

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-12-069**

PANEL: Ms Jacqueline Freedman, Chair
Dr. Arnold Kapitz
Ms Susan Sookram

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation (“MPIC”) was
represented by Mr. Morley Hoffman.

HEARING DATE: November 30, 2016.

ISSUE(S): Whether the Appellant is entitled to Personal Injury
Protection Plan benefits in connection with his right shoulder
injury.

RELEVANT SECTIONS: Subsections 70(1) and 71(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

Background:

The Appellant, [text deleted], was riding his bicycle on July 25, 2009, when he collided with a vehicle which had failed to stop at a stop sign. He was thrown from his bicycle. The Appellant suffered various injuries as a result of this motor vehicle accident (“MVA”) and sought medical treatment. In March, 2010, he advised MPIC that he may require surgery to his right shoulder, and he requested benefits under the Personal Injury Protection Plan (“PIPP”) provisions of the

MPIC Act. The case manager noted that the injury to the right shoulder had not been previously mentioned, and asked for further information.

The case manager considered the Appellant's request for PIPP benefits related to his right shoulder injury and issued a decision dated October 1, 2010, which states as follows:

As we discussed, there is no medical evidence to relate a right shoulder injury to the July 25, 2009 accident. If you require surgery of the right shoulder, your recovery and related medical expenses will not be MPI's responsibility.

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager and agreed with it. An Internal Review decision was issued on February 3, 2011, which provides as follows:

The first mention of right shoulder pain (and medical documentation) did not occur until March 2010, some nine months following the accident date.

Due to the absence of medical documentation and your own delayed report of right shoulder pain until March 2010, it is improbable that your right shoulder complaint resulted from an injury that is causally related to the motor vehicle accident.

Accordingly, I am upholding the case manager's decision and dismissing your Application for Review.

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to PIPP benefits in connection with his right shoulder injury.

Decision:

For the reasons set out below, the panel finds that the Appellant has not met the onus of establishing, on a balance of probabilities, that he is entitled to PIPP benefits in connection with his right shoulder injury.

Evidence for the Appellant:

The Appellant testified at the appeal hearing, and described the circumstances of the MVA. He said that he was riding his bike down the east side of [text deleted] when a van went through a stop sign and although he applied his brakes, he was unable to stop his bike in time. He hit the van with the left side of his body, and his left arm was trapped against the van. All of his body weight transferred onto his right arm. He said that he was then thrown over the handlebars and landed on his back on the road. His head hit the pavement and he was unconscious for a few moments. He felt that it was a very serious incident. The driver of the van offered to take him to the hospital, but as the [hospital] was only a few blocks away, he decided to ride there on his bicycle. He said he is used to riding in pain, as he had a previous accident in 1987 and has lived with pain ever since.

When the Appellant got to the [hospital], his heart was racing and he had various contusions. His ribs were checked, along with his vital signs. However, he said that the doctors ignored his ligaments and he was told that he was fine and that he should go home. A few days later, he went to his own doctor because he was still in pain. It took some time to determine exactly what was wrong with his shoulder. This involved visits to various doctors, including the [text deleted] Clinic, as well as various tests, including the MRI in 2012 which revealed the rotator cuff tear.

The Appellant noted that at the same time as he was pursuing a solution to the cause of his shoulder pain, he was forced to go back to work due to financial necessity. This caused his shoulder injury to worsen over time, due to the nature of his employment. He pointed out that his surgeon, [text deleted], initially thought he did not require surgery, but later changed his mind. He noted that his physician, [text deleted], in his report dated November 12, 2013, recognized

that he was suffering initially from serious pain to his left side, which is what he was focussed on, and that's why he didn't initially mention his right shoulder pain.

The Appellant said that the impact of the force of the MVA was large enough to "rip everything in my body; I was trying to hold everything with my arms". In his view, he did not get properly assessed at the [hospital], as he was not seen by an orthopedic surgeon. He also pointed out that it takes quite a long time to have an MRI.

Evidence for MPIC:

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination. The Appellant confirmed that he was not wearing a helmet at the time of the MVA. Counsel reviewed with the Appellant the injuries that he had complained of when he had arrived at the [hospital], including chest pain, neck pain and pain in his left shoulder and arm. He received an x-ray of his chest and ribs. The Appellant agreed that there was no record of any right shoulder complaints in the [hospital] Emergency Room report. The Appellant said that when he was at the [hospital], he was very concerned about his heart and his left side and he may not have mentioned his shoulder.

The Appellant had a similar explanation when counsel for MPIC questioned him regarding his first visit to [Appellant's doctor] after the MVA: the Appellant indicated that until the pain from his left side subsided, he did not mention the pain caused by his right shoulder. The Appellant noted that he lost his distal ligaments on the left side, to the point where he is embarrassed and feels he can't go to the beach any longer. However, his right side was hurt as well and since he is right-handed, and needs his right arm to be able to work, his right side is equally important to him.

Counsel for MPIC questioned the Appellant regarding a report from [Appellant's doctor] dated April 20, 2010, which mentions various injuries, but does not refer to any injuries to either shoulder. The Appellant responded that this report was prepared by [Appellant's doctor] in order to assist him in obtaining a brace or splint, and that some of [Appellant's doctor's] reports were guided to his needs. Counsel pointed out that this was not necessarily consistent with the Appellant's description of the MVA, that all of his limbs were ripped from his body. The Appellant responded that his hands were gripping the handlebars and he felt that that was what happened. He said that he did complain of every injury and that he didn't know how many of his complaints were written down.

Counsel noted that the Appellant had returned to work shortly after the MVA, around August 10, 2009. Counsel questioned the Appellant regarding an incident unrelated to the MVA that occurred shortly thereafter, on August 18, 2009, in which the Appellant suffered injuries to both his ankles. The Appellant said that he was unable to walk for four months after the incident and that he was in a wheelchair during that time. Counsel pointed to chart notes from [Appellant's doctor] which identified the Appellant's use of crutches. The Appellant said that he used the crutches as paddles while still in the wheelchair.

When asked regarding his visits to [Appellant's doctor] every two weeks, the Appellant responded that he was clinically unstable at the time, and [Appellant's doctor] wanted to see him frequently. Counsel pointed out that [Appellant's doctor] did not have a note of any right shoulder injury until March 2010. The Appellant responded that that may be the first time it is written down; however, he mentioned the pain during every visit.

Counsel for MPIC referred to an x-ray from March 17, 2010, which showed tendinitis in the Appellant's right shoulder. The Appellant responded that soon after that x-ray, it was determined that he required surgery. He pointed out that he mentioned it to the case manager on March 25, 2010. Counsel noted that [Appellant's surgeon], in his report of May 25, 2010, said that there was no indication for surgery. The Appellant noted that he did have surgery in June 2012, after the MRI identified the torn rotator cuff.

Counsel questioned the Appellant regarding his employment history. The Appellant said that he started training to work with cars when he was [text deleted] years old. He has spent 33 years fixing cars, which involves lots of repeated arm movements; he uses his arms all the time. He has worked with various body shops in [text deleted] as a frame man and as a body man, which involves working with chains, hammers and machines to tie or lock the vehicles in place.

Submission for the Appellant:

The Appellant submitted that he took it upon himself to do whatever he could to get better, seeing many doctors, including [Appellant's doctor], [Appellant's surgeon] and the doctors at [Clinic]. The Appellant noted that unfortunately [Appellant's doctor] is now deceased and is not able to testify, but his reports are part of the indexed file and they support his evidence. He managed to survive what could have been a worse ordeal. It takes time to do the diagnostic imaging and he has learned to accept that. He submitted that things would have been different if MPIC had taken into consideration the mental condition that he was in and the shock that he was suffering from due to the MVA. In addition, he suffered from the loss of the distal ligaments in his left shoulder.

The Appellant submitted that the [hospital] failed to check him for any injuries to his ligaments and any orthopedic injuries. He submitted that that hospital is known for missing out on things and that they are often too busy. [Text deleted]. However, when he saw his own doctor, [Appellant's surgeon], he reviewed the MRI and saw the rotator cuff tear that was ultimately repaired by surgery.

The Appellant noted that MPIC has suggested that the injury to his shoulder resulted from degenerative changes and was not caused by the MVA. The Appellant submitted that the shoulder injury was not caused by his work, which in fact keeps him strong and keeps him resistant to degenerative changes and ligament tears. He submitted that his shoulder injury was the fault of the strong force that hit him in the MVA.

The Appellant noted that he is an honest man and he went through a terrible ordeal. He said he was in terrible pain and took painkillers for a long time. He said it took several months to get an MRI and submitted that the system should be reviewed so that people can be assessed to determine what is wrong with them at the time of the MVA and not several years later.

Submission for MPIC:

Counsel for MPIC submitted that there is no causal connection between the Appellant's right shoulder injury and the MVA. He noted that there is no mention of right shoulder pain in any of the medical documentation until March, 2010.

He referred to the following documents, which do not contain any mention of right shoulder pain:

- The Appellant's Application for Compensation, dated August 7, 2009;

- The [hospital] Emergency Room report and x-ray report, both dated July 25, 2009;
- The report of [Appellant's doctor] dated July 28, 2009;
- [Appellant's doctor's] chart notes from July 28, August 5, August 24, October 2 and October 21, 2009; and
- The report of [Appellant's doctor] dated April 20, 2010.

Counsel pointed out that it was not until March, 2010, that there is any mention of right shoulder pain in any of the medical documentation, and noted that the report of [Appellant's doctor] dated March 24, 2010 identifies right shoulder issues.

MPIC's Health Care Services (HCS) team reviewed this issue and provided a report dated January 27, 2011. Counsel noted that the HCS consultant found as follows:

Based on the review of this file in its entirety ... it is opined that a probable relationship between the July 25, 2009 motor vehicle collision and subsequently described right shoulder difficulties is not present.

Counsel referred to a report from [Appellant's doctor] dated April 20, 2010, which refers to many areas of injury but does not refer to the right shoulder. Counsel submitted that it is hard to understand why the Appellant would identify some areas of injury and not others. Counsel also referred to the report from [Appellant's doctor] dated November 12, 2013, in which he indicated that the Appellant did not initially report the right shoulder pain due to the significant pain that he suffered in other areas. MPIC's HCS consultant reviewed this report and provided the following analysis in a report dated August 8, 2016: "the rationale expressed by [Appellant's doctor] (sic) that an individual does not report one pain because of another pain, is medically improbable."

Counsel referred to a report from [Appellant's surgeon] dated December 23, 2015. In that report, [Appellant's surgeon] noted that the Appellant gave a history of having injured his shoulder in the MVA. [Appellant's surgeon] stated:

With regards to the question whether the collision of July 26th (sic), 2009 negatively influenced this gentleman's shoulders, particularly his right shoulder, I have to rely on [the Appellant's] history. When I saw him May 25th, 2010, his main complaint was that of right shoulder pain and he described that his pain started after his bike collided with a car. I have to believe [the Appellant] and therefore some of his right shoulder problems were related to that collision. ...

Counsel submitted that [Appellant's surgeon's] reliance on the Appellant's recollection resulted in an inaccurate conclusion. He referred the panel to a report from the HCS consultant dated August 8, 2016. In that report, the HCS consultant noted that [Appellant's surgeon] did not conduct a review of all of the file material, but rather relied on the recollection of the Appellant, which was not consistent with the medical documentation. Counsel further pointed out that the MRI dated January 20, 2012, identified that the Appellant suffered from AC joint arthrosis, a condition which is degenerative in nature. Counsel submitted that degenerative changes were a much more likely cause of the Appellant's right shoulder injury, particularly given the manual nature of his employment as a body man involved in the repair of cars. Counsel argued that it would even be possible for the Appellant to have a tear in his shoulder and not know it.

Counsel for MPIC submitted that it is MPIC's position that the injury reflected in the MRI of January 20, 2012, was caused by degenerative changes and not by the MVA. He submitted that the Appellant has not discharged the onus upon him of showing that the Internal Review decision is incorrect; that he has not shown that his right shoulder injury is related to the MVA or that he is entitled to PIPP benefits in connection with that injury. Counsel for MPIC submitted that the Appellant's appeal ought to be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer dated February 3, 2011, is incorrect. In particular, the Appellant needs to show, on a balance of probabilities, that he is entitled to PIPP benefits in connection with his right shoulder injury. In order to be entitled to PIPP benefits, the Appellant needs to show that his right shoulder injury was caused by the MVA. 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;

"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 ...

Application of Part 2

71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

MPIC does not dispute that the MVA occurred. There is also agreement regarding the findings of the Appellant's MRI from January 20, 2012, as follows:

1. AC [acromioclavicular] joint arthrosis;
2. Low grade partial articular surface insertional tear supraspinatus;
3. Tear inferior labrum complicated by [illegible] paralabral cyst.

The dispute between the parties is whether the tears identified on the MRI were caused by the MVA. The Appellant argues that they were. MPIC argues that the tears were a result of degenerative changes, similar to the AC joint arthrosis shown on the MRI, which is degenerative in nature. The onus is on the Appellant to prove that the tears were caused by the MVA, on a balance of probabilities.

Was There a Delay in Reporting the Injury?

The panel has reviewed the documentary evidence on the indexed file from the time of the MVA on July 25, 2009 and notes that there is no mention of a right shoulder injury in the medical documentation until March 10, 2010, when a chart note from the Appellant's physician, [text deleted], indicates that the Appellant is "unable to elevate R [right] arm". The Appellant, at points in his direct testimony and cross-examination, explained that the absence of any mention of his right shoulder injury in the medical documentation for almost eight months after the MVA is due to the fact that his other injuries were more pressing concerns; therefore, he was more focused on those injuries during that period of time and did not mention his right shoulder. However, he also testified, on cross-examination, that he did mention his right shoulder injury frequently and that his medical providers simply failed to record it in their notes. His testimony was inconsistent in this regard.

If the Appellant did report his right shoulder injury to his medical providers prior to March, 2010, there is no record of it. However, it is clear that he did, prior to that time, report other injuries related to the MVA, and those were recorded in the medical documentation, including the following:

- Left hand, left ribs, bruising, strained left arm (Appellant's Application for Compensation, dated August 7, 2009);
- Chest pain, pain in left side ([hospital] Emergency Room report, dated July 25, 2009;
- Neck pain, mild headache, left shoulder pain, left chest and rib pain, left and right knee/leg pain, chest tenderness (report of [Appellant's doctor], dated July 28, 2009);
- Hit to left rib cage, laceration to L ring finger ([Appellant's doctor's] chart notes, July 28, 2009); and
- Ribs injury, unable to cope and sleep, nightmares, anxious ([Appellant's doctor's] chart notes, August 5, 2009).

In addition to the MVA-related injuries, the Appellant reported injuries relating to the incident that occurred on August 18, 2009, and those were recorded in the medical documentation, as follows:

- Was hit to the head, was semi-conscious and after had multiple injuries ([Appellant's] doctor's] chart notes, August 24, 2009);
- Still in pain, unable to sleep and cope, difficult to walk ([Appellant's] doctor's] chart notes, October 2, 2009); and
- Using cast to L leg and crutches ([Appellant's] doctor's] chart notes October 21, 2009).

[Appellant's] doctor] provided a report dated November 12, 2013, which addresses this issue. In that report, [Appellant's] doctor] stated as follows:

[The Appellant] suffered from an MVA on July 25, 2009 with multiple soft tissue injuries unable to localize right shoulder pain because of he had serious pain to left ribs and pain in right knees. He failed to declare right shoulder pain.

...

He estimates that in slow motion started to develop right shoulder pain and was unable to elevate right arm and unable to work.

It took time (8 months) to determine by MRI (see appended copy) that [the Appellant] had real injury to right shoulder.

The panel notes that [Appellant's] doctor's] report is not entirely internally consistent, in that initially it says that the Appellant did not declare the right shoulder pain due to other, more significant pain. However, further on, the report says that the right shoulder pain started to develop "in slow motion"; it is unclear whether this phrase means that the pain, and possibly the injury, may not have been present initially.

MPIC's HCS consultant considered this issue and stated as follows in a report dated January 27, 2011:

For a considerable time period following his motor vehicle collision, there is no mention from either claimant or from healthcare providers of right shoulder difficulties. If right shoulder difficulties were causally related to the motor vehicle collision, one would reasonably anticipate the symptoms to occur with some temporal proximity to the collision. The absence of reported symptoms for a lengthy period of time would make it improbable to relate these symptoms to the motor vehicle collision.

MPIC also considered this issue in its HCS report dated August 8, 2016, which provides as follows:

... Right shoulder findings were not described in this matter until several months after the event in question. The clinical note of July 28th, 2009 does not refer to a right shoulder injury, despite referring to numerous other areas of difficulty. The rationale expressed by [Appellant's doctor] (sic) that an individual does not report one pain because of another pain, is medically improbable.

The panel has considered this issue, including the fact that the Appellant reported multiple areas of injury on numerous occasions between the time of the MVA and March, 2010, which were recorded in the medical documentation, but failed to report his right shoulder injury, or if it was reported, that his medical providers recorded numerous other areas of injury but failed to record his right shoulder injury. We find it unlikely that the Appellant would report all of these other injuries during that time but not the right shoulder injury, if it had occurred at the time of the MVA, and we find it equally unlikely that his medical providers would have failed to record the injury if he had reported it. Further, the panel notes that the Appellant testified that he is right hand dominant and we find that it is unlikely that an injury to his right shoulder which occurred in July, 2009, would not have been mentioned by him to his medical providers prior to March, 2010.

Did the MVA Cause the Injury?

MPIC argues that it is more likely that the development of the Appellant's right shoulder injury was degenerative in nature, rather than that it was caused by the MVA. The panel notes that an x-ray taken on March 17, 2010, of the Appellant's cervical spine and right shoulder identifies degenerative change in the lower facet joints of the cervical spine and a tiny soft tissue calcification in the right shoulder, consistent with tendinitis. MPIC's HCS team reviewed this x-ray report and commented in a report dated January 27, 2011 as follows:

X-ray reports of the claimant's cervical spine and right shoulder reveal the presence of degenerative changes. These degenerative changes which would have occurred idiopathically, represent a significantly more probable explanation for right shoulder pain than to relate this pain to the July 2009 motor vehicle collision.

The MRI of January 20, 2012, identified that the Appellant suffered from degenerative changes of the right AC joint (AC joint arthrosis), as well as a rotator cuff tear (partial articular surface tear of the supraspinatus) and tearing to the inferior labrum. The MPIC HCS report dated August 8, 2016 provided as follows:

There is consistency in the medical literature that rotator cuff disease is an age-related, degenerative condition. It progresses with time. In patients the age of [the Appellant], close to [text deleted] at the time of this MRI, there is roughly a 50% probability of having both labral tears and rotator cuff tears. This is probably more frequent in the dominant arm, and probably has genetic, work related, and other influences. ...

The Appellant's surgeon, [text deleted], provided a report dated December 23, 2015, in which he stated as follows:

With regards to the question whether the collision of July 26th (sic), 2009 negatively influenced this gentleman's shoulders, particularly his right shoulder, I have to rely on [the Appellant's] history. When I saw him May 25th 2010, his main complaint was that of right shoulder pain and he described that his pain started after his bike collided with a car. I have to believe [the Appellant] and therefore some of his right shoulder problems were related to that collision. He had osteoarthritis of the acromioclavicular joint and the symptoms of that could have been related to the direct impact of the handlebars. He also had some intra-articular findings that could also be related to the accident.

MPIC's HCS consultant considered the December 23, 2015, report of [Appellant's surgeon] in the HCS report of August 8, 2016, which provided as follows:

A chronological review of the medicolegal information in a forensic fashion, as conducted by the prior Health Care Consultant does not appear to be done by [Appellant's surgeon]. He relies on the post hoc recollection of the patient. The patient's recollection does not appear to be borne out by the medical documentation in this matter. Right shoulder findings were not described in this matter until several months after the event in question. ...

... The utilization of crutches for the patient's ankle fracture, would be a potential source of activating underlying rotator cuff disease.

... The doctor's note of March 2010 documented that the patient was unable to elevate his right arm.

The family physician does not indicate that that difficulty was probably causally related to the car crash of eight months previously.

At this time, I would state that the new medical evidence does not indicate that there was a probable causal relationship between the event in question, and the patient's right shoulder disorder. The right shoulder disorder is a degenerative condition and this is widely established in the medical literature. There is insufficient evidence to link the symptomatic right shoulder difficulties, with the event in question. It is possible that trauma can activate underlying degenerative conditions and render them symptomatic. This, however does not appear to have been borne out by the chronological information in the bodily injury claim file.

The panel has considered this issue and accepts the opinion offered by the HCS consultant, that the conclusion of [Appellant's surgeon] as to causation, which was based on the recollection of the Appellant, cannot be relied upon. As was noted above, the Appellant's recollection, as reported to [Appellant's surgeon], that he had been reporting pain in his right shoulder since the time of the MVA is not consistent with the medical documentation.

The panel also notes that the Appellant, in his testimony, described his many years of manual labour as an auto body technician, which involved significant use of his arms. The panel accepts the findings in the HCS report of August 8, 2016, that in patients the age of the Appellant, "there is roughly a 50% probability of having both labral tears and rotator cuff tears. This is probably

more frequent in the dominant arm, and probably has genetic, work-related, and other influences”.

The panel finds that the HCS consultants, in the preparation of their reports dated January 27, 2011 and August 8, 2016, had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant’s file and were thorough and comprehensive in their analyses. The panel preferred the evidence provided by the HCS consultants to that of the Appellant, whose evidence was inconsistent, and to that of [Appellant’s doctor] and [Appellant’s surgeon], neither of whom had an opportunity to conduct a review of all of the file material.

Conclusion

Accordingly, after a careful review of all the reports and documentary evidence filed in connection with this appeal and after careful consideration of the testimony of the Appellant and of the submissions of the Appellant and counsel for MPIC and taking into account the provisions of the relevant legislation, the panel finds that the Appellant has not met the onus of establishing, on a balance of probabilities, a causal connection between the MVA and the Appellant’s right shoulder injury. Although it is possible that the Appellant’s right shoulder injury may have been caused by the MVA, he has not established, on a balance of probabilities, that this was the case. Accordingly, the Appellant has not met the onus to establish, on a balance of probabilities, that he is entitled to PIPP benefits with respect to his right shoulder injury.

Disposition:

Therefore, the Appellant’s appeal is dismissed and the decision of the Internal Review Officer of February 3, 2011, is upheld.

Dated at Winnipeg this 7th day of February, 2017.

JACQUELINE FREEDMAN

DR. ARNOLD KAPITZ

SUSAN SOOKRAM