

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-122**

PANEL: Ms Laura Diamond, Chairperson
Mr. Wilf DeGraves
Ms Jean Moor

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATES: March 15, 2010 and June 21, 2010

ISSUE(S): Entitlement to Income Replacement Indemnity benefits between January 9, 2006 and March 22, 2006.

RELEVANT SECTIONS: Section 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94 and Section 5(a) of Manitoba Regulation 40/94.

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 August 2, 2005. He suffered injuries to his shoulder, back, and neck and headaches.

At the time of the accident, the Appellant was a self-employed landscape architect. He was off work and in receipt of Income Replacement Indemnity ("IRI") benefits until November 6, 2005. He then returned to work at reduced hours on November 7, 2005, and returned to full duties on November 28, 2005.

The Appellant went on holidays from December 15, 2005 until January 2, 2006. Upon his return to work in January he experienced stiffness in his neck and shoulders, as well as headaches. He was then unable to work until March 22, 2006 and sought IRI benefits for this period.

The Appellant's case manager took the position that the symptoms which prevented the Appellant from working between January and March of 2006 were not related to the motor vehicle accident. This position was upheld by an Internal Review Officer for MPIC on June 21, 2006. The Internal Review Officer concluded that the Appellant had recovered from medical conditions arising from the motor vehicle accident, to the extent that he was able to function at a level that exceeded the demands of his occupation.

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

The Appellant also submitted an appeal to the Commission from the portion of the Internal Review Officer's decision of June 21, 2006 which denied him reimbursement for costs associated with treatments provided by practitioner [text deleted], as well as an appeal from the decision of an Internal Review Officer dated May 11, 2006 denying him funding for massage therapy when the care was not dispensed by a provider outlined in the legislation.

Subsequently, the Appellant withdrew these appeals, such that the outstanding issue before the panel was that of IRI benefits between January 9, 2006 and March 22, 2006.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described his work as a landscape architect. He also described the motor vehicle accident, the symptoms and injuries he suffered and their effect upon his ability to work.

The Appellant described his treatment with his family doctor, [Appellant's Doctor #1], and with his physiotherapist, [Appellant's Physiotherapist].

He also described his meetings with [Appellant's Occupational Therapist], who conducted an assessment of his job duties.

The Appellant described his gradual return to work following the motor vehicle accident and stated that he was satisfied that he could perform a significant majority of his central duties on a full-time basis by late November or early December of 2005. However, his office was closed for two weeks over the Christmas period and when he returned to work in January of 2006, he stated that his symptoms returned with a vengeance. He described a stiff neck, sore shoulders, a throbbing arm and migraine-like pain in his head. He could not work, read, sleep, watch TV or drive a car.

The Appellant described the severity of his symptoms in January and its effect upon his ability to perform his work duties. He reviewed the treatment he sought.

He initially sought treatment from [Appellant's Doctor #1], but he was out of town. Instead he saw [Appellant's Doctor #2], in [Appellant's Doctor #1's] office, who recommended

physiotherapy. He also consulted an acquaintance, [Appellant's Orthopaedic Surgeon], when he saw him, by chance, at [text deleted].

As well, reports were submitted from [Appellant's Doctor #1], [Appellant's Doctor #2], [Appellant's Orthopaedic Surgeon], [Appellant's Doctor #3] and [Appellant's Physiotherapist].

[Appellant's Physiotherapist] also testified at the hearing into the Appellant's appeal. She reviewed her reports and explained her diagnosis of the Appellant's injuries. She explained the basis for choosing a gradual return to work plan for the Appellant's resumption of his work duties both in August, following the motor vehicle accident and between January and March, following what she described as a flare-up related to his initial motor vehicle accident.

[Appellant's Physiotherapist] was cross-examined by counsel for MPIC regarding the possible subjective nature of the Appellant's symptoms. However, [Appellant's Physiotherapist] maintained that the many signs and measurements which she reported in her examinations of the Appellant were objective findings of a severe flare-up of the Appellant's injuries. Further, she was of the opinion that the Appellant's symptoms were not caused by a pre-existing history of arthritis or cervical spondylosis, which would produce a more general or global pattern of pain and symptoms, unlike the specific injuries and symptoms which the Appellant suffered between January and March 2006.

Both the Appellant and [Appellant's Physiotherapist] were cross-examined in regard to whether the Appellant had initially reported left shoulder and arm symptoms following the motor vehicle accident and then right sided shoulder and forearm pain in January of 2006. However, the Appellant stated that he had problems with both sides following the motor vehicle accident

although the left sided pain was worse. He suffered so much extreme pain immediately following the motor vehicle accident that any movement caused him to suffer at that point.

[Appellant's Physiotherapist] noted that, following the motor vehicle accident, she was treating both sides of his neck and had noted some symptoms down his right arm, although his left side had been the focus of her treatment at the time.

Counsel for the Appellant submitted that although the Appellant did suffer from pre-existing cervical spondylosis, prior to the motor vehicle accident, he had been symptom free for several years. Following the motor vehicle accident he was diagnosed with cervical shoulder strain, neck pain and headaches, with predominant symptoms in his right arm and shoulder. He participated in a gradual return to work treatment program and returned to work. Following a few weeks off of work on holidays, upon his return back to work, when he was predominantly working on the computer, he suffered a relapse. It was diagnosed as a relapse by [Appellant's Doctor #1] and [Appellant's Doctor #2], who had the opportunity to examine him firsthand, as well as by [Appellant's Physiotherapist]. [Appellant's Orthopaedic Surgeon] also indicated that his pre-existing condition may have been aggravated by the motor vehicle accident, although he deferred to the Appellant's general practitioner who would be in the best position to assess that.

Counsel for the Appellant reviewed evidence heard by the panel from [MPIC's Doctor], who relied upon [Appellant's Occupational Therapist's] Functional Capacity Evaluation to opine that the Appellant was capable of performing a significant portion of his duties and was not disabled from performing his job. Counsel for the Appellant noted several errors in [Appellant's Occupational Therapist's] assessments, as well as a lack of objective measurement which conflicted with the Appellant's doctors' examinations.

Counsel submitted that on the balance of probabilities, the evidence showed that between January and March 2006 the Appellant suffered from a physical impairment of function which was a result of the motor vehicle accident and that precluded him from doing a significant percentage of the duties of his employment. According to the Appellant's general practitioner and physiotherapist these symptoms were a relapse which occurred as a result of the motor vehicle accident and counsel submitted that the Appellant should be entitled to receive IRI benefits between January 9 and March 22, 2006 as a result.

Evidence and Submission for MPIC:

MPIC submitted reports from (sic) [Appellant's Occupational Therapist] who completed a Physical Demands Analysis in September of 2005 and a Percentage of Duties Assessment in March of 2006.

MPIC also submitted reports from [MPIC's Doctor], a Medical Consultant with MPIC's Health Care Services Team. [MPIC's Doctor] testified at the hearing into the Appellant's appeal.

[MPIC's Doctor] was of the view that the Appellant's symptoms in January of 2006 were not causally related to the motor vehicle accident. Any initial soft tissue injuries the Appellant had suffered had resolved when the Appellant returned to work with full duties. [MPIC's Doctor] did not feel that on a balance of probabilities, there was a causal connection to the motor vehicle accident when the Appellant's right sided symptoms appeared in January of 2006.

In [MPIC's Doctor's] view, the Appellant's symptoms were more in keeping with degenerative changes in his neck, which could be seen on radiologic investigations.

As well, in reviewing [Appellant's Occupational Therapist's] Physical Demands Analysis and Functional Assessment, [MPIC's Doctor] concluded that the strength demands of the Appellant's occupation were light, with a large sedentary component. The medical information did not establish that he was unable to complete the duties of his work as a landscape architect between January and April of 2006. The Appellant was assessed and treatment was recommended with no restrictions imposed; the medical reports at the time did not contain objective findings supporting a conclusion that the Appellant could not do his job.

Counsel for MPIC submitted that the Appellant's medical records showed that he suffered from an underlying condition and predisposition to cervical and pinched nerve symptoms which were at risk to suddenly reoccur.

Following the motor vehicle accident in August 2005, the Appellant presented with left sided symptomology. He suffered a sore left shoulder, sore neck and back, and headaches. There was suspicion that he had suffered a pinched nerve. With treatment, he improved by October and by the end of November, he returned to full-time duties.

Counsel submitted that the underlying condition of the Appellant's neck predisposed him to problems. Whatever he had done prior to his return to work in January 2006, which might be sitting in a car or something else, had caused his problems in January of 2006.

Counsel pointed out that [Appellant's Physiotherapist's] early treatments focused on left sided pain and that what she described as a "flare-up" occurred in his right shoulder, elbow, and forearm.

Counsel noted that [Appellant's Doctor #2's] report of January 16, 2006 also noted symptoms to his right shoulder. Further, she did not state that he should refrain from working because of these complaints. She prescribed only physiotherapy. It was not until his next clinic visit in March that it was noted that he was off work and should return to work in mid-April.

Counsel submitted that the evidence falls short of proving that on a balance of probabilities the Appellant is entitled to further IRI benefits. MPIC's decision not to pay IRI benefits in January 2006 and following is well supported by evidence before the Commission.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he was unable to work between January 9 and March 22, 2006, as a result of injuries suffered in the motor vehicle accident.

The MPIC Act provides:

Reimbursement of victim for various expenses

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

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

Manitoba Regulation 40/94 provides:

Medical or paramedical care

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

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

Manitoba Regulation 37/94 provides:

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.

[MPIC's Doctor], in his reports of June 6, 2006, July 9, 2009 and January 19, 2010, as well as in his evidence at the hearing, opined that the Appellant's clinical findings and diagnoses could not be causally linked to the motor vehicle accident. These included cervical spondylosis, head forward posturing, muscle fatigue and joint hyper-mobility. [MPIC's Doctor] attributed any symptoms suffered by the Appellant to these conditions, and also opined that at the relevant time the Appellant did not suffer from a condition which would lead to an impairment of function that would preclude him from performing the light level of work which had been identified for his occupation of landscape architect.

[Appellant's Physiotherapist], [text deleted], did not share this view. In reports dated January 12, 2006, February 6, 2007 and December 9, 2009, she described a severe flare-up of the Appellant's neck pain and dysfunction in early January of 2006.

"...He originally attended physio for this from August 9, 2005 until October 14, 2005. At that time his symptoms had improved from constant pain in his left shoulder, neck and head, to more intermittent pain brought on by overdoing his computer work..."

On reassessment, [the Appellant] reported experiencing a severe flare up of his neck pain and dysfunction in early January 2006 after returning to work after two weeks off in December. He described this as the same neck stiffness and headache as previously, but now also had right shoulder, elbow and forearm pain. Four fingers tingle intermittently and his thumb throbs almost constantly. Sleep is very disturbed by pain. Pain will flare quite unexpectedly, rendering his arm “useless” (I witnessed this during the assessment) but predictably occurs with changes in position of his arm or neck.”

She described his signs and symptoms as well as objective tests she performed. She stated:

“At this time, [the Appellant] was again not able to work on his computer due to it aggravating his neck. It was reasonable to me that this flare up, though delayed, was related to his initial MVA of August 2, 2005. This is the same conclusion as my letter of January 12, 2006 addressed to [case manager] ...”

[Appellant’s Physiotherapist] opined:

“...I indicated it was reasonable the flare-up commencing January 2006 was related to the initial motor vehicle accident. I do feel [the Appellant’s] condition at that time equated to a physical impairment of function that rendered him substantially unable to perform the duties of a landscape architect...”

[Appellant’s Orthopaedic Surgeon] provided a brief note and a report dated January 27, 2006.

He stated:

“Clinical examination is stated in the clinical notes. My diagnosis was regional myofascial symptoms. He had a history of cervical spondylosis, which may have been aggravated as well in the accident. This may preclude his work activities as described above, but on the one assessment only, I cannot verify that he is disabled for this extent over this time period. He needs further investigation, which will be done by [Appellant’s Doctor #2]. Normally, I do not see this type of condition and will not be seeing him again.

His condition is not precluding him from driving to and from the workplace. It involves limitations of his work tasks as stated in the report. It does not pose a safety risk. Returning to work could adversely affect the natural history in that it may worsen his inflammation.”

[Appellant’s Doctor #1], who has been the Appellant’s general practitioner for some time and treated him throughout much of the period following his motor vehicle accident, provided reports on May 25, 2006, February 10, 2006 (sic), February 8, 2009 and January 17, 2010.

He described his treatment of the Appellant as well as that of [Appellant's Doctor #2] and the physiotherapist, and the Appellant's encounter with [Appellant's Orthopaedic Surgeon]. He noted that the Appellant had been a patient of his for over 15 years and described some of the demands of his occupation. He indicated that he saw the Appellant after the motor vehicle accident and that he was seen by [Appellant's Doctor #2], of his office, on January 16, 2006. He indicated that:

“...Given his pain and restricted physical movements, it is my medical opinion that [the Appellant] should not have been working subsequent to his examination on January 16, 2006. His physical condition caused by the accident rendered him unable to perform the essential duties of his work. Returning to work would have aggravated his condition. He was advised to limit himself and rest and the onset of and the onset of pain and neck/shoulder stiffness.”

[Appellant's Doctor #1] was of the view that the injury of August 2, 2005 directly caused and aggravated the Appellant's pre-existing cervical spondyloarthropathy and that he was prevented from being able to perform his duties as a landscape architect from January 9 to March 22, 2006.

He stated:

“This was directly related to aggravation of symptoms and decreased function related to the accident of August 2, 2005.”

[Appellant's Doctor #3's] report dated January 22, 1996 was reviewed. It described findings of cervical spondylosis at multiple levels with significant foraminal narrowing, neck pain related to C7 and/or C8 compression, and suggested some physiotherapy.

The panel has also considered the evidence of the Appellant. We found the Appellant's evidence to be clear and credible. Although he did have a history of some neck and back problems in 1995 to 1996, and there was evidence of pre-existing cervical spondylosis, we also find that the

evidence establishes that the Appellant was symptom free for almost 10 years prior to the motor vehicle accident.

This was confirmed by [Appellant's Doctor #1's] evidence.

[Appellant's Doctor #1] confirmed that he had seen the Appellant in November 1995 for neck pain and that the Appellant had had a CT scan of the cervical spine. He noted:

“He has been seen regularly since then for other intermittent illnesses and check-ups and had been without any complaints regarding his neck until the accident of August 2, 2005 and fortunately when last seen for his regular check-up on February 6, 2009 he was doing well with no neck pain since June 1, 2006

I am enclosing investigations done in 1995-1996 and consultation records from [Appellant's Doctor #3].

[The Appellant] did have symptoms related to his cervical discopathy and spondylosis during that period but did go into remission with treatment until his unfortunate motor vehicle accident of August 2, 2005.”

In 2010, [the Appellant's Doctor #1] again confirmed his opinion that the Appellant “was unable to work from January 9 to March 22, 2006 as a result of injuries that aggravated his pre-existing cervical spondylosis from the accident of August 25, 2005”.

While some errors were found in the physiotherapist reports, particularly when, as she admitted in her testimony, [Appellant's Physiotherapist] referred to left instead of right sided pain, she did correct these errors by referring back to her chart notes. On the whole, we found her evidence to be credible. She provided valuable evidence regarding the objective signs as well as symptoms which the Appellant experienced, and her conclusions regarding their origin.

The observations and conclusions of both these caregivers, [Appellant's Doctor #1] and [Appellant's Physiotherapist], who had the opportunity to examine the Appellant following the motor vehicle accident and his difficulties in January of 2006, and who are fully aware of his pre-existing history, along with the evidence of the Appellant, meets the onus upon the Appellant to show, on a balance of probabilities, that he was unable to perform his occupation between January and March 2006, as a result of the motor vehicle accident.

Accordingly, the Commission finds that the Appellant has met the onus of showing, on a balance of probabilities that the Internal Review Decision of June 21, 2006 was in error in regard to his entitlement to Income Replacement Indemnity benefits. That Internal Review Decision is hereby overturned on that point, and the Appellant's appeal regarding that issue is allowed. The Appellant will be entitled to IRI benefits from January 9, 2006 until March 22, 2006. Interest upon that amount shall be added, in accordance with Section 163 of the MPIC Act.

Dated at Winnipeg this 20th day of July, 2010.

LAURA DIAMOND

WILF DEGRAVES

JEAN MOOR