Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-48

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C. Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Ms Joan McKelvey** **the Appellant, [text deleted], was represented by [Appellatn's representative]**
HEARING DATE:	**April 28th, April 29th and May 1st, 1997**
ISSUE(S):	**Whether disability caused by MVA; divergence of medical evidence.**
RELEVANT SECTIONS:	**Sections 81(1) and 110(1) of the 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 FACTS:

[the Appellant], at the time of his accident, was [text deleted] years of age, married, with one child. He had finished Grade [text deleted] and was employed by [text deleted]. His work consisted, in the main, of general maintenance, delivering drywall and other materials to

various job sites, ensuring that the construction crew had everything that they needed, and cleaning up the site at the end of the job. In other words, his duties covered the spectrum from light to heavy labour.

There is some doubt about the exact date of the accident since, although [the Appellant's] Application for Compensation gives October 17th, 1995 as the date, several reports from his chiropractor, [text deleted], show it as October 10th and he confirmed at the hearing of his appeal that the proper date was October 13th. Since that date is borne out by the internal memorandum of MPIC when he first phoned in his claim, we have assumed that this is the correct one.

All significant aspects of [the Appellant's] evidence were uncontradicted, and may be summarized as follows:

1. he was sitting in the driver's seat of his employer's [text deleted] truck at the corner of [text deleted] and [text deleted], with his foot on the brake, leaning forward to pick up a container of coffee and waiting for the light to change, when his vehicle was struck from behind by a [text deleted] van and pushed into the middle of the intersection;
2. there was minimal damage to [the Appellant's] vehicle, but the [text deleted] van sustained damage to the extent of about $2,500.00;
3. [the Appellant] felt a sudden, sharp pain, originating in his lower back and radiating concurrently down the right leg to the foot. He was stiff and sore immediately thereafter. As he puts it "I'm not the kind of person to go running off to see a doctor at the first bump or scratch - my mother is a hypochondriac and one in the family is enough!". He therefore

started a course of self-medication, starting with Aspirin, moving up in strength to Tylenol 3, and then using Robaxacet, an over-the-counter muscle relaxant. In the meantime, being concerned over the possible loss of his employment if he took too much time off work, and also being a person who enjoyed his job, [the Appellant] continued to report for work every day, although he says that he found himself working more slowly than before the accident;

4. he reported the accident to MPIC, by telephone, very shortly after the event although here, too, there is some question about the actual reporting date since [the Appellant] felt quite sure that it was done on the day of the accident whereas the adjuster's note seems to be dated October 17th;

5. he had experienced no problem of any kind involving pain in the leg or lower back, prior to the event of October 13th, 1995. His work record is excellent. Prior to the accident he was quite active in various sports, golfing about twice a week and playing baseball or football on most weekends; he is no longer able to engage in those activities;

6. [the Appellant] continued to report to work without losing any time, but the pain in his right leg and lower back made it increasingly difficult for him to do so. Finally, upon the recommendation of a neighbour, he consulted [text deleted], a chiropractor, who first saw him on December 15th of 1995. The Appellant filed a formal, written Application for Compensation on December 18th. [the Appellant] continued working until January 27th, 1996 when, by reason of his increased pain and upon the advice of [Appellant's chiropractor], he arranged for leave of absence from his job.

There is a strong probability that, prior to his accident, [the Appellant] had some degeneration of the lumbar spine at L3-4 or L4-5 levels, or both, resulting in a partial narrowing

of the spinal canal at L4-5 and that this arthropathy, when combined with a central and right posterior lateral disc protrusion (clearly indicated by a computed tomography or CT scan performed on March 13th, 1996) almost undoubtedly resulted in a compression of the right L5 nerve root which became the primary source of [the Appellant's] pain.

The primary issue that is before us is whether the disc protrusion and resulting disability were caused by [the Appellant's] motor vehicle accident, or whether the more probable cause was the very nature of his work with its attendant bending, lifting and twisting, as is strongly urged by MPIC's medical consultant.

We do not believe that much purpose would be served by a detailed analysis of all of the medical evidence placed before us at the hearing of this appeal. [the Appellant] has, for various reasons, consulted one chiropractor, [text deleted], two general practitioners, [Appellant's doctor #1] who first saw him in April of 1996 and [Appellant's doctor #2] who first saw him in December of 1996, an orthopaedic surgeon, [text deleted] who first examined him in September of 1996 and, finally, [text deleted], a physiatrist or specialist in physical and rehabilitative medicine. In addition to written reports from each of those practitioners other than [Appellant's doctor #2], we heard oral testimony from each of them except [Appellant's doctor #1]. While the descriptive portions of the evidence of each of them differed minimally from that of the other practitioners, they had all reached the one, basic and significant conclusion: the most logical and explicable cause for [the Appellant's] continuing disability was the trauma that he experienced at the time of his motor vehicle accident on October 13th of 1995.

[Text deleted], the medical director of MPIC's Claims Services Department, takes strong issue with that conclusion. He expressed the view that no one suffering the kind of injury alleged by [the Appellant] to have been sustained in his motor vehicle accident could possibly have continued working in a physically demanding job for the next couple of months. He points, as well, to the fact that there was no medical examination of the Appellant during those first two, post-accident months, and to what [MPIC's doctor] perceives as a paucity of hard information, even from the first examiner, [Appellant's chiropractor], from which [MPIC's doctor] could reasonably conclude that the Appellant had suffered a "frankly herniated nucleus pulposus with nerve root compression". [MPIC's doctor] expresses the opinion, in a memorandum of January 22nd, 1997, which he reaffirmed in his oral testimony at the hearing of this appeal, that he had still seen no reliable documentation or other evidence of such a herniation nor of any neurologic abnormalities, and he concludes that the relationship of the identified discopathy in [the Appellant's] case to the motor vehicle accident in question cannot be considered to be one of probable cause and effect.

Each one of the other practitioners disagrees with [MPIC's doctor]. None of them advances the firm opinion that there has been an actual herniation and resultant extrusion of the contents of [the Appellant's] L4-5 disc. Rather, they are unanimous in their belief that what exists here is a disc protrusion which, added to the existing facet arthropathy at that location, resulted in a narrowing of the vertebral canal and a strong likelihood of a nerve root compression.

As to [the Appellant's] ability to continue working until January 27th, 1996 and his apparent delay, until December 15th, 1995, before seeking professional treatment, we have ample

evidence - if evidence were needed - that, firstly, the pain caused by radiculopathy (in this case, nerve root compression) can be of varying degrees and, secondly, that the pain threshold of any one patient can differ markedly from that of another. [The Appellant] is a well-motivated person who was not disposed to quit work until his discomfort forced him to do so; in the interim, he dosed himself with painkillers and muscle relaxants, as noted above. We find his evidence to be credible.

Scott, A.C.J. Q.B., as he then was, dealt with a similar situation in the case of Payjack vs. Forkheim and Olinyk, reported at 54 Manitoba Reports, (2nd edition) at page 263. In that case, the victim did not even begin to experience low back pain until some time after her motor vehicle accident. She began to experience "a little pinch" in her lower back about two to three weeks after her accident, no medical report of actual pain appeared until about two months after the accident but, thereafter, matters deteriorated rapidly and she had to leave her employment about five months after the accident. The plaintiff in the Payjack case was twenty-two years of age at the time of her accident. The court in that case heard much detailed evidence respecting lumbar disc protrusions, as did we. In that case, it was the conclusion of the orthopaedic surgeon called to give evidence for the plaintiff that her low back injury, resulting in the acute lumbar disc protrusion, was probably caused by the automobile accident in the absence of any previous history of low back pain or any other trauma that could have caused the injury. That medical evidence emphasized that "the onset and increase in pain and discomfort was not an abrupt, but rather a gradual, process and that it was quite possible that there might be no back pain at the beginning, or minimal symptoms, but as time went on ..... the symptoms would begin to impact upon the plaintiff". Scott, A.C.J. Q.B., heard further testimony that "sometimes the symptoms of a disc

injury are delayed, especially if the original injury is a small tear to the annulus fibrosis, and this then progresses over time to a significant tear and, ultimately, a protrusion". Further evidence adduced before the learned Associate Chief Justice confirmed that "Trauma can be an initiating factor to a disc protrusion if there is some degenerative process already present .... it is sometimes the case that the initial tearing thereafter progresses to a point where a prolapse or protrusion takes place ....".

Applying the twin propositions that, firstly, a defendant takes his victim as he finds him (commonly referred to as the "thin skull doctrine") and, secondly, that causation is not a precise, scientific exercise, but rather one involving the practical application of common sense and experience (per Lord Reid in McGhee vs. National Coal Board, [1972] 3 A.E.R. 1008 at page 1011), the learned Associate Chief Justice had no difficulty in concluding, on the basis of the evidence presented to him, that the plaintiff's low back complaints with, in her case, a resultant need for surgery, were probably related to the automobile accident.

In the Payjack case, the primary disagreement between the conflicting streams of medical opinion related to the time lapse between the date of the accident and the commencement of low back symptoms. In [the Appellant's] case, those symptoms appeared almost instantaneously.

[MPIC's doctor's] opinion points to the apparent absence of neurological and other signs of a herniated nucleus pulposus (that is, the soft fibro-cartilage central portion of the intervertebral disc) with nerve root compression. He points to the fact that, although medical

evidence of positive straight leg raising tests was given, there was no hard, numerical data to support that finding. However, we find that there was ample evidence upon which a finding of nerve root compression could readily be made, if not with absolute certainty at least upon a strong balance of probabilities. We note, for example, that [Appellant's physiatrist's] written opinion of January 20th, 1997 reports positive Lasègue's signs - that is to say, if the patient, when supine with hip flexed, has pain in the posterior thigh when the foot is turned upward at the ankle joint, that pain is indicative of radiculopathy or nerve root pressure. [Appellant's physiatrist] testified that, with a younger patient, a flexion-rotation type of injury is the major culprit in bringing about a disc protrusion, particularly if there is some predisposition in the form of a weakened annulus fibrosis (the outer covering of the disc). The nature of [the Appellant's] accident, - foot on the brake, leaning forward to pick up coffee, rear-end collision - is a good example of flexion-rotation injury. As [Appellant's physiatrist] puts it, "I don't see anything else that fits [the Appellant's] case, other than that the motor vehicle accident must have precipitated the problem from which he now appears to suffer". [Appellant's physiatrist], who has examined [the Appellant] on three or four occasions, bases his opinion on the history related to him by [the Appellant] (a factor which, [MPIC's doctor] agrees, constitutes up to 85% of the basis of a diagnosis), as well as upon [Appellant's physiatrist's] own physical, neurological and musculo-skeletal examinations of [the Appellant], the CT scan and an electromyogram performed under his supervision.

Had [the Appellant] been comparatively pain free for the two months following his accident, MPIC's position that his troubles should be attributed to the nature of his work rather than to the accident might have carried more weight. However, upon reviewing all of the evidence

presented to us and, in particular but without limitation, having in mind that [the Appellant] experienced the very kinds of pain normally associated with a nerve root compression at L4-5 right at the time of the accident, complained about it to MPIC when phoning in his initial accident report almost immediately thereafter and found it necessary to dose himself with analgesics of increasing strength before succumbing, we have no difficulty in finding, on a strong balance of probabilities, that his motor vehicle accident was the proximate cause of his disc protrusion. It may well be that the nature of his work for the several years prior to the accident had indeed caused a weakening of the annulus fibrosis and that the situation was certainly not helped by what the CT scan report calls the "early facet arthropathy" but, as noted above, the insurer must take the claimant as it finds him - in this case, with a probable predisposition to a disc prolapse. We feel constrained to add that we have not arrived at our conclusion merely by reason of the fact that [MPIC's doctor] is seriously outnumbered by the practitioners who attribute [the Appellant's] continuing problem to his motor vehicle accident. To have done that would have been to adopt the attitude of the Inquisition when confronting Galileo's solitary advocacy of the Copernican system; in other words, the number of opinions lined up behind a given theory do not necessarily persuade us of the validity of that theory. However, when those opinions appear to be backed up by clinical evidence and logical deductions from that evidence by clinicians who are apparently disinterested and have personally examined the claimant, we find that their opinion should be accepted.

DISPOSITION:

We find that [the Appellant] was a full-time earner within the meaning of Section 70(1) of the MPIC Act and that his motor vehicle accident rendered him unable to continue that

employment after January 27th, 1996.

We find, further, that [the Appellant] is entitled to the reinstatement of his income replacement indemnity payments of $683.97 bi-weekly from June 2nd, 1996, that being the date when, so far as we can tell from MPIC's file, the insurer terminated those payments. That reinstatement, which will be reflected in the Order to which these Reasons are attached, appears to be the extent of this Commission's jurisdiction since, although the decision of the Internal Review Officer speaks, merely, of 'benefits', income replacement seems to have been the only benefit addressed.

([The Appellant] will be entitled to be reimbursed for the costs of any medical reports prepared and produced in support of his appeal, pursuant to the provisions of Section 148 of the Act to the extent qualified by Section 43 of Regulation 40/94, if that has not already been done.)

RECOMMENDATION:

What follows, therefore, must be read as non-binding recommendations only. None of [the Appellant's] medical advisors was very sanguine about his ability to return to his full, former duties even if the job is still open. [Text deleted], from whom [the Appellant] is drawing a disability benefit under his former employer's group plan, is working with him in an effort to find him suitable re-training and, says [the Appellant], would probably still be prepared to assume one-half of the cost of any such re-training even in the event of this appeal being successful.

From all the evidence placed before us, we do not recommend the continuance of chiropractic treatments nor the resumption of any other passive modality unless, very briefly and carefully monitored, for the sole purpose of relieving pain to facilitate more active therapy aimed at trunk stabilization. Proper instruction in home exercises, a professional assessment of [the Appellant's] employment aptitudes, followed by appropriate re-training and, if necessary, work-hardening, seems to be the proper course to be followed, with a view to returning the Appellant to the work force as soon as is practicable. Occasional epidural steroid injections may be required, as may be recommended by [Appellant's physiatrist], to decrease the likelihood of inflammation of the tissue that might otherwise be adding to the stenosis and decreasing the size of the vertebral canal at L4-5.

It is our recommendation that the foregoing pattern of rehabilitation might fruitfully be the basis of discussion between the experts available to MPIC and [text deleted], together with [Appellant's physiatrist] who appears, at the moment, to be [the Appellant's] treating physician.

Dated at Winnipeg this 8th day of May 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED