

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]

AICAC File No.: AC-00-64

PANEL: **J. F. Reeh Taylor, Q.C., Chairman**
Ms Yvonne Tavares
Mr. Colon Settle, Q.C.

APPEARANCES: **[Appellant's representative] appeared for the Appellant;**
Manitoba Public Insurance Corporation ('MPIC')
was represented by Mr. Tom Strutt

HEARING DATE: **February 20th, 2001**

ISSUE(S): **(i) Whether Appellant unable to work by reason of MVA;**
(ii) whether Appellant entitled to further therapy.

RELEVANT SECTIONS: **Sections 85(1), 86(1), 105 and 138 of the MPIC Act,**
Section 8 of Manitoba Regulation No. 37/94 and
Section 5 of Manitoba Regulation No. 40/94

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, [text deleted], was injured in a motor vehicle accident on April 10th, 1996 when, stopped at a pedestrian crossing behind some nine other vehicles, his car was rear-ended. He saw his physician, [text deleted], on the following day and was diagnosed with a strain of his neck and right shoulder. [Appellant's doctor #1] noted that [the Appellant] had been involved in an earlier motor vehicle accident on the 7th of July 1994

and was, at the time of the accident now under review, suffering from neuropathic and myopathic pain syndrome due to diabetes mellitus and to that prior motor vehicle accident. The pain in [the Appellant's] right shoulder and neck, however, appears to have arisen after his April 1996 accident. An x-ray of his cervical spine produced normal results. [Appellant's doctor #1] referred [the Appellant] to [text deleted] Physiotherapy Clinic, where he started attending on April 26th, 1996. He received in excess of 60 treatments there before MPIC ceased paying for them.

Since he continued to complain of pain in his neck and right shoulder, [the Appellant] made an appointment to see [Appellant's doctor #2], who had treated him for previous problems; [Appellant's doctor #2] saw him on August 26th, 1996. At that point, [the Appellant] was complaining of neck pain, right shoulder pain, pains and aches in both hands, sleep disturbances and reduced functional capabilities with low endurance for any prolonged sitting, standing and repetitive activities since his motor vehicle accident of April 10th, 1996 ('the MVA').

[The Appellant] told [Appellant's doctor #2], and confirmed to this Commission upon the hearing of his appeal, that the impact of the other vehicle pushed [the Appellant's] car forward "a couple of feet"; it did not hit any car in front of him, nor any other object. He told [Appellant's doctor #2] that he hit both knees on the dashboard of his car and strained his neck and shoulder. He told this Commission that "I felt something happen to my body; my right hand struck the steering wheel and I hurt my neck. I was holding the steering wheel at the time; my right hand struck the dashboard".

We note, in passing, that the apparent cost of repairing the damage to [the Appellant's] vehicle was \$562.00. He testified that his muffler had been broken as well as a bracket, and the collision had caused a dent in the middle of his rear bumper.

MEDICAL EVIDENCE:

From [Appellant's doctor #2's] initial report, it is clear that [the Appellant] had been attending three physiotherapy sessions each week for quite some time, although by November 25th of 1996 that frequency had been reduced to twice weekly. Most, if not all, of those physiotherapy treatments were of a passive nature. Even with that, [the Appellant] reported to [Appellant's doctor #2] that he had noticed a 70% improvement in his pain syndrome by August 26th, 1996. He was instructed to apply moist hot packs to his neck and shoulder girdle muscles, followed by specific stretching exercises twice daily. He was also given general principles of muscle relaxation exercises.

By November 25th, 1996 [the Appellant] was reporting a further 15% improvement in his neck pain (taking him to a level 85% of normal) although he was still not doing any resistive exercises due to his complaints of pain. [Appellant's doctor #2] gave him spray and stretch treatments, encouraged him to do his daily stretching exercises and attempted to wean him off Tylenol #3 and Naprosyn. [Appellant's doctor #2] did not feel that [the Appellant] required any CT Scan, MRI, EMG or nerve conduction velocity studies, found no nerve root injuries nor any peripheral nerve injuries but, merely, soft tissue injuries of

the neck and shoulder girdle muscles. His diabetes was contributing to his slow recovery from his injuries. By December 10th, [Appellant's doctor #2] was recommending a further four weeks of physiotherapy, of a more aggressive modality than had formerly been the case. He felt that [the Appellant] should have made a complete recovery by the end of January or February of 1997.

A further report from [Appellant's doctor #2], dated March 27th, 1997, discloses that [the Appellant] was now reporting an overall 60% improvement since the onset of his symptoms. He was complaining of pain and stiffness in his hands and feet and in the tibial bone anteriorly bilaterally. He felt sore in the right shoulder if he had slept on the right side the previous night. "Nowadays he sleeps good (sic) for six to seven hours", although his functional level had apparently not improved. [The Appellant] was still reporting to [Appellant's doctor #2] that he could do no cleaning, nor any medium to heavy work which, instead, was done by his daughter. By March 24th, 1997, he reported an overall improvement of 70% since his injury exactly as he had reported on August 26th of the previous year. By March 27th, 1997, said [Appellant's doctor #2], [the Appellant] required no further physiotherapy, massage therapy nor chiropractic manipulations. He should simply continue with his home exercise program.

On July 28th, 1997, [Appellant's doctor #2] submitted a further report in response to a request from MPIC. He noted that [the Appellant] was still taking 20 to 30 tablets of Tylenol #3 per month and was still regularly consuming Naprosyn. [Appellant's doctor #2] administered local needling and injection of Xylocaine and Depo-Medrol in the

trigger points of the right supraspinatus muscle, in order to relieve some perceived taut bands and restore muscle function. Rather surprisingly, [Appellant's doctor #2] noted this time that there had been no pre-existing or unrelated conditions that might be delaying [the Appellant's] recovery, although in earlier reports he had specifically mentioned the diabetic condition as just such a factor. While [Appellant's doctor #2] did not feel that [the Appellant] had made maximum medical improvement in his soft tissue injuries, he could not be certain whether a complete recovery would ever be achieved.

There are two other medical reports that are relevant to the present inquiry;

- (a) in a letter dated June 25th, 1999 and addressed by [Appellant's doctor #1] to [the Appellant's] counsel, [text deleted], [Appellant's doctor #1] comments that, when the Appellant presented himself to [Appellant's doctor #1] the day after the MVA, "he was complaining of increased pain over his right shoulder and upper arm (emphasis added). The necessary inference is that there had been pre-MVA pain, if the word 'increased' is to be given any significance. [Appellant's doctor #1] goes on to say

In regards to the ability to work is concerned (sic), before the motor vehicle accident [the Appellant] was not able to get any gainful employment due to his medical condition (retinopathy, neuropathic and myopathic pains due to diabetes mellitus, et cetera). His pain in the neck and right shoulder became worse after the accident and there is no improvement in his symptoms in spite of different treatments including

physiotherapy, medications and injections given by [Appellant's doctor #2]. So now it will be difficult for him to handle any gainful employment.

[Appellant's doctor #1] also felt that [the Appellant] would benefit from access to membership in a fitness club.

- (b) In a subsequent letter, dated July, 2000 and also addressed to [Appellant's representative], [Appellant's doctor #1] comments, in part:

Throughout the years (since the accident) [the Appellant] has continued to present symptoms of aches and pains in his body especially his neck, and left shoulder during his office visits. During his most recent visit on July 27th, 2000, [the Appellant] informed me that he was still exhibiting pain in the left shoulder and neck. He further went on to say that sometimes it gets better and sometimes worse. (Emphasis added.)

EMPLOYMENT BACKGROUND:

[The Appellant] came to Canada from [text deleted]. He has been a diabetic for some 22 years. He first worked in Canada, briefly, as a lathe operator, working on metal; he has no formal qualifications as a machinist but apparently had some experience in that field in [text deleted]. He lived for some time in [text deleted] where, from April 1993 to January 1994, he worked for his son as a store or building cleaner. From January 1994 he was unemployed. He moved to [text deleted] in November, 1994, but remained unemployed and, although there is a suggestion on the file that he might have worked for two days on a casual basis in early 1996, we were given no evidence of any kind of

employment in which [the Appellant] had been engaged after January of 1994. It is clear that he was a non-earner, within the meaning of the MPIC Act, at the time of his accident, at which point he was a month short of his [text deleted] birthday. He spoke of having a numb hand, an inability to raise his right arm above his shoulder, either to the front or the side, an inability to reach behind his back and an apparent belief, gleaned from a doctor whom he had consulted on a visit to [text deleted], that he might have sustained a permanent paralysis or neck cancer from his motor vehicle accident.

[The Appellant] claims to exercise daily.

With respect to his accident, [the Appellant] testified initially that he had made no claim for vehicle damage. However, he also noted that his car had been recalled by his adjuster at MPIC "After they got the bill from my mechanic; they refused to pay him because he had not repaired the vehicle properly". [The Appellant] added that his mechanic had closed his shop permanently and that [the Appellant] did not know whether the man had ever been paid or not. [The Appellant] had not paid him.

Referring to [Appellant's doctor #1's] reports, [the Appellant] acknowledged that he had been unable to work for a short period prior to his MVA but, he says, he had been well enough to work but simply unable to find work from December of 1995. He had been in [text deleted] during the period of his disability and [Appellant's doctor #1] had been his family physician throughout that time.

[The Appellant], in referring to [Appellant's doctor #2's] report of July 28th, 1997, testified that, although [Appellant's doctor #2] had reported that the Appellant had a 15% restriction in normal movements in all planes, [Appellant's doctor #2] was wrong. [The Appellant] felt that his restriction was much greater than that. He agreed that [Appellant's doctor #2] "did have me move my arm in all directions".

SUBMISSIONS ON BEHALF OF THE APPELLANT:

[Appellant's representative] submits that [the Appellant] still has problems related to his MVA. He points out that neither [Appellant's doctor #2] nor [Appellant's doctor #1] is prepared to say that [the Appellant] has fully recovered, nor even that he will probably recover 100%.

[Appellant's representative] submits that the Appellant was employed in 1993 and 1994, had no medical problems at the time of his accident and was, in fact, actively seeking work at that date. He reminds the Commission that [the Appellant] testified as to his inability to sleep on his right side; the grip of his right hand is "very loose" and weak, and he cannot raise his right arm above the shoulder. His diabetes had no adverse impact upon his pre-Canadian life, submits [Appellant's representative], and it is [the Appellant's] MVA that brings about his present disability. He therefore urges the Commission to award the Appellant income replacement indemnity and to order MPIC to pay for a membership in the [text deleted] in order to complete the Appellant's rehabilitation at least to the maximum extent possible.

SUBMISSIONS ON BEHALF OF MPIC:

Mr. Strutt submits that [the Appellant] had been out of work for a little over two years at the time of his accident and, even when working, his only job in Canada had not been an arm's-length one but, rather, had been a form of casual employment by his son as a store cleaner.

Mr. Strutt suggests that the Commission should interpret [Appellant's doctor #1's] report literally, to mean that the Appellant was unable to hold gainful employment by reason of his pre-accident condition, and therefore to apply Section 105 of the MPIC Act, which reads as follows:

No Entitlement to IRI or Retirement Income

105 Notwithstanding Sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.

Alternatively, Mr. Strutt submits, the Appellant was obviously ineligible for any income replacement indemnity during the first 180 days following his accident and, thereafter, there is no compelling evidence to suggest that, if he was unable to work, that inability can properly be ascribed to his motor vehicle accident.

DISPOSITION:

We agree with Mr. Strutt's submissions on both counts. [Appellant's doctor #1's] evidence is clear, when he says that [the Appellant] was unable, even before his MVA, to obtain gainful employment due to his medical condition - that is to say, retinopathy, neuropathic and myopathic pains due to diabetes mellitus, et cetera. There is no evidence before us to suggest that this condition has been cured or brought under sufficient control to allow [the Appellant] to enter the workforce. While [the Appellant] himself suggested that he had been able to resume work by December of 1995, that evidence is not supported by [Appellant's doctor #1] nor by [the Appellant's] actual experience; he never did, in fact, go back to work, and we have no evidence that would even suggest any effort on his part to do so. His most recent experience in the work force had been as a cleaner; it is not a supportable premise that he could not have found work in that capacity between January, 1994, and December, 1995, had he been willing and able to do so.

If, as [the Appellant] suggests, [Appellant's doctor #1] is wrong, or if this Commission's interpretation of [Appellant's doctor #1's] letter is wrong, and if in consequence [the Appellant] had only been disabled by non-accident-related causes for only a few months, then it seems clear that:

- (a) as a non-earner, [the Appellant] would have no entitlement to IRI during the first 180 days following his accident; and
- (b) [Appellant's doctor #2's] findings are not such as would indicate a substantial inability to perform the essential requirements of the only occupation which, had

it been necessary, MPIC would have been able to determine for [the Appellant], namely that of an office or store cleaner. It is, perhaps, noteworthy that in none of [Appellant's doctor #2's] detailed reports does he offer the opinion that [the Appellant] is unable to seek gainful employment.

We are unable to find any reasonable ground upon which we could award [the Appellant] income replacement indemnity.

With respect to his claim for membership in the [text deleted], although [Appellant's doctor #1] does suggest that such a membership might be beneficial, he stops short (and, in our respectful view, with good reason) of offering the opinion that such a membership is medically necessary and required due to injuries sustained in the MVA.

It follows, therefore, that [the Appellant's] appeal must be dismissed.

Dated at Winnipeg this 21st day of March 2001.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

COLON SETTLE, Q.C.