added)

The case manager's reference was to the motor vehicle accident of February 13, 2003.

In response [Appellant's doctor #1] stated "My answer is: In my opinion, no". (underlining added)

### **Appeal:**

The relevant provisions in respect of this appeal are:

#### **Definitions**

[70\(1\)](#) In this Part,

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

**"non-earner"** means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student;

**"victim"** means a person who suffers bodily injury in an accident.

#### **Entitlement to I.R.I. for first 180 days**

[85\(1\)](#) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

**Appeal Hearing:**

The Appellant testified at the hearing and said that as a result of the motor vehicle accident which occurred on February 16, 2003 he suffered injury to his neck. The Appellant acknowledged that he did not file an injury claim with MPIC until nine months after this motor vehicle accident.

The Appellant testified that he also was involved in a subsequent motor vehicle accident on September 12, 2004. He testified that he was not working at the time of this motor vehicle accident because of the injuries he sustained in the first motor vehicle accident.

MPIC did not call any witnesses.

**Submissions:**

The Appellant submitted that as a result of injuries suffered in the motor vehicle accident of February 16, 2003 he was prevented from working up to the time of the second motor vehicle accident which occurred on September 12, 2004. The Appellant further submitted that MPIC erred in denying him PIPP benefits relating to his February 16, 2003 accident.

In response MPIC's legal counsel pointed out that the Appellant did not file an injury claim in respect of the February 16, 2003 accident until nine months after the motor vehicle accident. The Internal Review Officer accepted the medical opinion of [MPIC's doctor] who had reviewed [Appellant's doctor #1's] medical reports and concluded that there was insufficient evidence to

support the claim that the Appellant had suffered a WAD 3(a) injury as a result of the February 16, 2003 accident.

[MPIC's doctor] concluded that the Appellant's medical file supported a diagnosis of a WAD 1 to the neck which is defined as a neck complaint of pain, stiffness or tenderness only.

**Discussion:**

The Commission finds that this the neck injury the Appellant suffered in the February 16, 2003 motor vehicle accident was a soft tissue injury which would have resolved itself within a few weeks. The Commission further notes that there was no damage to either vehicle in the motor vehicle accident and the Appellant waited nine months before reporting his injuries. The Commission finds that if the Appellant had suffered a significant injury at the time of the February 16, 2003 accident, he would have reported that accident within days to MPIC and would not have waited nine months. It is for this reason that the Internal Review Officer stated:

“...I am having a hard time being convinced that [the Appellant] was even injured in the February 2003 accident...”

The Commission acknowledges that prior to the motor vehicle accident of February 13, 2003, the Appellant had injured his neck and had experienced pain ever since. [Appellant's doctor #1] noted that when the Appellant visited him on February 17, 2004 he mentioned that the accident of six years ago had damaged two discs in his neck and caused arthritis in his left shoulder.

[Appellant's doctor #1] further noted that when the Appellant made his first visit on May 8, 2003, some three months after the motor vehicle accident of February 16, 2003, the Appellant provided no history that he had been involved in a motor vehicle accident. [Appellant's doctor

#1] concluded his report by stating that in his opinion the Appellant's current complaints were not related to the February 13, 2003 accident.

The Commission therefore finds that:

1. the Appellant has failed to establish on a balance of probabilities that he suffered significant long-term injuries to his neck as a result of the February 16, 2003 accident.
2. The Appellant did suffer minor neck injury which would have resolved itself within a very short period of time.
3. The Appellant did not make an application for any compensation in respect of the neck injury until nine months after the motor vehicle accident.
4. The Appellant provided no medical documentation to support his claim.
5. As a result of the Appellant's delay in making an application for compensation, MPIC did not even have an opportunity to determine whether or not the Appellant did suffer from any motor vehicle accident or whether or not he was entitled to PIPP benefits.
6. At the time the Appellant made an application for compensation in respect of his February 16, 2003 motor vehicle accident, the Appellant was no longer suffering from any injuries sustained in that motor vehicle accident.
7. The Appellant did not have a compensable claim when he made an application for compensation nine months after the February 16, 2003 accident.

For these reasons the Commission finds that the Appellant has failed to establish on a balance of probabilities that as a result of a motor vehicle accident on February 13, 2003, he is entitled to PIPP benefits. The Commission therefore confirms the Decision of the Internal Review Officer

dated March 1, 2006 and dismisses the Appellant's appeal in respect of his claim for PIPP benefits.

**180 Day Determination:**

The Commission notes that in order for the Appellant to establish entitlement to IRI benefits for the first 180 days after a motor vehicle accident, he must first establish that as a result of a motor vehicle accident causing bodily injury he was unable to hold employment that he would have held during the period if the accident had not occurred. The Appellant's legal counsel initially submitted to the Internal Review Officer that at the time of the second motor vehicle accident on September 12, 2004, the Appellant had been employed. The case manager determined that the Appellant had been employed by Anco Lumber on a casual basis from 1988 to 2003 off and on working two or three days a week for a few hours each day when the company was short of drivers and was no longer employed after November 28, 2003.

The Appellant's legal counsel subsequently submitted that because of the Appellant's injuries sustained in the first accident on February 16, 2003, he was unable to work at the time of the second accident of September 12, 2004.

In his testimony the Appellant did acknowledge that he did not work after January 14, 2004. The Commission has found that the Appellant sustained minor whiplash as a result of the first accident which would have resolved itself in a very short period of time and would not have prevented the Appellant from working prior to his September 12, 2004 accident.

The Commission finds that the Appellant has failed to establish on a balance of probabilities that the motor vehicle accident of February 13, 2003 prevented him from holding employment he would have held during the 180 day period following the motor vehicle accident of September 12, 2004. As a result the Commission concludes that MPIC correctly determined that the Appellant was a non-earner at the time of the September 12, 2004 accident. For these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated March 1, 2006.

Dated at Winnipeg this 24<sup>th</sup> day of September, 2009.

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**MEL MYERS, Q.C.**

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**LES MARKS**

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**LINDA NEWTON**