Manitoba

# Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]**
**AICAC File No.: AC-07-01**

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| **PANEL:** | **Mr. Mel Myers, Chairperson**<br>**Mr. Errol Black**<br>**Mr. Paul Johnston** |
| **APPEARANCES:** | **The Appellant, [text deleted], was represented by Mr. Dan Joanisse;**<br>**Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Dianne Pemkowski.** |
| **HEARING DATE:** | **March 30, 2009, March 31, 2009 and May 20, 2009** |
| **ISSUE(S):** | **Entitlement to Personal Injury Protection Plan ("PIPP") Benefits** |
| **RELEVANT SECTIONS:** | **Section 81(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')** |

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.**

## Reasons For Decision

On October 31, 2005, [the Appellant] was the driver of a truck involved in a two-vehicle, head-on collision, which occurred on the highway near [text deleted], Manitoba. At the time of the accident the Appellant was almost [text deleted] years old and had been employed as a working foreman at [text deleted] for almost four years.

After the motor vehicle accident the Appellant continued to work. On January 17, 2006 the Appellant advised his case manager at MPIC that he had no outstanding expenses for treatment (or anything else) and agreed that his claim file with MPIC should be closed.

The Appellant had low back pain prior to the motor vehicle accident. An X-ray report in respect of his lumbosacral spine on January 21, 2004 indicated:

> "There is spondylolysis of L4 with a grade I/IV spondylolisthesis of L4 and L5. The spondylolisthesis is developed since the previous exam of March 1995. Disc space narrowing is also developed at L4-5. The remaining disc spaces are normal. No other significant abnormality is seen."

The Appellant attended at the [text deleted] Physiotherapy Clinic in respect of his low back pain. The physiotherapist, [text deleted], provided a report to the Appellant's personal physician, [Appellant's doctor #1], dated March 28, 2004 which indicated the Appellant had attended physiotherapy for two sessions and that signs and symptoms in respect of his low back pain were resolving. [Appellant's physiotherapist] also reported that it was estimated he would need to be seen for two or three more sessions. The Appellant in his testimony before the Commission indicated that he did attend these sessions.

The ambulance report in respect of the Appellant dated October 31, 2005 (particularly the diagram on the first page thereof) makes specific mention of neck and right shoulder pain only. The report states in part that the Appellant "states no loss" of consciousness with pain restricted to neck and shoulder. A record provided by the RCMP indicated "two occupants in truck, occupant in truck unconscious".

The Critical Care Record of October 31, 2005 indicated that the Appellant suffered from right shoulder pain radiating to back of neck and back soreness with buttocks getting numb.

The Internal Review Officer in his decision dated December 15, 2006 summarized the Emergency Department records dated October 31, 2005 as follows:

> "The emergency department records indicate that you were alert and coherent upon arrival. The "presenting problem" was described as "Pain neck and [right] shoulder". You were triaged at 0835. The nursing notes for 0915 mention "Sore back", and the notes for 0933 indicate "Back [increasing] soreness. Buttocks getting numb." [Note: These are the only references to back pain until March, 2006.] You were discharged home at 1045."

In a memo to file dated January 17, 2006 the case manager reported a telephone discussion with the Appellant. In that telephone discussion the Appellant informed him he had not gone for any treatment and had no other expenses and the case manager informed the Appellant that he would be closing the file.

A CT Scan report dated March 23, 2006 indicates:

> "Clinical history: back pain for 3 yrs, worse if stands or stays in 1 position, parasthesia & numbness in feet & legs work poorly at times…
>
> **IMPRESSION:** Grade I/IV spondylolisthesis at L4-5 due to bilateral isthmus defects."

[Appellant's doctor #1], the Appellant's personal physician wrote on April 3, 2006, to [Appellant's orthopedic surgeon], an orthopaedic surgeon with the [text deleted] Clinic, and stated:

> "This gentleman has had chronic low back pain. He was noted in January 2004 to have an L4/5 spondylolisthesis. This was considered to be a grade I/IV on x-rays taken March 10, 2006. CT scan confirms bilateral isthmus defects with a grade I/IV spondyloisthesis at L4/5.
>
> He is a carpentar.(sic) Currently he can only work for the first two hours each morning after that he has to rest every 10 minutes. He is very uncomfortable standing in one position. He experiences paresthesia and numbness in his feet. He says his legs at time will not work properly. He is okay during the night, although he has to be careful getting out of bed in the morning.
>
> On examination: straight leg raising is 75 degrees bilaterally. Knee jerks are equivical and ankle jerks are present.

> Although he has only got a grade I/IV spondylolisthesis his symptoms seem quite severe. He is a well motivated individual and I wonder if he is a candidate for some surgical intervention."

The case manager in a report to file dated April 5, 2006 reports a discussion he had with the Appellant as follows:

> "[The Appellant] said he was advised by his MD (Appellant's doctor #1) (sic) to have his Injury File re-opened as [the Appellant] is having problems with his back, may require back surgery. [The Appellant] advised me that he had back problems prior to MVA, but after the MVA the back problems were worse. [Appellant's doctor #1] had sent [the Appellant] for a CT Scan and has referred him to a Specialist in [text deleted]. [The Appellant]s (sic) said [Appellant's doctor #1] said he has 2 cracks in the vertebrae, will likely require surgery. [Appellant's doctor #1] said this also could have been caused by the MVA. I advised [the Appellant] that I would have his file reopened and assigned to a Case Mgr."

The Appellant completed a Workers Compensation Injury Report Form on April 26, 2006. In this report, the Appellant refers to a workplace accident that occurred approximately in July of 2004 when an 18 foot wall fell over causing the Appellant to overextend/stretch his back.

The Internal Review Officer's decision further states:

> "[Appellant's doctor #2] submitted a form report dated April 13, 2006. The examination date is not indicated on the report, but the other records suggest it likely took place on November 7, 2005 – one week post-accident. The report mentions neck and right shoulder pain only. There is no mention of back pain in either the "Symptoms" or the "Physical Signs" portions of the report."

[Appellant's orthopaedic surgeon] provided a report to [Appellant's doctor #1, dated May 9, 2006. In this report [Appellant's orthopaedic surgeon] states:

> "Thank you for asking me to see this [text deleted] year old patient. He works as a carpenter and presents with a history of having had progressive pain in his lower back for the past 2 years. This occurred when a wall fell onto his back. He continued working but since that time has noticed progressive pain with radiation down to his right leg. This was somewhat improved following treatment but then he had a further relapse in October 2005 when he was involved in a motor vehicle accident. This was a head on collision. He was wearing a seatbelt at the time but had to be cut out of the car by the

> Emergency Personnel. Since then he has noticed more progressive back pain as well as right leg pain. The right leg pain is typically affecting the L4 dermatome with pain to his thigh and medial aspect of his lower leg. There is equal back and leg pain. Typically the pain is worse when standing approximately 2 hours but he has to keep changing position. He can walk for ½ block only. At the time he has severe leg pain forcing him to either drag his leg or to stand still. He noticed a severe deterioration after January, 2 months following his motor vehicle accident. He denies any bladder or bowel dysfunction. He has been taking medication without much success. He has been using Arthrotec and Tramacet."

[Appellant's orthopaedic surgeon] further reported:

> "The neurological examination of his lower limbs confirm weakness of his right quads as well as soleus muscle. This is partly due to pain and partly due to weakness.
>
> The patient is not aware of any sensory disturbance in his lower limbs and this appeared to be normal on examination. Vibration sense however was somewhat limited on the right side. This also affected the pain sensation which is certainly less on the left at the level of L4.
>
> The reflexes were intact.
>
> X-rays dated 2004 and 2006 confirms a spondylolisthesis of L4-5. This has remained rather constant. However on the CT scan there is certainly foraminal stenosis due to disc impingement which certainly could be related to the work accident as well as the motor vehicle accident. (underling added)
>
> CONCLUSION:
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> The patient has therefore had chronic back pain with progressive neurological dysfunction. I have advised an L4-5 decompression, fusion and fixation. This will include a PLIF fusion. The patient has agreed to all of this in spite of all the risk factors which were clearly outlined to him."

The Appellant made an application for compensation with MPIC dated May 25, 2006. In response to a question whether the injuries in the motor vehicle accident affected his ability to perform household duties the Appellant stated "Yard work and heavier chores are very limited for me". This incapacity began on October 31, 2005. In response to what job duties the Appellant could not perform due to the accident, he stated "I'm not able to get fully involved in the day to day business aspect. The business builds custom homes & cabinetry."

[Appellant's doctor #1], the Appellant's personal physician, provided a narrative to MPIC dated June 27, 2006 as follows:

> "[The Appellant] did have previous low back pain, which had been troublesome since 2003. On January 21, 2004 an xray of his lumbo-sacral spine showed a grade I/IV spondyloisthesis at L4/5. It was indicated that the spondyloisthesis had developed since a previous examination in March 1995.
>
> [The Appellant] has been taken off of work, because of low back pain with associated neurological symptoms in his legs. He last worked on May 04, 2006. [The Appellant] is restricted from physical work because of low back pain, and neurological symptoms in his legs.
>
> [The Appellant's] current situation is not related to his motor vehicle accident. Low back and leg symptoms may have been aggravated, but I see no record of back pain being recorded at the time of his motor vehicle accident..." (underling added)

MPIC's case manager referred the Appellant's entire medical file to [MPIC's doctor] who is a Medical Consultant with MPIC's Health Care Services and requested [MPIC's doctor] to determine whether there is a medically probable cause and effect relationship between the Appellant's current clinical status and the motor vehicle accident of October 31, 2005.

[MPIC's doctor] summarizing the incidents relating to the motor vehicle accident stated:

> "The claimant attended the [text deleted] Medical Clinic on November 7, 2005, approximately 7 days following the above motor vehicle collision. The subjective symptom complains were of dizziness and headache with nausea and vomiting. Neurologic examination is documented to be normal.
>
> The next visit recorded to the [text deleted] Medical Clinic occurred on March 10, 2006. The clinical encounter notes describe "bad back x 3 year on Arthrotec – carpenter, aggravated during work". There is a description of normal motor function in the legs and no tenderness in the lumbar spine. Analgesic medications and a back brace are prescribed.
>
> The claimant is again seen on March 16, 2006 at the [text deleted] Medical Clinic. The subjective complaints are of back pain and paresthesias into the feet and legs intermittently. . .
>
> The claimant saw [Appellant's orthopaedic surgeon] on May 9, 2006 and he recommended L4-5 decompression, fusion, and fixation. [Appellant's orthopaedic

> surgeon] opines that "there is certainly foraminal stenosis due to disc impingement which could be related to the work accident as well as the motor vehicle accident"."

[MPIC's doctor] with respect to the issue of causation stated:

> "With respect to the claimant's diagnosis of spondylolytic spondylolisthesis, this condition predates the motor vehicle collision. Accordingly, there is no probable cause and effect relationship between this diagnosis and the motor vehicle collision. (underling added)
>
> With respect to the claimant's back pain and progressive neurological dysfunction, the cause (A) is medically probable to the extent that there is independent confirmation of the October 31, 2005 motor vehicle collision. The effect/diagnosis (B) is medically probable to the extent that the motor vehicle collision was of sufficient magnitude to cause an aggravation of a pre-existing spondylolytic spondylolisthesis. To the extent that the claimant did not report significant back pain seven days following the motor vehicle collision and to the extent that the claimant did not present for medical care until approximately 4 ½ months following the motor vehicle collision and to the extent that there has been progressive deterioration of neurologic function since 4 ½ months following the motor vehicle collision until June 6, 2006, in my opinion, there is not a biologically plausible temporal relationship between the motor vehicle collision and the claimant's current diagnosis that would establish a probable cause and effect relationship. (underlining added)
>
> In summary, on the balance of probabilities, the claimant's current clinical status is not causally related to the motor vehicle collision in question."

On August 22, 2006 the case manager wrote to the Appellant advising him that MPIC was unable to provide any PIPP benefits to the Appellant on the grounds that his injuries were not related to the motor vehicle accident. In arriving at this decision the case manager relied on the medical opinion of [MPIC's doctor], MPIC's Health Care Consultant.

On September 11, 2006 [Appellant's orthopaedic surgeon] wrote to [Appellant's doctor #1] and indicated he saw the Appellant approximately 10 weeks after the Appellant's back surgery. [Appellant's orthopaedic surgeon] reported that the Appellant was happy with the results since he no longer had leg pain whatsoever and had only minimal low back pain. [Appellant's orthopaedic surgeon] concluded:

> "This patient, therefore, has known L4-5 spondylolisthesis which was aggravated following his motor vehicle accident. This was in October, 2005. The patient was treated soon thereafter by yourself with anti-inflammatories and pain management but in spite of this the problem progressed.
>
> There is not doubt, therefore, that the motor vehicle accident, which was a head-on collision, certainly accentuated his problem. At the same time, there is no doubt that he did have an underlying spondylolisthesis. As you know, however, the incidence of spondylolisthesis in the general population is about 15% for males. Therefore, there is no doubt that the accident aggravated the underlying condition. Therefore, there should be an appropriation of any claim in the future with 50% being for the underlying condition, 50% being for the recent accident." (underlining added)

The Appellant made an application for review of the case manager's decision on September 22, 2006.

On November 1, 2006 [Appellant's orthopaedic surgeon], in a letter to [Appellant's doctor #1], indicated he saw the Appellant again and that it was now four months since his surgery. [Appellant's orthopaedic surgeon] further stated:

> "There seems to be some confusion regarding the impact of his motor vehicle accident on his progression of his disease and eventual surgery.
>
> According to [the Appellant], he has known about the spondylolisthesis for some time, however at the time of impact he was completely normal and was working full time. After impact he was admitted with back pain and referred pain to both buttocks. This settled down soon after but he was constantly aware of progressive mechanical pain. This was initially treated by his posture and self-medication. Eventually he received medical care only four months later. It is quite possible that there is a delay in impact and symptoms; this is due to the fact that with chronic instability there is normally some fibrosis giving a hint of stability. However with impact this was broken and this could lead to progressive symptoms again.
>
> I have therefore no doubt in my mind, as I said in a previous letter, that the impact sustained during the accident certainly had a detrimental affect on his outcome. Certainly the whole process and pathogenesis has been accelerated at the very least. I would therefore still continue with my previous approach that 50% of his problem was the underlying pathology and 50% followed the impact during the accident." (underlining added)

In an inter-departmental memorandum dated November 8, 2006 the Internal Review Officer provided [MPIC's doctor] with the consultation notes from the orthopaedic surgeon, [text deleted] to [Appellant's doctor #1] dated September 11, 2006 and November 1, 2006. [Internal Review Officer] states in his memorandum:

> "The existence, or not, of a probable causal connection between the motor vehicle accident on October 31, 2005 and the conditions giving rise to the back surgery in July, 2006 remains the live issue at this time. It is on this issue that your opinion is once again being sought.
>
> As will be noted from the recent reports, and as confirmed during the Internal Review hearing on November 7, 2006, the surgery was a marked success and has enabled [the Appellant] to return to work.
>
> I received some collateral information yesterday from [the Appellant] which may be of assistance to you. Most of the information was directed towards explaining the 4-month delay between the accident and the medical consultations which ultimately led to the surgery.
>
> As you may recall, while there were no references to back pain in either the ambulance report (Tab 1) or the initial Primary Health Care Report (Tab 4), there were two references to back pain in the nursing records (09:15 and 09:33) obtained from the [text deleted] Hospital (Tab 2). The clinical notes from the [text deleted] Medical Group (Tab 7) confirm that there were no visits between November 7, 2005 and March 10, 2006.
>
> [The Appellant] offers the following by way of explanation:
>
> 1. Around the time of the accident, [the Appellant] had changed job duties. He was no longer doing the heavier house construction work but was focusing on custom carving of doors and other lighter objects. He found it exciting to be paid for what had been, to that point, just an enjoyable hobby, and he was reluctant to take time off notwithstanding the progressive worsening of his back pain following the accident.
>
> 2. He continued to use Arthrotec (which had been prescribed well before the accident) and he believes that it is a powerful enough medication to have "masked" the damage to his pre-existing condition, which he believes was exacerbated by the accident.
>
> 3. He began sleeping and resting more after the accident – 9-10 hours per night as opposed to his usual, pre-accident 7-8 hours per night.
>
> 4. His employer helped him out by giving him a week off at Christmas, 2005 and another week off in February, 2006.

> [The Appellant] believes that these factors contributed to his ability to continue functioning until March, 2006, when the pain became disabling enough for him to seek medical attention.
>
> Please consider the above and provide me with our opinion as to whether there is a probable causal connection between the accident and the conditions giving rise to the July, 2006 back surgery."

In an inter-departmental memorandum dated November 17, 2006 [MPIC's doctor] wrote to [Internal Review Officer]. A summary of [MPIC's doctor's] comments are contained in the Internal Review Officer's decision dated December 15, 2006 as follows:

> "j. The salient points in the November 17, 2006 memo from [MPIC's doctor] are (again, in no particular order of importance):
>
> i. The CT Scan taken in March, 2006 – several months post-accident – "does not demonstrate a worsening of the [known, pre-existing] spondylolisthesis".
>
> ii. The onset of bladder control symptoms in June, 2006, likely due to the neurological compromise first documented in March, 2006, would be a surgical emergency requiring an early intervention but would not be causally related to the accident in October, 2005.
>
> iii. The Arthrotec you were taking before and after the accident would not have masked the neurologic dysfunction for such a lengthy period of time, post-accident.
>
> iv. Your "progressive neurologic deterioration and subsequent spinal surgery are not causally related to the motor vehicle collision in question, in all probability."

**Internal Review Decision**

The Internal Review Officer wrote to the Appellant on December 15, 2006 further to a telephone hearing which was conducted on November 7, 2006. In this decision the Internal Review Officer reviewed all of the events reflected in the Appellant's MPIC file and concluded:

> "I am not prepared to say that there is no possibility of a causal relationship, but the law requires that I apply a "balance of probabilities" test. In other words, I must be convinced that it is more probable than not that the accident caused the condition giving rise to the need for surgery.

> Having carefully considered the whole of the evidence – set out in some detail above – I have concluded that a causal connection is possible, but not probable. Since this falls short of the required standard of proof, I have no alternative but to uphold the decision of the case manager dated August 22, 2006." (underlining added)

The Appellant filed a Notice of Appeal on December 27, 2006.

In response to a letter from the Claimant Adviser Officer, who was representing the Appellant, [Appellant's orthopaedic surgeon] wrote to the Claimant Adviser Officer on August 14, 2008 and stated:

> "As you know, he has underlying spondylolisthesis which is a natural developing condition. This was under control but was aggravated following his motor vehicle accident. There is no doubt in my mind that the accident had aggravated and accelerated his condition. This is in spite of [MPIC's doctor's] opinion. I am quick to point out, however, that this obviously was not caused by the accident but that aggravation only was caused by the accident. Therefore, an appropriation of 30% due to the accident and 70% due to natural causes should be a fair reflection of this patient's condition and subsequent surgeries that had to follow." (underlining added)

## Appeal

The relevant provision of the MPIC Act is Section 81(1)(a) which states:

> **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 Appellant testified that as a result of the motor vehicle accident on October 31, 2005 that he complained, at the hospital where he was taken following the accident, of pain to his neck, right shoulder and his lower back. He further testified:

1. He stayed in the hospital for 2 to 4 hours.

2. The reason he went to work the next day is that he wanted to set an example.

3. One week later he started feeling more back pain.
4. On November 7, 2005 approximately seven days after the motor vehicle accident he did see his doctor and complained about dizziness and headaches without complaints to his lower back pain.
5. He was taking Arthrotec for his back pain.
6. Initially he had a greater concern for the pain to his neck and shoulders than to his lower back.
7. The back pain gradually got worse.
8. He thought in due course he would be able to work off his back pain problem.

The Appellant further testified subsequent to the motor vehicle accident that:

1. He continued, as a Supervisor, to directly participate in working alongside his fellow workers after the motor vehicle accident.
2. His employer began accommodating him by reducing his hours of work from 9½ to 8 hours a day, by granting an extension of the lunch hour and permitting him to take a number of work breaks during the day.
3. As well, his employer began to provide lighter duties and as a result he commenced to work nearly full time carving doors for houses being built by his employer.
4. His back pain became progressively worse and he had to take more time off from his employment even though he had only light duties to perform.
5. The increased back pain caused him to attend at his doctor's office on March 16, 2006 complaining about "numbness in his feet, and his legs at times were not working properly".
6. On March 23, 2006, he underwent a CT scan on his lumbar spine that confirmed he had a pre-existing Grade I/IV spondylolisthesis.

7. As a result of the increased back pain he gave up all yard work at home and many of the housecleaning duties that he had undertaken prior to the motor vehicle accident.
8. He was taking different medications to minimize his back pain.
9. He subsequently reduced his hours to 2 hours a day and when the back pain became unbearable he was required to leave his employment in the month of June 2006.

[Text deleted], the President of [text deleted], where the Appellant was employed testified that:

1. The Appellant was an excellent worker who viewed the job as coming first and as a result had been promoted to working as foreman.
2. After the motor vehicle accident, the Appellant continued to work as a foreman which involved both doing the actual work with fellow employees and supervising them at the same time.
3. The Appellant starting complaining about back pain and as a result he accommodated the Appellant by shifting the Appellant's job duties to more sedentary work and less physically demanding work, such as custom wood carving of doors.
4. He further accommodated the Appellant by reducing his hours from 9.5 to 8 hours per day permitting the Appellant to take frequent rest breaks during the work day.
5. The Appellant was absent from work for approximately 7 to 10 days after the motor vehicle accident.
6. He further accommodated the Appellant by permitting him to take vacation in the months of December 2005 and March 2006.
7. Notwithstanding the substantial reduction in the daily hours the Appellant was unable to work due to his back pain and eventually the Appellant quit working in the month of June 2006.

[MPIC's doctor] testified on behalf of MPIC. [MPIC's doctor] is a medical doctor with a

diploma in Sports Medicine, was employed as an emergency physician in [text deleted] and as well at two separate clinics.

[MPIC's doctor] testified that:

1. After reviewing all of the relevant medical reports, he concluded there was no causal connection between the motor vehicle accident injuries the Appellant sustained and the Appellant's condition of spondylolisthesis which resulted in the Appellant's surgery.
2. Spondylolistheses is a condition of slippage of the lumbar vertebrae.
3. In arriving at his conclusion, he noted that the Appellant had an L4-5 spondylolisthesis in the month of January 2004 which pre-existed prior to the motor vehicle accident of October 31, 2005.
4. The Appellant had attended the [text deleted] Medical Clinic on November 7, 2005, approximately seven days after the motor vehicle accident and had not complained of an acute back problem condition.
5. He would have expected the symptoms of acute back pain to be immediate following the motor vehicle accident and would have continued thereafter.
6. However, the Appellant did not really complain about acute back pain until March 10, 2006 when he attended at the [text deleted] Medical Clinic 4½ months later.

[MPIC's doctor] further testified that:

1. The Appellant was seen again at the [text deleted] Medical Clinic on March 16, 2006 and at that time complained about back pain and numbness into his feet and legs.
2. He concluded that since the extreme back pain was not evident until the month of March 2006 there could not be a causal connection between the motor vehicle

accident and the Appellant's back condition which ultimately resulted in back surgery.

3. His opinion was confirmed by the fact that there was no structural change between the x-ray conducted on the Appellant's back in January 2004 and the CT scan which was done on March 23, 2006.

[MPIC's doctor] also testified that:

1. The Arthrotec medicine that the Appellant was taking at the time of the motor vehicle accident and thereafter could not have masked the pain of neurological symptoms for a period of 4½ months.
2. He concluded that since the Appellant's condition of spondylolisthesis predated the motor vehicle accident, there was no probable cause and effect relationship between this diagnosis and the motor vehicle accident.
3. Since the Appellant did not complain about his back pain until approximately four months after the motor vehicle accident on March 10, 2006, to the extent there had been progressive deterioration in his neurological function, that in his view there was no biologically plausible temporal relationship between the motor vehicle accident and the Appellant's condition of spondylolisthesis.

[MPIC's doctor] did acknowledge in his testimony that a physician personally attending upon an Appellant in order to obtain a personal history to examine the Appellant is in a much better position to assess the Appellant's credibility than a doctor who only conducts a paper review.

[Appellant's orthopaedic surgeon] testified that:

1. He was an orthopaedic surgery specialist since 1985 in [text deleted].

2. He initially started in an orthopaedic surgery practice in [text deleted], approximately one year, and then settled in [text deleted] where he performs orthopaedic surgery.
3. He specialized on surgery of the spine from 1990 to 2003.
4. At present he performs approximately 12 surgeries per week.
5. He arrived in [text deleted] and he created the orthopaedic surgery program for [text deleted].

[Appellant's orthopaedic surgeon] further testified that:

1. Obtaining a patient history was extremely important to provide a full picture of a patient's problem.
2. As well, a personal examination was critical to help identify neurological deficits.
3. A personal examination is critical in determining the credibility of the patient.
4. Through the personal examination he is able to determine if there are any inconsistencies between the patient's objective report that the patient makes to the doctor and the objective findings that the doctor makes as a result of a personal examination.
5. In determining the diagnosis, [Appellant's orthopaedic surgeon] examines his objective findings, reviews diagnostic tests and referral letters from other doctors and examines inventory scores or questionnaires.

He further testified that:

1. Due to his back problem prior to and after the motor vehicle accident, the Appellant was taking Arthrotec which is a powerful enough medication to mask symptoms for a limited period of time.

2. The Arthrotec anti-inflammatory medication reduces swelling and pain, but its effectiveness decreases over a period of time and in due course the symptoms will emerge as occurred in the Appellant's severe deterioration.

3. [Appellant's orthopaedic surgeon] confirmed the contents of his report to [Appellant's doctor #1] dated May 9, 2006.

He further testified that:

1. The Appellant informed him that he was involved in a motor vehicle accident in October 2005 and since that time he noticed progressive back pain as well as pain through his right leg.
2. At present there was equal back and leg pain and that the pain was worse when he was standing approximately two hours and as a result, he had to keep changing his position.
3. He could only walk for half a block and that he has severe leg pain forcing him to either drag his leg or to stand still.
4. He noticed a severe deterioration after January 2, 2006 which was several months following the motor vehicle accident.

[Appellant's orthopaedic surgeon] also testified that:

1. The x-rays taken in 2004 and 2006 confirmed that the Appellant was suffering from a spondylolisthesis, which he explained showed a slippage of the lumbar vertebrae.
2. This condition has remained constant.
3. However, on a CT scan taken at the [hospital], in a report dated March 23, 2006 a

radiologist noted that there was a slight bulging annulus but there was no evidence of disc protrusion.

[Appellant's orthopaedic surgeon] further testified that:

1. In his own experience he does not rely on the radiologist report but personally examines the CT scan.
2. He did examine the Appellant's CT scan itself and concluded that it showed a bulging annulus with nerve root compressions at L4-5, a finding contrary to the radiologist's opinion.
3. Similarities between an x-ray and a CT scan before and after a motor vehicle accident were not significant because even if the vertebrae are in the same position, it does not mean there was no injury to the disc.
4. X-rays do not show any fibrous tissue and when an x-ray and a CT scan are taken with the person lying down the alignment could be very different from when the person is standing and there is a loading on the spine.

In his testimony [Appellant's orthopaedic surgeon], disagreed with [MPIC's doctor's] opinion that because there was a 4½ month delay in the Appellant complaining about back pain and neurological symptoms that the motor vehicle accident could not have materially contributed to the injuries sustained in the motor vehicle accident. He testified that:

1. Having regard to the impact of the motor vehicle accident, trauma would have accelerated and aggravated the Appellant's pre-existing spondylolisthesis.
2. The motor vehicle accident was not the sole cause of the aggravation to the Appellant's pre-existing condition but was a material factor in the aggravation and acceleration of this condition.

[Appellant's orthopaedic surgeon] also testified that:

1. The Appellant's spondylolisthesis was initially stabilized by fibrous tissue which acts as a glue surrounding his verterbrae.
2. The impact of the motor vehicle accident on the Appellant caused a break in the fibrous material which surrounds the vertebrae.
3. The Appellant was involved in the construction industry and his activities both in the workplace and in his other daily activities would cause the protective fibrous material surrounding the vertebrae to become more unstable over time.
4. When the vertebrae was no longer stable the protection of the disc is gone.
5. The gradual deterioration of the fibrous material would result in a disc protrusion causing severe back pain and neurological symptoms to the Appellant which ultimately required surgery.

[Appellant's orthopaedic surgeon] in his testimony:

1. Described the process of the Appellant's increasing back pain by analogy to be similar to removing a fencepost from the ground by forcing the post in all directions in order to loosen it so it can be removed from the ground.
2. In the same manner, the vertebrae can become more and more unstable all the time due to continued activity and work.

[Appellant's orthopaedic surgeon] further testified that:

1. Disc damage could occur immediately after the motor vehicle accident or gradually become more and more unstable over time due to the Appellant's daily activities.
2. Disc damage can occur suddenly or gradually like a balloon which, with sufficient

force, can explode immediately or develop a slow leak and diminish in size over a period of time.

3. The Arthrotec anti-inflammatory medication masked the Appellant's back pain after the motor vehicle accident until the month of January 2006 when severe deterioration occurred.

4. When he operated on the Appellant he observed the bulging of the disc, particularly on the left side and this confirmed his diagnosis of a bulging disc based on the Appellant's history and his view of the CT scan.

**Discussion:**

On the issue of causation there was a conflict in the medical opinions of [MPIC's doctor] and [Appellant's orthopaedic surgeon].

In summary, [MPIC's doctor] concluded the Appellant's severe back pain which resulted in surgery was not caused by the motor vehicle accident while [Appellant's orthopaedic surgeon's] was of a contrary view.

In arriving at his opinion, [MPIC's doctor] determined:

1. X-rays prior to the motor vehicle accident indicated the Appellant had a pre-existing spondylolysis with spondylolisthesis at L4-5.

2. In order for the motor vehicle accident to have caused the disc damage resulting in surgery, the Appellant would have suffered at the time of the motor vehicle accident, acute back pain together with radiculopathic pain neurological symptoms into the lower limbs.

3. Examination of the emergency department documentation at the time of the motor

vehicle accident and the clinical assessment that the Appellant's doctor made seven days after the accident did not demonstrate any lower back pain or neurological dysfunction to the lower limbs.

4. The Appellant's first complaint about back pain was made to his family physician 4½ months after the motor vehicle accident on March 10, 2006. This doctor and the family physician concluded that the back pain was "aggravated during work".

5. The Appellant's physician saw him on March 16, 2006 and reported that the Appellant was complaining about back pain which included "parasthesia and numbness in feet, and legs at times won't work properly".

6. The CT scan which was performed nearly five months after the motor vehicle accident did not demonstrate a worsening of the spondylolisthesis.

7. The Arthrotec medication the Appellant was taking after the motor vehicle accident would not mask neurological symptoms for such a long interval.

[MPIC's doctor] therefore concluded the Appellant's back problems resulting in surgery was not due to a motor vehicle accident but was due to a pre-existing condition and was caused by the Appellant's physical labour in the construction industry as well as his activities outside of the workplace.

[Appellant's orthopaedic surgeon], on the other hand, disagreed with [MPIC's doctor] that a delay of 4½ months, the Appellant complaining about acute back pain does not demonstrate that there was not a causal connection between the motor vehicle accident and his back pain. [Appellant's orthopaedic surgeon] testified that the impact of the motor vehicle could have caused a crack in the fibrous material surrounding the vertebrae and over a period of time, as a result of the Appellant's daily activity, would have caused an acceleration or aggravation of the

Appellant's pre-existing back condition.

[Appellant's orthopaedic surgeon] disagreed with [MPIC's doctor] as to the effect of the Arthrotec medication which was an anti-inflammatory drug taken by the Appellant both prior to and after the motor vehicle accident. [Appellant's orthopaedic surgeon] was of the view that this drug initially masked the back pain and over a period of time the effectiveness of this drug decreased and in due course there was a progressive increase in the Appellant's back pain.

[Appellant's orthopaedic surgeon] also disagreed with [MPIC's doctor's] opinion that the CT scan which was performed nearly five months after the motor vehicle accident did not demonstrate a worsening of the spondylolisthesis. [MPIC's doctor's] opinion was based on the findings of the radiologist who had performed the CT scan. [Appellant's orthopaedic surgeon] based on his own experience did not rely on the radiologist's report but examined the CT scan itself and concluded that it showed a bulging annulus with nerve root compression at L4-5. [Appellant's orthopaedic surgeon] concluded that contrary to the radiologist's opinion that there was evidence of disc protrusion [Appellant's orthopaedic surgeon] testified that when he operated on the Appellant he observed the bulging of the disc clearly on the left side and confirmed his earlier diagnosis of a bulging disc based on the Appellant's history and his view of the CT scan.

The Commission notes that [MPIC's doctor's] opinion was based on a paper review without the opportunity of meeting with the Appellant and obtaining a personal history when examining the Appellant. On the other hand, [Appellant's orthopaedic surgeon] did have the opportunity to examine the Appellant and obtain history of his complaints from the time of the motor vehicle accident to the time he examined the Appellant. He concluded contrary to [MPIC's doctor's]

testimony that the Appellant's condition deteriorated slowly over a period of time following the accident and that notwithstanding the 4½ .month delay, there was a causal connection between the Appellant's back problems and the motor vehicle accident.

The Appellant testified in a very candid, direct, and unequivocal fashion and the Commission found him to be an impressive witness. After the motor vehicle accident, the Appellant continued to work as a carpenter/supervisor at [text deleted]. Initially he had no complaints of back problem but testified that over a period of time his back became more and more painful. As a result he had difficulty walking and standing and working. As a result of the worsening back conditions his job duties shifted to more sedentary, less physically demanding work such as wood carving, there was a reduction in the daily hours of work and he took frequent rest breaks during the work day, was absent from work for approximately seven to ten days due to his back pain.

The Appellant was an amateur wood carver and his work, over a period of time, shifted from a working foreman in the construction industry which involved physically demanding work to being a custom wood carver of wooden doors. He testified that although he had trouble walking, sitting and standing he continued to work because he was loyal to the company and it was important for him as the working foreman to be a role model for other employees.

His testimony was corroborated in full by his employer, [text deleted], who recognized that as a result of the motor vehicle accident the Appellant was unable to fulfill his normal job duties and as a result he did reduce his work schedule and accommodated to a shorter work day until the Appellant could no longer carry out any duties at all. [Appellant's employer] testified that the Appellant was a very valuable employee and he relied on him totally. The Commission accepts

[Appellant's employer's] testimony as credible and finds it corroborates the Appellant's testimony.

**Decision:**

[Appellant's orthopaedic surgeon] is an orthopaedic surgeon of wide experience and found the Appellant to be a credible person. [Appellant's orthopaedic surgeon] found that the Appellant's back pain complaints were bonafide and he concluded the motor vehicle accident contributed to aggravating or accelerating the Appellant's pre-existing spondylolisthesis which ultimately resulted in surgery. [Appellant's orthopaedic surgeon], unlike [MPIC's doctor], had the opportunity of examining the Appellant. and obtaining a history of complaints from the time of the motor vehicle accident to the time he examined the Appellant. [Appellant's orthopaedic surgeon] concluded that contrary to [MPIC's doctor's] testimony, the Appellant's condition deteriorated slowly over a period of time following the accident and that notwithstanding the 4½ month delay there was a causal connection between the Appellant's back problems and the motor vehicle accident.

The Appellant's testimony was corroborated not only by his employer M.C., but also by [Appellant's orthopaedic surgeon].

[Appellant's orthopaedic surgeon], unlike [MPIC's doctor], is a specialist in spinal surgery and has had enormous experience in conducting such surgery, [text deleted]. [Appellant's orthopaedic surgeon], unlike [MPIC's doctor], did have the opportunity of personally examining the Appellant, from obtaining his medical history and assessing his credibility. For these reasons the Commission gives greater weight to the medical opinion of [Appellant's orthopaedic surgeon] than it does to the opinion of [MPIC's doctor].

The Commission finds that after reviewing the documentary evidence, the testimony of all the witnesses, the Appellant has established on a balance of probabilities that there was a causal connection between the motor vehicle accident and the Appellant's problems which prevented the Appellant from working. We agree with [Appellant's orthopaedic surgeon's] opinion that:

1. The impact of the motor vehicle accident was not the sole cause of the Appellant's back problem which prevented him from returning to work and led to his surgery.

2. The motor vehicle accident, however, clearly contributed to aggravating or accelerating the pre-existing condition of the Appellant's back problem resulting in the Appellant being unable to work and his subsequent surgery in July 2006.

The Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated December 15, 2006 and refers this matter back to MPIC to determine the amount of PIPP benefits the Appellant is entitled to.

The Commission further finds that if the parties are unable to determine this issue in whole or in part within 60 days of receipt of this decision, either party with reasonable notice can request the Commission to determine this issue.

Dated at Winnipeg this 24th day of June, 2009.

**MEL MYERS**

**ERROL BLACK**

**PAUL JOHNSTON**