

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-212**

PANEL: Ms Laura Diamond, Chairperson
Dr. Patrick Doyle
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted]
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski and Ms Alison Caldwell

HEARING DATE: September 14 and 27, 2010 and October 26, 2010

ISSUE(S): Entitlement to Income Replacement Indemnity benefits beyond December 29, 2003.

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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

Reasons For Decision

The Appellant was injured in a motor vehicle accident on December 24, 2002. As a result, he sustained back pain which radiated into his leg.

At the time of the accident, the Appellant was a self-employed water bottle distributor. Following the accident, the Appellant found it difficult to deliver the cases of water, weighing about 30 pounds, and hired people to help him do the work.

The Appellant attended for physiotherapy treatments. He attempted to return to work on an occasional basis, but found it too difficult to work on a consistent basis.

Following an independent physiotherapy assessment in September of 2003, the Appellant was assessed by an athletic therapist. He reviewed a job demand analysis for the Appellant's occupation and planned a graduated return to work program for him. The Appellant continued treatment with his general practitioner, [Appellant's Doctor] and with a physiatrist, [Appellant's Physiatrist]. He was also referred to [Independent Doctor] for an independent medical examination.

On January 2, 2004, the Appellant's case manager wrote to him indicating that as he had the functional capacity to perform his regular job duties, his IRI benefits would end.

The Appellant sought an Internal Review of this decision. On October 4, 2004, an Internal Review Officer for MPIC found that there were no functional impairments preventing the Appellant from returning to work by the end of 2003 and upheld the case manager's decision to terminate his IRI benefits.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident.

The Appellant also described himself as being in good health at the time of the motor vehicle accident. He worked out at the gym and had no prior back problems. The only incident he

recalled occurred on December 11, 2002, when he had been working out at the gym doing sit-ups. He felt a pinch in his back, stopped exercising, and attended at his family doctor. [Appellant's Doctor] examined him and ordered X-rays. The Appellant indicated he took a day or so off from work and exercise and that by the third day the pain was gone and he went back to work full-time without a need to see the doctor again. The incident did not result in any limitation of function.

The Appellant described his self-employed business, which involved buying bottles of water which were delivered to his storage room. From there, he sold water and delivered it to different clients. The bottles came in a variety of sizes and some weighed approximately 30 pounds or more.

The Appellant described the process of loading the water from trucks into his storage facility, without a loading dock, as well as the process of transferring the water, by dolly, and in his van to various businesses. He would then have to unload them, take them inside the business and lift and put them on the shelves. Sometimes he had to climb stairs as well. The Appellant agreed that the Job Demands Analysis prepared by an occupational therapist on February 13, 2003 accurately reflected the demands of his occupation. This report listed the following critical physical demands:

“Unloading new Product...

Critical Physical Demands:

- Constant lifting and carrying; lifts range from floor to chest height. Shelving is at knee and chest heights. The boxes of bottled water weigh 30 lbs each. The juice flats weigh approximately 20 lbs each. Receiving a shipment of water involves lifting and handling each case (250-300) twice. Front carrying occurs when the dolly is tilted backwards and the load is partially supported by the arms while pushing. Each dolly load of bottled water is 150 lbs (5 cases).

- Constant walking between stacks of cases of bottled product distances vary from 10 feet to 100 feet on cement floor/ground.
- Frequent forward trunk bending to move/place cases on shelving
- Constant squatting to lift
- Constant gripping to handle cases and to push dolly
- Frequent pushing of medium force to move the dolly and to arrange cases on shelving as needed

Delivering Product...

Critical Physical Demands:

- Frequent dynamic standing and walking varied distances, varying indoor and outdoor surfaces
- Frequent pushing of dolly at moderate force
- Frequent lifting of cases weighing 30 lbs, lifting levels range from floor to chest height
- Frequent from carrying of cases stacked on dolly, partial load of 150 lbs, occasional carrying of individual boxes varying distances down store aisles or on shoulder as when carrying up/down stairs
- Occasional squatting to perform lifts
- Occasional forward trunk bending, especially to stack cases in rear of van (30" from ground)
- Constant gripping
- Occasional stair climbing with and without a load; stair flights vary from a few steps to 19 steps, climbing into/out of truck
- Occasional crouching to clean and stock cooler
- Occasional forward reaching to place bottles into cooler from knee to shoulder heights
- Occasional sitting to drive, operation of foot pedals, neck motions to drive"

The Appellant described the pain which he suffered following the motor vehicle accident and the difficulties he had walking and lifting. He was in a lot of pain and this affected his whole business. Physiotherapy helped, but the pain never completely went away. His business was at a standstill.

The Appellant met with the physiotherapist, [Appellant's Physiotherapist], who reported on September 25, 2003. She suggested that the Appellant wear an elastic back support and special shoes to assist him. The Appellant followed her directions and tried to wear the belt to lift cases

of water. He found it a little bit easier to do the lifting, but also found that after he took the belt off in the evening, he had even more pain than before.

[Appellant's Physiotherapist] reported that:

“The client would benefit from a 2 month weight training and/or pool therapy conditioning program that the client can perform independently in the community. He would also benefit from a lumbar roll, heel lifts and arch supports. The client also needs to be aware of proper sitting posture with the proper foot and back support...

The client demonstrates the ability to lift 20 lbs safely while using the elastic back support. I indicated the client should start working 3-4 hours a day and work up to full time within 3-4 weeks after the assessment date of September 23, 2003 and that he could gradually wean himself off the elastic lumbar support as required.”

The Appellant also met with [Appellant's Occupational Therapist] with [text deleted].

[Appellant's Occupational Therapist] concluded that the Appellant was limiting his ability based upon his subjective complaints and recommended a graduated return to work plan, which he provided to [Appellant's Doctor].

However, [Appellant's Doctor] would not support the graduated return to work plan. He referred the Appellant to see [Appellant's Psychiatrist].

As well, MPIC arranged for the Appellant to attend at an independent medical assessment with [Independent Doctor]. [Independent Doctor] reported, on December 16, 2003 that the Appellant had no measurable impairment of function that would preclude him from performing his full-time regular duties.

The Appellant continued to seek treatment from [Appellant's Psychiatrist]. In January of 2004 he received his case manager's letter advising that his IRI benefits were to be discontinued.

[Appellant's Physiatrist] testified at the hearing into the Appellant's appeal. He also provided a number of medical reports dated March 24, 2004, May 24, 2004, September 19, 2004, December 4, 2004, March 24, 2006 and June 3, 2009.

[Appellant's Physiatrist] is a specialist in physical medicine and rehabilitation, with expertise in areas regarding the back, spine, muscular, skeletal and functional impairment.

[Appellant's Physiatrist] described his examinations of the Appellant and the various tests and investigations which were documented. He indicated that he saw and examined the Appellant regarding his motor vehicle accident injuries on eight occasions.

[Appellant's Physiatrist] described the Appellant's condition and his own findings. His conclusion was that, while the Appellant did have some pre-existing deterioration in his spine, he had suffered a disc herniation as a result of the motor vehicle accident and had not recovered from his motor vehicle accident injuries. He recommended that the Appellant avoid heavy lifting, repetitive twisting, bending and rotation and indicated that he was not able to lift more than 20 pounds.

In cross-examination, [Appellant's Physiatrist] reviewed academic literature he had referred to as well as the relative merits of CT and MRI investigations. He discussed the physiotherapist and athletic therapist reports, the Physical Demands Analysis of the Appellant's occupation and MPIC's suggestion that the disc herniation may not have been caused by the motor vehicle accident.

[Appellant's Physiatrist] was quite clear that in his view, on a balance of probabilities, the Appellant had suffered a disc herniation in the motor vehicle accident. The MRI and [Appellant's Physiatrist's] physical findings upon examination led him to conclude that a disc herniation had occurred at the L3-L4 level. He noted that the fact that the MRI did not show disc herniation at the lower levels led him to conclude that the herniation was not due to wear and tear and degeneration, which would have shown at all levels. To [Appellant's Physiatrist], this meant that the disc herniation suffered by the Appellant was not due to aging of the disc or degeneration, but rather to forces applied at the time of the motor vehicle accident.

In [Appellant's Physiatrist's] opinion, the Appellant had not recovered from the injuries suffered in the motor vehicle accident at the time he had examined him and he was not, at that time, able to perform the duties of his pre-motor vehicle accident occupation.

Counsel for the Appellant submitted that the Appellant had been in good health prior to the motor vehicle accident. He was working and active. He had suffered a minor injury while exercising on December 11, 2002, which did not result in any limitation of function; he recovered within a few days and was able to carry on his job duties.

Following the motor vehicle accident, the Appellant suffered from intense discogenic low back pain. He was unable to walk or stand without excruciating pain and used a cane for walking. This was confirmed by the report following his first examination at the [text deleted] Clinic and by reports of his general practitioner, [Appellant's Doctor]. He was advised not to perform his occupation at that time, and early into 2003. He could not lift more than 10 pounds and could not bend or twist without lumbar pain.

By the spring and summer of 2003, the Appellant's business was at a stand-still, with no deliveries being done. He was still suffering from stiffness in his lower lumbar region and limited movement in his lower back. He tried to lift some crates of water, but was sore and could not continue.

By the fall of 2003, he tried to work at a reduced capacity, but the pain did not go away.

Although the physiotherapist noted decreased range of motion in the Appellant's lower back, her suggestion that the Appellant could lift 20 pounds safely with an elastic back support did not allow the Appellant to perform all the functions of his job. The elastic back support helped control his lower back complaints but he still had pain when he increased his activities.

Then, the athletic therapist recommended a graduated return to work program which [Appellant's Doctor] was unable to support. Instead, he referred the Appellant to [Appellant's Physiatrist] for assessment. [Appellant's Physiatrist] saw the Appellant several times, examined him and ordered diagnostic tests. He also provided six narrative reports. In his view, the Appellant suffered a disc tear or herniation in the motor vehicle accident which reduced his functional abilities. [Appellant's Physiatrist] recommended that the Appellant avoid heavy lifting or repetitive twisting and bending as it could cause further disc herniation at the same level or the level below and could aggravate his lower back pain. [Appellant's Physiatrist] was of the view that there was no evidence to support [Independent Doctor's] conclusion that the Appellant suffered from no functional deficits. He was also of the view that the Functional Capacity Evaluation performed by [Appellant's Physiotherapist] in September of 2003 was dated and that a more current Functional Capacity Evaluation would be required. The Appellant

continued to suffer from functional impairment, and still had not recovered from the injuries suffered in the motor vehicle accident at the time MPIC terminated his IRI benefits.

Counsel noted that at the time of the motor vehicle accident the Appellant had been working 8 to 12 hours a day with only occasional days off. His work involved lifting 500 cases per month weighing 30 pounds or more. In his condition, following the motor vehicle accident, he could not perform that job. His business had essentially shut down, due to his impairments. Clearly, the Appellant was not able to hold the employment he held at the time of the motor vehicle accident and his IRI benefits should not have been terminated pursuant to Section 110(1)(a) of the Act. Any pre-existing spondylolisthesis which may have been pointed out by [Independent Doctor] had been asymptomatic prior to the motor vehicle accident and the Appellant had been fit and healthy and able to perform his job. As a result of injuries sustained in the motor vehicle accident he was precluded from returning to his pre-motor vehicle accident employment and effectively lost his distributorship business. The totality of the medical evidence did not support the termination of the Appellant's benefits and counsel submitted that these should be reinstated.

Evidence and Submission for MPIC:

[MPIC's Doctor] [text deleted], provided several reports contained in the Appellant's indexed file. He also testified at the hearing as an expert in sports medicine and musculoskeletal issues.

[MPIC's Doctor] noted, on July 11, 2006 that:

“...[Appellant's Physiatrist] had indicated that the claimant had developed numerous disc protrusions as a result of the motor vehicle collision in question. This would also be an improbable affect (sic) of the motor vehicle collision. In reviewing the Application for Compensation, the claimant was involved in a rear end collision. In this collision, the lumbar spine is protected by the seatback and would not likely have been undergone the flexion – extension – rotation mechanism outlined by [Appellant's Physiatrist]...”

“...Notwithstanding the findings reported on MRI examination, the issues of function, impairment and employability cannot be answered by simple imaging tests. Impairment is based upon an assessment of objective physical findings that can affect an individual’s ability to perform the essential duties of an occupation. In this case, the objective physical findings have not altered from that reported in the medical file prior to my March 1, 2005 review. Thus, my opinions regarding the claimant’s probable employability would not be altered.”

On November 17, 2009, following a further review of the file and [Appellant’s Psychiatrist’s] reports, [MPIC’s Doctor] reiterated his opinions regarding causation and the degree of functional impairment that would lead to employment disability. He noted:

“Disc herniations are very common occurrences. Statistically, once the disc has been herniated, it is more likely to be herniated again. Flexion, extension, rotation, and heavy lifting are risks for recurrent disc herniations. However, these can occur in any situation. They are not only limited to work situations. In fact, it is my clinical experience that disc herniations can occur frequently outside of situations that are occupational in nature...”

[MPIC’s Doctor] distinguished the medical literature to which [Appellant’s Psychiatrist] had referred, indicating that these were not clinical studies but rather involved laboratory testing on dead spines. [MPIC’s Doctor] indicated that he had reviewed the Appellant’s file and considered the mechanism of injury in the motor vehicle accident. In his view, the mechanics of a rear-end collision involving a seat-belted individual would not result in major flexion of the lower spine or loading of the discs involved in the Appellants’ injuries. He pointed out that if the Appellant had ruptured three discs in the motor vehicle accident he would have been immediately feeling more pain and sought medical care sooner. He also indicated that there would have been more reporting of symptoms radiating down the Appellant’s legs if a disc had herniated in the accident, putting pressure upon the nerve roots.

[MPIC’s Doctor] indicated that although the MRI showed disc damage, it could not speak directly to the cause or age of the damage.

[MPIC's Doctor] reviewed a series of [Appellant's Physiatrist's] narrative reports. He noted that [Appellant's Physiatrist] had moved from a prior diagnosis before the MRI report that the motor vehicle had aggravated pre-existing asymptomatic spondylosis to a diagnosis of a level 3 (three) disc tear. Yet in [MPIC's Doctor's] view, it was possible that there had been abnormalities in the Appellant's spine prior to the motor vehicle accident which the prior X-rays had not been sensitive enough to reveal.

Further, [MPIC's Doctor] pointed to the report of the physiotherapist and the return to work recommendations developed by the athletic therapist. At that time, the Appellant had shown no objective signs of disability and the elastic brace had allowed him to lift to a point where the physiotherapist was confident that the Appellant would be able to perform his occupational duties.

[MPIC's Doctor] indicated that the test was not whether the Appellant had fully recovered from his injuries from the motor vehicle accident, but rather whether he could go back to work. He indicated that the issue was not 100% recovery, as it was rare for someone to 100% completely recover from their injuries. The measurement is not whether the individual could get back to their exact pre-motor vehicle accident level of functioning, but rather whether enough recovery had occurred so that objectively, the Appellant could go back to work. The therapists' reports and the Functional Capacity Evaluation determined that at the time the Appellant's IRI benefits were discontinued, he was functionally able to return to work at his pre-accident occupation.

Counsel for MPIC noted that both the X-rays taken after the Appellant's exercise incident on December 11, 2002 and at the request of [Independent Doctor] in December of 2003, showed degenerative narrowing at the same levels. Clearly, there were degenerative changes in the

Appellant's spine prior to the motor vehicle accident. This, it was submitted supports [Appellant's Physiatrist's] initial diagnosis of an exacerbation of pre-existing spondylosis.

The disc herniations later seen on the MRI, and attributed by [Appellant's Physiatrist] to the motor vehicle accident, were, as [MPIC's Doctor] pointed out, very unlikely to have occurred as the result of the appellant's rear-end collision, where the mechanism of injury does not commonly cause herniation of a disc.

Further, in assessing the Appellant's ability to return to his employment, counsel for MPIC relied upon the Physical Demands Analysis which the Appellant indicated correctly reflected his employment duties, as well as the Functional Capacity Evaluation and report from [Appellant's Physiotherapist]. [Appellant's Physiotherapist] was of the view that with the appropriate elastic support, the Appellant could lift sufficient amounts to perform his job duties. This view was also supported by the athletic therapist who developed the graduated return to work plan and finally by [MPIC's Doctor]. As [MPIC's Doctor] explained, the graduated return to work plan was a way for the Appellant to transition back into his job after he had not worked for a while, taking into account the possible symptoms he might encounter upon his return.

[Independent Doctor] concluded, in December of 2003, that the Appellant had recovered from his motor vehicle injuries and was capable to (sic) working.

[MPIC's Doctor], reviewing all of this information, concluded that the Appellant was substantially able to complete the duties of his occupation. Although [Appellant's Physiatrist] was of the view that the Appellant was not fully recovered from his injuries, this was not the relevant question. As [MPIC's Doctor] had indicated, it is rare for individuals to attain 100%

recovery. Rather, the question is whether they can do their job and whether they are prevented from doing so by limitations related to the motor vehicle accident. The test is not whether the Appellant was fully recovered, but whether he could return to work. Counsel for MPIC submitted that the Appellant's file contained documented objective findings that he could return to work and that these findings, along with the opinions of [MPIC's Doctor] and [Independent Doctor] supported the case manager and Internal Review Officer's decisions that the Appellant's IRI benefits should be terminated. Accordingly, the decision of the Internal Review Officer should be upheld.

Discussion:

MPIC Act:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in his finding that the Appellant was no longer entitled to receive IRI benefits.

The panel has reviewed the documentation on the Appellant's indexed file, as well as the testimony of the Appellant, [Appellant's Psychiatrist] and [MPIC's Doctor], and the submissions of counsel.

The panel is of the view that the Appellant's self-employment as a water distributor was a heavy job. It involved repetitive lifting, carrying, bending and twisting of weight involving 20, or even

greater than 30, pounds. The occupation made great physical demands upon the Appellant throughout the day, and even when the Appellant was able to lift the required amounts, the repetitive nature of the tasks caused difficulty for his back.

Although the panel recognizes that X-rays taken prior to the motor vehicle accident in 2002 already showed degenerative changes, these changes were the same on earlier X-rays which had been taken in 2001. Accordingly, it is unlikely that the exercise incident in the gym was the cause of the damage in the Appellant's spine.

[Appellant's Physiatrist] noted that there was evidence of pre-existing spondylosis in the Appellant's spine prior to the motor vehicle accident. However, the Appellant's evidence was clear that he was asymptomatic. He was healthy and fit and able, with very little exception, to perform the demands of his occupation. Following the motor vehicle accident, the Appellant began to suffer consistent pain and symptomology in his lower back and legs. He attempted to return to his duties, sometimes on a part-time basis and sometimes with assistances, but his back condition prevented him from consistently performing his job duties on a full time basis.

The reason for this, according to [Appellant's Physiatrist], was that the Appellant had suffered a disc herniation in the motor vehicle accident. The panel notes that [Appellant's Physiatrist] had many opportunities to interview, assess and examine the Appellant. He ordered further diagnostic tests which led to confirmation by an MRI that the Appellant had objectively suffered a disc herniation. In his evidence before the panel, [Appellant's Physiatrist] explained why he believed that the disc herniation at this level, with other levels unaffected, had been caused by the motor vehicle accident.

In his most recent narrative report, dated June 3, 2009, [Appellant's Physiatrist] stated:

“IN MY OPINION: [the Appellant] suffered disc herniations in the December 24th, 2002 motor vehicle accident. The objective findings included on several examinations since I have been involved in his care included tenderness of the lumbosacral spines and ligaments, reduced range of motion of the lumbar spine, flexion and extension will aggravate the back pain and radicular symptoms in his right leg, weakness of the muscles of the back, abdomen and hip girdle. Straight-leg raising positive on the right side, sluggish right knee and ankle stretch reflex and this objective evidence was further supported by diagnostic MRI test done on the 20th of October 2005 at [Hospital] confirming disc herniations at L2-L3, L3-L4, and L4-L5 level. There is no disc herniation at L5-S1 level. This indicates that these changes are not related to age. If it was related to age, then it should also have shown disc herniation at L5-S1 level.”

[Appellant's Physiatrist] also opined (and testified at the hearing) that the Appellant, as a result of his motor vehicle accident injuries, had not regained the functional capacity to carry out his regular pre-accident employment.

In his letter dated June 3, 2009, [Appellant's Physiatrist] reviewed the lifting requirements of the Appellant's occupation and the impact which lifting such weight during his shifts had on him:

“Any lifting beyond 600 lbs aggravated his back and leg pain and he required Tylenol No. 3 on a regular basis to control the pain. My comment – This indicates that he had limited functional capacity and lifting beyond 600 lbs of weight during his shifts will aggravate his back pain and leg pain, this can be explained on the basis of repetitive and excessive loading does cause further disc herniation or bulging of the discs, does cause fatigue of the impaired muscles and the ligaments causing further pain and spasm of the muscles leading to reduced functional capabilities...”

...He had not regained the functional capabilities to carry out his regular pre-accident job duties at the time of Manitoba Public Insurance terminated his income replacement indemnity benefits in December 2003. Potential long term effects of a disc herniation on an individual as this applies to [the Appellant]. Any heavy lifting, repetitive twisting, bending and rotational activities and lifting of heavy objects may cause reoccurrence of disc herniations at the site of disc herniations or level above or below...”

The panel has reviewed the evidence and relied upon the Appellant's testimony regarding his condition prior to and following the motor vehicle accident and his ability to meet the demands of his occupation. We have also relied upon the well documented conclusions of [Appellant's

Physiatrist] which were reiterated in his testimony at the hearing, regarding both the cause of the Appellant's injuries and their effect upon his functional capacity to perform his occupation. As a result, the panel concludes that the Appellant has met the onus upon him of showing, on a balance of probabilities, that he was unable, as a result of injuries sustained in the motor vehicle accident, to substantially perform the duties of his pre-accident occupation as a water distributor.

Accordingly, the panel finds that the Appellant's appeal from the decision of the Internal Review Officer dated October 4, 2004 should be upheld, and the Internal Review Decision is rescinded. We find that the Appellant was not able to work at his occupation at the time his IRI benefits were terminated on December 29, 2003 and find that the Appellant is entitled to receive IRI benefits from that time.

The calculation of the IRI benefits which the Appellant shall be entitled, with interest, shall be referred back to the Appellant's case manager for determination. The Commission will retain jurisdiction in the event that the parties are unable to agree regarding the appropriate calculation of these amounts.

Dated at Winnipeg this 8th day of December, 2010.

LAURA DIAMOND

DR. PATRICK DOYLE

PAUL JOHNSTON