Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-13-136

PANEL:	**Ms Jacqueline Freedman, Chairperson** **Ms Mary Lynn Brooks** **Dr. Sheldon Claman**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**October 8, 2014**
ISSUE(S):	**Whether the Appellant is entitled to additional permanent impairment benefits with respect to his spine.**
RELEVANT SECTIONS:	**Subsection 70(1) and Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Schedule A of Manitoba Regulation 41/94.**

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

Background:

The Appellant, [text deleted], suffered from a pre-existing medical condition known as ankylosing spondylitis ("AS"). He was then involved in three motor vehicle accidents ("MVAs") in 1997, 2000 and 2002. By letter from the case manager dated July 31, 2013, MPIC confirmed that the 1997 MVA caused an enhancement of the pre-existing condition of AS in

relation to the Appellant's cervical spine and accordingly the Appellant was entitled to a permanent impairment benefit in relation to that enhancement.

The Appellant, while agreeing that the 1997 MVA did cause an enhancement of his AS in relation to his cervical spine, disagreed that the enhancement was only to that area of the spine and sought review of the case management decision. The case manager's decision was confirmed by an Internal Review Officer by letter dated October 31, 2013. That Internal Review Decision stated that changes to the Appellant's thoracic and lumbar spine were not attributable to the MVAs. The Appellant disagreed with this Internal Review Decision and filed this appeal with the Commission.

The issue which requires determination on this appeal is whether, on a balance of probabilities, the MVAs resulted in an enhancement or acceleration of the Appellant's pre-existing AS in his thoracic and lumbar spine so as to entitle him to additional permanent impairment benefits.

Decision:

For the reasons set out below, the panel finds that the Appellant is entitled to further permanent impairment benefits.

Evidence for the Appellant:

Although the Appellant was present at the hearing of his appeal, he did not testify. The only witness to testify at the hearing was [Appellant's Rheumatologist], who was qualified as an expert in Rheumatology. He first saw the Appellant as a patient in 2002.

[Appellant's Rheumatologist] provided evidence on the nature of AS, indicating that there are approximately 1,000 people in Manitoba who have this disease and he treats about 200 to 250 of them. He indicated that the development of the disease is multi-factorial. People who have AS have the particular gene HLA-B27, often have developed a particular type of infection, and often have associated inflammatory bowel disease or what he called "leaky gut". AS often develops in individuals in their late teens or early 20's. [Appellant's Rheumatologist] indicated that not everyone who has AS develops a completely fused spine. In fact, ten percent of people who have the disease may be asymptomatic. He noted that a major change developed in the treatment of the disease in the 1970's with the development of non-steroidal anti-inflammatory drugs.

[Appellant's Rheumatologist] testified that people with AS are susceptible to fracture risk and erosion to bone, factors which result in osteoporosis and result in a rigid spine. They are susceptible to trauma and the risk of fracture for them is greater than that to the general public. In those with AS, the spine cannot absorb pressure (load and force) in the same way as it does in the non-AS population. In AS it is difficult to know exactly how trauma affects the spine, although we do know that the repair structures lead to more thickening and boney fusion and thinning of the vertebrae and therefore more rigid vertebrae, more osteoporosis and an acceleration of kyphosis (the flexed forward posture).

[Appellant's Rheumatologist] noted that although x-rays are used, they can miss microscopic tissue changes or fractures and x-rays do not reflect what is happening in the repair process. He explained how inflammation of the bone-tendon junction results first in scar tissue forming at that junction, then gradual calcification and, eventually, fusing of the joint. He explained that this is a result of the body's immune responses and healing processes.

[Appellant's Rheumatologist] indicated that with a whiplash injury, this could accelerate the AS process in other parts of the spine. He indicated that the Appellant's 1997 MVA was a high speed trauma, not a simple flexion/extension injury. Even though the majority of the load would be in the lower part of the neck, the forces would be distributed throughout the entire vertebral column. The more force, the more trauma that there would be.

He noted that in the 1997 MVA, the Appellant fractured his ribs. The load on the ribs would have caused micro-trauma or trauma to the Appellant's thoracic spine. The nature of the 1997 MVA would have meant there was a lot of rolling to the entire spine and a significant load and force applied.

He noted that prior to the 1997 MVA, the Appellant's problems were confined to his sacroiliac and the nature of the development of AS is very orderly. It typically starts in the sacrum and then moves up. Without some intervening event, it does not typically jump; that is statistically improbable. Therefore, the 1997 MVA trauma could have contributed to the spread of AS to the Appellant's thoracic spine.

[Appellant's Rheumatologist] said the MRI of the Appellant's spine in 2005 showing compression fractures involving the end plates was not normal for the Appellant's age, reflecting an acceleration in his AS. This would be improbable without some intervening event, namely the MVA.

[Appellant's Rheumatologist] indicated that in his view, on a balance of probabilities, the Appellant's AS was also accelerated in his lumbar spine by the 1997 MVA. The entire spine (rod and vertebral column) in an AS patient is much more subject to trauma than in a person

without AS. He noted that the 1997 MVA caused the fractured ribs and other injuries and a significant load and force were applied. He said that given the natural history of the disease, any trauma, large or small, could result in the changes which led to these compression fractures. It is clear that the Appellant's entire spine was affected by the load and force. The lumbar spine would not have been spared the movement from that load and force, being the 1997 MVA and also the other two MVAs.

Evidence for MPIC:

MPIC did not call its own witnesses but did cross-examine [Appellant's Rheumatologist].

Counsel for MPIC questioned [Appellant's Rheumatologist] on the causes of AS. [Appellant's Rheumatologist] indicated that the elements include being the right genetic type, in some cases having a first degree relative with the disease, and having a leaky bowel. [Appellant's Rheumatologist] acknowledged that the Appellant's AS was pre-existing, prior to the 1997 MVA. MPIC questioned the natural history of AS, noting that it generally begins in the low back and typically moves up from there, although it could remain confined in the low back. [Appellant's Rheumatologist] agreed that that is the general pattern of AS. A classic case could result in fusion of the spine, although [Appellant's Rheumatologist] noted that that typically takes over 20 to 30 years, a period of decades. Only 1 in 20 patients will have the result of total fusion of the spine, what is known as "bamboo spine". That is what happened to the Appellant.

Counsel for MPIC questioned [Appellant's Rheumatologist] regarding possible treatments for patients with AS. [Appellant's Rheumatologist] discussed anti-inflammatory drugs, which may prevent bone formation. He indicated that the Appellant was treated with these, which did not seem to have much effect. Another possible treatment is biologic disease modifying drugs.

Exercise is another possible answer although there is a question as to whether there is any benefit from this. Typically after years the posture is affected in some people. The Appellant was affected by thoracic kyphosis, the flexed forward posture. [Appellant's Rheumatologist] indicated that this was accelerated due to trauma. The Appellant's chest cavity became smaller and he lost 25% of lung volume. This resulted in difficulty breathing. [Appellant's Rheumatologist] indicated that this difficulty was even greater at night and could result in early mortality.

Counsel for MPIC asked whether an MVA could affect the progression of AS and whether it would depend on the severity of the MVA. [Appellant's Rheumatologist] indicated that an MVA could affect the progression because an MVA results in mechanical violence to the spine, which is a shock absorber. He reiterated that he treats 20% to 25% of patients with AS in Manitoba, and also treats patients in [text deleted] at the [text deleted].

Counsel for MPIC questioned [Appellant's Rheumatologist] as to the emphasis in the materials in the indexed file on the neck pain complaints of the Appellant. [Appellant's Rheumatologist] indicated that only 1 in 4 fractures are symptomatic; ¾ of the patients don't complain. He indicated that the nature of sports medicine is to focus on the primary complaint while Rheumatology is more holistic. Counsel for MPIC noted that the Appellant had some back complaints prior to the 1997 MVA, which is consistent with the nature of AS. [Appellant's Rheumatologist] acknowledged that this was the case. Counsel for MPIC noted that the Appellant had been consistent, [text deleted], with complaints of pain in his lower back and [Appellant's Rheumatologist] agreed. This was mentioned in a report as far back as 1992.

Counsel for MPIC questioned [Appellant's Rheumatologist] on his July 2005 report, in which he states:

> "If one weighs the balance of probabilities it is most likely that had [the Appellant] never been involved in any motor vehicle accidents that his Ankylosing Spondylitis would have been very slowly progressive with involvement of his lumbar spine and sacroiliac joints and perhaps his thoracic spine at this point in his life."

[Appellant's Rheumatologist] indicated that this is an incomplete report, which is superseded by his 2010 report, where he indicates that the progression to a completely fused spine would have been a 1 in 20 chance for the Appellant without the MVAs. He said that when you look at the degree of trauma of the MVAs and the forces involved, the likelihood that the MVAs did nothing is statistically improbable. In [Appellant's Rheumatologist's] opinion had the Appellant not been in these MVAs, in all probability, the Appellant would have had low back discomfort only, and he would be earning a living doing his [text deleted].

Counsel for MPIC questioned [Appellant's Rheumatologist] as to the likelihood of the initial pain reports being limited to the neck if there were actually damage to other parts of the spine. Counsel noted that back symptoms were not reported until approximately one year after the 1997 MVA. [Appellant's Rheumatologist] indicated that in situations where there is micro-trauma, this sets off a chain of inflammation and repair, which results in a time and even a space delay. He indicated that if the greater immediate pain were in the neck, this could have distracted the Appellant until it was under control or until the other pain became more significant. He further indicated that there was no way to rule out progression in the sacro-lumbar and thoracic spine. He indicated that there was only a 1 in 20 chance of progression to the bamboo spine condition given the Appellant's preceding history.

On questions from the panel, [Appellant's Rheumatologist] stated that in his opinion, the MVAs caused an acceleration of the Appellant's AS on a balance of probabilities in the Appellant's thoracic and lumbar spine. Inflammation is not confined to a local area and the MVA of 1997 caused acceleration all along the Appellant's spine to a high degree of probability. This happened much earlier to the Appellant than would be the natural progression of the disease.

On further examination by counsel for MPIC [Appellant's Rheumatologist] noted that the 1997 MVA was a significant accident, involving not only cervical strain but also a chipped tooth, a fall off a motorcycle at a reasonable speed, and significant force to the entire spine of a person with AS, involving a twist and load on the rod of the spine which was required to absorb the force. This produced the obvious problems in the neck and created problems down the spine as well.

Submission of the Appellant:

The Appellant's position is that the MVAs enhanced and accelerated his AS throughout his spine. Counsel for the Appellant provided the panel with written notes of his submission, which were appreciated.

Counsel for the Appellant argued that the evidence of [Appellant's Rheumatologist] supports the Appellant's position, both in his oral testimony and in his written reports.

Counsel noted that [Appellant's Rheumatologist] testified about the nature of the AS disease process, and how a force exerted at one end of the spine can result in micro-fractures along the entire spine. He noted that [Appellant's Rheumatologist] had identified the 1997 MVA as a significant one, in which the Appellant was subject to significant forces. He said that the evidence of [Appellant's Rheumatologist] was that these forces would have affected the

Appellant's entire spine, thereby accelerating the AS process throughout all levels of his spine. [Appellant's Rheumatologist] had noted that the fractured ribs would undoubtedly cause trauma to the thoracic spine.

Counsel for the Appellant noted that [Appellant's Rheumatologist] had referred to the MRI report dated November 2, 2005, which documents compression fractures of the end plates in the thoracic and lumbar spine. [Appellant's Rheumatologist] pointed to this as evidence of injuries sustained in the MVAs to those parts of the spine and also of acceleration of the disease process in the thoracic spine. [Appellant's Rheumatologist] stated that such compression fractures would be highly unlikely to occur in someone of the Appellant's age; typically it occurs in much older people.

Counsel pointed out that [Appellant's Rheumatologist] also noted that pain symptoms are not a good indication of progression of the disease. He stated that the imaging evidence showed clear signs of the acceleration of the AS process, regardless of whether there may or may not have been pain symptoms. He also noted that the Appellant was on anti-inflammatory drugs and pain killers which may have masked some of the thoracic symptoms.

Counsel for the Appellant referred to other reports in which reference was made to symptoms suffered by the Appellant in other areas of his spine:

- A report by [Appellant's Doctor #1] dated January 13, 1999, which refers to pain in the thoracic spine;

- A report by [Appellant's Doctor #2] dated September 17, 2001, which refers to reduced range of motion in the cervical as well as thoracic and lumbosacral spine;
- A report by [Appellant's Rheumatologist] dated April 4, 2002, which refers to limited rotation of the thoracic spine; and
- An X-ray report dated April 4, 2002, which refers to syndesmophytes throughout the cervical spine, in the thoracolumbar region and in the lower lumbar spine.

The Appellant therefore argues that it is not accurate to state that the Appellant's symptoms were confined to his cervical spine; there are ongoing references to his thoracic and lumbar spine symptoms, as well.

In his submission, counsel for the Appellant noted that [Appellant's Rheumatologist] was quite emphatic that on a balance of probabilities, the injuries incurred by the Appellant in the MVAs accelerated the AS disease process in all areas of his spine. [Appellant's Rheumatologist] stated that, based on statistical evidence and the Appellant's pre-accident history of relatively benign AS, that balance of probabilities is in the order of 95%:5%.

Counsel for the Appellant noted that in response to questions from the Panel, [Appellant's Rheumatologist] stated unequivocally that the motor vehicle accidents had caused acceleration of the Appellant's AS in both his thoracic and lumbar spine (in addition to his cervical spine).

The final paragraphs of counsel's written submission are reproduced here:

> 16. Tab 155 is [Appellant's Rheumatologist's] CV. We would suggest that, based on his training and experience, his expert opinion in regard to the relationship of [the Appellant's] AS to the motor vehicle accidents is to be preferred to the opinion of MPIs medical consultant, who is a Sports Medicine doctor with no specific training or experience in treating patients with AS.
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> 17. Based on this evidence, it is our position that, on a balance of probabilities, the MVAs of 1997 and 2002 accelerated the Ankylosing Spondylitis disease process, not

> only in [the Appellant's] Cervical spine, but also in his Thoracic and Lumbar spine and we would ask the Appeal Panel to so rule.
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> 18. MPI's HCS consultant at Tab 163 states that, based on the MRI evidence, the ankylosis in the thoracic spine would result in a PI award of 30%, and the lumbar spine would result in a PI award of 20%, for a total of 50%. We would suggest that this is, indeed, the Permanent Impairment award to which [the Appellant] is entitled.

Submission of MPIC:

It is MPIC's position that the permanent impairment award as confirmed by the Internal Review decision was more than generous, especially considering that MPIC's consultant didn't originally accept that there was a connection between the MVAs and the AS, although MPIC did eventually change its view.

Before the 1997 MVA, the Appellant had some lower back problems, which were likely from AS which had not been diagnosed at that time.

With respect to the 1997 MVA, the injury that MPIC feels is relevant is the neck sprain and MPIC is ignoring the other injuries for the purpose of the AS. The investigation following the 1997 MVA centered on the neck and the treatment by the physiotherapist and the chiropractor centered on the neck. There is nothing suggesting any thoracic or lumbar spine involvement. The independent chiropractic examination indicated neck strain from the MVA. Shortly after the 1997 MVA, [Appellant's Doctor #3] ordered an MRI of the neck and MPIC submits this was ordered because that was the area of injury.

There were two subsequent MVAs, in 2000 and 2002. These MVAs exacerbated the neck pain and in 2001 and 2002, investigation regarding the neck continued. The 2000 and 2002 MVAs

may have led to some low back pain, but MPIC submits there is nothing that would significantly alter anybody's opinion. In a report dated October 16, 2003, MPIC's medical consultant states on page 4:

> "Although the claimant's symptomatology may have potentially increased following the motor vehicle collision in question, his functional abilities did not seem to have been appreciably altered following the motor vehicle collision from those prior to the motor vehicle collision in question. Thus, I would not be able to conclude that the motor vehicle collision in question led to a significant incapacity for the claimant's return to his pre-collision level of function."

Counsel for MPIC noted that [Appellant's Rheumatologist], an expert on AS, diagnosed the Appellant with AS in 2002, although it was concluded that the Appellant had AS prior to the MVAs as he had the various components of the disease. MPIC submits that we know, from [Appellant's Rheumatologist's] report in July of 2005, that even without any MVAs the Appellant would have had some low back involvement and some pain in his thoracic spine. MPIC reads that 2005 report as saying that the Appellant's neck would not have deteriorated but the rest of his spine would have deteriorated.

Although [Appellant's Rheumatologist] did clarify, in his testimony at the hearing, that this deterioration would not have occurred for a long time, and MPIC acknowledges that [Appellant's Rheumatologist] said that his 2005 report is incomplete and must be read with his 2010 report, MPIC submits that there is a lack of clarity to the wording of the 2005 report. Furthermore, MPIC noted that page 1 of the 2010 report states "I endorse my previous statements". Counsel for MPIC further noted that [Appellant's Rheumatologist] did not say why the 2005 report was not accurate; he simply referred to the November 2005 MRI.

In referring to the 2010 report, counsel for MPIC noted that in the summary of that report and in the Appendix, there seems to be a focus on the Appellant's neck. He suggested that the focus on

the neck was due to the fact that this is the one area where the MVAs may have played a role and that is why MPIC accepted it. He argued that the Appellant's mind wasn't really that attuned to other areas because it was the neck that was hurt in the MVAs.

Counsel for MPIC submitted that [Appellant's Rheumatologist's] evidence that the Appellant might be distracted by significant pain in his neck and would therefore ignore other injuries was not very strong. MPIC submitted that the Appellant would have mentioned all injuries and argued that it is significant that there was no mention of other pain for over a year. MPIC argued that there was no probable effect or no permanent effect of the MVAs on the thoracic or lumbar spine and there were no low back symptoms. MPIC argued that there must be a direct connection between the AS and the MVA in order to trigger a benefit for a permanent impairment award under Section 127 of the MPIC Act.

MPIC submits that the MVA did not cause or accelerate the Appellant's AS symptoms in his thoracic and lumbar spine. MPIC was fair in paying a permanent impairment award for the neck. The Internal Review decision indicated that the AS would not have progressed into the Appellant's neck without the MVAs, but the AS would have gone into the Appellant's low back. The onus is on the Appellant to show that the Internal Review decision was wrong and MPIC submits that the Appellant has not done that. MPIC argues that the AS in the lumbar and thoracic spine could be the natural progression of the Appellant's disease.

Reasons for Decision:

In order to qualify for entitlement to Personal Injury Protection Plan ("PIPP") benefits, the onus is on the Appellant to establish, on a balance of probabilities, that he has suffered an injury caused by an accident within in the meaning of Subsection 70(1) of the MPIC Act. If an

Appellant has a pre-existing condition, in order to qualify for PIPP benefits the Appellant must show that the accident caused an enhancement or acceleration of that pre-existing condition. MPIC accepted that the 1997, 2000 and 2002 MVAs caused an enhancement of the Appellant's pre-existing AS in his cervical spine and paid the Appellant an award for permanent impairment (PI) under Section 127 of the MPIC Act. The only issue in dispute is whether the MVAs caused an enhancement or acceleration of the Appellant's AS in his lumbar and thoracic spine as well.

The only witness to testify in this appeal was [Appellant's Rheumatologist], an expert in Rheumatology. He has been the Appellant's treating physician for 12 years. He testified in a clear and cogent manner, explaining the nature of AS and how the disease process affects the spine, and how this can further be accelerated by trauma. In his oral evidence, he stated unequivocally that on a balance of probabilities, the acceleration to the Appellant's AS in his lumbar and thoracic spine was caused by the MVAs, and the panel accepts his evidence. Although MPIC questioned [Appellant's Rheumatologist] on this point, [Appellant's Rheumatologist] remained firm in his opinion.

[Appellant's Rheumatologist] provided a report dated January 24, 2010. In that report he states, at page 6, as follows:

> "... Prior to the motor vehicle accidents [the Appellant's] self-reported symptoms were limited to the low back. ... With his pre accident presentation, I would suggest that there was an approximately a 1 in 20 chance that he would have the current outcome if he had never been in any of the accidents.
>
> The assertion that the motor vehicle accidents and trauma to his neck contributed to his long-term functional problems is made based on the patient's subjective statements, correlation of the symptoms with radiologic progression, disproportionate progression of cervical spine changes, and the rheumatologic appreciation of the natural history of the disease. The balance of probabilities would suggest that a proportion of his long-term pain, progression of the disease, and functional impairment were as a consequence of his 3 motor vehicle accidents.

> It is improbable that the motor vehicle accidents and trauma to his neck have not had any effect on the pain, progression of his radiologic findings, and current functional impairment. If the test is to provide proof beyond the shadow of a doubt that the motor vehicle accidents caused all of his problems, then it must be stated that the motor vehicle accidents did not produce all of his current functional impairment. It is however much more unlikely that Ankylosing Spondylitis alone and without any influence from the trauma produced his current complaints."

And at page 5, he states:

> "The balance of probabilities would suggest that the motor vehicle accidents have exacerbated a pre-existing condition (Ankylosing Spondylitis) which is likely to have accelerated the changes to his spine and subsequent pain and function."

On the basis of the evidence of [Appellant's Rheumatologist], the panel finds that the Appellant has met the onus to establish that the Internal Review decision was incorrect and that the changes to his thoracic and lumbar spine were accelerated by the MVAs. Accordingly, the panel determines that the Appellant is entitled to an award for permanent impairment benefits on that basis.

Disposition:

Based on the foregoing, the decision of the Internal Review Officer dated October 31, 2013 is rescinded. The Appellant is hereby awarded an entitlement to permanent impairment benefits for ankylosis in his thoracic and lumbar spine, based on the calculation identified by MPIC's Health Care Services Consultant in a report dated June 17, 2013 (30% and 20%, respectively), and the matter is remitted to the case manager for calculation in accordance with that report.

The Commission shall retain jurisdiction in this matter and if the parties are unable to agree on the amount of compensation, either party may refer this issue back to the Commission for final determination.

Dated at Winnipeg this 10th day of December, 2014.

JACQUELINE FREEDMAN

MARY LYNN BROOKS

DR. SHELDON CLAMAN