

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-32**

PANEL: Mr. Mel Myers, Q.C., Chairperson

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's chiropractor]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: January 11, 2007

ISSUE(S): Entitlement to Income Replacement Indemnity benefits after March 11, 2005

RELEVANT SECTIONS: Sections 70(1), 110(1)(a) and 136(1)(a) of *The Manitoba Public Insurance Corporation Act* (the 'Act') and Section 5(a) of Manitoba Regulation 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] was employed as a welder at [text deleted] and suffered a workplace injury to his left elbow on December 8, 2004. The Appellant received medical treatment in respect of this injury and, as well, was in receipt of Workers Compensation Benefits for loss of earnings. The Workers Compensation Board determined that his return to work date would be January 10, 2005.

On January 5, 2005 the Appellant was injured in a motor vehicle accident which resulted in his inability to return to work on January 10, 2005 and he was in receipt of Income Replacement Indemnity ('IRI') benefits from MPIC. [Appellant's chiropractor] initially saw the Appellant in respect of his motor vehicle accident injuries on January 7, 2005, two (2) days after the motor vehicle accident, and indicated that the Appellant complained about left shoulder pain, as well as neck pain. The Appellant was initially treated by [Appellant's chiropractor] in respect of a cervical whiplash injury. The Appellant was also treated in respect of complaints relating to his left shoulder on two (2) occasions during the month of January 2005 by [Appellant's physiotherapist].

[Appellant's chiropractor], in his report to MPIC dated February 16, 2005, indicated that the Appellant's left shoulder had been injured as a result of the workplace injury on December 8, 2004 and this injury was aggravated as a result of the motor vehicle accident on January 5, 2005. Subsequently [Appellant's chiropractor] did treat the Appellant in respect of his left shoulder complaints.

On November 10, 2005 MPIC's case manager wrote to the Appellant and indicated that the medical information that MPIC had in respect of the Appellant had been forwarded to MPIC's Health Care Services consultants, who had concluded that, as of March 11, 2005, he had fully recovered from his motor vehicle accident injuries and that the Appellant was capable of returning to work. As a result, MPIC terminated the Appellant's IRI benefits as of that date. In respect of MPIC's reimbursement to the Appellant for the cost of chiropractic treatments, MPIC continued to reimburse these treatments until May 31, 2005.

Internal Review Officer's Decision

The Appellant made Application to Review the case manager's decision on December 8, 2005. In this Application the Appellant asserted that he was entitled to IRI benefits from March 12, 2005 until May 15, 2005 because his motor vehicle accident injuries prevented him from resuming his employment until May 16, 2005.

On February 8, 2006 the Internal Review Officer issued her decision confirming the case manager's decision and in rejecting the Appellant's Application for Review, stated:

I discussed your concerns once again with the Chiropractic Consultant of our Health Care Services and he reiterated his prior opinion that you had a pre-existing pattern of left shoulder injuries, there is not enough of a temporal relationship (time) between the onset of your shoulder problems and the motor vehicle accident, and you would have felt left shoulder pain within 72 hours, if not 24 hours of the motor vehicle accident. I also note that on January 26, 2005, in your Application for Compensation, you indicated that your left shoulder was fine. I also note that on January 18, 2005, when you attended at your physiotherapist, [Appellant's physiotherapist], for your left shoulder, throughout the interview you stated that the problem was a result of lifting which you had initially ignored but the injury increased in discomfort.

I will adopt the thorough and comprehensive reasons provided by your case manager in the decision letter of November 10, 2005 to terminate your Income Replacement Indemnity benefits.

Appeal

The Appellant filed a Notice of Appeal dated February 20, 2006.

The relevant provisions of the Act in respect of this appeal are:

“Victim” as defined under Section 70(1) of the Act:

"victim" means a person who suffers bodily injury in an accident.

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;

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Manitoba Regulation 40/94

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

The appeal hearing commenced on January 11, 2007. The Appellant was represented by [Appellant's chiropractor], and Morley Hoffman represented MPIC.

The Appellant testified at the appeal hearing and acknowledged that prior to the motor vehicle accident he had problems with his left shoulder and had received physiotherapy treatments in respect thereof. He further testified that as a result of:

1. the workplace injury he was in receipt of Workers Compensation benefits and expected to return to work on January 10, 2005, when he was involved in a motor vehicle accident on January 5, 2005.

2. this motor vehicle accident he suffered an injury to his neck and aggravated the injury to his left shoulder.
3. these injuries he was unable to return to work and was in receipt of IRI benefits until March 11, 2005 when MPIC terminated these benefits.
4. the motor vehicle accident injuries he was not able to return to work on March 11, 2005 and should have received IRI benefits for loss of income until his return to work on the month of May 2005.

The Appellant was cross-examined by MPIC's counsel and he did not deny that:

1. in his Application for Compensation to MPIC, which he completed on January 26, 2005, three (3) weeks after the motor vehicle accident, he made no mention of shoulder injuries related to the motor vehicle accident.
2. in his written statement to MPIC he stated that, prior to the motor vehicle accident, his left shoulder had been painful off and on for about three (3) years and that he had received physiotherapy treatments for the shoulder one (1) year prior to making his Application for Compensation.
3. when he attended at his physiotherapist on January 18, 2005 he advised the physiotherapist that the problems with his left shoulder were as a result of lifting.

MPIC's Submissions

MPIC's legal counsel submitted that:

1. MPIC was correct in terminating the Appellant's IRI benefits on March 11, 2005 on the grounds that, prior to the motor vehicle accident, the Appellant had a pre-existing pattern of left shoulder injuries and that there was not enough of a temporal

relationship between the onset of these shoulder problems and the motor vehicle accident.

2. the Appellant had not made any complaint, initially, in respect of any shoulder pain arising out of the motor vehicle accident.
3. the Appellant, in his Application for Compensation, dated January 26, 2005, three (3) weeks after the motor vehicle accident, made no mention of shoulder injuries relating to the motor vehicle accident.
4. in the Appellant's handwritten statement, located at page 7 of the Application for Compensation, he stated that he was attending physiotherapy for treatment of his left shoulder prior to the motor vehicle accident and that this shoulder had been painful off and on for about three (3) years.
5. given the absence of any earlier reports of left shoulder problems on the documentation of his prior problems, it is likely that his current shoulder problems related to his recurrent pre-existing condition and not to any injuries sustained in the motor vehicle accident.
6. on January 18, 2005 the Appellant had attended [Appellant's physiotherapist], who in his report dated June 29, 2005, stated that he was informed by the Appellant that the Appellant's problems to his left shoulder was a result of lifting, which the Appellant had initially ignored but which injury increased in discomfort.
7. the Appellant did not inform [Appellant's physiotherapist] that his shoulder problems related to any injuries sustained in the motor vehicle accident.

MPIC's legal counsel referred to [Appellant's chiropractor's] report dated March 11, 2005 wherein [Appellant's chiropractor] reported that the Appellant's cervical spine was functional with only end range pain in flexion, extension and rotation. MPIC's legal counsel submitted that

[Appellant's chiropractor's] report confirmed that as of March 11, 2005, the Appellant had substantially recovered from the neck injury he had sustained in the motor vehicle accident and was capable of returning to work at that time. MPIC's legal counsel further submitted that the Appellant had failed to establish, on a balance of probabilities, that he was unable to return to work on March 11, 2005 due to the motor vehicle accident injuries and, therefore, was not entitled to receipt of IRI benefits at that time. As a result, MPIC was justified, pursuant to Section 110(1)(a) of the Act in terminating the Appellant's IRI benefits and that, therefore, the Commission should dismiss the Appellant's appeal.

Appellant's Submission

The Appellant testified that:

1. he suffered both an injury to his neck and shoulder as a result of the motor vehicle accident, was unable to return to work and was in receipt of IRI benefits.
2. although the neck injury resolved itself quicker than the shoulder injury, he was unable, due to the shoulder injury, to return to work until the month of May 2005.
3. although prior to the motor vehicle accident he had a problem with his left shoulder, at no time did his left shoulder problem prevent him from attending at work at [text deleted].
4. as a result of the motor vehicle accident he suffered injuries not only to his neck, but also aggravated his pre-existing left shoulder problem and caused him a great deal of pain.
5. he did report having a problem to his left shoulder to his chiropractor, [Appellant's chiropractor], on January 7, 2005, two (2) days after the motor vehicle accident, and that [Appellant's chiropractor's] medical documentation did support his position that

[Appellant's chiropractor] treated not only his back injury but his left shoulder injury as a result of the motor vehicle accident.

6. MPIC was incorrect in prematurely terminating his IRI benefits as of March 11, 2005 and should have continued to provide him with these benefits until the month of May 2005 when he returned to work.

Discussion

Causal Connection – Lack of Appellant's Complaint

MPIC had terminated the Appellant's IRI benefits as of March 11, 2005 on the grounds that the Appellant had not established, on a balance of probabilities, that there was a causal connection between the Appellant's shoulder problems and the motor vehicle accident which had occurred on January 5, 2005. The Internal Review Officer, in her decision dated February 8, 2006, stated that there was not enough of a temporal relationship between the onset of the Appellant's shoulder problems and the motor vehicle accident, and that the Appellant would have felt left shoulder pain within 72 hours, if not 24 hours, of the motor vehicle accident. In arriving at her decision in respect of causation, the Internal Review Officer adopted the opinion of MPIC's chiropractic consultant and accepted in full the decision of the case manager dated November 10, 2005.

The Commission notes that the Appellant had been involved in a workplace accident on December 8, 2004 and this had resulted in a soft tissue injury to his left elbow. The Appellant was treated with respect to this injury by [Appellant's chiropractor] prior to the motor vehicle accident. The Appellant was expected to return to work on January 10, 2005 but, unfortunately, due to the motor vehicle accident injuries he sustained on January 5, 2005, he did not return to work and was treated for his motor vehicle accident injuries by [Appellant's chiropractor].

[Appellant's chiropractor] provided a Primary Health Care Report to MPIC dated January 10, 2005 in respect of his examination of the Appellant on January 7, 2005, two (2) days after the motor vehicle accident. This report indicates that the Appellant was experiencing neck pain, arm pain, interscapular pain as well as left shoulder pain. This report clearly indicates the Appellant was experiencing left shoulder pain within forty-eight (48) hours after the motor vehicle accident. The Commission therefore finds that the Internal Review Officer, in her decision dated February 8, 2006, was incorrect when she concluded that there was no temporal relationship between the onset of the Appellant's shoulder problems and the motor vehicle accident on the basis that he did not feel any shoulder pain within 72, if not 24, hours of the motor vehicle accident. The Commission finds that, contrary to the decision of the Internal Review Officer, the Appellant's complaint of left shoulder pain to [Appellant's chiropractor] on January 7, 2005, two (2) days after the motor vehicle accident, establishes, on a balance of probabilities, that there was a temporal relationship between the motor vehicle accident and the Appellant's left shoulder pain.

The Commission notes that the Internal Review Officer, in arriving at her decision to terminate the Appellant's IRI benefits, adopted the decision of the case manager. An examination of the case manager's decision dated November 10, 2005 to terminate the Appellant's IRI benefits, clearly indicates that the case manager, in coming to this conclusion, relied on the chiropractic consultant's Inter-Departmental Memorandum dated August 10, 2005. In this Memorandum the chiropractic consultant indicated that he had reviewed the entire Appellant's medical file that he received from the case manager. He reported that [Appellant's chiropractor] did not provide any objective findings in his examination of the Appellant on January 7, 2005 in respect to the Appellant's discomfort that he experienced to his left shoulder in his report dated January 10, 2005. The chiropractic consultant, in arriving at his opinion that there was no causal connection

between the motor vehicle accident and the Appellant's left shoulder complaints, was influenced by the failure of [Appellant's chiropractor] to include in his report any objective findings of left shoulder discomfort.

However, the Commission finds that the chiropractic consultant did not take into consideration, in arriving at his opinion in respect of causation, [Appellant's chiropractor's] report to the case manager dated June 15, 2005 wherein [Appellant's chiropractor] states that the Appellant was involved in a motor vehicle accident on January 5, 2005 which prevented him from returning to work on January 10, 2005 and he further states:

2. My objective physical findings on first exam of his shoulder after the MVA were as follows:

Decreased global ROM left shoulder
+ Appleys
Pain on palpation
Decreased muscle strength left shoulder. (underlining added)

The Commission therefore finds that:

1. the chiropractic consultant failed to consider that [Appellant's chiropractor], in his report to the case manager dated June 15, 2005, did set out objective findings in respect of the Appellant's left shoulder complaints which he observed in his initial examination on January 7, 2005.
2. this failure was a serious omission on the part of the chiropractic consultant in respect of material facts which were ignored by him in concluding that there was no causal connection between the motor vehicle accident and the Appellant's left shoulder injuries.
3. unfortunately, in error, the Internal Review Officer accepted the incorrect opinion of the chiropractic consultant on the issue of causation and, as a result, terminated

the Appellant's IRI effective March 11, 2005. In her decision letter to the Appellant dated February 8, 2006 she stated:

I discussed your concerns once again with the Chiropractic Consultant of our Health Care Services and he reiterated his prior opinion that you had a pre-existing pattern of left shoulder injuries, there is not enough of a temporal relationship (time) between the onset of your shoulder problems and the motor vehicle accident, and you would have felt left shoulder pain within 72 hours, if not 24 hours of the motor vehicle accident. . .

Causal Connection - Lack of Documentation

The Commission also finds that the chiropractic consultant, in his Inter-Departmental Memorandum to the case manager dated August 10, 2005, erred in stating that there was a lack of documentation by [Appellant's chiropractor] in respect of the treatment to the Appellant's left shoulder until January 31, 2005, when [Appellant's chiropractor] placed more emphasis on the treatment of the left shoulder. Based on this finding the chiropractic consultant concluded that the Appellant's left shoulder complaints were not causally connected to the motor vehicle accident but were due to a pre-existing left shoulder problem.

The Commission notes, however, that [Appellant's chiropractor], in his Treatment Plan Report to MPIC dated February 16, 2005, clearly states that the motor vehicle accident aggravated the existing injury to the Appellant's left shoulder. [Appellant's chiropractor] further states that the Appellant had tried physiotherapy on his left shoulder with little relief and that chiropractic treatments were initiated to treat his left shoulder and that his left shoulder would not be receiving any further physiotherapy.

The Commission notes that [Appellant's physiotherapist] provided a report to MPIC dated June 29, 2005, which indicates that the Appellant reported a problem concerning his "left scapular region". The physiotherapist in this report states:

. . . Also indicated he has a cervical problem as result of MVA – sees chiropractor.

In respect to his left elbow – no physiotherapy treatment was provided. [The Appellant] was treated for his left shoulder problem: exam revealed cervical movement restrictions – acute palpable pain to left Para thoracic structures T3 – TR7 but no loss of scapular movement.

The MVA may have exacerbated soft tissue condition but should not add to the chronicity of the scapular problem. The scapular condition was treated on two occasions: Jan 18 & 25, 2005 following which treatment was discontinued by [the Appellant].
(underlining added)

An examination of [Appellant's chiropractor's] Treatment Plan Report dated February 16, 2005, and the physiotherapist's report dated June 29, 2005, clearly indicates that after the motor vehicle accident the Appellant was treated by [Appellant's chiropractor] in respect of his cervical problem and on two (2) occasions, on January 18 & 25, 2005, by the physiotherapist in respect of his left shoulder problem.

The Commission finds that the chiropractic consultant erred in concluding that [Appellant's chiropractor] did not provide any chiropractic treatment to the left shoulder injury until January 31, 2005 and, as a result, the left shoulder injury was not related to the motor vehicle accident. The Commission notes that the Appellant acknowledged to MPIC, in his Application for Compensation, that in respect of his left shoulder problems they had pre-existed prior to the workplace injury and motor vehicle accident and that he had been treated by a physiotherapist in respect of the left shoulder injury.

The Commission determines that upon examination of [Appellant's chiropractor's] medical reports and the report of the physiotherapist, [Appellant's chiropractor] indicated that he initially treated the Appellant's left shoulder problems after the motor vehicle accident and the physiotherapist indicated that he treated the Appellant's left shoulder on January 18 and January 25, 2005. The Commission therefore determines that the chiropractic consultant erred in failing to take into account the treatment provided by [Appellant's chiropractor] and the physiotherapist to the Appellant's left shoulder on several occasions prior to January 31, 2005. The Commission notes that the chiropractic consultant's error in this respect was unfortunately adopted by the Internal Review Officer in her decision dated February 8, 2006 when she concluded that, based on the opinion of the chiropractic consultant, there was not sufficient evidence of a temporal relationship between the onset of the Appellant's shoulder problems and the motor vehicle accident and, as a result, terminated the Appellant's IRI benefits prematurely.

Causal Connection - Application for Compensation

The Internal Review Officer, in her decision dated February 8, 2006, erred in finding corroboration for her decision on the issue of causation in the statements the Appellant made in his Application for Compensation and in a report from the [Appellant's physiotherapist]. The Internal Review Officer in her decision states:

. . . I also note that on January 26, 2005, in your Application for Compensation, you indicated that your left shoulder was fine. I also note that on January 18, 2005, when you attended at your physiotherapist, [text deleted], for your left shoulder, throughout the interview you stated that the problem was a result of lifting which you had initially ignored but the injury increased in discomfort.

The Appellant's Application for Compensation contains the following description of his workplace injuries:

. . . I do a lot of welding, but I also have to sand and grind down the area I weld to provide a smooth surface. This is how I injured my elbow, my left shoulder is fine. I was attending my chiropractor for treatment of my left elbow in December 2004. . . .
(underlining added)

The Appellant, who was employed as a welder, stated in his Application for Compensation that while he was in the process of sanding and grinding down an area in order to provide a smooth surface to weld, he injured his elbow, but not his shoulder and, as a result of this workplace injury, he attended at his chiropractor for treatment of his left elbow in December 2004. The Commission finds that when the Appellant indicated that his left shoulder was fine, he was describing events relating to his workplace injury which occurred on December 8, 2004 and not to events relating to his subsequent motor vehicle accident injury which occurred on January 5, 2005, one month later.

For these reasons the Commission finds that the Internal Review Officer erred in concluding that the Appellant's statement in his Application for Compensation, corroborates her opinion that there was no causal relationship between the motor vehicle accident and the Appellant's left shoulder injury. As a result, the Internal Review Officer incorrectly terminated the Appellant's IRI benefits on March 11, 2005.

Causal Connection - Physiotherapist's Report

The Internal Review Officer, in her decision dated November 10, 2005, erred in finding corroboration for her decision on the issue of causation in the statements made by the Appellant to his physiotherapist, which is set out in the physiotherapist's report to MPIC dated June 29, 2005. In this report the physiotherapist stated:

Our first contact with [the Appellant] was January 18, 2005 when he presented a problem concerning his left scapular region: through the interview he stated the problem was result of lifting – initially ignored but the injury increased in discomfort. He also indicated was – off work due to a left elbow problem (WCB) but had returned to work – light duties. Also indicated he has a cervical problem as result of MVA – sees chiropractor.

The Appellant had been employed for many years as a welder at [text deleted] and that job involved a great deal of heavy lifting. The Commission finds that the Appellant saw the physiotherapist on January 18, 2005 for the purpose of receiving treatment to his left shoulder as a result of the motor vehicle accident injury. In order to provide proper treatment the physiotherapist obtained a medical history from the Appellant in respect of his left shoulder problems.

During the course of setting out his medical history, the Appellant described chronologically the events in respect of his pre-existing shoulder problem, his subsequent workplace injury to his left elbow, which occurred on December 8, 2004, and lastly the treatment he received from his chiropractor as a result of the motor vehicle accident which occurred on January 5, 2005. The Appellant advised the physiotherapist that:

1. his left shoulder problems occurred as a result of lifting, which he initially ignored, and which injury caused him a great deal of discomfort. This statement is consistent with the Appellant's acknowledgment that prior to the workplace injury he had left shoulder problems and was in receipt of physiotherapy treatments.
2. the workplace injury to his left elbow, which had occurred on December 8, 2004, caused him to be off work.
3. as a result of the motor vehicle accident which occurred on January 5, 2005 he saw a chiropractor in respect of his cervical problem.

The physiotherapist also reported that when the Appellant saw him on January 18, 2005 the Appellant presented a problem concerning his left scapular region. The physiotherapist's subsequent report dated June 29, 2005 indicated that he had treated the Appellant's left shoulder problems on January 18th and on January 25th, 2005. The Commission therefore finds that the Appellant did inform the physiotherapist that he did receive a left shoulder injury as a result of the motor vehicle accident.

The Commission determines that the chiropractic consultant erred in his report to the case manager dated August 10, 2005 (in paragraph 8) when he states that the Appellant told the physiotherapist that the problem with his left shoulder and scapular region was a result of lifting and that he did not relate his shoulder problem to the effects of the motor vehicle accident. The Commission also finds that the Internal Review Officer unfortunately agreed with the chiropractic consultant in her decision dated February 8, 2006 and erred when she stated:

. . . I also note that on January 26, 2005, in your Application for Compensation, you indicated that your left shoulder was fine. . .

For these reasons the Commission finds that the Internal Review Officer erred in concluding that this statement by the Appellant to the physiotherapist corroborates her opinion that there was no causal relationship between the motor vehicle accident and the Appellant's left shoulder injury. As a result, the Internal Review Officer incorrectly terminated the Appellant's IRI benefits.

Causal Connection - [Appellant's chiropractor's] Medical Reports

The Commission determines that [Appellant's chiropractor], who treated the Appellant before and after the motor vehicle accident in respect of his left shoulder, was in the best position to

determine whether or not there was a causal connection between the motor vehicle accident and the Appellant's left shoulder injury.

[Appellant's chiropractor] personally examined the Appellant over a significant period of time and, as a result of his examinations and discussions with the Appellant, he was able to assess the credibility of the Appellant. On the other hand, the chiropractic consultant, whose opinion is relied upon by the Internal Review Officer in arriving at her decision to terminate the Appellant's IRI benefits, conducted a paper review and did not have the opportunity of personally examining the Appellant and assessing his credibility.

The Commission finds that the chiropractic consultant did, on several occasions in his report to the case manager, err in failing to consider all of the relevant material facts when he concluded that there was no causal relationship between the motor vehicle accident and the Appellant's left shoulder problems. For these reasons the Commission gives greater weight to [Appellant's chiropractor]'s medical opinion that there is a causal connection between the motor vehicle accident and the Appellant's left shoulder injury than it does to the opinion of the chiropractic consultant in respect of this issue.

On March 11, 2005 [Appellant's chiropractor] provided MPIC with a Treatment Plan Report which indicated that the Appellant's neck pain had improved and that there had been a decreased range of motion in the Appellant's left shoulder. [Appellant's chiropractor], contrary to the opinion of the chiropractic consultant, did not find that the Appellant had fully recovered by March 11, 2005 and he correctly determined that the Appellant required a series of strengthening programs in order to prepare himself to return to handle the heavy machinery and metal at [text deleted].

[Appellant's chiropractor's] opinion is fully set out in his Treatment Plan Report dated April 14, 2005 which was accompanied by a narrative report dated April 14, 2005. In this report [Appellant's chiropractor] states:

[The Appellant] suffered a work related injury in Dec. 2004. While being treated for his left shoulder he had a MVA in Jan. 2005. This accident severely aggravated his existing injury to the left shoulder and also caused whiplash in his cervical spine.

[The Appellant's] cervical spine has improved steadily. The progress in his left shoulder has been positive but slow.

There is decreased discomfort in the cervical spine with pain only at end range ROM. +Kemp's and +shoulder depression test.

The left shoulder has decreased ROM with extension and abduction. While testing for abduction the patient's left arm starts to shake. +Appley's test and +Apprehension test.

Decreased muscle strength in his left shoulder. While testing for muscle strength the patient arm starts to shake.

A 4 week strengthening program was implemented in April with positive results. Taking into account [the Appellant's] age and nature of injury I believe another 4 weeks of strengthening is required before [the Appellant] can return to his full active duty at [text deleted] as a welder.

A gradual return to work was anticipated starting with light duty but [text deleted] will not accommodate any modified work schedule. [The Appellant] requires more strengthening in his left shoulder before he will be able to handle the heavy machinery and metals at [text deleted].

It is my goal to get [the Appellant] back to work at full active duty no later than May 16, 2005. (underlining added)

In summary, [Appellant's chiropractor] in this report clearly indicates that the motor vehicle accident aggravated the Appellant's pre-existing left shoulder problems and that because [text deleted] does not permit a gradual return to work for injured employees, [Appellant's chiropractor] was of the view that the Appellant would not be able to return to full active duty

before May 16, 2005 and the Commission accepts [Appellant's chiropractor's] opinion in this respect.

Causal Connection - Testimony of the Appellant

The Appellant impressed the Commission in respect of the dignified manner in which he presented himself to the Commission, and in the thoughtful manner in which he responded to questions by both his representative and MPIC's counsel. The Appellant, in his testimony, did not deny any statements he made in his Application for Compensation or in his discussions with the physiotherapist even though these admissions may have gone against his self interest. The Appellant stated that prior to the motor vehicle accident he had problems with his left shoulder which he had treated in the past by a physiotherapist. He also testified that at no time did he ever miss work as a result of his left shoulder problems prior to the motor vehicle accident. He further testified that as a result of the motor vehicle accident injuries to his left shoulder he was not able to return to work until the month of May 2005.

The Appellant testified in a very direct and unequivocal fashion and the Commission finds him to be a credible witness and accepts his testimony. The Appellant's testimony is corroborated by the medical reports of [Appellant's chiropractor].

The Commission finds that the motor vehicle accident caused soft tissue injuries to the Appellant's neck and aggravated his pre-existing left shoulder injury. Both of these injuries prevented the Appellant from returning to work on January 10, 2005 and, as a result of both of these injuries, the Appellant was in receipt of IRI benefits. The Commission further finds that by May 11, 2005 the Appellant had recovered from his neck injury but did not recover from his left shoulder injury until the month of May 2005, at which time he was able to return to work.

Pursuant to the decision of the Supreme Court in *Athey v. Leonati et al* (1996), 140 D.L.R. (4th) 235, and in the decision of Mr. Justice De Graves in *Liebrecht v. Egesz et al*, 135 Man.R. (2d) 206 (confirmed by the Manitoba Court of Appeal in 150 Man. R (2d) 257), the Commission finds that the motor vehicle accident materially contributed to aggravating the Appellant's pre-existing left shoulder problems and this injury prevented him from returning to work on March 11, 2005.

In [text deleted] (*AC-01-42*), dated September 18, 2001, the Commission stated:

The Review Officer correctly set out the two legal tests to deal with causation in these matters. In *Athey v. Leonati et al* (1996), 140 D.L.R. (4th) 235, the Supreme Court dealt extensively with this issue. In a unanimous decision, Mr. Justice Major states:

A. General Principles

(13) Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

(14) The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

(15) The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, supra. A contributing factor is material if it falls outside the de minimis range: *Bonnington Castings, Ltd. v. Wardlaw*, supra; see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

In *Liebrecht v. Egesz et al*, 135 Man.R. (2d) 206 Justice De Graves, in arriving at his decision, cites *Athey v. Leonati et al* (supra) and states:

(64) Causation must be proved on a balance of probabilities. But it is only necessary by that civil standard of proof to prove that the defendants' negligence materially contributed to the injury.

(65) On the question of causation Major, J., for the court (S.C.C.) in *Athey v. Leonati et al* (1996), ... restated the principle in the context of competing causes as follows:

“It is not now necessary, nor has it ever been for the plaintiff to establish that the defendant’s negligence was the sole cause of the injury.

“The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the ‘but for’ or material contribution test. Future or hypothetical events can be factored into the degrees of probability, but causation of the injury must be determined to be proven or not proven. (p. 245-246)

...

This decision was appealed to the Manitoba Court of Appeal, and on the issue of causation, the Manitoba Court of Appeal unanimously confirmed the decision of Mr. Justice De Graves (150 Man. R (2d) 257)

**Causal Connection - Section 136(1)(a) of the Act and
Section 5(a) of Manitoba Regulation 40/94**

The Commission finds that MPIC’s position that there was not a causal connection between the motor vehicle accident and the Appellant’s left shoulder injury is contradictory.

[Appellant’s chiropractor], in a letter dated March 6, 2006 in support of the Appellant’s appeal, states:

The last issue that is extremely perplexing to me is the fact that I was compensated for treating [the Appellant] during the time in question which is March 11th, 2005 until May 31st, 2005. It appears somewhat odd that [text deleted] is acknowledging the injuries from the motor vehicle accident by way of payment to me for treatment rendered during that time frame but doesn’t see how [the Appellant] is entitled to payment for wage loss under the PIPP plan. [The Appellant] should not lose his entitlement to his wage loss coverage. His actions were based on advice from myself, his treating chiropractor. He made many attempts to return to work on light duty however [text deleted] does not support light duty in any way.

The Commission notes that in a Memo to File created by the case manager dated October 26, 2005 she indicates that she spoke to her supervisor, [text deleted], and confirmed payment of chiropractic treatments to June 2005 and payments for IRI benefits to March 11, 2005. In considering MPIC's position in respect of the causation issue, the Commission finds there is a contradiction in respect of the payment of [Appellant's chiropractor's] chiropractic fees after March 11, 2005 and non-payment by MPIC of the Appellant's IRI after March 11, 2005.

MPIC determined, in accordance with Section 136(1)(a) of the Act and Section 5(a) of Manitoba Regulation 40/94, to pay [Appellant's chiropractor] for the chiropractic expenses incurred by the Appellant in respect of treatment for his left shoulder from the date of the motor vehicle accident on January 5, 2005 until the end of June 2005. In order for MPIC to pay for these chiropractic expenses pursuant to Section 136(1)(a) of the MPIC Act and Section 5(a) of Manitoba Regulation 40/94, MPIC must have been satisfied that there was a causal connection between the Appellant's left shoulder problems and the motor vehicle accident and that the chiropractic treatments were medically required.

On the other hand, MPIC determined that during the same period of time that they paid [Appellant's chiropractor's] chiropractic fees they refused to pay the Appellant's IRI benefits after March 11, 2005 on the grounds there was no causal connection between the Appellant's left shoulder problems and the motor vehicle accident.

The Commission therefore finds that on the issue of causation MPIC had contradicted itself, having regard to the payment of chiropractic expenses incurred by the Appellant and the non-

payment of the Appellant's IRI benefits after March 11, 2005 and, as a result, rejects MPIC's position on causation.

Decision

For these reasons the Commission finds that, on the balance of probabilities, the Appellant has established that the motor vehicle accident of January 5, 2005 resulted in aggravating his pre-existing shoulder problems to such an extent that this injury prevented him from returning to work until the month of May 2005. The Commission finds that, contrary to Section 110(1)(a) of the MPIC Act, MPIC improperly terminated the Appellant's IRI benefits on March 11, 2005.

The Commission directs MPIC to pay the Appellant IRI benefits from March 11, 2005 until he returned to work at [text deleted] during the month of May 2005. As a result, the Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated February 8, 2006.

Dated at Winnipeg this 31st day of January, 2007.

MEL MYERS, Q.C.