Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-32

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Bob Sample;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**November 19 and 20, and December 14 and 15, 2008**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits beyond 15 July 1999.**
RELEVANT SECTIONS:	**Section 81(1) 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 was injured in a motor vehicle accident on January 12, 1998.

At the time of the accident she was employed as a waitress at the [text deleted].

On November 17, 1997 while in the course of her employment as a waitress, the Appellant sustained an injury to her lower back while lifting a pail of loonies weighing approximately eighty (80) pounds. As a result of this incident, she was admitted to hospital with complaints of

pain radiating down her left leg. At the time of the motor vehicle accident on January 12, 1998, she was still off work as a result of this injury with no scheduled date of return.

The Appellant remained off work and received treatment for injuries to her neck and trapesius resulting from the motor vehicle accident and continued with therapy for lower back injury which arose out of the workplace incident. She saw [Appellant's doctor #1], [Appellant's doctor #2], [Appellant's doctor #3] and attended at physiotherapy.

On August 17, 1998, she saw [Appellant's rehabilitation specialist], a physical medicine and rehabilitation specialist. He examined and assessed the Appellant and found that although the motor vehicle accident may have temporarily aggravated or exacerbated her low back symptoms, these were directly related to the workplace incident. However, he found a probable causal relationship between the motor vehicle accident on January 12, 1998 and the claimant's symptoms of neck and shoulder girdle discomfort.

The Appellant was then referred to the [rehab clinic #1] for an assessment which took place on October 7, 1998. She began a multi-disciplinary therapy and rehabilitation program at that facility.

The Appellant complained of back pain with increasing lower lumbar and leg pain during her program at the [rehab clinic #1]. She saw [Appellant's rehabilitation specialist] again, who requested further radiographic results on February 15, 1999. In March of 1999 [Appellant's rehabilitation specialist] noted a disc protrusion on the Appellant's CT/myleogram results.

The Appellant then saw [text deleted], an orthopaedic surgeon, who ultimately performed disc surgery on the Appellant on May 20, 1999. [Appellant's orthopaedic surgeon] confirmed that the significant lumbosacral disc injury was a result of the workplace accident of November 27, 1997.

The Workers' Compensation Board of Manitoba Appeal Commission held a hearing on April 18, 2002. A decision was issued by the Appeal Commission on May 14, 2002 which found that the work hardening program at the [rehab clinic #1] caused the Appellant's disc injury to become more symptomatic and more herniated. As such, the surgery was a sequela of the motor vehicle accident.

> "Historically it sounds as if [the Appellant's] lower lumbar spine was injured with her lifting injuries in December 1997. The early CT myelogram which was done very soon after the incident did in fact show a small L5-S1 disc herniation. Her vehicle accident on January 12, 1998, appeared to have strained her back and caused more mechanical problems than sciatic problems. Only when she went to the [rehab clinic #1] for work hardening did she in fact experience increasing lower lumbar back pain and radiating left leg pain. Undoubtedly the lower disc was weakened as a result of her lifting injury in December, 1997. Conditioning and work hardening required by MPIC to get her back to work created the disc injury to become more symptomatic and more herniated, creating left-sided sciatica. The most recent CT myelogram suggests an even larger disc herniation with entrapment of the S1 exiting nerve root on the left. Some of the herniation has now become chronic and calcified. Therefore, the initial disc injury and herniation caused mechanical back problems. This was aggravated by the vehicle accident. However, the herniation was worsened and produced left sided sciatica after two attempts at work hardening at the [rehab clinic #1]."

MPIC arranged for the Appellant's file to be reviewed by [rehab clinic #2's doctor], a physical medicine and rehabilitation specialist practicing with the [rehab clinic #2]. Videotape surveillance evidence from December 1998 was reviewed by MPIC, and her file was also reviewed by the MPIC medical consultant, [MPIC's doctor].

On June 28, 1999, the Appellant's case manager wrote to her indicating that the whiplash associated disorder sustained by the Appellant as a result of the January 12, 1998 motor vehicle accident had healed with no resulting permanent alteration in tissue which would account for the Appellant's ongoing subjective complaints. The case manager indicated that in MPIC's view the documents on the Appellant's files indicated that her disc herniation was a result of her work related injury and that the exacerbation which developed in January 1999 was not as a result of the rehabilitation program. Accordingly, the Appellant's ongoing low back disc injury was related to her Workers' Compensation Board claim and she was no longer entitled to Income Replacement Indemnity benefits. The case manager advised that the Appellant's benefits would be terminated on July 15, 1999.

The Appellant sought an internal review of this decision. On December 3, 2003, an Internal Review Officer for MPIC reviewed the information on the Appellant's file and concluded that:

> Taken as a whole the medical evidence fails to establish, on a balance of probabilities, the Manitoba Public Insurance is responsible for your ongoing low back symptoms or your resulting surgery.

The case manager's decision was upheld.

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

Evidence for the Appellant

The Appellant testified at the hearing into her appeal. She was also cross-examined by counsel for MPIC who reviewed videotaped evidence with her.

The panel also heard evidence from the Appellant's former husband, as well as her sister and mother.

The Appellant described the accident she suffered at work in 1997 and the injuries which resulted from it. She also described the motor vehicle accident and the symptoms which followed in her neck and shoulders, as well as the aggravation of her lower back.

She gave evidence describing her job as a waitress and why her injuries prevented her from returning to this employment.

The Appellant talked about her examination by [Appellant's rehabilitation specialist] in August of 1998, alleging that during the examination, the doctor hurt her. She said that she was not in pain when she went to see him, but after the exam, during which she became tearful, she had pain in her back, leg, calf and that her foot was tingling.

The Appellant testified that she was still sore when she went to the [rehab clinic #1] in October 1998. She described her assessment by the physiotherapist, [text deleted], and said that this caused spasms in her back.

She described her sessions at the [rehab clinic #1], including sessions with [text deleted], a psychologist. She understood that she was to learn how to cope with her pain while going through a work hardening program, but she felt that she was unprepared for the intrusiveness of the psychological examination.

The Appellant disagreed with any suggestion that she was a high pain-focused person and stated that although she may have been upset at some points she was not hostile to the program or the individuals at the [rehab clinic #1].

She described how her injuries and pain affected her life and her marriage.

The Appellant also reviewed documents illustrating exercises, and described which ones she had done at the [rehab clinic #1] and how many repetitions she had been required to perform. She also described some work simulation exercises that she was put through at the [rehab clinic #1]. She testified that when she had difficulty with any of these exercises the physiotherapist would re-examine her but also threaten that if she did not comply she would have her benefits cut off.

The Appellant testified that she went on holidays from December through to early January 1999, but was careful on the flight so as not to get too stiff. She explained that the vacation in a warm climate was very nice and she was able to relax.

According to the Appellant she was taking a good deal of medication in order to get through her sessions at the [rehab clinic #1]. She said that she would take multiple Tylenol 3s with codeine before she even went into the [rehab clinic #1] and that the staff at the [rehab clinic #1] had told her to do this.

In order to fulfill the activities of daily life, such as grocery shopping or helping her mother, she had to take more pills.

She explained that the videotape surveillance was done at a time when she had been reporting limited function to her health care workers and she had not been completely disabled. Some of the videotapes did not even depict her. For example, a videotape showing a woman shoveling on December 19, 1998 depicted her sister.

According to the Appellant the motor vehicle accident was severe enough to fracture her mother's ribs and her own lower back (which was starting to feel better by July of 1998) was aggravated by the motor vehicle accident. However, it was really when she went to see [Appellant's rehabilitation specialist] and to the [rehab clinic #1] to do the work hardening program that the severe pain and spasms got worse.

The Appellant's husband gave evidence regarding the effects of the reconditioning and work hardening program at the [rehab clinic #1] on the Appellant. He said that every time she came home from these sessions she would be hurting more and that her back and leg would be sore. She was taking lots of pain killers and complaining that the [rehab clinic #1] program was hurting her. He found her to be frustrated and argumentative, and their social life came to an abrupt end. He described his wife as normally having a good work ethic before these symptoms affected her. He also confirmed that the videotape showing a woman shoveling snow was very unlikely to be his wife as she was not generally enthusiastic about shoveling snow.

The Appellant's mother testified that she was a passenger in the motor vehicle during the accident and described the treatment that she and the Appellant had sought from their family doctor. She also testified that she had accompanied the Appellant to some of her sessions at the [rehab clinic #1] and described the interaction between her daughter and the [rehab clinic #1]

staff, the number of pills her daughter would take before going in to the centre and the complaints of pain that her daughter expressed as a result of her sessions.

The Appellant's sister confirmed that it was she who was depicted in the videotape shoveling snow in December of 1998. She also indicated that she did not believe that the Appellant was a high pain-focused individual. Rather, she indicated that her sister was a very strong person who could tolerate a lot of pain.

The Appellant also submitted reports from her family doctor, as well as from [Appellant's orthopaedic surgeon], and [text deleted], an occupational therapist.

An independent examination and assessment were also obtained from another orthopaedic specialist, [independent orthopedic specialist].

The reports from [Appellant's orthopaedic surgeon], [independent orthopedic specialist] and [Appellant's occupational therapist] supported the Appellant's position that the exercises at the [rehab clinic #1] had worsened or exacerbated her lower back disc injury.

Evidence for MPIC

MPIC provided reports from [Appellant's rehabilitation specialist] and [MPIC's doctor] in addition to the various other medical information contained in the Appellant's indexed file.

[MPIC's doctor] and [Appellant's rehabilitation specialist] testified at the hearing into the Appellant's appeal.

[MPIC's doctor], a medical consultant with MPIC's Health Care Services team, reviewed the documents and reports on the file, as well as the videotaped evidence. He noted that while [independent orthopedic specialist] was a respected orthopaedic surgeon, his main focus in orthopaedics was on knees, ankles, hips and shoulders, focusing more on extremities. He had not been actively involved in treating spines since the early nineties.

He also noted that a review of the videotapes indicated that if the Appellant had suffered a herniated disc, or damage to it, this happened later in January, at least from his viewing of the videotapes.

He could not identify any exercises in the illustrations submitted that called for pelvic tilting. Rather, in his view these exercises prescribed a neutral alignment.

In [MPIC's doctor's] view there was no indication that the Appellant's clinical presentation regarding her lower back changed as a result of the motor vehicle accident, beyond the minor aggravation felt immediately following the accident. His review of the exercises, and the level of exercise that the Appellant was asked to perform at the [rehab clinic #1] did not, in his view, provide a reason or explanation for the deterioration of the Appellant's condition, which he could not see as being related to the low level exercise program provided by the [rehab clinic #1].

[Appellant's rehabilitation specialist], a physiatrist, testified regarding his examinations of the Appellant and diagnosis of her. He testified that he had been concerned that there might be an element of a chronic pain disorder, where symptoms take on a life in and of their own, in the Appellant's case.

In regard to the Appellant's testimony that during his assessment of her in August of 1998 the Appellant had hurt her back and was still sore in October when she went to the [rehab clinic #1], he noted that this was unusual, as he had not physically touched her back during that examination. Nor did her hear back from her that day, or on any other occasions with complaints that he had hurt her. No relevant calls to his office were recorded. He had not really laid hands on her back; he examines spines every day and is accustomed to approaching an injured spine by taking a history and asking individuals to bend certain ways while he observes them.
Nor was that issue brought up to him when he saw her for follow-up in 1999.

[Appellant's rehabilitation specialist] testified that during his first meeting with the Appellant most of the testing focused upon her neck and that it was his impression that her low back symptoms were improving sufficiently for her to attempt to return to work or a rehabilitation program.

During his second examination of the Appellant in February 1999, it became apparent that things had taken a turn for the worse. The Appellant stated that she had done well while she was away on vacation in January, but then the work hardening program led to a flare-up. He reviewed her exercises and techniques with her.

During this examination, [Appellant's rehabilitation specialist] found that her condition was quite different and that her range of motion was much more limited. The pain she reported on sensory examination was abnormal, and so widespread that it would not normally be compatible with ambulation. It was difficult to make a diagnosis with the wide variety of symptom reaction she was reporting and he recommended a CT scan for follow-up. He suggested a multi-

disciplinary treatment approach, including perhaps a physiotherapist and pain psychologist as well as a change in her medications. After receiving additional documentation that he had requested, he provided a narrative medical report on February 19, 1999.

[Appellant's rehabilitation specialist] indicated that his review of the Appellant's records reinforced his understanding that she might suffer from a chronic pain disorder and that several risk factors for this had been identified.

In [Appellant's rehabilitation specialist's] opinion, there was not any evidence that the examinations at the [rehab clinic #1] had enhanced the Appellant's back problems. He indicated that the notes he reviewed indicated that it had been a pretty straight forward, standard low back exam. That intake assessment had identified areas of weakness that needed improvement, including in the low back. In his view it is prudent and appropriate to screen for such back pain, as the areas of the back are inter-connected and there is a lot of overlap.

The Appellant demonstrated her exercises for [Appellant's rehabilitation specialist] in his office. He described the majority of them as basic, gentle exercises simulating daily living. Loads were acceptable and he encouraged the Appellant to continue these, as they were quite appropriate. He described the exercises as introductory, quite reasonable exercises to do and perfectly appropriate for someone even with a disc injury. Any intolerance the Appellant might have felt from sitting on a bike would not have caused damage but rather some discomfort and he noted that many people preferred walking on the track as opposed to sitting etc. Neither aerobic exercise was injurious and rather was an important part of a rehabilitation process.

The psychologist, [Appellant's psychologist], had reported that the Appellant was a pain-focused individual, pre-disposed not to cope well. In [Appellant's rehabilitation specialist's] view, with such wide spread weakness, an individual would not respond well to specific focal treatment. Disc herniation, he felt, would heal non-operatively ninety (90) to ninety-five (95) percent of the time and this patient did not fit into the parameters he would use to refer for surgery. In his view anything could have caused her flare-up, but the exercises he understood that she had done, were appropriate.

The panel also heard evidence from [text deleted], a physiotherapist on staff at the [rehab clinic #1]. She described her experience with treating many neck and back problems throughout her career, for the past thirty (30) years. She has also treated many herniated discs.

The witness testified that she had reviewed the Appellant's [rehab clinic #1] file. She described the program the Appellant underwent following her assessment. She reviewed the physiotherapist's notes as well as the diagrams of the exercises prescribed for the Appellant in detail, and demonstrated many of the exercises for the panel, explaining what they were meant to test, strengthen or stretch.

She reviewed the reports of the Appellant's progress through this program and noted that it had looked like she was gradually improving although, as one might expect, at the start of treatment she occasionally reported low back pain. However, there were notes from both physiotherapists that the Appellant's pain response had been excessive for the treatment provided, in the absence of any objective findings of worsening.

She described the exercises, however, as basic, gentle, entry level exercises done with a neutral spine and with a supervising therapist watching the client and correcting technique.

[Rehab clinic #1's physiotherapist] also testified regarding current research on pain science in the last ten (10) years. In her view pain is real and is a construct used by the brain as a system to protect us. Pain however does not need to equate with physical harm. All tissues heal to some extent but pain continuing beyond that is more associated with changes in the brain. The pain is a protective system encouraging the individual to stay hyper-vigilant to prevent more pain. This results in anxiety. The Appellant's history suggested that her pain was not in proportion to the physical findings. This was noted by many of her doctors and treating therapists. Factors such as fatigue, anxiety and her beliefs regarding her recovery were all driving factors to keep her pain at a high level. This pain is self-limiting, by encouraging the individual to hold themselves back to protect themselves from harm, and is not in the patient's conscious control in any way, shape or form.

The exercises performed, she emphasized, were gentle, appropriate, entry level exercises. The work simulation tasks were appropriate after an injury of the kind the Appellant had suffered. Her review of the records at the [rehab clinic #1] did not indicate or provide any specific mention of an incident or anything else to suggest that the Appellant sustained injury or a rupture of a disc while doing components of this program

Submission for the Appellant

Counsel for the Appellant noted that the parties agree that this appeal is complicated by the involvement of the prior work related injury on November 17, 1997. However, according to

counsel for the Appellant, the most significant complication occurred when MPIC sent the Appellant to the [rehab clinic #1] to participate in a reconditioning and work hardening program.

His review of the evidence indicated that a report from [Appellant's doctor #3] dated July 7, 1998 showed that the Appellant was doing quite well with her low back, with no further numbness and tingling in the legs, and she would be allowed to return to work with a limitation of lifting beyond thirty (30) pounds for the next two (2) weeks, and then return to full duties.

It was the Appellant's position that her low back was well on its way to being healed at this point, but problems with her neck and shoulders, resulting from the motor vehicle accident, required further attention. This led to her examination by [Appellant's rehabilitation specialist], who noted that she would be unable to tolerate the activities of her previous employment as a waitress, with the main limiting factors being the neck and lifting her arms over her head. He recommended a return to work program emphasizing improved range of motion and the development of a home exercise program for her neck and shoulders. [Appellant's rehabilitation specialist] further noted the Appellant may have aggravated/exacerbated her lower back symptoms and that she was displaying features of chronic pain syndrome.

This resulted in a further referral to physiotherapy and an assessment at the [rehab clinic #1] on October 7, 1998. The physiotherapist who prepared the assessment report dated October 8, 1998, [text deleted], noted that the Appellant demonstrated cooperation throughout the reconditioning assessment but that she also displayed significant pain behaviours and that she frequently self-limited her abilities due to pain.

The psychologist, [Appellant's psychologist], also noted that the Appellant may not have been motivated to proceed with the program. However, the Appellant indicated at a team meeting on October 27, 1998 that she agreed to the program and just wanted to be rid of her pain and get on with her life and back to work.

A CT scan dated February 23, 1999 showed an enlargement of the L5-S1 herniated disc and impingement on the S1 nerve root. This, counsel submitted, was objective medical evidence of a deterioration of the Appellant's L5-S1 disc. This deterioration, he submitted, occurred as a result of the involvement of the [rehab clinic #1].

Counsel noted that as early as December 10, 1998, the Appellant had reported to [Appellant's doctor #4] that new areas of her body were experiencing pain. She ascribed these to the old workplace related injury and new exercises prescribed for her back. On December 11, 1998, [Appellant's physiotherapist #1] reported a recurrence of low back and left leg symptoms.

The Appellant and her husband went on vacation from December 30, 1998 until January 13, 1999. She returned to the [rehab clinic #1] on January 14, 1999. New exercises were prescribed for her at that time and the Appellant reported that they increased her lower back pain and caused left leg pain and numbness. On January 20, 1999 the case manager reported that the Appellant complained that her back was acting up because of the exercises and that she expressed concerns about returning to work because of the lifting and carrying requirements, although she did want to get back to work.

Also in January 1999, [Appellant's doctor #1] recommended an MRI for the Appellant.

On January 24, 1999, a medical note was provided by [Appellant's doctor #5] identifying active muscle spasms precluding any physiotherapy until they settled. On January 29, 1999, physiotherapist, [Appellant's physiotherapist #2] was asked to do an assessment of the Appellant due to her reported flare-up of lower back and leg pain. She found the possibility of dural or nerve irritation and felt that it would be prudent to have the Appellant refrain from any potentially aggravating positions and that physiotherapy treatment was not indicated at that time.

Counsel for the Appellant submitted that this showed that at this point, there was concern about the impact of the [rehab clinic #1] program activities and the impact the program activities were having on the Appellant's lower back. Both MPIC and the [rehab clinic #1], he submitted, were aware of concerns relating to the Appellant's pre-existing lower back injury. The activities prescribed would place significant stress on the lower back.

A report from [Appellant's rehabilitation specialist] dated February 19, 1999 noted that the Appellant's chronic pain disorder appeared to have intensified since the motor vehicle accident. However, Counsel pointed out that [Appellant's doctor #3's] examination of July 1998 had shown that there was significant improvement to the lower back injury and no further numbness or tingling in the left leg.

Counsel for the Appellant reviewed [Appellant's rehabilitation specialist's] reports as well as his evidence at the hearing. He noted that [Appellant's rehabilitation specialist] had reported that:

> Given the previous history of a low back injury and what sounds like a resolving lumbosacral radiculopathy, it is possible that a portion of the [Appellant's] symptoms can be attributed to either an exacerbation of her pre-existing condition or an enhancement of it. The latter term would imply an aggravation of the pre-existing condition that would alter its natural history.

Counsel for MPIC submitted that [Appellant's rehabilitation specialist's] reports provided evidence demonstrating a link between the activities of the [rehab clinic #1] reconditioning program and the work hardening program and the worsening of the injury affecting the lumbosacral spine and left leg. Although [Appellant's rehabilitation specialist] testified that the bulge on the Appellant's CT scan showing a disc herniation was probably present back in 1997 but to a lesser degree, counsel for the Appellant emphasized that the interval between the two studies, taken December 13, 1997 and February 23, 1999, showed that the size of the herniated fragment had increased and there was further displacement of the S1 root.

Counsel for the Appellant also relied upon the reports of [Appellant's orthopaedic surgeon]. On April 13, 1999, [Appellant's orthopaedic surgeon] stated that the Appellant appeared to have left-sided sciatica, likely S1 root initiated, from the original work accident and aggravated by the work hardening therapy at the [rehab clinic #1].

In a report dated May 11, 1999, [Appellant's orthopaedic surgeon] reviewed the findings of a CT scan taken the same day and reported that it showed persistent L5-S1 disc herniation on the left with entrapment of the S1 nerve root. He performed surgery to relieve the pressure on the S1 nerve on May 20, 1999.

Although in a report dated May 12, 1999, [MPIC's doctor] opined that this treatment was not causally related to the motor vehicle accident, counsel for the Appellant noted that while the Appellant's lumbar disc herniation followed the work related injury, that injury had significantly improved by July 1998 and the Appellant was doing quite well with her low back. It was the [rehab clinic #1] program which re-injured her lower back and caused her lower back and disc injury to become more symptomatic and more herniated, creating left side sciatica.

[Appellant's orthopaedic surgeon] reported on September 28, 1999 indicating that historically, the Appellant's lower lumbar spine was injured in November 1997. The motor vehicle accident which followed appeared to have strained her back and caused more mechanical problems than sciatic problems, but when the Appellant went to the [rehab clinic #1] for work hardening she experienced increasing lower lumbar back pain and radiating left leg pain. The CT scan of May 11, 1999 showed that the disc herniation was now larger and that the condition had been enhanced or progressed and in [Appellant's orthopaedic surgeon's] view, the only common feature creating this would be the [rehab clinic #1] work hardening experience.

[Appellant's orthopaedic surgeon] reported again on January 4, 2002 and indicated that the disc herniation was aggravated by the motor vehicle accident and further aggravated by the work hardening activities at the [rehab clinic #1].

Counsel for the Appellant noted the decision of the Workers' Compensation Board Appeal Commission on May 14, 2002 where the Commission found:

> … conditioning and work hardening required by MPIC to get her back to work created the disc injury to become more symptomatic and more herniated, creating left-side sciatica. … the herniation was worsened and produced left-side sciatica after two attempts of work hardening at the [rehab clinic #1].

The foregoing opinion, he submitted, clearly leaves one with the impression that the necessity for back surgery came about as a result of MPIC's authorized treatment. In other words, this surgery was sequela of the motor vehicle accident.

Counsel also reviewed an independent medical assessment report from [independent orthopedic specialist] dated December 11, 2007. [Independent orthopedic specialist] noted that the

rehabilitation at the [rehab clinic #1] was not directed solely to the motor vehicle injuries but also involved some exercises directed at the back and lower limbs, and in particular, pelvic tilting types of exercises. The rehabilitation program made the lower back and left leg symptomology worse. CT scans taken before and after this program showed an increase in the size of the disc herniation. He felt that the exercises may well have contributed to this, as may have the motor vehicle accident itself. Although the argument could be made that this was just a natural evolution of the disc herniation, he felt that on consideration of the balance of probabilities, a combination of the motor vehicle accident and the reconditioning program exacerbated her back condition, worsening it and leading to surgery. The fact that the Appellant was not relieved of her symptoms by her surgery did not mean that surgery was not correct or that the diagnosis was not correct, but rather that she may have developed fibrosis following surgery which could cause a continuation of symptoms.

A second report was provided by [independent orthopedic specialist] dated October 10, 2008. He considered views expressed by [MPIC's doctor] on June 26, 2008, and opined that on the balance of probabilities, the motor vehicle accident, (plus or minus the rehabilitation program) was more likely to be the cause of a disc herniation than an airplane flight with prolonged sitting or coughing. He noted that a more likely cause could be found in a motor vehicle accident which was severe enough to fracture ribs of a passenger.

Counsel also pointed to a report dated October 9, 2008 from [Appellant's occupational therapist] of [text deleted] Rehabilitation Consulting Services. That report responded to a request for an opinion as to whether the reconditioning exercises and work simulation activities the Appellant was involved in at the [rehab clinic #1] could have aggravated, or exacerbated or enhanced the pre-existing disc injury. That opinion identified three (3) exercises from an exercise sheet

provided, as well as two (2) work hardening activities that could be problematic to the pre-existing lumbar disc injury.

> Lifting, even with minimal weight, with a forward flexed posture is contraindicated. The upper part of the human body represents *approximately* 65% of our total body weight. Therefore, for example, if a 150 pound individual lifted a one pound weight from the floor with in appropriate body mechanics, their back would actually be lifting one pound (the object) and 97.5 pounds (the weight of the upper body).

Counsel for the Appellant submitted that the rehabilitation program at the [rehab clinic #1], and, in particular certain exercises and activities prescribed by the [rehab clinic #1], were not directed at her upper back symptoms and exacerbated her lower back condition. There was some temporary exacerbation of the lower back condition following the motor vehicle accident and then an enhancement of the L5-S1 disc herniation resulting from the rehabilitation program. Both the attending orthopaedic surgeon, [Appellant's orthopaedic surgeon], and an independent medical examination by [independent orthopedic specialist] confirmed that on the balance of probabilities, the motor vehicle accident and the subsequent program at the [rehab clinic #1] exacerbated the Appellant's back condition, and he submitted that the surgery was therefore a sequela of the motor vehicle accident.

Thus he submitted, MPIC materially contributed to and/or caused the worsening of the Appellant's herniated disc. But for the [rehab clinic #1] reconditioning and work hardening activities that enhanced the pre-existing low back injury and caused the reoccurrence and worsening of the Appellant's left leg symptoms, the Appellant's low back injury would have continued to improve and she would have returned to work at her previous occupation as recommended by [Appellant's doctor #3] in July of 1998. Conditioning and work hardening required by MPIC to get her back to work, caused the disc injury to become more symptomatic and more herniated.

The Appellant received wage loss benefits from the Workers' Compensation Board until September 4, 2001. Consequently, counsel submitted that should the Commission decide in the Appellant's favour, MPIC should be responsible to pay IRI benefits from September 5, 2001 to date.

Counsel submitted that the Appellant has shown on a balance of probabilities that the exacerbation of her lower back condition was caused by the motor vehicle accident and the resulting return to work program, and as such, the decision of MPIC's Internal Review Officer should be overturned and the Appellant's appeal allowed.

Submission for MPIC

Counsel for MPIC noted the complexity of this case, which was made more difficult by the fact that MPIC was not made aware of the Appellant's contention, which was heard when she gave her oral testimony, that not only did the [rehab clinic #1] program aggravate her disc injury, but that [Appellant's rehabilitation specialist's] examination also caused damage.

At the hearing, she testified that her disc was actually flared up by [Appellant's rehabilitation specialist] in August of 1998, that it continued to be sore when she was assessed at the [rehab clinic #1] in October of 1998, and then aggravated more by the program at the [rehab clinic #1] in November and December in 1998. Thus, she gave clear evidence that her back was aggravated at [rehab clinic #1] well before she went on her trip to [text deleted].

Counsel for MPIC contended that the Appellant's theory becomes problematic when faced with other potential factors which were likely to have flared her disc problems, such as her respiratory problems and coughing, sitting in a long plane ride to her vacation, and the usual activities of day-to-day life.

Counsel noted that there was no supporting evidence for the Appellant's theory. None of the clinical notes from the [rehab clinic #1], notes from [Appellant's doctor #1], reports from [Appellant's rehabilitation specialist] or [MPIC's doctor] show any evidence or communication from the Appellant complaining about what [Appellant's rehabilitation specialist] did. Even the Appellant's mother and husband did not recall the Appellant worsening after [Appellant's rehabilitation specialist's] examination. Nor was there any indication in the documents on the file regarding her WCB appeals indicating [Appellant's rehabilitation specialist] flared her disc when he examined her in August 1998. The evidence of [Appellant's rehabilitation specialist] that he didn't even touch her back and examined the Appellant using the methods he uses on a daily basis to examine patients with herniated discs, failed to support this theory as well.

This is why counsel for MPIC surmised, the Appellant's counsel, in his submission, had not suggested that [Appellant's rehabilitation specialist] did anything to injure the Appellant's back.

Similarly, counsel for MPIC submitted that there was no evidence that the physiotherapist, [Appellant's physiotherapist #1], did anything to flare up the Appellant's back when he assessed her in 1998. There was no indication in the clinical notes from the [rehab clinic #1], the reports or notes from [Appellant's doctor #1], or of messages from the Appellant to MPIC complaining of this. While the assessment may have made her feel some discomfort, that is a far cry from flaring up a disc injury or enhancing her lower back injury. [Rehab clinic #1's physiotherapist]'

evidence also noted that her review of the file found no sign that [Appellant's physiotherapist #1] did anything to flare up the Appellant's back.

The Appellant's testimony was not credible, he submitted, not only in this respect. In several other areas, she was shown to be lacking in credibility.

Her evidence regarding which activities she did around the house in 1998 was inconsistent with reports she had made and which were recorded in the [rehab clinic #1] notes.

She testified that she did not know why she was seeing the psychologist, [text deleted]. However, [Appellant's psychologist] report said that the Appellant knew why she was seeing a psychologist for screening and was unhappy with the referral.

Her testimony regarding a respiratory infection that she had, as well as the fracture of her mother's ribs in the motor vehicle accident, were shown to be inconsistent or incorrect.

She accused [Appellant's rehabilitation specialist] of apologizing for misdiagnosing her, but the only reference in the chart relating to an apology (and [Appellant's rehabilitation specialist's] evidence regarding an apology) was in reference to his being sorry that he was not able to forward his report directly to her.

Counsel for MPIC also suggested that it was important to note that she had never told [Appellant's orthopaedic surgeon], her surgeon, that she had a prior 1990 back injury as she did not think that was important, and that her reporting to [independent orthopedic specialist],

(which included comments regarding burns sustained in the motor vehicle accident which were really only bruises) demonstrated inaccuracies.

The Appellant, he submitted, was not a credible historian.

Counsel also submitted that the Appellant was a high pain-focused individual. She disagreed with this, although this was a recurring theme in reports from all her caregivers and documented in almost all of the reports.

Counsel submitted that the preponderance of the evidence showed that the [rehab clinic #1] did not enhance the Appellant's disc injury. He pointed to the reports of [Appellant's rehabilitation specialist] as well as his testimony. He also noted the reports of [rehab clinic #2's doctor] and [MPIC's doctor] and the testimony of [rehab clinic #1's physiotherapist].

[Appellant's rehabilitation specialist] and [rehab clinic #1's physiotherapist] noted that the exercises prescribed for the Appellant were safe and reasonable, and nothing in them would cause a flare up. There was no record that the Appellant sustained an injury to her back at [rehab clinic #1] or was involved in any activity which might cause disc flare up. Indeed, there was minimal progression in the exercises from when they were first prescribed.

Counsel submitted that there was no evidence that the Appellant's back was worsening throughout November and December. Once in a while there was a record of back pain with some radiating into the leg, but this then cleared up. The pain might sometimes increase, but then would go down. Evidence on the whole showed that there was no real worsening of the disc during this time period.

Counsel also submitted that the panel should look very carefully at the reports from [Appellant's orthopaedic surgeon] and [independent orthopedic specialist].

He noted that [Appellant's orthopaedic surgeon] had not received any of the reports from [rehab clinic #1] and was basing his opinion only upon what the Appellant had told him. He also mentioned that the Appellant had denied having any previous problems with her back, although she did have a back injury in 1990 which he doesn't appear to know about. He clearly stated that he was basing his information on what the Appellant told him, rather than his own review of the records at the [rehab clinic #1].

[Independent orthopedic specialist] stated that the exercises may have contributed to the increase in the size of the Appellant's disc herniation. However, he included his view that pelvic tilting exercises led to an increase in symptoms. Yet, there was no evidence of any exercise involving pelvic tilting, and this was supported by clear evidence from [Appellant's rehabilitation specialist] and [rehab clinic #1's physiotherapist]. He relied on the fact that the motor vehicle accident was so severe as to fracture the ribs of the passenger, but there was no evidence to support that the Appellant's mother's ribs were indeed fractured. Counsel also noted that while [independent orthopedic specialist] is a respected orthopaedics expert, he is not a back expert and has no special expertise in this area, and that he saw the Appellant nine (9) years after the relevant events occurred.

In regard to the report of [Appellant's occupational therapist] of [text deleted] Rehabilitation, counsel noted that she also commented on many exercises which the Appellant was not even prescribed or doing.

Unfortunately for the Appellant, the Workers' Compensation Board appears, in its decision, to have latched onto part of [Appellant's orthopaedic surgeon's] report where he mentioned that the work hardening program at [rehab clinic #1] aggravated her back. This was, however, misguided, as [Appellant's orthopaedic surgeon] did not even have the records from [rehab clinic #1], so he was just basing his views on what the Appellant told him. In this respect, counsel submitted the Appellant had no one to blame but herself, for misleading [Appellant's orthopaedic surgeon]. But it is not necessarily clear that this was a case where WCB should have accepted responsibility after September 2001. We do not know what WCB's policy is when someone has a work-related disc injury which then flares up at home, for example.

Certainly though, this is not a case where MPIC has any responsibility. Unfortunately for the Appellant, she had a disc herniation that was not covered, but this is no different from anyone else that sustains an injury at home.

This was not a case of the Appellant slipping through the cracks between two feuding sources (WCB and MPIC). Whatever may have caused her disc to flare up, resulting in surgery in May of 1999 and leading to her ongoing issues, it has not been proven by a preponderance of evidence that it was related to the motor vehicle accident or activity at the [rehab clinic #1].

More likely, he submitted that it flared up due to other factors such as:

- inherent progression of her herniated disc;
- daily activities;
- respiratory infection and constant coughing;

- prolonged sitting in an airplane, or
- some other unknown cause.

Counsel also submitted that even if [rehab clinic #1] had enhanced her WCB disc injury, which he submitted it did not, this does not mean that the injury was caused by a motor vehicle accident. He cited the case of *Mitchell v Rahan (2002), 163 Man. R. (2d) 87 (CA)* as authority that this would create a separate tort action against the [rehab clinic #1], but was not the responsibility of MPIC. MPIC sent her for neck and upper shoulder treatment and it would not be their responsibility if [rehab clinic #1] did anything to the Appellant's lower back.

In summary, counsel submitted that the Appellant was not entitled to anything further from MPIC. She has not met the onus upon her of establishing, on the balance of probabilities and by a preponderance of evidence, that she has any entitlement to benefits from MPIC for the disc herniation.

Discussion

Manitoba Public Insurance Corporation Act

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;

(b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;

(c) the full-time earner is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Manitoba Regulation 37/94

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 onus is on the Appellant, to show, on a balance of probabilities, that she continued, beyond July 15, 1999 to be unable to hold employment on account of physical or mental injury caused by the motor vehicle accident of January 12, 1998.

The panel has reviewed the testimony at the hearing, the medical reports and other documentation on the indexed file, and the submissions of counsel.

The panel finds, on the whole, that the Appellant is not a reliable historian. This is based on the documentation on the file, her testimony and cross-examination, and the videotaped evidence. Given the many discrepancies and examples of vague or imprecise recollections in her accounts, we find that she was not able to clearly articulate, with credibility, what occurred.

The panel has considered the evidence of [Appellant's rehabilitation specialist] and [rehab clinic #1's physiotherapist] which we find explained, to a large degree, the evidence from [Appellant's orthopaedic surgeon], [independent orthopedic specialist] and [Appellant's occupational therapist] that was submitted in support of the Appellant's claim.

We find that [Appellant's orthopaedic surgeon], [independent orthopedic specialist] and [Appellant's occupational therapist] did not have as much access to precise, relevant information regarding the actual exercises which the Appellant performed, as [Appellant's rehabilitation specialist] and [rehab clinic #1's physiotherapist] did.

[Appellant's orthopaedic surgeon], in his September 28, 1999 report stated:

> … I have had no access to any files or information relating to medical or paramedical documentation of complaints and physical findings from the initial work-related injury, the initial vehicle injury and any visits to the [rehab clinic #1] in the Fall of 1998 or the New Year of 1999. Therefore I cannot specifically comment about what the back and left leg symptoms or signs were, and what specific activities or exercises were required at work hardening, and whether they would be detrimental or potentially increase a patient's symptomatology.
>
> … I have no documentation on the file other than her comments that would confirm or deny there was symptomatology referable to her left leg or sciatica present at that time. Therefore it is very hard to know if there is some ongoing overlap from the initial work-related injury and the initial motor vehicle accident. Lumbosacral disc herniation with subsequent left S1 sciatica is the injury preventing her from working at this time. Chronologically it appears to have been initiated by the work-related injury in December 1997. There has been some aggravation with the motor vehicle accident in January 1998. Historically the need for work hardening and conditioning made [the Appellant] more symptomatic when attempting to do same in the Fall of 1998 and early 1999. The most recent CT myelogram of May 11, 1999, shows that the disc herniation is now larger and hence the condition has been enhanced or progressed. The only common feature creating same would be the work hardening experience. However, I have seen no information or files about what was found when [the Appellant] attended the [rehab clinic #1], either from a physician's office or the [rehab clinic #1] treating therapist.
>
> … The only information I have on file that the [rehab clinic #1's] treatment aggravated [the Appellant's] back condition is her recorded subjective complaints of worsening of her back and left leg symptoms will (sic) attempting work hardening on two occasions.

[Independent orthopedic specialist] noted pelvic tilting exercises done by the Appellant, in his letter of October 10, 2008, although the evidence at the hearing did not support the conclusion that the patient actually performed pelvic tilting exercises that would have put her lower back at risk.

> … The patient attended physiotherapy at the [rehab clinic #1] to deal with the motor vehicle accident symptomatology in which was for the most part confined to the upper body. Nevertheless the exercises involved among other things, pelvic tilting which is definitely not an upper but in fact a lower body exercise and she

> did note an exacerbation in her symptomatology at the time these exercises were carried out.

[Appellant's occupational therapist] also made comments in her letter of October 9, 2008, regarding exercises which, the evidence showed, the Appellant was not asked to perform.

This contrasts with the evidence of [Appellant's rehabilitation specialist] and [rehab clinic #1's physiotherapist].

The evidence of [Appellant's rehabilitation specialist] and [rehab clinic #1's physiotherapist] was detailed and specific regarding the exercises and treatment described and followed. They testified regarding the standard physiotherapy treatment for injuries of this nature and compared this to their review of chart notes and notes taken at the [rehab clinic #1]. This included the diagrams of the exercises actually performed, as well as levels of difficulty and number of repetitions.

The evidence of [Appellant's rehabilitation specialist] and [rehab clinic #1's physiotherapist] also included an explanation of pain and a description of the Appellant's pain-focused behaviour. [Appellant's rehabilitation specialist] was concerned during his first examination that an element of a chronic pain disorder might be present and felt that a pain psychologist might help identify the factors which can precipitate a focus on pain and help the Appellant deal with it. He was clearly of the view from all of the information on the Appellant's file that her significant pain behaviour limited her function.

[Appellant's rehabilitation specialist] expressed the view that anything could have caused the Appellant's flare up. In his experience, many people never know what caused a rupture or

triggered a flare up of a disc, but he was not of the view that any of the [rehab clinic #1] exercises was the cause.

It is not within the panel's jurisdiction to make findings regarding the conclusions or decisions of the Workers' Compensation Board Appeal panel. We have reviewed this decision, but have viewed it in context with the totality of evidence on the file and before the panel at the hearing.

In this regard, the panel has concluded that the Appellant has not met the onus upon her of showing, on a balance of probabilities, that any factors flowing from the motor vehicle accident or the accident itself rendered the Appellant unable to hold employment beyond July 1999. The Appellant's failure to provide credible evidence, and the reliance by [Appellant's orthopaedic surgeon], [independent orthopedic specialist] and [Appellant's occupational therapist] upon her subjective complaints and accounts, lead us to find that the evidence is not sufficient to establish that the treatment at the [rehab clinic #1], [Appellant's rehabilitation specialist's] examination, or the motor vehicle accident, caused her to be unable to continue her employment.

This panel finds the Appellant has failed to show, on a balance of probabilities, that the motor vehicle accident or the treatment flowing from it (including the examination by [Appellant's rehabilitation specialist] and the Appellant's program at the [rehab clinic #1]), was the cause of the progression of the Appellant's disc herniation or of the exacerbation or worsening of her back condition. We find, therefore, that she was not entitled to receive Income Replacement Indemnity benefits from MPIC beyond July 15, 1999.

Accordingly, the decision of the Internal Review Officer dated December 3, 2003 is hereby confirmed and the Appellant's appeal dismissed.

Dated at Winnipeg this 26th day of February, 2009

MS LAURA DIAMOND

MS MARY LYNN BROOKS

MR. PAUL JOHNSTON