Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-185

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Dr. Neil Margolis**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Kathy Kalinowsky.**
HEARING DATE:	**December 18, 2007**
ISSUE(S):	**Entitlement to reinstatement of Income Replacement Indemnity benefits**
RELEVANT SECTIONS:	**Section 81(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was injured in a head on collision on February 22, 1998. As a result of the accident, he sustained a closed head injury as well as a fracture to his clavicle. He suffered from problems with range of motion in his left shoulder and left knee difficulties for which he was treated with physiotherapy.

The Appellant was in receipt of Personal Injury Protection Plan ('PIPP') benefits as a result of these injuries.

In 2000, the Appellant reported to his case manager that he was having pain in his right arm, especially while working at his computer and keyboard and while driving or working. As the pain increased, he sought assistance from his general practitioner, [Appellant's Doctor #1], from [Appellant's Chiropractor], and [Appellant's Physiotherapist #1].

The difficulties with the Appellant's right arm increased until he was unable to work as a result of his symptoms. The Appellant's case manager consulted with [MPIC's Doctor], of MPIC's Health Care Services Team. The Appellant also sought treatment from [Appellant's Doctor #2].

On August 21, 2002, the Appellant's case manager reviewed the medical information on the file and determined that there was no causal link between the Appellant's shoulder and arm complaints and the accident, and as such, the Appellant was not entitled to further Income Replacement Indemnity ('IRI') benefits.

The Appellant sought an Internal Review of this decision. On November 3, 2003, an Internal Review Officer for MPIC reviewed the causal relationship between the Appellant's shoulder and arm complaints and the motor vehicle accident of February 22, 1998. He reviewed the opinions provided by [Appellant's Doctor #2], [Appellant's Doctor #1] and [Appellant's Physiotherapist #1], as well as [MPIC's Doctor's] opinion that there was no cause and effect relationship between the arm complaints and the motor vehicle accident. The Internal Review Officer pointed to the fact that the Appellant did not complain of right arm symptoms until approximately two (2) years after the accident, and found that although [Appellant's Doctor

#2's] remarks reinforced the "possibility" of a causal relationship, they did not meet the balance of probability test. The Internal Review Officer found that the shoulder complaints were not related to the motor vehicle accident and that the Appellant was not entitled to further IRI benefits.

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

Evidence and Submission for the Appellant

The Appellant described the motor vehicle accident as a high impact, severe collision. He described the difficulties he had with his mental state, as a result of his head injury, following the accident, as well as the three (3) weeks which he spent in hospital at that time. He testified that he recalls experiencing a numb patch in his arm and discussing it with his caregivers in the hospital. However, he admitted that, for some reason, this had never been documented in his [Hospital] files.

He did point to references in the Patient Progress Notes from [Hospital] at the time. Three (3) references were provided in the notes on the Indexed file which described

> ". . .right upper arm swollen and bruised ++ . . .
>
> Large amount of bruising and swelling to right arm . . .
>
> Large amount of bruising to right arm . . ."

The Appellant testified that, due to the other, severe medical problems he was facing, he did not immediately pay much attention to the numb spot in his arm. Following his release from hospital, and during his recovery, he returned to his exercise program at the gym, on a limited,

gradual basis. He testified that at that time he felt something strange in his right arm, like a low grade pain and weakness.

He had not yet returned to full time work with full duties. He was working for a radio station in [text deleted] and testified that he was determined that there was nothing wrong with him. He wanted to work full time as soon as possible and his physicians and family had to convince him to slow down.

As the Appellant recovered and began to become more and more active, he also became more and more aware of the numbness and weakness in his right arm. He also testified that his right arm and shoulder, including his trapezius, rhomboid and deltoid, had all become smaller on the right side than the left, due to muscle wasting on his right side.

The Appellant testified that he did not suffer any further accidents or traumatic incidents to his right side in the period following the motor vehicle accident.

The Appellant pointed to evidence from [Appellant's Neuropsychologist] who treated the Appellant. It was [Appellant's Neuropsychologist's] opinion that the Appellant's mental state following the accident would have prevented him from voicing complaints regarding his right side while in the hospital. In fact, at that time, he intended to minimize any difficulties, as he was so anxious to return to his pre-injury status and to work and driving.

The Appellant submitted that he was not in the appropriate mental state following the accident, nor in the year or years following, to make the connection between his symptoms and the accident.

The Appellant also pointed to the evidence of his chiropractors and physiotherapists who described his right arm symptoms and recognized the possibility that it arose from the motor vehicle accident. [Appellant's Doctor #1], he submitted, took the position that it was more than fifty (50%) percent likely that the shoulder problem resulted from the motor vehicle accident.

Finally, the Appellant referred to several opinions from [Appellant's Doctor #2], who treated him. It was [Appellant's Doctor #2's] opinion that if not for the collision in question, the Appellant would not be in his current situation. Although he later described the connection between the injury and the motor vehicle accident as possible, he did recognize that with severe head injuries there is often a high risk of concomitant cervical spine injuries, and that MRI's and CT scans are often not effective at detecting such injuries.

The Appellant submitted that his delay in seeking treatment for his right arm could be explained by the severity of his other injuries and mental state at the time. As his awareness increased, along with his increase in activity, and exacerbation of symptoms, his symptoms progressed to the point where he sought medical treatment for them, some two (2) years after the accident.

Submission of MPIC

Counsel for MPIC reviewed a memorandum from [MPIC's Doctor] dated July 30, 2002, reviewing the history of the Appellant's right shoulder complaints. [MPIC's Doctor] stated:

Causation

> 1. Cause
> Energy sufficient to cause bodily injury was exchanged in the course of the motor vehicle collision. While the described mechanism could have led to a neck injury, there is no documentation of a blow to the right shoulder in the course of the collision that could have traumatized the rotator cuff.
>
> 2. Effect
> The clinical diagnosis dating back to [Appellant's Doctor #1's] clinic notes of May 2000 is most consistent with rotator cuff tendinopathy. This is confirmed in the current diagnosis by [Appellant's Doctor #2] clinically. As mentioned above, there is insufficient medical evidence to support a diagnosis of cervical radiculopathy. Accordingly, on the balance of probabilities, the most likely diagnosis accounting for the claimant's right upper limb symptoms is rotator cuff tendinopathy.
>
> 3. Temporal Relationship
> Notwithstanding the cause and effect, there is no documentation of right upper limb symptoms immediately following the motor vehicle collision. The first documentation of right upper limb symptoms is in June 2000 estimating the onset as being late 1999 or early 2000. Therefore there is an approximately two-year time lag between the motor vehicle collision and the onset of right upper limb symptoms. Whether the claimant's current condition is considered to be due to cervical radiculopathy or right rotator cuff tendinopathy, the relationship for the onset of the claimant's right to cervical radiculopathy or right rotator cuff tendinopathy, the temporal relationship for the onset of the claimant's right upper limb symptoms is medically improbably related to a motor vehicle collision in February 1998.
>
> Therefore, on the balance of probabilities, it is medically improbable that a causal link exists between the claimant's motor vehicle collision of February 22, 1998 ad (sic) his current complaints of right upper limb dysfunction.

Counsel for MPIC submitted that the case manager's decision that there was no causal connection between the Appellant's right shoulder and arm complaints and the motor vehicle accident, was based upon and supported by [MPIC's Doctor's] opinion. [MPIC's Doctor] identified a possible rotator cuff tendinopathy as a possible diagnosis for the Appellant's condition.

Counsel for MPIC reviewed some of [Appellant's Doctor #2's] opinions and noted that in January of 2003 [Appellant's Doctor #2] had provided a more complete conclusive opinion

> It is my opinion that if not for the collision in question, [the Appellant] would not have experienced the musculoskeletal problems, which may also have some relationship to his workplace.

However, [Appellant's Doctor #2's] last opinion, dated June 13, 2007 stated:

> In my opinion, the most that I can assert is that your right arm pain is possibly causally related to the collision in question. Given my involvement in your case, after the fact, I cannot comment on the balance of probability, given my understanding of all the issues here.

Counsel for MPIC reviewed [Appellant's Physiotherapist #2's] physiotherapy assessment, dated September 16, 2004:

> . . . on a balance of probabilities, and supported by the reported temporal relationship, ongoing signs and symptoms and lack of expected response to exercise, [the Appellant's] current cervical, scapular/shoulder and upper extremity soft tissue dysfunction can be attributed to the motor vehicle accident in question.

Counsel for MPIC submitted that the physiotherapist also noted that this opinion was based on a one-time assessment, in conjunction with speaking with the Appellant's trainer and reviewing [Appellant's Doctor #2's] report.

Counsel for MPIC reviewed [Appellant's Neuropsychologist's] reports which set out the Appellant's tendency to minimize his difficulties as well as the low likelihood that he would have probably recognized any numbness to have been significant. However, she noted that while [Appellant's Neuropsychologist] was a highly respected neuropsychologist, he was not the treating doctor dealing with the physical injury.

When [MPIC's Doctor] had the opportunity to review the information from the Appellant's caregivers, he still maintained, in a report dated April 9, 2003, that:

> . . . my medical opinion on the issue of causation has not changed. There is still

> insufficient evidence to establish a medically probable cause and effect relationship between the claimant's right upper limb pain (working diagnosis of subacromial impingement syndrome) and the motor vehicle collision of February 26, 1998 (sic).

Counsel for MPIC submitted that the earliest report of right shoulder, elbow and wrist pain from the Appellant to caregivers was documented in mid-2000 and only dated back to January of 2000, almost two (2) years following the motor vehicle accident. She submitted that in order to establish a medically probable cause and effect relationship between the motor vehicle accident and the Appellant's symptoms, it is necessary to demonstrate a medically probable cause, a medically probable effect, and a medically probable temporal relationship between the cause and effect. Counsel submitted, based upon all of the above, that there was no temporal relationship between the cause (mva) and the effect (right shoulder, arm and wrist pain). Accordingly, the decision of the Internal Review Officer, she submitted, must be upheld.

Discussion

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;

The onus is on the Appellant to show, on a balance of probabilities, that his right shoulder and arm complaints were caused by the motor vehicle accident.

The panel has carefully reviewed the evidence of the Appellant and the documentation on his file. The panel finds that the Appellant did sustain initial bruising and swelling to his right arm and shoulder, which were briefly documented by his caregivers in the [Hospital].

The panel found the Appellant to be a credible witness and we accept his evidence that he

experienced some numbness to his right arm following the accident, and that he could not identify any traumatic events, subsequent to the motor vehicle accident, which could have caused the symptoms in his right arm.

The panel also finds that the Appellant has established, through his own evidence and through the reports of [Appellant's Neuropsychologist], that, following the accident, he lacked the insight and awareness into his medical condition that would have allowed him to properly report the symptoms in his right arm and shoulder.

On May 20, 2003, [Appellant's Neuropsychologist] stated:

> . . . I can advise that in his early recovery, [the Appellant] did not have full insight into the affects (sic) of his accident. In my first report of May 25, 1998, I had stated as follows: "Indeed, [the Appellant] may at that time have been minimizing any difficulties, tending to feel that he was back to his pre-injury status, and he was anxious to return to work and driving" (p.4). . . .

[Appellant's Neuropsychologist] added that this was a common pattern amongst individuals with a severe brain injury, where initially insight was reduced into the effects of the injury.

On January 30, 2004, responding to questions from the Appellant, [Appellant's Neuropsychologist] stated:

> You did not have full insight into the sequelae of your accident when I had initially assessed you.

[Appellant's Neuropsychologist] indicated the Appellant minimized difficulties and that there was a high likelihood he would not have brought all of his symptoms to medical attention spontaneously, without specific questioning.

[Appellant's Neuropsychologist] also opined that there was a low likelihood that the Appellant would have been able to recognize the significance of the numbness in his right arm (an annoyance rather than debilitating) in light of the number of other important issues he was dealing with. Finally, [Appellant's Neuropsychologist] indicated there was a low likelihood that the Appellant would have been able to recognize numbness in his right forearm as being a potentially serious issue in the months and even year following the accident.

The panel has reviewed [MPIC's Doctor's] theory that the Appellant's symptoms are the result of a rotator cuff tendinopathy, and not connected to the motor vehicle accident. However, we have also had regard to the reports from [Appellant's Doctor #2], who examined and treated the Appellant. On January 7, 2003 [Appellant's Doctor #2] noted:

> The best temporal relationship between the right upper extremity symptoms and the collision, which can be documented in [the Appellant's] case appears to be approximately two years after the collision in question.
>
> Despite this temporal relationship, it is evident that there was significant trauma to [the Appellant's] right upper arm and shoulder region. There was substantial bruising and swelling documented in that region.
>
> . . .
>
> . . . It is probable that local muscle wasting would have followed the substantial bruising and swelling.
>
> [The Appellant] had ongoing signs of muscle imbalance, scapular asymmetry, and subacromial impingement syndrome of the right shoulder. . . .

[Appellant's Doctor #2] also noted the Appellant's "substantial brain injury".

> . . . The medical documentation supplied by [the Appellant] indicates that there was definite trauma to the region of his right upper arm and shoulder accompanied by bruising and swelling. It is noteworthy that during this time, [the Appellant] did not complain of right shoulder difficulties despite the evidence of trauma to this region. On the balance of probability, [the Appellant's] mental state would have prevented him from voicing complaints while in the hospital.

> [The Appellant's] testimony to me continues to be that he had symptoms in his right upper extremities since the collision in question. He feels that although these symptoms were present, he was trying to put his life back together after a major head injury, hospitalization, depression and other conditions associated with impairment and disability. It is my opinion, that if not for the collision in question, [the Appellant] would not in his current situation. . . . It is my opinion that if not for the collision in question, [the Appellant] would not have experienced the musculoskeletal problems, which may also have some relationship to his workplace. It is my understanding that he did not have these types of symptoms prior to the collision in question.

At that point, [Appellant's Doctor #2] recognized that the Appellant did not have a radiculopathy as he had previously opined. His later report of June 13, 2007, indicated there was no evidence of nerve root or spinal cord compression on the Appellant's MRI's and CT scans, but recognized that these are not capable of detecting certain cervical joint problem. It was his conclusion, that the Appellant's right arm pain was possibly causally related to the collision in question.

The panel recognizes MPIC's concerns regarding the temporal lag between the Appellant seeking medical care for his right arm and shoulder problems and the motor vehicle accident. However, in our view, this has been explained by the Appellant. The panel accepts the Appellant's submission and evidence that he suffered from a lack of insight and awareness regarding his injuries. As his activity level and his awareness level increased, these symptoms became more troublesome to him, to the point where he sought medical attention. We find that it is unlikely that the muscle wasting and atrophy which the Appellant suffered on that side would have occurred without some form of trauma, and we find that the Appellant has established, on a balance of probabilities, that he did not suffer such trauma, except for the motor vehicle accident.

Accordingly, based upon the Appellant's evidence, the initial findings of bruising and swelling at the site, the findings of muscle wasting, and the information and opinions obtained from [Appellant's Neuropsychologist] and [Appellant's Doctor #2], the panel finds that the Appellant

has established, on a balance of probabilities, that his right arm and shoulder complaints were caused by the motor vehicle accident.

Accordingly, the Appellant's appeal is allowed. He will be entitled to IRI benefits, and the decision of the Internal Review Officer dated November 3, 2003 is hereby overturned.

The Appellant shall be entitled to IRI benefits, with interest, in accordance with Section 163 of the MPIC Act. The Commission will retain jurisdiction in the event that the parties are unable to arrive at a mutually satisfactory arrangement regarding the Appellant's benefits.

Dated at Winnipeg this 31st day of January, 2008.

LAURA DIAMOND

MARY LYNN BROOKS

DR. NEIL MARGOLIS