

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-09-109**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Dr. Patrick Doyle

APPEARANCES: Appellant - [text deleted];
Manitoba Public Insurance Corporation ('MPIC') –
Ms Danielle Robinson.

HEARING DATE: October 27, 2011

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits.

RELEVANT SECTIONS: Section 70(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 injured in a motor vehicle accident on September 17, 1995. He attended at his doctor and was diagnosed with post-motor vehicle accident cervical strain.

The Appellant also had a history of some workplace injuries, predating the motor vehicle accident.

Following the motor vehicle accident he sought further medical care and diagnosis and returned to work at a reduced capacity and then full-time.

He sought further medical treatment, as well as chiropractic treatment and filed an application for compensation with MPIC dated July 25, 2007 which stated that he had been incapacitated from September 17, 1995, the date of the motor vehicle accident.

The Appellant's case manager wrote to him on October 17, 2008 indicating that the available medical information did not support that his medical condition(s) are as a result of the motor vehicle accident and given this, that the Appellant did not qualify for Personal Injury Protection Plan ("PIPP") benefits.

The Appellant sought an Internal Review of this decision, and on July 28, 2009, an Internal Review Officer for MPIC reviewed the Appellant's file, including opinions from MPIC's Health Care Services Team. He noted that the collision related documentation indicated the development of mainly cervical and upper thoracic regional pain as the only condition attributable to the motor vehicle accident in question. The Internal Review Officer found that the documentation on the Appellant's file clearly showed a change in his pain about the time of a reported repetitive injury claim to the Workers' Compensation Board of Manitoba on [text deleted], 1997 for a workplace injury which occurred to the thoracic spine. This injury was referred to in his doctors' files and his chiropractor's notes, and was a new condition, which was not motor vehicle accident related. His disability thereafter was attributable to the lower thoracic and lumbosacral pain caused by his work, and it was improbable that this ongoing thoracic and lumbar spinal pain related to the motor vehicle accident, from which the only injuries which had arisen were that of a cervical strain and upper back pain.

Accordingly, the Internal Review Officer concluded that it was more probable that his present symptoms were a result of his work and/or a pre-existing medical condition rather than the motor vehicle accident.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

The Appellant and MPIC agreed that the Appellant's appeal would proceed by way of written documentation and submissions. Accordingly, a vive voce hearing was not held in the matter and written submissions were provided to the panel for consideration, along with the Appellant's indexed file.

Evidence and Submission for the Appellant:

The Appellant submitted that it was the motor vehicle accident which was the cause of his symptoms. He stated that neither his inability to endure the bouncing and vibration of the forklift in the workplace after the motor vehicle accident, nor his post motor vehicle accident anxiety and depression, had existed or affected his ability to function in society and earn a living prior to the motor vehicle accident. The documentation clearly showed the natural progression of his motor vehicle accident injury preventing him from working after the day of the accident.

The Appellant submitted that this was not a relapse and not a new injury, but rather a failed treatment plan, arising out of the treatment which MPIC supported for him following the motor vehicle accident. MPIC's treatment plan made his motor vehicle injury worse and he was forced to open a WCB claim in order to get further treatment. He submitted that all the documentation

showed a natural progression which began on September 17, 1995. There was a downward spiral which came to an abrupt halt in April 1997 with a failed treatment plan.

The Appellant submitted that the Commission should disregard the opinion of [Appellant's workplace safety and health specialist], of the [text deleted], and his own doctor, [Appellant's doctor #1]. He argued that the only way he could talk to the Workplace Safety and Health Specialist, [Appellant's workplace safety and health specialist], was to open a WCB claim so that he could get further physiotherapy. He also submitted that [Appellant's doctor #1]'s objectivity ended when his injury was made worse by her MPI supported treatment plan.

The Appellant maintained that there was absolutely no evidence to suggest that he was incapable of performing the duties of his workplace prior to the motor vehicle accident.

The Appellant noted that he was fully functional and doing manual labour for years prior to the motor vehicle accident. He queried why MPIC had ignored an independent opinion of causality from [independent chiropractor] and why they had considered irrelevant information regarding WCB claims, when the Appellant had had no symptoms, was not being treated and was doing heavy manual labour right up until the motor vehicle accident.

The Appellant addressed comments made by [Appellant's doctor #2] regarding the possibility that he should be assessed for a somatoform disorder. The Appellant submitted that this was a recognized diagnosis which was a direct result of the motor vehicle accident. The Appellant's position was that this comment, along with a report provided by [Appellant's doctor #3], showed that he suffered bodily and mental harm at the hands of MPIC and from his motor vehicle injuries.

The Appellant submitted that he was a fully functioning, healthy, happy, productive member of society with a promising future prior to the September 1995 motor vehicle accident and he was seeking accountability in this regard on the part of MPIC.

Evidence and Submission for MPIC:

Counsel for MPIC took the position that the Appellant's thoracic and lumbar spine symptoms were not causally related to his motor vehicle accident of September 17, 1995 and as such, the Appellant is not entitled to PIPP benefits and his appeal should be dismissed.

Counsel referred to evidence of a 1993 workplace injury when the Appellant was lifting a crate of glass that weighed approximately 250 pounds and injured his middle and lower back. Reports from his chiropractor, [Appellant's chiropractor #1], as well as from [Appellant's doctor #1] and [Appellant's doctor #4] were reviewed. Counsel noted that the Appellant continued to report problems with his thoracic spinal region to [Appellant's doctor #4] in June of 1994.

Following the September 1995 motor vehicle accident, the Appellant complained of a sore neck, upper back and shoulders. At the time of the accident, he reported that he was employed as a forklift operator by a [text deleted].

An X-ray in September 1995 confirmed that the Appellant had not sustained any fracture or dislocation and that there was normal motion with flexion and extension. In October 1995 [Appellant's doctor #1] referred the Appellant to [Appellant's doctor #5] for recurrent numbness in his left upper arm and left hand. [Appellant's doctor #5] recommended the Appellant take two to three weeks off work and undergo physiotherapy. A physiotherapist with [physiotherapy

clinic] provided a report in October of 1995, indicating that after 12 sessions, the Appellant had full neck range of motion with most of the pain having subsided, aside from episodic pain in the T10-11 level as well as periodic numbness in the left upper limb. He felt the Appellant would be able to return to work part-time. The Appellant returned to work at full capacity on November 20, 1995.

The Appellant was also sent for an independent chiropractic examination with [independent chiropractor], who reported on June 23, 1997 and found that the Appellant's cervical, thoracolumbar and lumbar spinal ranges of motion were all full and pain free to the end range. He concluded that there was no reason why the Appellant could not work at that time and did not anticipate any permanent impairment from the motor vehicle accident.

MPIC's chiropractic consultant, [MPIC's chiropractor], reviewed [independent chiropractor]'s report and questioned whether the injuries found were even causally related to the motor vehicle accident, since the Appellant had initially presented with neck pain and been diagnosed with cervical strain. [MPIC's chiropractor] was of the view that the current barrier to return to work at that time was the thoraco-lumbar region which had not been reported as being related to the motor vehicle accident.

Counsel also reviewed reports following a 1997 workplace injury. [Appellant's doctor #6] had reported on March 14, 1997 that the constant bouncing from driving a forklift had aggravated the Appellant's mid-back area.

In April of 1997, [Appellant's doctor #2] noted complaints of lower thoracic pain that were not associated with any functional abnormalities, also noting that the Appellant's reports of pain came on with work.

In a WCB report dated May 20, 1997, the employer confirmed that the Appellant had gone off work on May 12, 1997 for discomfort in the back that could not be tied to any particular incident. The Appellant's own report regarding that injury indicated that his lower and mid-back had been bothering him for some months due to the constant bouncing and jarring of the forklift, possibly because of hard rubber tires.

[Appellant's doctor #2] reported again on May 21, 1997, noting that the Appellant was complaining of pain and had been off work for one week. Medication almost completely resolved the pain. [Appellant's doctor #2] recommended that the Appellant continue working with that medication.

The Appellant saw [Appellant's workplace safety and health specialist] of [text deleted]. He provided a report dated June 4, 1997. He noted the upper back and neck injuries sustained in the motor vehicle accident, indicating that these injuries resolved in six to eight weeks following the accident. [Appellant's workplace safety and health specialist] wrote that the Appellant's current symptoms related to driving a forklift with uneven rubber wheels that caused vibration and impulse forces, impacting the Appellant's back and causing muscle tension.

[Appellant's doctor #2] reported again, indicating that he could not find anything wrong with the Appellant and that the features of his pain had changed.

Another chiropractor, [Appellant's chiropractor #2], provided a report dated August 15, 1997, which was reviewed by counsel for MPIC. The Appellant reported to [Appellant's chiropractor #2] that he had hurt himself at work while driving a forklift due to continuous vibration, also noting a 1990 back injury and a 1993 injury at work.

[Appellant's neurologist] provided a report dated December 18, 1997 noting that although the Appellant reported significant problems that he believed were work related, [Appellant's neurologist] could not find anything from a neurological perspective.

[Appellant's doctor #3] provided an undated report mentioning lifting accidents in 1990 and 1993, as well as low back pain that developed while the Appellant was working on the forklift. She did not mention the motor vehicle accident.

As well, counsel referred to an X-ray report dated October 10, 2006, confirming that there were no abnormalities in the Appellant's cervical, thoracic or lumbar spine regions.

Counsel relied upon a report dated September 30, 2008, prepared by MPIC's Health Care consultant. The medical consultant had reviewed the chronology of the medical information on the Appellant's file. Counsel for MPIC submitted that this report showed that:

- “The appellant sustained prior thoracic spine injuries affecting the lower thoracic spine dating back to 1991;
- The motor vehicle accident injuries were cervical and upper thoracic regional pain syndromes;
- The motor vehicle accident injuries resolved approximately 6-8 weeks after the accident but the appellant experienced about 4 months of symptoms involving the neck;

- The appellant's lower thoracic spine condition was first reported 1 year after the motor vehicle accident;
- The thoracic spine condition cannot be related to the accident:
 - Due to the time lapse;
 - Due to the fact that there is no specific impairment identified to determine a probable relationship with the motor vehicle accident; and
 - There is no information that the condition lead to any significant disability.
- The pain the appellant experienced at the end of April and the beginning of May 1997 is in keeping with the development of a repetitive injury
 - The appellant attributed the development of back symptoms to the workplace injury
 - [Appellant's workplace safety and health specialist] and [Appellant's doctor #5] indicated that this was a new injury.

The medical consultant concluded that based on the chronological record, it is improbable that the Appellant's ongoing thoracic and lumbar pain is related to the motor vehicle accident of September 17, 1995."

Counsel for MPIC also reviewed a report dated November 19, 2007, from a psychological consultant with MPIC's Health Care Services Team, who concluded that the Appellant had not sustained any psychological injuries as a result of the motor vehicle accident of September 17, 1995.

Counsel added that the psychological consultant had reviewed the Appellant's file and provided a second report dated July 20, 2011, again concluding that the Appellant did not sustain a psychological injury as a result of the motor vehicle accident.

Counsel for MPIC argued that the evidence indicates that the Appellant has a long history of medical issues with his thoracic and lumbar spinal regions due to workplace issues. In 1990 and 1993 he strained his back while lifting heavy objects causing injury. This is what caused the Appellant to switch from lifting work to working on a forklift.

According to the evidence, the Appellant injured his cervical and upper thoracic spine in the motor vehicle accident, but these injuries resolved within six to eight weeks. Within approximately four months the Appellant was symptom free from the motor vehicle accident injuries and back at work at full duties.

Two years after the motor vehicle accident, she submitted, the Appellant began to have trouble working on the forklift, attributing his symptoms to the vibrations caused by the hard rubber tires that were not properly maintained.

As [MPIC's chiropractor] had first noted in 1997, this was not related to the motor vehicle accident and therefore causation was not established. This was then confirmed by the medical consultant's review of the Appellant's file.

The Appellant had submitted that he was "forced" to open a WCB claim in 1997 and that the injuries that he reported to WCB in relation to that claim in fact were related to the motor vehicle accident of September 17, 1995. However, counsel for MPIC submitted that the evidence, specifically the Appellant's statements set out in the reports from his doctors, indicated that the symptoms which developed in 1997 were causally related to workplace factors and not to the motor vehicle accident. The medical and psychological evidence did not substantiate that any of the Appellant's current symptoms were related to the motor vehicle accident of September 17, 1995, and accordingly, MPIC submitted that the Appellant was not entitled to PIPP benefits in relation to his current symptoms and submitted that his appeal should be dismissed and the decision of the Internal Review Officer dated July 28, 2009 upheld.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he suffers from symptoms and injuries as a result of the motor vehicle accident of September 17, 1995.

The panel has reviewed the submissions of the Appellant and counsel for MPIC. We have carefully reviewed the medical evidence on the Appellant's file. While we have considered reports from various caregivers regarding the causes and implications of the Appellant's pain complaints, we have made particular note of the findings of [Appellant's doctor #2] and [Appellant's neurologist], arising out of their examinations of the Appellant.

On April 25, 1997, [Appellant's doctor #2] reported that he had examined the Appellant for complaints of lower thoracic pain radiating out towards the lateral margins of the rib, and up and down the spine, about five inches. He noted this was not associated with any functional abnormalities but had persisted since the motor vehicle accident of September 1995.

[Appellant's doctor #2] stated:

“Examination revealed very little. His cervical and thoracic spine was unremarkable with no tenderness. Range of motion of the lumbar spine was full...

...It is unlikely that there is any pathology here...This may well represent a Somatoform Pain Disorder.”

On April 30, 1997, [Appellant's doctor #2] reported again stating:

“I reviewed the chiropractic x-rays to find that there was no sinister pathology in his cervical spine, thoracic or lumbar spine including the hips...”

On July 8, 1997, [Appellant's doctor #2] reported again indicating that he had re-examined the Appellant's abdomen to find no abnormalities and that his thoracic spine was not very tender. He could flex reasonably well. His hips and knees were unremarkable, there was no muscle mass loss, no tenderness and good sensation in his feet. He concluded:

“I cannot find anything seriously wrong with this man.”

[Appellant’s neurologist] reported on July 23, 1997. He concluded that he had found no abnormalities and that he did not think the Appellant had a neurological problem:

“I do not think that he has a neurological problem. I feel that his pathology lies in a musculoskeletal category, perhaps myofascial pain. I would recommend a referral to the [text deleted] Clinic...”

On December 3, 1997, he indicated that although the Appellant was requesting a scan regarding some numbness of his left great toe, he was not prepared to scan the Appellant’s lower back at that time.

[Appellant’s neurologist] reported again on December 18, 1997 following a review of the Appellant and his recent MRI. He indicated:

“...No significant abnormality has been found and I am not inclined to any further neurological investigations.

This man truly has a significant ongoing problem, and he believes this to be work related. Unfortunately, I cannot address these issues from a neurological perspective.”

The panel has also noted the findings of [Appellant’s doctor #5], and [physiotherapy clinic] which found that the Appellant had largely recovered from the motor vehicle accident related injuries within months after the accident, and [independent chiropractor], who found full range of motion in June 1997.

Based upon all findings noted above, the panel concludes that the Appellant has failed to establish, on a balance of probabilities that his complaints are the result of a physical injury arising out of the motor vehicle accident.

However, his caregivers did note the possibility that other problems, such as a somatoform disorder, could be at play.

Caregivers such as [Appellant's doctor #2] and [Appellant's neurologist] identified the possibility that the Appellant might be suffering from issues such as a somatoform or myofascial pain disorder.

In undated notes, [Appellant's doctor #3], from [text deleted], noted that the Appellant was being treated for depression. She noted extreme anxiety, sleep disturbance, depressed mood, decreased motivation and concentration. She recommended that the Appellant be considered for the possibility of a day treatment program and on May 1, 2000, requested assessment at a dual diagnosis clinic due to depression, anxiety and alcohol use.

[Appellant's doctor #1] provided a report on April 1, 1999 indicating that the Appellant had been treated for panic anxiety. He had been prescribed Paxil in October 1994, but in April of 1996, seven months after the motor vehicle accident, he was referred to a psychologist. [Appellant's psychologist] then reported on September 3, 1996 confirming that she had begun treatment of the Appellant for anxiety in April of 1996.

[Appellant's doctor #7], of [text deleted], also provided a note dated August 25, 2000 indicating that the Appellant was still recovering from depression/anxiety. He had improved, but was still not fully stable.

The Commission also noted the Appellant's written submission which stated:

“Secondly, a Somatoform disorder is still a recognized diagnosis which is a direct result of this MVA. The onus is on MPI to prove this disorder pre dates this MVA. As with the arbitrary start date of their natural progression theory there is no documentation of a somatoform disorder or any mental problems affecting my ability to function predating this MVA and both [Appellant’s doctor #1] and [Appellant’s doctor #3] have documented post MVA depression and anxiety.

It is a legal chain of causation which MPI is responsible for as it is a direct result of this MVA. It was [Appellant’s doctor #2] who told me “disk are easily damaged” and “disk do not heal” and “if it hasn’t gotten better by now it never will, it will only get worse” the same time he diagnosis’s (sic) me with a mental disorder.”

In his reports dated November 20, 2007 and July 20, 2011 MPIC’s psychological consultant took the position that the Appellant did not suffer from any psychological injury as a result of the motor vehicle accident. Both reports focused on the Appellant’s physical and musculoskeletal complaints, and without further significant analysis, found there was no MVA related psychological condition. However, he failed to provide any comment, discussion or analysis regarding the reports and comments of [Appellant’s doctor #2], [Appellant’s neurologist], [Appellant’s doctor #3], [Appellant’s psychologist], [Appellant’s doctor #1] and [Appellant’s doctor #7] with regard to the Appellant’s depression, anxiety, or possible somatoform disorder, in spite of the Appellant’s referral for treatment for anxiety in April of 1996, seven months following the motor vehicle accident, and the psychological difficulties and attempts at treatment which followed.

Accordingly, the panel is of the view that further investigation is warranted regarding the Appellant’s psychological condition and its possible relationship to the motor vehicle accident. The Appellant’s file will therefore be referred back to his case manager to arrange psychological assessment, to determine whether the Appellant suffers from psychological barriers arising out of the motor vehicle accident which are preventing his recovery. The Internal Review Decision of July 28, 2009 will be varied accordingly and the Appellant’s appeal upheld to that extent. The

Commission will retain jurisdiction should any difficulties arise between the parties in this regard.

Dated at Winnipeg this 14th day of December, 2011.

LAURA DIAMOND

NEIL COHEN

DR. PATRICK DOYLE