Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-04

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Neil Cohen** **Mr. Phil Lancaster**
APPEARANCES:	**[Appellant's representative] appeared on behalf of the Appellant, [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**December 15, 2005**
ISSUE(S):	**1. Whether the Medical Reports listed at page 2 of the Internal Review Office decision October 29, 2004, constitute new information as required by Section 171(1) of The Manitoba Public Insurance Corporation Act.** **2. Whether the Appellant is entitled to a Permanent Impairment award pursuant to Section 127 of The Manitoba Public Insurance Corporation Act.**
RELEVANT SECTIONS:	**Sections 126, 127 and 171(1) of The Manitoba Public Insurance Corporation 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

On October 10, 1996, [the Appellant], was injured in a motor vehicle accident when, while stopped at a traffic light, the car in which he was the driver was rear-ended at high speed by another vehicle, his seat broke and he was thrown into the back seat of his vehicle. His injuries were diagnosed as "muscoligamentous strain of the lower back". As a result of the injuries, the Appellant became entitled to compensation for Personal Injury Protection Plan ('PIPP') benefits pursuant to Part 2 of *The Manitoba Public Insurance Corporation Act* (hereinafter referred to as the 'Act').

Through the medical interventions resulting from this accident, it was discovered that the Appellant was suffering from degenerative changes to his lumbar spine. This condition had not prevented the Appellant from working prior to his accidents.

On September 19, 1997, while still off work from the first accident, the Appellant was involved in a second motor vehicle accident when the car in which he was the driver, was hit in the driver's side door as he was changing lanes. In this accident he suffered two (2) broken ribs and bruising to his back and shoulder.

Background: The Previous Decisions of the Commission

On July 26, 1999, the Appellant's IRI benefits were terminated by MPIC, effective August 26, 1999, on the basis that "no physical impairment of function arising from his motor vehicle accident had been identified that would prevent him from safely returning

to his occupation of a self-employed crane operator". The Internal Review Officer upheld the case manager's decision and the Appellant sought an appeal.

In the first stage of a two-part decision in the appeal, on March 1, 2000 the Automobile Injury Compensation Appeal Commission (hereinafter referred to as the 'Commission'), referred the case back to MPIC to undertake a Functional Capacity Evaluation (FCE) of the Appellant to decide whether he was, or was not, as of September 1999, "entitled to further benefits, and, if he is found definitively to be unable to return to his former occupations, to decide upon a proper classification for him" pursuant to s. 107 of the Act which permits the corporation to "determine an employment for a victim" who, as a result of the accident, is unable to return to their former employment.

MPIC carried out the FCE, and decided that the Appellant was able to return to his former employment and declined to determine a new employment for him.

On August 10, 2000, in the second stage of the decision, the Commission reviewed the information provided to them and determined, "on a slender balance of probabilities" that the Appellant was not able to return to his former employment as a crane operator and made a determination pursuant to s. 107, that he could perform the duties set out under category number 1149 of Schedule C, of Manitoba Regulation 39/94 , 'Other Managers and Administrators, (not elsewhere classified)'.

The Commission ordered the determination effective as of September 19, 1999 and reinstated IRI benefits. The Commission ordered that the IRI benefits would terminate, pursuant to s. 110(1)(d) of the Act, on September 19, 2000, one (1) year after the determination took effect.

On October 4, 2002, the case manager ended the Appellant's entitlement to medications in relation to the accidents on the basis that there was no longer a causal connection between the motor vehicle accidents and the need for the medications. On May 20, 2003, the Commission allowed the appeal of the Internal Review Officer's decision confirming the case manager's decision, and reinstated the entitlement to medication on the basis that the Appellant's "ongoing pain is related to the injuries sustained at the time of the motor vehicle accidents".

"New Information": The Internal Review Officer's Decision of October 29, 2004

By July 10, 2003, following a medically required change of medications, the Appellant had informed the case manager that the new, more powerful medications rendered him unable to work. In a note to file, dated July 11, 2003, the case manager acknowledged the Appellant's request for a reconsideration of his eligibility for IRI benefits on the basis that a predictable effect of the new medications rendered him unable to work. That note documents the following strands to the Appellant's argument:

- The Commission decision of May 20, 2003, held that the pain he is experiencing is a result of the motor vehicle accidents;
- The Commission decision of May 20, 2003, held that MPIC must pay for the medications required for that pain;
- Since the necessary change in medications, taking the medications results in him being unable to work;

- Since the medication are required as a result of the accident, the inability to work is also a result of the accident;
- Therefore, MPIC is obligated to provide IRI benefits.

Following further communication with the Appellant, on September 21, 2004, the case manager wrote to the Appellant stating that the decision of the Commission on IRI entitlement was final and that no decision letter would be issued by MPIC. On October 12, 2004, the case manager informed the Appellant that the HCS review had been completed and that his entitlement to medications would be terminated, November 1, 2004, on the basis that that the need for medications was not related to the motor vehicle accidents.

On October 29, 2004, the Internal Review Officer issued a decision confirming the case manager's decision that there was no new information warranting a reconsideration of the Appellant's entitlement to IRI benefits pursuant to s. 171 of the Act.

Permanent Impairment: The Internal Review Officer's Decision of December 21, 2004

The Appellant also sought a benefit for permanent impairment on the basis that the change in medications had rendered him unable to work. On November 15, 2004, the case manager issued a decision letter informing the Appellant that he did not qualify for a permanent impairment award pursuant to s.127 of the Act on the grounds that:

- there was no evidence that the pre-existing condition was enhanced;
- there is no evidence of any neurologic disorder that resulted in any permanent neurologic damage;
- there is no evidence of any structural change involving the spine that resulted in permanent damage.

The Appellant sought Internal Review stating:

> 8 years after the first car accident I continue to be treated for the injuries directly related [to] those MVAs. It is because of the injuries sustained in those MVAs and the effects of the medications required that I am left with a permanent impairment and unable to work.

In a decision, dated December 21, 2004, an Internal Review Officer:

- set aside the case manager's decision of October 12, 2004 terminating funding of the Appellant's medications. The Internal Review Officer found that there was no "new information" to support a reconsideration of the May 20, 2003, decision of the Commission; and
- confirmed the decision denying entitlement to a permanent impairment award on the basis that there was no permanent impairment within the meaning of ss. 126 and 127 of the Act.

Appeal

The Appellant has appealed the October 29, 2004 Internal Review decision on IRI and the December 21, 2004 Internal Review decision on permanent impairment to the Commission.

Preliminary Matters

On December 6, 2004, [Appellant's doctor #1], one of the Appellant's caregivers, submitted to the Commission, an additional medical report. [Appellant's doctor #1] noted that it was unlikely that the Appellant would ever return to gainful employment and repeated his conclusion that there was a causal relationship between the Appellant's "present condition" and the motor vehicle accident.

A pre-hearing meeting was held June 27, 2005, which resulted in agreement between the parties that the hearing would focus on these two issues:

1. Do the medical reports listed in the Internal Review Officer's decision of October 29, 2004, constitute "new information" within the meaning of s. 171 of the Act, sufficient to permit the Corporation to make a fresh decision in respect of the Appellant's entitlement to Income Replacement Indemnity benefits? The Reports referred to are: 1, [Appellant's doctor #1], November 5, 2002; 2, [Appellant's doctor #2], undated, faxed 08/05/03; [Appellant's doctor #1], October 23, 2003; [Appellant's doctor #2], July 1, 2004; [Appellant's doctor #1], July 13, 2004; [Appellant's doctor #3], July 26, 2004; [MPIC's doctor], October 5. 2004.
2. Is the Appellant entitled to a Permanent Impairment Award as a result of the injuries suffered in the motor vehicle accidents?

At that meeting it was further agreed that the report of [Appellant's doctor #1] dated December 6, 2004, could not be used as "new information" within the meaning of s. 171(1) of the Act in this appeal. It was further agreed that the report could be otherwise used as evidence by the Commission in reaching its decision in relation to the two above-noted issues.

Submissions of the Appellant

[Appellant's representative], appearing for the Appellant, noted that s. 149 of the Act requires the claimant to advise the corporation of any changes that may affect his benefits. Section 149 reads:

> **Claimant to advise of change in situation**
> 149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects, or might affect, his or her right to an indemnity or the amount of the indemnity.

Following the change of medications, it was submitted, the claimant had notified the case manager that he was no longer able to work in real estate, which was the employment he

had hoped to pursue at the time of the Commission's decision, dated August 15, 2000. On October 29, 2002, the Appellant informed the case manager that because of the effects of the new, more powerful pain medications, he was unable to pursue any employment.

The Appellant argued that s. 150 of the Act places upon the corporation the duty to ensure the claimant gets the benefits to which he is entitled. The corporation understood that in order to obtain a fresh decision, it is necessary to show "new information" in the sense required under s. 171(1) of the Act. The corporation knew, the Appellant continued, that the Appellant was seeking IRI and a permanent impairment award on the basis that, due to his medications, he was unable to pursue any employment and yet they did not actively seek the opinions of the Appellant's caregivers on this specific point. This, it was suggested, fell short of the corporation's duty, under s. 150, of the Act to "ensure that the Appellant would receive the benefits to which he is entitled".

The corporation did seek a review of the caregivers' treatment of the Appellant and received from them, it was acknowledged, six (6) of the reports which are the subject of this appeal. The seventh report is the opinion of [text deleted], a medical Consultant with MPIC's Health Care Services department, in which [MPIC's doctor] concluded that the six other reports obtained by MPIC did not show any new information upon which to make a fresh decision.

Other than the pre-morbid history contained in [Appellant's doctor #2's] July 1, 2004 report, the Appellant admitted, the reports do not contain any new information. However, it was argued, the reason there is no new information, is because the case manager did not ask the right question of the Appellant's caregivers. It was only of [MPIC's doctor], that the case manager asked for an opinion as to whether the Appellant was able to do his job. Consequently, it is only [MPIC's doctor] who makes a finding on that issue. This failure to ask the right question was, the Appellant suggested, a clear breach of the obligation of the case manager's s. 150 duty to the Appellant.

It is for that reason, the Appellant stated, that the December 6, 2004 opinion of [Appellant's doctor #1] was obtained, in which [Appellant's doctor #1] states that the Appellant, as a result of the accident, is in unable to work and likely would never be able to return to work. The Appellant closed on this point by stating that he cannot work and hasn't been able to since 2002 and should be receiving IRI.

On the issue of permanent impairment benefits, the Appellant argued that chronic pain is a disability and entered two (2) Worker's Compensation Board decisions, in support of the argument. In *Penny* v. *W.C.B.*, No 9, the Worker's Compensation Board of Manitoba granted benefits to a claimant who had developed a drug dependency in response to chronic pain and was, as a consequence, unable to work. The claimant was given a permanent impairment award. In *Nova Scotia (Workers' Compensation Board)* v. *Martin*; *Nova Scotia (Workers' Compensation Board)* v. *Laseur*, [2003] 2 S.C.R. 504, the Court issued a decision that s. 15(1) of the *Charter of Rights and Freedoms*, does not

permit differential treatment of a worker disabled from working through chronic pain and one disabled through other injuries.

Submissions of MPIC

Mr. Kumka, appearing for MPIC, noted that it was agreed at the pre-hearing meeting that the issue before the Commission in this appeal is whether the seven (7) reports noted in the Internal Review Officer's decision of October 29, 2004, constitute "new information" within the meaning of s. 171(1) of the Act. It was also agreed, he added, that the December 6, 2004 report of [Appellant's doctor #1], could not in itself be regarded as "new information" for the purposes of this appeal.

The Commission decision of August 15, 2000, Mr. Kumka argued, ended the Appellant's entitlement to IRI as a result of the accidents. Section 188 of the Act, he explained, provides that a decision of the Commission is "final and binding". Only with a relapse, as provided for in s. 117(1), or where there is "new information" pursuant to s. 171(1), Mr. Kumka argued, can a decision be amended.

Counsel for MPIC argued that at the time of its decision of August 15, 2000, the Commission had before it medical reports from [Appellant's doctor #3], [Appellant's doctor #4], [Appellant's doctor #2] and [Appellant's doctor #1], as well as the evidence of the Appellant himself. He argued that the six (6) reports obtained from the Appellant's caregivers listed in the Internal Review Officer's decision contain nothing new over the information that was before the Commission at that hearing. It is, he argued, the same

information from the same doctors and it is not possible to describe that information as "new information" in the sense required to make a fresh decision pursuant to s. 171(1) of the Act.

In relation to the Appellant's claim for a permanent impairment award, Mr. Kumka continued, it is essential that the Appellant show that he has suffered a permanent impairment consistent with the Act. Neither chronic pain, nor an ongoing need for medication are sufficient to support an award for a permanent impairment under the Act, he stated.

The Internal Review Officer, in his decision of December 21, 2004, counsel for MPIC continued, set out in a clear and unequivocal manner, the requirements that must be met in order to support a decision for a permanent impairment award. The Appellant has not shown, he submitted, that he has suffered any permanent impairment as set out in ss. 126 and 127 of the Act. The decision of the Commission, dated May 20, 2003 that the Appellant requires pain control medications as a result of injuries suffered in the motor vehicle accidents, together with the Appellant's claim that he is unable to work as a result of taking that medication, simply do not, counsel for MPIC argued, amount to a permanent impairment within the meaning of ss. 126 and 127 of the Act. The appeal should be dismissed, he concluded.

Discussion

"New Information"

The issue before the Commission is whether the reports listed in the decision of the Internal Review Officer are "new information" in the sense required by s. 171(1) of the Act. That provision reads:

> **Corporation may reconsider new information**
> s. 171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The Supreme Court of Canada, in *R.* v. *Palmer*, [1980] 1 S.C.R.759, set out the requirements under the law to establish a claim for the introduction of new evidence at a Court of Appeal:

> The following principles have emerged:
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> (3) The evidence must be credible in the sense that it is reasonably capable of belief.
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. (at 775)

The Federal Court of Canada, in *Canada* v. *Lambie*, (1995) 30 Admin L. R. (2d) 218 (F.C.T.D.), held that the rules can be relaxed somewhat in relation to practice before the Canadian Human Rights Review Tribunal. This Commission follows the practice as set out by the SCC and modified by the FCC.

The Commission finds that the information contained within the seven (7) reports listed by the Internal Review Officer in his decision of October 29, 2004 is not new information in the sense required by s. 171(1) in order to render a fresh decision. The Commission

finds that the reports are consistent with the information before the Commission at the time of its August 15, 2000 decision. For example:

- [Appellant's doctor #1], in his report of November 5, 2002 reports that he first saw the Appellant, October 12, 1999, and reviews his treatment of the Appellant since that time. [Appellant's doctor #1] states, "As I had indicated in that previous assessment sent to you in the year 2000, [the Appellant's] low back continues to be a problem for him. ... *His condition has not changed from that previous assessment*".
- [Appellant's doctor #2] in his undated report, faxed 08/05/03 reports that he last saw the Appellant, July 28, 2003 and comments, "*His symptoms continue to be consistent with spinal stenosis*." In his Report of April 12, 2000, which was available to the Commission at the time of the August 15, 2000 decision, [Appellant's doctor #2] had stated, "His persistent pain complaints are consistent with spinal stenosis."
- [Appellant's doctor #1], in his October 23, 2003 report comments, "*He continues to have ongoing low back pain from severe degenerative changes in his lumbar spine*."
- [Appellant's doctor #2], in his July 1, 2004 report, provides a medical history of the Appellant from June 18, 1986 noting no reported back problems before the motor vehicle accident. *This information may not have been before the Commission at the time of its August 15, 2000 decision*.
- [Appellant's doctor #1], July 13, 2004 reported on two recent treatments and commented, "*Physical findings were unchanged from previous examinations*."
- [Appellant's doctor #3]'s report of July 26, 2004, discusses a June 24, 1997, examination of the Appellant in which [Appellant's doctor #3] had noted that the Appellant had admitted to "occasional low back pain, never severe" before the accident, and in which [Appellant's doctor #3] had commented, "[I]t appeared that the ... accident of October 1996, resulted in an aggravation of the pre-existing condition ... *and at the time of my assessment the aggravation persisted*."
- [MPIC's doctor's] October 5, 2004 report, consists of a file review in which [MPIC's doctor] acknowledges that the medication then being used by the Appellant might result in difficulties while operating a crane, but concludes, "If [the Appellant] is not employed at this time, it is my opinion his inability to do so is a by-product of the severe degenerative changes involving the lumbar spine and possibly the side effects of his medication." (Emphasis added)

The Commission finds, as the Appellant's representative acknowledged at the hearing, that none of this information is new in the sense required by s. 171(1). The only "new information" in the list of reports is the pre-morbid history contained in [Appellant's

doctor #2's] July 1, 2004 report. This is not "new information" in the legal sense required by s. 171(1). It is clear that this information, had it been placed before the Commission, would not in any way have affected the decision of the Commission on August 15, 2000. The relevant content of the six (6) reports is consistent with the information that was before the Commission prior to its August 15, 2000 deliberations and is, as Mr. Kumka noted, the same information from the same doctors.

The Appellant argued that any lack of new information is due to MPIC not asking the right questions. This, it was further suggested, is in breach of the s. 150 duty of the corporation to "ensure that claimants are informed of and receive the compensation to which they are entitled".

In preparation for the review of the Appellant's eligibility for benefits pertinent to this appeal, the case manager asked the Appellant's caregivers generally for information regarding the Appellant's medical file through the time of their treatment of him. She asked, for example, of [Appellant's doctor #1], June 24, 2004:

> In order to assist us in the medical management of his claim file, we would appreciate receiving a narrative report from you advising what the status of his medical condition is and the cause of his present symptomatology. In addition, please outline your examination findings subsequent to the that of which (sic) you provided in your report of October 23, 2003, including your treatment recommendations.

The questions asked of [Appellant's doctor #2] and [Appellant's doctor #3] were similarly general.

The request for review sent by the case manager to [MPIC's doctor], September 9, 2004 , was more specifically focussed on the issue of the effects of the medication on the ability of the Appellant to perform his occupational duties.

While the Commission recognizes that the questions asked of the Appellant's caregivers were more general than those asked of [MPIC's doctor], the Appellant has not provided any evidence which shows that this has resulted in any prejudice to the Appellant.

The reports of [Appellant's doctor #1], dated November 5, 2002, October 23, 2003 and July 13, 2004, show a consistency which clearly supports the decision reached by the Internal Review Officer, October 29, 2004, that there was no new information in relation to the Appellant's condition such as would warrant a new decision pursuant to s. 171(1) of the Act.

The Commission further notes that in his December 6, 2004 report to the Commission for this appeal, [Appellant's doctor #1] does not contradict or qualify the information contained in those earlier reports.

The Commission finds, therefore, that the Appellant has not shown that the questions asked of the Appellant's caregivers by the case manager in requesting the reports relevant to this appeal are in breach of the duty of MPIC pursuant to s. 150 duty to "ensure that claimants are informed of and receive the compensation to which they are entitled".

The Appellant asked of the Commission what he might do to ensure his file is accurate and complete.

The Commission notes that it is open to the Appellant, as Mr. Kumka has acknowledged, to bring the December 6, 2004 report to MPIC for consideration by his case manager.

The Appellant may seek a review of his file pursuant to s. 117(1) or (3) of the Act which read:

> **Entitlement to I.R.I. after relapse**
> 117(1) If a victim suffers a relapse of the bodily injury within two years
> (a) after the end of the last period for which the victim received an income replacement indemnity, other than an income replacement indemnity under section 115 or 116; or
> (b) if he or she was not entitled to an income replacement indemnity before the relapse, after the day of the accident;
> the victim is entitled to an income replacement indemnity from the day of the relapse as though the victim had been entitled to an income replacement indemnity from the day of the accident to the day of the relapse.
>
> **Relapse after more than two years**
> 117(3) A victim who suffers a relapse more than two years after the times referred to in clauses (1)(a) and (b) is entitled to compensation as if the relapse were a second accident.

This would permit the corporation, if the Appellant is able to demonstrate that his condition has deteriorated to the point where he is, as a result of the injuries sustained in the accident, unable to work, to review his eligibility for renewed benefits.

If the Appellant is able to establish that "new information" as required by s. 171(1) exists, it would be possible for him to again seek a review pursuant to that section. The Commission notes, however, that s. 188 of the Act provides that a decision of the

corporation or the commission is final and binding and only open to review as permitted within the Act. In order to obtain a fresh decision pursuant to s. 171, it is imperative that the Appellant comply the requirements of the section and with the rules laid down by the Supreme Court of Canada in *Palmer* (*supra*).

Permanent Impairment

The onus is on the Appellant to establish, on the balance of probabilities, that he is impaired within the meaning of the Act. The Commission finds that the Appellant has not established that he suffers from a permanent impairment as required pursuant to ss. 126 and 127 of the Act.

The Appellant argued that he was permanently impaired in that he was rendered unable to work as a result of the side-effects suffered from medication which he must take to alleviate ongoing pain suffered as a result of the accident. He argued also that he is permanently impaired in the sense that he is, due to ongoing permanent pain, unable to work at any employment.

The Internal Review Officer correctly pointed out to the Appellant in his December 21, 2004 decision, that continuing need for pain medication is not sufficient to establish eligibility for a permanent impairment award. The requirements are set out in ss. 126 and 127 of the Act which read:

> **Meaning of "permanent impairment"**
> 126 In this Division, **"permanent impairment"** includes a permanent anatomicophysiological deficit and a permanent disfigurement.

> **Lump sum indemnity for permanent impairment**
> 127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500. and not more than $100,000. for the permanent impairment.

In his December 21, 2004 decision, the Internal Review Officer set out the requirements to be met in order to establish a permanent impairment sufficient to entitle the Appellant to an award. He stated:

> Section 126 of the Act defines "permanent impairment" to include "a permanent anatomicophysiological deficit and a permanent disfigurement." Section 127 implicitly expands that definition to include also a "mental impairment". You suffered neither a disfigurement nor a mental impairment as a result of either of these car accidents. ... [MPIC's doctor's] November 8 2004 opinion is correct in saying that there must be evidence that the car accident altered a boney structure or resulted in neurologic compromise before you could become entitled to such a benefit. I accept [MPIC's doctor's] assessment that there is no such evidence. Accordingly, you are not entitled to a Permanent Impairment Award."

The Appellant has not proved the existence of any permanent anatomicophysiological deficit, permanent disfigurement or a mental impairment. The Commission finds, therefore, that the Appellant has failed to establish that he suffers from any permanent impairment within the meaning of ss. 126 and 127 of the Act.

Decision

The Commission finds that the Appellant has failed to establish, on the balance of probabilities, that the seven (7) reports listed in the decision of the Internal Review Officer of October 29, 2004, are "new information" sufficient to permit the corporation to make a fresh decision in his case. The Commission further finds that the Appellant has failed to establish that he suffers from a permanent impairment pursuant to ss. 126 and

127 of the Act. Consequently, the decisions of the Internal Review Officer of October 29, 2004 and December 21, 2004 are confirmed.

Dated at Winnipeg this 3rd day of February, 2006.

LAURA DIAMOND

NEIL COHEN

PHIL LANCASTER