Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-128

PANEL:	**Ms. Laura Diamond, Chairperson** **The Honourable Mr. Armand Dureault** **Mr. Neil Cohen**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Kevin Carrol;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Dianne Pemkowski.**
HEARING DATE:	**March 14, 2005**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits after March 7, 2004**
RELEVANT SECTIONS:	**Section 110 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94**

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 November 7, 2000. As a result of injuries sustained in that accident, he was in receipt of treatment benefits and Income Replacement Indemnity ('IRI') benefits from MPIC.

The Appellant had a pre-existing history of injuries arising out of a motor vehicle accident on September 4, 1987, which resulted in a tort claim settlement.

Prior to the accident of November 7, 2000, the Appellant was operating his own business, and employed as a security consultant in that business. Following the accident, he was unable to work in his business, which has since closed and is no longer in operation.

On March 7, 2003, the Appellant's case manager determined that he had recovered from the medical conditions arising from the accident, both physically and psychologically, to the extent that he was able to return to his occupational duties. As such, he was no longer entitled to IRI benefits in accordance with Section 110(1)(a) of the MPIC Act.

However, since the Appellant's business was no longer in operation (in part as a result of his injuries), MPIC determined that he was entitled to IRI benefits for a further one year in order to secure alternate employment, in accordance with Section 110(2)(d) of the MPIC Act. Accordingly, the Appellant was provided with IRI benefits up until March 7, 2004.

Internal Review Decision

This determination was considered by an Internal Review Officer for MPIC and an Internal Review decision issued on May 3, 2004. The Internal Review Officer reviewed the extensive medical reports on file, including reports from [text deleted] (the Appellant's general practitioner), [text deleted] (Physical Medicine and Rehabilitation Specialist), [Appellant's pain specialist] [text deleted], [Appellant's physiatrist #1] and [Appellant's physiatrist #2] [text deleted], [text deleted] (Psychiatrist), [text deleted] (Clinical Psychologist), a physiotherapist, occupational therapist, and [text deleted] (MPIC's Medical Consultant).

The Internal Review Officer concluded that the Appellant no longer had a psychological impairment that would prevent him from returning to his pre-accident duties.

As well, the Internal Review Officer relied on [MPIC's doctor's] analysis that the Appellant was able to carry out the duties of his pre-accident employment and that any difficulties he was having could be attributed to ongoing physical and psychological difficulties arising out of the 1987 motor vehicle accident and not to injuries arising out of the accident in question.

4. [MPIC's doctor's] analysis of March 1, 2004 is strongly supportive of the decision to terminate your IRI benefits. The basis of [MPIC's doctor's] opinion is stated in the following paragraph:

   "Based on the circumstances surrounding the incident in question it is not unreasonable to conclude [the Appellant] aggravated his pre-exiting (sic) back condition. One might assume that since there is little documentation of back problems between July 1999 and November 2000 it is possible the MVC made a pre-existing condition symptomatic. Based on the medical evidence indicating [the Appellant] had chronic disabling back pain from 1987 until 1999 it is my opinion such an assumption is not probable. In most rear-end collision, an individual properly seated in the vehicle with the seatbelt on would not be exposed to a type of trauma that in turn would adversely affect the lumbar spine to the extent disc herniations or protrusions would occur. The most common mechanism leading to disc disruption involves flexion and/or rotational movements of the lumbar spine. It is unlikely [the Appellant's] spine was subjected to these type of movements based on the knowledge the incident was a rear-end collision. An exacerbation of a pre-existing condition is defined as a temporary increase in symptoms without altering the nature course of the condition. It is documented that [the Appellant] would likely experience episodic low back pain as a result of the chronic back condition he developed subsequent to the 1987 motor vehicle incident. The file does not indicate [the Appellant's] pre-existing lumbar spine condition was enhanced by the November 7, 2000 motor -vehicle incident. Based on the type of treatments [the Appellant] received following the incident in question and the length of time the treatments were provided, it is my opinion [the Appellant's] exacerbation of his pre-existing condition resolved in all probability."

5. I would concur with [MPIC's doctor's] conclusion that the file does not "...identify a structural change to the spine and/or the development of a neurologic abnormality that in turn could be causally related to the incident in question". That based upon [MPIC's doctor's] analysis (which is reasonable in my view) your ongoing physical and psychological difficulties are attributed to the 1987 motor vehicle accident and not the injuries arising out of the accident in question. As [MPIC's doctor] pointed out at page 5:

   > "Information obtained from [Appellant's rehab specialist] indicates [the Appellant's] condition improved to the extent that he was able to return to his work duties on a part-time basis with restrictions in place. It is interesting to note that the restrictions documented by [Appellant's rehab specialist] are similar to those implemented by [Appellant's pain specialist] in 1991."

> Therefore, based upon my review of your file, I am upholding [text deleted's] decision of March 7, 2003 and dismissing your Application for Review.

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

Appellant's Submission

The Appellant testified that, as a result of the November 2000 rear-end collision in which he was involved, he had suffered both physically and mentally and had lost his business. He submitted that the case manager and Internal Review Officer did not properly review all of the medical evidence.

It was the evidence of the Appellant that his physical difficulties and pain were not a result of the 1987 accident, and were different in character following the November 2000 accident. Besides his back pain, he could not feel two toes on his left foot; this had never been a problem before the accident. He argued that an MRI had showed that he suffered from a disc herniation which was touching fifty (50) percent of the nerve root. This was a large herniation that was not there prior to the accident and had not previously been impinging on the nerve. His disc herniation condition had changed and deteriorated as a result of the accident and was the cause of his pain and his inability to work at his pre-accident employment.

As a result of this pain, he suffered daily and nightly and was taking medication which interfered with his ability to concentrate and interfered with his thought processes. This made it impossible for him to operate his security business or to work on a regular basis and this was caused by the accident.

It was submitted on behalf of the Appellant that the medical evidence from his caregivers established that prior to the accident, there had been no evidence of nerve root compression and that he had been asymptomatic in regard to his pain.

As [Appellant's pain specialist] stated in a report dated August 12, 2002

> From approximately three years prior to the motor vehicle accident of November 7, 2000, [the Appellant's] pain was relatively stable with this combination of therapy.

[Appellant's physiatrist #1] reported, on January 12, 2004, that

> I previously treated him for low back and lower limb pain on your referral in 1999. . . . Following a series of myofascial trigger point needling and 1% Xylocaine infiltration along with emphasis on stretching exercises he became asymptomatic. At that time, he had no physical signs of L5 or S1 neurologic deficits and no evidence of nerve root irritation on straight leg raising. He did have a small right sided disc herniation at L5-S1 on CT scan . . .

It was submitted that [Appellant's pain specialist], [Appellant's physiatrist #2], [Appellant's rehab specialist] and [Appellant's physiatrist #1] all recognized that the Appellant had significant limitations since the accident and had suffered significant deterioration since November 7, 2000. He had still not reached his pre-accident status.

[Appellant's pain specialist], on March 13, 2001 stated

> He was doing fairly well regarding these symptoms until November 7, 2000, when he was involved in another motor vehicle accident.

[Appellant's pain specialist] was of the view, on August 12, 2002, that

> [The Appellant] has certainly not reached his pre-accident status and it is obvious there has been a significant deterioration since his November 7, 2000 accident.

It was the submission on behalf of the Appellant that the case manager and Internal Review Officer had given undue weight to the opinion of [MPIC's doctor], who had never examined the Appellant and that more weight should have been given to the evidence of [Appellant's pain specialist] and [Appellant's physiatrist #1] which, it was submitted, established that he had not reached his pre-accident status and was still suffering an enhancement or exacerbation of pain as a result of the accident.

MPIC Submission

Counsel for MPIC submitted that the Appellant had a long history of back pain even prior to the 1987 motor vehicle accident, and had certainly suffered from significant back pain since that accident. [Appellant's physiatrist #1], as early as April 8, 1999 had indicated that the Appellant had suffered from low back pain ever since on an intermittent basis. The Appellant was characterized as having a history of chronic low back pain, and [Appellant's pain specialist] had indicated, on December 12, 1994, that he would likely continue to experience such pain.

> In summary, [the Appellant] continues to experience low back pain and unfortunately the prognosis for complete recovery does not seem good. He will likely continue to experience episodic pain depending on the amount and type of activity that he performs and will likely require episodic analgesics and other symptomatic treatment in the future.

While counsel for MPIC acknowledged that there was a period where the Appellant may have been asymptomatic and working prior to November 27, 2000, the accident caused only temporary exacerbation of his low back pain. It did not cause an enhancement of his condition, and the pain resulting from the accident has long since resolved.

He pointed to [Appellant's physiatrist #1's] report of January 13, 2004 which compared the results of a 2002 MRI scan with a previous CT scan carried out in 1998.

> He had a MRI scan of the lumbosacral spine at [hospital] on June 3, 2002. This was compared with a previous CT scan carried out in 1998. At L5-S1 level, small to moderate sized central and right paracentral disc herniation was noted with no compression of the

> thecal sac or central spinal stenosis. Disc material was reported as contacting the right S1 nerve root with the possibility of mild compression or irritation. It was suggested that clinical correlation for right S1 radiculopathy be carried out. [Appellant's doctor #2] stated that the disc herniation appeared very similar in size and appearance to the previous CT scan from 1998.

Counsel for MPIC submitted that the results of a worksite assessment of the Appellant's job capabilities, performed by [text deleted], Occupational Therapist, showed that the physical job demands of the Appellant's employment fell within the "medium strength" classification which the Appellant was capable of performing.

[Appellant's rehab specialist's] assessment of the Appellant dated September 27, 2001 indicated that the Appellant had described his job as "heavy" involving lifting over sixty (60) pounds, although the Occupational Therapist's assessment had indicated a medium range with lifting of forty-five (45) pounds. Accordingly, counsel submits, the Appellant may have supplied [Appellant's rehab specialist] with unreliable information.

A later interview with [Appellant's occupational therapist] on May 4, 2001 indicated that there were "other business related barriers to performing installations in addition to the aggravated complaints relating to the mva."

Counsel for MPIC also pointed to reports by the psychiatrist and psychologist, particularly, the April 8, 2002 report of [Appellant's psychiatrist] which indicated:

> 2. Symptoms are remitting. He has fewer symptoms of Major Depression than he has had in the past. However, I have not reviewed his symptoms of depression within the past 4-6 weeks. I would note; however, that his Major Depression, to the extent that he has had these symptoms, have always been in the mild range and have not been the major barrier preventing return to work.
>
> 3. Regarding return to work, psychiatric factors are not the main impairment.

4. As above, there are no psychological barriers preventing [the Appellant] from returning to his pre-accident occupation.

Counsel for MPIC relied in large part upon an Inter-Departmental Memorandum dated March 1, 2004, prepared by [MPIC's doctor], [text deleted]. [MPIC's doctor] conducted a thorough review of the medical evidence on the Appellant's file and reached the following conclusions:

CONCLUSION
Based on my review of [the Appellant's] file, the following conclusions are made:

- [the Appellant] had chronic low back pain that resulted in a permanent impairment of function prior to the November 2000 motor vehicle incident.
- Symptoms [the Appellant] was experiencing in June and July 1999 resolved with the treatments provided by [Appellant's physiatrist #1].
- [the Appellant's] pre-existing low back condition was exacerbated by the November 7, 2000 motor vehicle incident.
- The exacerbation resolved in all probability.
- The medical evidence does not support the conclusion [the Appellant's] pre-existing low back condition was enhanced by the November 7, 2000 motor vehicle incident.
- [the Appellant] developed psychological dysfunction as a result of the November 7, 2000 motor vehicle incident that responded to the treatments provided by [Appellant's psychologist].
- [the Appellant] was provided sufficient supervised treatment to address the exacerbation of his pre-existing low back pain that developed secondary to the incident in question.
- [the Appellant's] level of function improved to the extent that he was able to return to his work on a part time basis with restrictions in place (i.e. avoid heavy lifting, prolonged bending at the waist, prolonged posturing of the spine). These restrictions are similar to those given in 1991.
- The potential for [the Appellant] to be retrained appears to be hampered by his severe familial dyslexia.
- It is not medically probable that further supervised treatment interventions will result in additional functional recovery.
- [the Appellant] will experience improvement in function and a decrease in symptoms if he remains compliant with his home-based exercise program, in all probability.
- The actual cause of [the Appellant's] low back pain is not known. It is possible that the pain is a byproduct of mechanical, myofascial and/or disc pathology. Based on the information as it relates to [the Appellant's] 1987 motor vehicle accident, it appears that the pain originated from these same generators.

Counsel for MPIC further submitted that the Internal Review Officer had also done a very thorough review of the issues involved in the appeal, coming to the conclusion that [MPIC's doctor's] analysis was correct, and that the Appellant was physically and psychologically able to return to his pre-accident employment. He submitted that the Internal Review Officer was correct in finding that any possible symptoms that the Appellant still had, were no longer related to the motor vehicle accident but rather to his previous back pain and that no injuries resulting from the accident of November 2000 were preventing him from returning to his previous occupation.

Discussion

The MPIC Act provides for entitlement to IRI benefits when a victim is unable to continue their employment as a result of the motor vehicle accident. Section 8 of Manitoba Regulation 37/94 defines "unable to hold employment" as:

> **Meaning of unable to hold employment**
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The legislation provides that IRI benefits are terminated in certain circumstances:

> Section 110 (1)(a) of the MPIC Act states:
>
> **Events that end entitlement to I.R.I.**
> **110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
> (a) the victim is able to hold the employment that he or she held at the time of the accident;

Section 110(2)(d) of the MPIC Act states:

> **Temporary continuation of I.R.I. after victim regains capacity**
> **110(2)** Notwithstanding clauses (1)(a) to (c), a full-time earner or a part-time earner who lost his or her employment because of the accident is entitled to continue to receive the

> income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:
> . . . .
> (d) one year, if entitlement to an income replacement indemnity lasted for more than two years.

In order to support entitlement to further IRI benefits, the onus is on the Appellant to show that he is unable to perform the essential duties of employment that were performed at the time of the accident, as a result of a physical or mental injury that was caused by the accident.

The Appellant has had a long history of injury and back pain. It is difficult to isolate the effects of the November 7, 2000 motor vehicle accident from this history of pain and the past recognition by his caregivers that he would likely have to live with chronic pain in the future.

The problems described by the Appellant in this appeal were not new and different from his history of back problems and they cannot be definitely connected, at this point in time, to the accident. Given the ambiguity of the medical evidence, the Appellant has not established a definitive conclusion, on the balance of probabilities, as to the cause of his current pain and its effect on his ability to return to his pre-accident employment.

The Appellant's primary argument was that his disc herniation condition had changed and deteriorated as a result of the accident and that this was the cause of his continuing pain and inability to work at his pre-accident employment.

However, the panel has reviewed the evidence of the medical practitioners and is of the view that the Appellant has failed to establish a significant change in his disc herniation condition resulting

from the motor vehicle accident. The evidence supporting a right S1 radiculopathy was not produced by the Appellant.

[Appellant's physiatrist #1], in his report of January 13, 2004, compared the CT scan carried out in 1998 (after the 1987 accident, and before the 2000 accident) with the MRI scan performed at [hospital] on June 3, 2002, and concluded that :

> . . . The MRI is very similar to the 1998 CT scan in regards to the location and size of L5-S1 disc herniation. . .

In that report, [Appellant's physiatrist #1] noted the "possibility of mild compression or irritation". This echoed [Appellant's rehab specialist's] finding, as expressed by [Appellant's rehab specialist] to [MPIC's doctor] on November 15, 2002 and recorded in [MPIC's doctor]'s Memorandum:

> You outlined that the MRI identified a disc lesion with a possible contact to the S1 nerve root but based on your assessment of [the Appellant], it was your opinion that he did not have a radiculopathy. You indicated that his inability to return to his work duties was a result of pain and not objective evidence of a physical impairment precluding him from doing so.

[Appellant's pain specialist], on August 12, 2002, noted the results of a CT scan after the accident which "demonstrated a suspected L5-S1 central disc herniation just contacting the thecal sac".

That CT scan, which was performed on January 11, 2001 found

> L3-4 and 4-5 disc levels are unremarkable with no evidence of spinal stenosis, disc herniation or nerve root entrapment. At L5-S1 central disc herniation just contacting the thecal sac is suspected.

The medical evidence establishes only "possible" or "suspected" contact of the nerve by the disc herniation. Accordingly, the Commission finds that the medical evidence does not meet the onus upon the Appellant of showing that he suffered an injury in the accident which continues to prevent him from working at his pre-accident employment. There is no clear evidence of a positive finding showing a change in status or of pressure, impingement or compromise of the nerve root, resulting from the accident, and causing the Appellant's more recent pain complaints. The Internal Review Officer undertook a thorough review of the medical evidence. He reviewed multiple reports from [Appellant's rehab specialist], [Appellant's pain specialist], [Appellant's physiatrist #1] and [Appellant's doctor #1], as well as [MPIC's doctor's] analysis. While it is clear that the Appellant suffered an exacerbation of low back symptoms and developed psychological dysfunction as a result of the November 7, 2000 accident, the balance of medical evidence supports the case manager's finding that these issues had since resolved.

Although [Appellant's pain specialist] felt the Appellant had not reached pre-accident status in 2002, [Appellant's rehab specialist] was of the view, by September 19, 2002, that the Appellant

> should be able to complete most of the physical demands of the job as outlined in the job site visit report from [Appellant's occupational therapist] dated March 21, 2001. In my opinion he might not be able to perform heavy lifting and prolonged bending at the waist, and prolonged posturing of the spine in awkward positions for installing the security hardware. . . .

As is noted by [MPIC's doctor] and by counsel for MPIC, these restrictions are similar to those imposed for the Appellant by [Appellant's pain specialist] in 1991.

By November 15, 2002, [Appellant's rehab specialist] was of the view that there was no physical impairment precluding the Appellant from returning to his work duties.

Given the extensive amount and modalities of treatment which the Appellant received following the accident, the Internal Review Officer accepted [MPIC's doctor's] opinion that the Appellant's exacerbation of his pre-existing condition had, in all probability, resolved.

It is the finding of the Commission that the medical evidence does not disclose, and the Appellant has not established, a positive finding of injury resulting from the accident, preventing the Appellant from working at his pre-accident employment after March 7, 2003. For these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date May 3, 2004.

Dated at Winnipeg this 5th day of April, 2005.

LAURA DIAMOND

HONOURABLE ARMAND DUREAULT

NEIL COHEN