

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-090**

PANEL: Ms Laura Diamond, Chairperson
Mr. Wilf DeGraves
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Alison Caldwell.

HEARING DATE: December 1, 2011

ISSUE(S): Whether the Appellant has provided a reasonable excuse for
failing to file his Application for Review within the 60-day
time limit and, if so, is he entitled to Personal Injury
Protection Plan benefits for left should injury.

RELEVANT SECTIONS: Sections 71(1) and 172 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

The Appellant was injured in a motor vehicle accident on November 10, 2006. As a result of the accident he sustained soft tissue injuries to his neck, back, left elbow, right shoulder and contusions and lacerations to his face and neck. He received Personal Injury Protection Plan ("PIPP") benefits, including Permanent Impairment benefits.

On February 28, 2008, the Appellant advised his case manager that he had injured his left shoulder in the motor vehicle accident and that surgery was pending. The case manager investigated the causal relationship of his left shoulder injury and surgery to the motor vehicle accident, including examining the Appellant's work and Worker's Compensation Board history.

On November 28, 2008, the case manager wrote to the Appellant indicating that the information on his file had been reviewed by the Health Care Services team at MPIC. Based upon this review, it was concluded that the medical evidence did not indicate that the Appellant had sustained an injury to the left shoulder as a result of the motor vehicle collision of November 10, 2006. Therefore, the necessity for left shoulder surgery was not related to the motor vehicle accident.

The Appellant sought an Internal Review of this decision on March 9, 2009..

On June 4, 2009, an Internal Review Officer for MPIC rejected the Application for failure to comply with the time limit set out in section 172 of the MPIC Act for filing an Application for Review. The Internal Review Officer also considered the merits of the Application and reviewed the medical evidence on the Appellant's file. She agreed with the opinion of MPIC's Health Care Services Team that there was not a causal relationship between his current left shoulder symptoms and the motor vehicle collision. The Internal Review Officer considered the Appellant's workplace injuries and Worker's Compensation Claim as well as evidence indicating that he had injured his left shoulder in an assault [text deleted] on August 6, 2007.

The Internal Review Officer upheld the case manager's decision. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant's sister testified at the hearing into his appeal. She described how physically active the Appellant was prior to the motor vehicle accident, playing football and soccer on teams. He also participated in weightlifting and kickboxing and even helped her with her weight training. She indicated that prior to the motor vehicle accident, she had seen him bench pressing between two hundred and twenty five to two hundred and fifty pounds. But now, after the motor vehicle accident, she indicated that he has a hard time lifting even one hundred to one hundred and fifty pounds. He can no longer play soccer the way he used to, often coming off the field complaining that his shoulder is sore and grinding.

The Appellant also testified at the hearing into his appeal. He spoke to his failure to file the Application for Review within the appropriate time lines. He testified that he had spoken to his case manager on November 28, 2008 when he received the decision, advising her that he was seeing [Appellant's surgeon], a specialist, regarding the surgery and he was waiting for paperwork from him. However, he did not expect to see [Appellant's surgeon] until February 10, 2009 and he didn't feel he could complete his Application until he had the appropriate information from [Appellant's surgeon]. The Appellant testified that the case manager told him this was not a problem and that it would be taken care of.

When he sent in the paperwork for his Application for Review, it was declined. He felt this was a result of miscommunication. If he had known he would be penalized for late filing, he would have handed in his Application on time. When he tried to follow up on this, he found that he had a new case manager, as his original case manager was on leave.

The Appellant maintained that approximately one month after seeing [Appellant's surgeon] he sent in his Application for Review papers, and that because he had been misled by his case manager, he should not be penalized and should be allowed to pursue his review and appeal.

The Appellant also gave evidence regarding his left shoulder injury. He explained that he was not assaulted at [text deleted], but rather had been assaulted at an [text deleted]. Further, this was not when he injured his left shoulder. He pointed to chart notes made by his family doctor, [Appellant's doctor #1] on July 31, 2007, a couple of weeks prior to this assault, which recorded his complaints providing his left shoulder.

[Appellant's doctor #1's] letter of December 27, 2010 set out this note:

“...please be informed that reference to a recurrent dislocation of the left shoulder is made in the course of an appointment [the Appellant] had with my office on July 31, 2007. Notes taken read “C/o (complains of) recurrent dislocation of the left shoulder, right shoulder also injured in a MVA Nov 10. Had 2 more accidents since. To Orthop Surgeon. Concussion, assaulted a few times, drowsiness, headaches, hit on the head.”

The Appellant submitted that this note showed that the conclusion of the Internal Review Officer that his left shoulder injury was due to an assault which occurred in August of 2007 was not correct.

The Appellant also described a workplace injury which occurred in October of 2007 when a stack of boxes fell on him and he suffered a sprain and dislocation in his left shoulder. He said that he was off work for about two years after that, but only received Worker's Compensation benefits for one month because the Worker's Compensation Board attributed causation of his continuing difficulties with his shoulder to the motor vehicle accident and the assault. As a

result, he was in receipt of short term and then long term disability benefits. He was off work while awaiting surgery.

The Appellant also referred to a primary health care report from [Appellant's doctor #2] dated May 28, 2008, which documented an examination dated November 10, 2006. He noted that under the symptoms section of the form, [Appellant's doctor #2] had checked off both left and right shoulder/arm pain. He questioned how a primary health care report dated November 16, 2006 from [Appellant's doctor #1], ten days later, could then ignore all left-sided symptoms and only refer to "strain of neck, right shoulder, multiple contusions to right upper limb".

The Appellant testified that he had seen [Appellant's doctor #2] the day of the motor vehicle accident and then had seen his family doctor a week later. However, his family doctor had missed quite a few of his symptoms.

The Appellant indicated that after the motor vehicle accident he was in shock and was medicated. He only recalls bits and pieces of what happened. He knows that ever since the motor vehicle accident his upper body has never been the same and that the muscle injuries he suffered cause him a great deal of problems. He has had physiotherapy for both sides of his body, but the physiotherapist emphasized his right shoulder.

The Appellant noted that on December 27, 2006, his physiotherapist, [Appellant's physiotherapist], indicated that he was able to return to work for four hours per day with restriction to light duties. He queried why he would have only been allowed to return to light duties if he was not still having problems strengthening his muscles as a result of the motor vehicle accident.

The Appellant emphasized that before the motor vehicle accident he had never had any problems with his upper body and since the motor vehicle accident he had many, especially with his shoulders. Accordingly, he submitted that his left shoulder injury was due to the motor vehicle accident and that his appeal should be allowed.

Evidence and Submission for MPIC:

In regard to the late filing of the Appellant's Application for Review, Counsel for MPIC submitted that the Commission should not accept the Appellant's excuses as reasonable or credible. The evidence indicated that the Appellant's case manager told him that she could not do anything about the sixty day deadline. He had been in possession of the Application for Review since November 28, 2008 and must have been aware that he did not have to wait until he received a report from [Appellant's surgeon] to simply file the Application.

Further, Counsel for MPIC submitted that the Appellant was not entitled to PIPP benefits as a result of the injury suffered to his left shoulder. PIPP benefits only apply, pursuant to section 71 of the Act, to injuries suffered in a motor vehicle accident, and both the medical and oral evidence in this appeal showed it was improbable that the Appellant's left shoulder injury related in any way to the motor vehicle accident.

Counsel reviewed the documents on the Appellant's indexed file, in chronological order, beginning with the ambulance report from the day of the motor vehicle accident and moving through the emergency and triage hospital records, records from [Appellant's doctor #2] at the [text deleted] and then the physiotherapy reports. All of these reports, through the first ten days following the motor vehicle accident, reported on right neck and shoulder pain as well as cervical

strain and sprain, but none mentioned the Appellant's left shoulder, including the "Patient Face Sheet" and clinical notes from the [text deleted].

Even the Appellant's Application for Compensation, dated December 11, 2006, a month after the motor vehicle accident, complains of pain in the neck on both sides, the shoulder on the right side and a bruised left elbow. The Appellant was able to be specific regarding which sides his pain was on, but made no mention of left shoulder pain.

Reports from [Appellant's doctor #1] mentioned only right-sided symptoms, and even after he was approved for return to work at light duties, a physiotherapy exam on February 15, 2007, three months after the motor vehicle accident, mentioned only weakness in his right shoulder and cervical sprain. [Appellant's doctor #1], in an exam of January 11, 2007, made no mention of left shoulder pain.

Counsel then reviewed a report from [Hospital] Emergency dated August 6, 2007 which referred to the Appellant's claims that he had been jumped [text deleted] and reports of pain in his left shoulder with a diagnosis of a dislocated shoulder. This incident, she submitted, a good nine months after the motor vehicle accident, is the first time we see a diagnosis of a dislocated shoulder as opposed to earlier mentions of strains and sprains. Finally, the left shoulder in particular is noted.

X-rays followed, as well as an MRI of the left shoulder on November 25, 2007, well over a year following the motor vehicle accident. MPIC took the position that the injury seen in the subsequent x-rays and MRIs are irrelevant in regard to establishing a causal connection between the injury and the motor vehicle accident, since none of these investigations were performed

soon after the motor vehicle accident and any abnormalities seem to relate to different causes of injury.

Counsel also reviewed the Appellant's Application for Worker's Compensation benefits filed in December of 2007 for an injury to his left shoulder. The documentation completed by the Appellant indicated that in November 2007 he had been [text deleted] and then again injured his left shoulder when it was dislocated and he took a week off work. The Application also describes an injury to his left shoulder when he stretched out his left arm and hurt himself in a workplace accident.

[Appellant's doctor #3] reported on December 18, 2007, reviewing the MRI assessment of the left shoulder and the injury disclosed, and recommending possible surgical stabilization for his recurrent anterior dislocation of the left shoulder joint. There was no discussion in that report of any motor vehicle accident related injuries.

Then, on February 15, 2008, the Worker's Compensation Board wrote to the Appellant regarding his claim for a left shoulder injury from December 13, 2007, while working for [text deleted]. The Worker's Compensation Board accepted responsibility for medical treatment costs and wage loss up to and including January 17, 2008 but indicated that the Appellant then recovered from the effects of the compensable left shoulder strain injury.

Then, for the first time, on February 28, 2008, the Appellant contacted MPIC to advise that his left shoulder was injured in the motor vehicle accident and he now needed surgery. This was the first time that the Appellant contacts MPIC regarding his left shoulder and it occurred two weeks

after he was informed by the Worker's Compensation Board that he was no longer eligible for coverage for his left shoulder.

Counsel for MPIC also reviewed the Primary Health Care Report completed by [Appellant's doctor #2] on May 28, 2008 (long after the motor vehicle accident had occurred). She also reviewed the report of [Appellant's doctor #3] regarding an examination of December 13, 2007, reporting on June 2, 2008, long after the motor vehicle accident, and diagnosing a recurrent dislocation of the left shoulder. In his narrative report of June 8, 2008, [Appellant's doctor #3] mentions ache and discomfort of the left shoulder girdle noting that "*apparently*" the Appellant was involved in a road accident causing initial injury to this joint. This is just a reflection of [Appellant's doctor #3] reporting what the Appellant had told him, she submitted, and does not represent a determination of causation by [Appellant's doctor #3].

[MPIC's doctor] reviewed documentation and reported on November 27, 2008. He reviewed [Appellant's doctor #2's] report, the [Physiotherapy] reports, [Appellant's doctor #3's] information and the information obtained from the [Hospital] regarding the [text deleted] incident. [MPIC's doctor] concluded that the left shoulder dislocation likely occurred as a result of this assault and that the Appellant's left shoulder condition was not likely related to the motor vehicle incident in question.

Following the case manager's decision, which relied upon [MPIC's doctor's] report, [Appellant's surgeon] reported on February 10, 2009, reviewing and discussing the Appellant's left shoulder instability. Again, [Appellant's surgeon] reported what the Appellant had told him regarding the motor vehicle accident roll over, his shoulder pain afterwards and his physiotherapy. He then noted the assault which increased the shoulder instability problems.

However, Counsel for MPIC maintained that [Appellant's surgeon] was only recounting what the Appellant had told him and was not proving an actual opinion regarding causation.

This was exemplified by the letter which the Appellant wrote, dated March 9, 2009, which confirmed:

“.....on December 13, 2007 [Appellant's doctor #3] examined me subsequently and mentioned the MRI results. I informed the doctor of the accident I was in on Nov. 10, 2006 and told him about the shoulder pain that has occurred since then as claimed in the Autopac claim. I was also assessed by [Appellant's surgeon] and this concluded the same results. [Appellant's surgeon] ensures that the result of this injury is due to the accident on Nov. 10, 2006.....”

[Appellant's doctor #1] and the physiotherapist, [Appellant's physiotherapist] were asked to review their files. Their replies, dated December 27, 2010 and January 6, 2011, did not include any references to left shoulder pain following the motor vehicle accident or before July 2007. The physiotherapist records make no reference to a left shoulder injury, even though the physiotherapist was treating him within two to three weeks after the accident.

Counsel submitted that MPIC is not required to prove the exact medical cause of the left shoulder injury. Rather, the onus is on the Appellant, on a balance of probabilities, to prove that it was caused by the motor vehicle accident and she submitted that he had not done so. There is no medical report on the Appellant's indexed file challenging the conclusions made by [MPIC's doctor] after he reviewed all the documents on the file – [Appellant's doctor #3], [Appellant's surgeon] and [Appellant's doctor #1] did no such analysis. Although the Appellant did suffer serious injuries in the motor vehicle accident, the injury to his left shoulder could not be attributed to that accident and was not, on a balance of probabilities, caused by the motor vehicle accident.

Counsel submitted that the appeal should be dismissed.

Discussion:

The MPIC Act provides:

Application for review of claim by corporation

[172\(1\)](#) Except as provided in subsection (1.1), a claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

Non-application to decisions under section 137.1

[172\(1.1\)](#) Subsection (1) does not apply if the decision is about a matter under section 137.1.

Corporation may extend time

[172\(2\)](#) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

The Appellant filed his Application for Review on March 9, 2009, more than six weeks outside of the time limits set out by 172 of the MPIC Act.

The Panel has considered the Appellant's explanation of his reasons for the delay. While the Panel believes that the Appellant should have been more attentive to the filing of his documentation, and are concerned regarding the additional delay in filing after [Appellant's surgeon] reported on February 10, 2009, we find that the Appellant's delay was affected by miscommunication with his case manager.

The Panel finds that the Appellant did communicate to his case manager his intention to seek an Application for Review as soon as he received information from [Appellant's surgeon].

Accordingly, the Panel finds that, having regard to all of the circumstances, including the Appellant's clear expression to his case manager of his intent to seek a review upon receipt of [Appellant's surgeon's] report, the ensuing miscommunication with the case manager and change of case management, the Panel will exercise its discretion to allow for the late filing of the Appellant's Application for Review.

The onus is on the Appellant to show on a balance of probabilities, that his left shoulder injury was caused by the motor vehicle accident.

The MPIC Act provides:

Application of Part 2

71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

The Panel has considered the Appellant's appeal on the merits and reviewed the medical information on the Appellant's indexed file, as well as the testimony at the Appeal hearing and submissions of the Appellant and Counsel for MPIC.

The Panel has reviewed numerous reports dealing with a variety of injuries and incidents involving the Appellant's left shoulder, but most of these occurred over a year after the motor vehicle accident.

The Panel finds that a large majority of the medical reports reviewed, particularly in the early period following the motor vehicle accident, do not mention an injury to the Appellant's left shoulder. As Counsel for MPIC noted, a review of the ambulance, emergency, triage, and early

doctor and physiotherapy reports in the weeks following the motor vehicle accident do not show specific mention of the left shoulder injury.

The first real reports regarding the left shoulder appear over a year after the motor vehicle accident, and a few weeks after the Worker's Compensation Board decision denying the Appellant further benefits.

The evidence is confusing and contradictory, with inconsistencies, and fails to clearly define the cause of the Appellant's left shoulder problem. This makes it difficult for the Panel to attribute the injury to his left shoulder to the motor vehicle accident. The Appellant did provide some evidence from [Appellant's doctor #3] and [Appellant's surgeon] supporting his position that the accident caused the left shoulder injury, but these reports did not include a review of his medical file and history and do not provide a focused analysis regarding causation.

Accordingly, the Commission finds that the Appellant has failed to meet the onus upon him of showing, on a balance of probabilities, that his ongoing left shoulder complaints and symptoms were caused by the motor vehicle accident. As a result, the decision of the Internal Review Officer dated June 4, 2009 is upheld and the Appellant's Appeal is dismissed.

Dated at Winnipeg this 31st day of January, 2012.

LAURA DIAMOND

WILF DEGRAVES

NEIL COHEN