Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-12-014

PANEL:	**Ms Laura Diamond, Chairperson** **Dr. Sheldon Claman** **Dr. Chandulal Shah**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.**
HEARING DATE:	**May 29, 2014**
ISSUE(S):	**Whether the Appellant is entitled to a permanent impairment benefit for L5 nerve impairment.**
RELEVANT SECTIONS:	**Section 127 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 March 4, 2010. He sustained injuries to his neck and low back. The Appellant had also been involved in numerous motor vehicle accidents in the past, in which he had sustained similar types of injuries.

In September of 2011, the Appellant asked his case manager for a permanent impairment award for the enduring pain he was suffering as a result of a nerve injury. The Appellant's case manager wrote to him on September 21, 2011 indicating that the medical information on file did

not provide a diagnosis of nerve injury. The medical information stated that his injuries were degenerative in nature and therefore not a result of the motor vehicle accident, and the MPIC Act does not provide payment for general damages for pain and suffering. For all these reasons, the case manager denied the Appellant's application for a permanent impairment benefit.

The Appellant sought an Internal Review of this decision. On January 23, 2012, an Internal Review Officer for MPIC denied the Appellant's Application for Review. Although the Appellant sought a permanent impairment award for an L5 nerve impairment, the Internal Review Officer, after reviewing medical information on the Appellant's file (including a report from [Appellant's Orthopedic Surgeon]) concluded that a review of the Appellant's MRIs showed disc bulging, but nothing to suggest specific nerve root entrapment. The Appellant indicated he had this problem for many years after having been involved in 18 car accidents and the Internal Review Officer indicated that at some point one of these accidents <u>may</u> have caused the apparent L5 nerve condition. However, [Appellant's Orthopedic Surgeon's] indication that there was nothing to suggest a nerve root entrapment led the Internal Review Officer to uphold the case manager's decision. The current medical information, in his view, did not support a diagnosis of an L5 nerve condition.

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

<u>Evidence and Submission for the Appellant:</u>

The Appellant testified at the hearing into his appeal. He indicated that he had been in 24 motor vehicle accidents. Some were minor and some were serious.

He described various motor vehicle accidents, including one rear-end motor vehicle accident that caused a lot of trouble with his neck and a 1997 accident where he was t-boned resulting in sacroiliac pain.

The Appellant testified that he required surgery for the condition of his L4-L5 disc. He had been suffering from pain for a long time, and explained that the disc was half gone and the spine twisted. According to the Appellant, the seatbelt came across the spot where the sciatic nerve lies, causing damage in the accidents and the resulting pain in his left leg and lower back, where the L4-L5 disc is. He had been having such problems for five or six years.

He described the pain he suffered in his lower back, including burning and tingling. He had some numbness in his toes, which was now spreading to his whole foot.

The Appellant indicated that he had gone for physiotherapy and dry needling therapy which seemed to be helping. He still functioned as a volunteer medical courier. He tried to stay away from pain killers.

On cross-examination, the Appellant denied that prior to the motor vehicle accident on March 4, 2010 he had already been diagnosed as suffering from degenerative changes in his lumbar spine. He indicated however, that although he had a clinical history of persistent back pain, he had never had as much trouble with his back as he does now, following all these motor vehicle accidents.

The Appellant also referred to two reports from neurologists, [Appellant's Neurologist #1] and [Appellant's Neurologist #2].

The Appellant submitted that the panel should rely upon the evidence of [Appellant's Neurologist #2], a qualified neurologist, who had been seeing the Appellant, with thorough examinations, for many years. On the other hand, he had only seen [Appellant's Physiatrist] once, and had never been examined by MPIC's Health Care Services consultant, who was not a neurologist, but rather a sports medicine physician.

He relied on several reports provided by [text deleted] [Appellant's Neurologist #2]. On September 10, 2012, [Appellant's Neurologist #2] reviewed the Appellant's long-standing history of low back pain and his motor vehicle accidents. Following examination, he concluded that there was clinical evidence of left L5 and S1 root compression and noted that an MRI of the left spine from 2010 showed a left L5 and possibly S1 radiculopathy.

On December 20, 2012 [Appellant's Neurologist #2] reported after a follow-up with his patient. Clinically, he suspected an L5 and/or S1 radiculopathy on the left, which would fit with the MRI report of a left S1 radiculopathy.

[Appellant's Neurologist #2] reported again on January 23, 2013 indicating that the Appellant continued to have ongoing pain in his lower back, right hip and neck, with his left hand still numb.

On November 13, 2013, [Appellant's Neurologist #2] concluded that the Appellant had signs suggestive of an L5 radiculopathy. On December 11, 2013 he reported that his clinical findings were suggestive of an L5 and possibly S1 radiculopathy on the left although EMG testing did not show denervation in that distribution. However, in his view, this did not rule out a

radiculopathy, since his clinical findings fit with the MRI and CT findings of a left L5 and left S1 radiculopathy. [Appellant's Neurologist #2] concluded:

> "In conclusion, it is quite probable (more than 50% likely) that he does have an L5 and S1 radiculopathy on the left. His clinical exam shows mild weakness and numbness in that distribution as well as quire significant left leg and low back pain, as referenced in my November 13/13 letter.
>
> It is probable that one or another MVA contributed to this low back and left sided sciatica but it is not possible to determine which accident was most responsible."

It was the position of the Appellant that, as noted by [Appellant's Neurologist #2], he did suffer from an L5 and S1 radiculopathy and that this was caused by the numerous motor vehicle accidents in which he had been injured.

Evidence and Submission for MPIC:

MPIC relied upon reports provided by the [Appellant's Physiatrist], as well as opinions from the MPIC Health Care Services chiropractic and medical consultants.

Counsel framed the issue as to whether the Appellant is entitled to a permanent impairment for an L5 nerve impairment. The Internal Review decision dated January 23, 2012 found that no diagnosis of such a condition had been established. Counsel for MPIC took the position that although the Appellant does suffer from a degenerative disc disease, no diagnosis of an L5 nerve condition has been confirmed and his degenerative disc disease is not related to the motor vehicle accident.

Counsel reviewed the Appellant's testimony regarding the back pain that he has suffered since 1997. However, she pointed out that the motor vehicle accident at issue in this appeal occurred on March 4, 2010. A lumbar spine CT scan report dated August 16, 2006 showed multi-level

degenerative spondyloarthropathy. Therefore, counsel submitted that the Appellant's low back symptoms were a result of this multi-level degeneration and that the motor vehicle accident had not been shown to cause any enhancement of these degenerative changes.

Counsel also reviewed reports from the [Appellant's Physiatrist] who was not able to correlate the Appellant's increased symptoms with his motor vehicle accidents. For example, [Appellant's Physiatrist's] report of November 1, 2012 set forth her impression that the Appellant had a previous discopathy, now with a decreased mobility of his cervical and lumbar spine, secondary to degenerative disc disease.

In a report dated November 28, 2012 [Appellant's Physiatrist] indicated that his right L5 nerve root was slightly displaced posteriorly and that the pain in his legs was probably caused by the irritation of the nerve root at S1 or L5. She explained to the Appellant that she could not correlate his motor vehicle accident to the degenerative disc disease because, as age advanced, there was increased incidence of degenerative disc disease.

In a report dated June 5, 2013 [Appellant's Physiatrist] again referred to her explanation to the Appellant that since she had only started seeing him in October of 2012, she could not attest to the fact that his degenerative disc disease and radicular pain were related to the motor vehicle accidents.

Counsel reviewed reports from MPIC's chiropractic consultant. In a report dated January 29, 2008, he noted that the Appellant had failed to mention low back pain following treatment arising out of a motor vehicle accident on February 6, 2007. He later presented to a

physiotherapist with low back pain symptoms, but there were no neurological difficulties or symptoms reported at that time.

A CT of the Appellant's lumbar spine dated October 8, 2008 showed a shallow posterior disc bulge and indicated that nerve root irritation of the exiting left L5 nerve root could not be excluded. However, the MRI report dated May 17, 2009 noted multi-level degenerative changes in the lumbar spine with posterior disc protrusions.

The Appellant was treated by an athletic therapist who reported on March 16, 2010, following the motor vehicle accident of March 4, 2010. She documented symptoms of headaches, cervical pain, left hip buttock pain with occasional radiation, but there was no mention of low back symptoms and a clinical diagnosis of cervical mechanical strain with a history of lumbar disc disease was provided.

An MRI of the lumbar spine dated July 30, 2010 showed no interval changes in the lumbar spine from prior studies, although the exiting L5 nerve root was identified as possibly being compromised with a potential for irritation.

[Appellant's Orthopedic Surgeon], provided a report dated August 10, 2010. He indicated that the MRI showed wear and tear in the lumbar spine with some disc bulging but nothing was present to suggest specific nerve root entrapment. The MRI showed no internal change from the previous MRI.

Therefore, counsel for MPIC submitted that the March 4, 2010 motor vehicle accident had not enhanced any nerve root irritation at L5 which may have been present. Nor did the medical

reports on file establish that the other motor vehicle accidents had, with any probability, caused a nerve irritation.

Counsel also reviewed a physiotherapy report dated September 16, 2010 which described the Appellant's pre-existing history of disc bulges in his lower lumbar spine, and a Health Care Services report from MPIC's medical consultant dated April 5, 2011 which described the Appellant's pre-existing problems with lumbar degenerative disc disease. A further Health Care Services report dated July 9, 2012 undertook a full review of the file and concluded:

> "Based on a review performed on April 5, 2011, it was determined that prior to March 4, 2010, [the Appellant] (sic) had problems with lumbar degenerative disc disease and possible compromise of the left L5 nerve root. The information obtained from the above noted documents does not indicate the L5 nerve root irritation that might still be present is a byproduct of the March 4, 2010 motor vehicle incident."

The reviewer concluded that the Appellant's symptoms were not causally related to the motor vehicle accidents.

Later reports from [Appellant's Neurologist #2] noted the possibility of a radiculopathy, due to clinical signs observed. However, counsel submitted that this diagnosis was not definitive. She relied upon [Appellant's Physiatrist's] comments regarding the degenerative origin of the Appellant's symptoms.

As noted by MPIC's Health Care Services (sports medicine) consultant in a report dated January 13, 2014, there was insufficient medical evidence to support the position that an L5 radiculopathy had been objectively validated through electro-physiological testing.

> "...I was not able to locate medical evidence indicating [the Appellant's] clinical presentation revealed neurological findings confirming a further deterioration in neurological function to the extent he would be entitled to a greater permanent impairment award as it relates to the L5 radiculopathy."

Therefore, counsel for MPIC submitted that a nerve impairment had not been revealed in any of the radiological tests to date. Although [Appellant's Neurologist #2] found clinical signs, counsel submitted that these were not objective findings but were reliant upon symptom reporting from the Appellant. In the alternative, if the Appellant did suffer from such a condition it was the position of MPIC that this was not caused by the motor vehicle accident or any prior motor vehicle accidents, but rather was the result of the Appellant's degenerative disc disease,which causes his symptoms.

Discussion:

The MPIC Act provides:

> **Lump sum indemnity for permanent impairment**
>
> 127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500 and not more than $100,000 for the permanent impairment.

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to a permanent impairment benefit for an L5 nerve impairment caused by the motor vehicle accidents.

Counsel for MPIC has pointed out that the majority of experts that examined the Appellant or reviewed the information on his file did not make a causal connection between the Appellant's L5 condition and the motor vehicle accident. Some of these experts, such as the Health Care Services consultant, questioned even the existence of disease or injury at that level, due to the lack of radiological confirmation of the clinical signs found by [Appellant's Neurologist #2] and [Appellant's Physiatrist]. The Health Care Services consultant, in a report dated July 9, 2012 did

appear to recognize a "possible compromise of the left L5 nerve root", but maintained that information on the file did not indicate that the L5 nerve root irritation "that might still be present" was a by-product of the March 4, 2010 motor vehicle accident.

[Appellant's Physiatrist] recognized the existence of the nerve root condition but, even though she specifically put her mind to the question, clearly was not prepared to recognize a link between the condition and the motor vehicle accident.

However, as the Appellant noted, [Appellant's Neurologist #2], the Appellant's neurologist, had the advantage of treating him for several years and examining him on many occasions. [Appellant's Neurologist #2] was also provided with a large package of documents from the Appellant's indexed file to review.

The panel has given significant weight to [Appellant's Neurologist #2's] opinion in this regard. He is a well-respected specialist in neurology with a long-standing practice and much experience in the area. He was asked to and did specifically address the question of the Appellant's diagnosis and its connection to the motor vehicle accident. His conclusion, as set out in his report dated December 11, 2013 is as follows:

> "This is in response to your request for information dated Nov 6/13. I understand that you are referencing the MVA of March 4, 2010 and it's (sic) relationship to the low back pain and sciatica. I have reviewed my records and the records that you have supplied. Unfortunately he has had 23 MVAs and it is difficult to determine which one is responsible for his back problems.
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> I note the CT of the LS spine from August 2006 showed a potential left L5 radiculopathy. The most recent MRI of the LS spine from November 2012 (enclosed) indicated possible bilateral L5 and left S1 radiculopathy.
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> My clinical findings from September 10, 2012 were suggestive of an L5 and possibly S1 radiculopathy on the left, although EMG performed from December 20, 2102(sic) did not show any denervation in that distribution. Repeat EMG today (Dec 11/13) also

> did not show denervation. That does not rule out a radiculopathy. His clinical findings fit with the MRI and CT findings of a left L5 and left S1 radiculopathy.
>
> In conclusion, it is quite probable (more than 50% likely) that he does have an L5 and S1 radiculopathy on the left. His clinical exam shows mild weakness and numbness in that distribution as well as quire significant left leg and low back pain, as referenced in my November 13/13 letters.
>
> It is probable that one or another MVA contributed to this low back and left sided sciatica but it is not possible to determine which accident was most responsible."

Based on [Appellant's Neurologist #2's] level of expertise, his long history of treating and examining the Appellant and his focused review of the Appellant's file, we find that [Appellant's Neurologist #2], of all the experts who provided opinions on this file, was in the best position to provide and did provide the most direct and persuasive opinion regarding diagnosis and causation of the Appellant's condition.

Accordingly, the panel agrees with [Appellant's Neurologist #2's] conclusion that it is quite probable that the Appellant suffered an L5/S1 radiculopathy, and that one or another motor vehicle accident contributed to his low back and left sided sciatica.

The Commission finds that the Appellant has met the onus upon him of showing, on a balance of probabilities, that he suffers from an L5 nerve impairment resulting from the motor vehicle accident. The Appellant's appeal is upheld and the decision of the Internal Review Officer dated January 23, 2012 is overturned. The matter will be referred back to the Appellant's case manager for determination of the permanent impairment benefit.

Dated at Winnipeg this 17th day of July, 2014.

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LAURA DIAMOND

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DR. SHELDON CLAMAN

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DR. CHANDULAL SHAH