

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-002**

PANEL: Ms Laura Diamond, Chairperson
Mr. Trevor Anderson
Ms Leona Barrett

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

HEARING DATE: June 19 and 20, 2018

ISSUE(S): Whether the Appellant is entitled to Personal Injury
Protection Plan benefits.

RELEVANT SECTIONS: Section 70(1) and 71(2) 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

Background:

The Appellant was injured after a fall from his scooter, sustaining a broken left hip. He reported that he was involved in a motor vehicle accident (MVA) while operating a scooter when a police cruiser made a right hand turn in front of him and stopped, causing him to fall off the scooter and break his left leg. He applied for PIPP benefits from MPIC.

The Appellant's case manager advised that MPIC was unable to confirm that his injuries were sustained as a result of a MVA, stating that due to an absence of information supporting that he was hit by a motor vehicle, MPIC was unable to substantiate that an accident occurred and PIPP coverage was denied.

An Internal Review Officer (IRO) for MPIC reviewed the matter and provided the Appellant with an Internal Review Decision (IRD) dated December 23, 2014. After reviewing the reports on file, the IRO concluded that the documented history did not support that a MVA was involved in the mechanism of injury. The IRD found that the injuries were not caused by an automobile or the use of an automobile as defined by Section 70(1) of the Act and the case manager's decision was upheld.

It is from this decision of the IRO that the Appellant has now appealed.

Issue:

The issue for determination by the Commission was whether the Appellant's injury to his left hip was caused by a MVA. The Appellant took the position that his injury was caused by a fall from a scooter behind a police cruiser car when that car cut him off. MPIC took the position that part 2 of the *MPIC Act* does not apply to a scooter, which falls under the exception from coverage under section 71(2)(b)(ii) as a motorized mobility aid or power assisted bicycle. To fall under the scope of the *Act*; an injury arising out of such a fall only arises where an automobile in motion is involved in the accident. MPIC took the position that the movement of the police cruiser had not caused the

Appellant's first fall, and further, as the Appellant had suffered a second fall on the same night, it was not clear that it was the incident with the cruiser car which had caused the injury.

The panel, having reviewed the documentary evidence on file, testimony of witnesses and the submissions of the parties concludes that the Appellant has failed to show, on a balance of probabilities, that his injury was caused by the fall from the scooter behind the police cruiser car.

Preliminary Matters:

During the case management process and at the beginning of the hearing into the Appellant's appeal, counsel for MPIC sought to introduce a sentencing notice of appeal document from the Court of Queen's Bench, Winnipeg Centre. The Appellant objected to the introduction of the document.

Counsel for MPIC submitted that the document was relevant to the issue under appeal as it contains information regarding the Appellant's condition following his dialysis treatment. The Appellant was alleging that the cruiser car caused his fall, but it was the position of MPIC that this fall occurred on his way home from dialysis treatment. The side effects set out by the Appellant in the sentencing notice of appeal document regarding his dizziness and weakness after dialysis were relevant to his condition on the date of his left hip injury, and the cause of his fall.

After reviewing the document and the positions of the parties, the panel advised that the document was admissible and that it would hear evidence in cross-examination of the Appellant in that regard. Following the end of the evidence portion of the hearing, the panel advised that the

document was relevant to the issue before it and would be admitted as Exhibit 1. However, the panel noted that it was aware, as the Appellant had suggested in his objection, that the document was not a doctor's report establishing an expert opinion regarding dizziness and weakness after dialysis and that the document was from 2013, over one year before the Appellant's hip injury. As such the weight to be placed upon the document would be limited.

Evidence of the Appellant:

The Appellant testified at the hearing into his appeal. He indicated that he had been at the [hospital] receiving dialysis treatment on August 1, 2014. He has his treatment three times a week (on [text deleted]). As far as he could recollect, his treatment that evening went "99% okay" and he left the hospital as he normally did around 11 p.m. He testified that he felt no dizziness whatsoever. He had his electric scooter parked outside the front door and rode it home.

The Appellant described his route home down [text deleted] Avenue in the diamond/bike lane. He says he was travelling about 30 kilometres per hour and described passing [text deleted] and [text deleted] Street and approaching [text deleted] Street. He noticed a police cruiser car "whoosh" right beside him in the same direction when he was 150 feet from the intersection of [text deleted] Street. The cruiser then slowed down just prior to [text deleted] Street and came to a dead stop at the intersection because there were two pedestrians standing on the corner of [text deleted] and [text deleted], right in his bike lane path. The cruiser car stopped dead in its track diagonally across his bike lane, completely blocking his route. As he got closer to the cruiser car he started to brake hard and turn his handle bars. As a result the scooter jackknifed on him, he flew over the handle bars and landed on the cement with his scooter lying on top of him.

He lay on the ground on his left side. He was in severe pain and could not move. Looking under the car he saw the police exit the car and walk to the front of the car and talk to the pedestrians while he lay writhing in pain and unable to do anything. After a couple of minutes went by, the two officers walked to the back of the car on the passenger side and saw him lying there on the ground, inches from their bumper. They apologized and asked each other whether they had heard any thumps. He asked them to call an ambulance because there was no way he could get up and walk. As he lay there, disoriented, thinking about whether to call 911 himself, he worried about what would happen to his scooter. The officers were two big strong guys so he asked them to lift him up and set him on the scooter, which they did. As a result, he did not know at that time that his leg was broken. He told them he was okay, was going to go home and could they follow him. They said that they would. However, they did not.

He drove home, indicating that he was not dizzy but was in severe pain. When he got to the front lawn in front of his apartment doors, he stopped the scooter and put his left foot down on the ground to exit the scooter. He stepped on his left foot, not realizing that his left hip was broken. He fell over onto the grass because he could not put any weight on his leg at all. He lay there and took his cellphone from his pocket to phone his daughter to come and take him to the hospital. She was visiting her boyfriend on [text deleted] Avenue. She came with her boyfriend, who has a van, directly to his apartment, drove up onto the grass, and took him in the car to [hospital].

On cross-examination, the Appellant denied that he had any difficulty with his dialysis that day. He denied experiencing any shortness of breath during the treatment. He also denied experiencing

any light-headedness, headache, fatigue, altered vision, memory problems, nausea or muscle cramps.

The Appellant said that the officers parked their car diagonally at the corner. After parking, they took 15 seconds to exit the cruiser and walk to the front of the car. He also said that after parking they stopped for five seconds and then they went to talk to the pedestrians first.

Counsel for MPIC noted that there were references in the medical reports to shortness of breath and muscle cramps during and after dialysis on that day, but the Appellant denied experiencing such symptoms that day.

Counsel also reviewed with the Appellant the statement he had included on his sentencing notice of appeal on July 2013, which indicated "I get dizzy and weak everyday after dialysis". The Appellant indicated that he wrote this because he had not agreed with the sentence he was appealing at that time but denied he was dizzy and weak following his dialysis treatment on August 1, 2014.

The Appellant was also questioned regarding some discrepancies in his testimony and in the reports on the indexed file, where he had, for example, earlier indicated that the incident occurred near [text deleted] Street and later, near [text deleted] Street. He was questioned regarding discrepancies between the original reports and his testimony regarding how long it took for the officers, after exiting their car, to speak with and assist him, as well as the details of his conversation with the police officers, his description of the officers' physical assistance to him, his

description of the second fall from his scooter at his home and the circumstances of his trip to the hospital with his daughter.

Evidence of [the Appellant's daughter]:

The Appellant's daughter testified at the hearing into the appeal. She explained that on August 1, 2014 her cellphone rang at approximately 8:00 p.m. It was her father calling. She understood that he had fallen off his bike behind a police cruiser and he had broken his hip. The police officers had bumped him off and left him there. They had told him they were going to get him an ambulance but they did not and that is why he was phoning his daughter. He had made it home but he was in pain.

After he phoned her, his daughter proceeded to her father's home and was there within about 10 to 15 minutes. Her boyfriend drove her in his vehicle, which they parked in the parking lot. When they got to his building, her father was sitting on the front stairs and his scooter was lying on the ground approximately 15 feet ahead of him. He was screaming and yelling to take him to the hospital. They pushed the scooter into the car and carried her father to the car by his knees and back, because he could not walk. They dropped the scooter off on [text deleted] Avenue because they had no other way of securing the scooter and he then demanded to go to the [hospital]. They went to the front door at the emergency department, put him in a wheelchair and dropped him off at the front entrance.

When asked on cross-examination whether perhaps this incident could have happened approximately at 11:00 p.m. instead of 8:00 p.m., the Appellant's daughter indicated that all she could remember was that it was dark out.

Evidence of Officer [text deleted]:

The police officer driving the cruiser car testified at the hearing into the appeal. He described passing an electric bicycle while driving a cruiser car travelling eastbound on [text deleted] Avenue. Two blocks later, at [text deleted] Street, the officer saw suspicious activity of pedestrians on the sidewalk and stopped the cruiser car abruptly and diagonally at the corner of [text deleted] Street and [text deleted] Avenue. The officers spoke with two pedestrians through the car window, who then made them aware that the Appellant had fallen off his scooter behind them. The officers exited the cruiser car and went to the back to find the Appellant lying on his left side with his bike immediately beside him and his leg near the scooter. The officer described using his hands to assist the Appellant to stand on his feet while his partner picked up the scooter. They asked him if he was okay and he said that he was. They asked him if he needed any medical assistance and offered to call him an ambulance. He refused and said he was fine. The officer said he might have held onto one of the Appellant's hands as he climbed back on his scooter. He then drove away eastbound on [text deleted].

Officer [text deleted] testified that the Appellant sounded like he might have been a little bit sore, speaking with a tight voice, but that he did not complain of any pain or injuries. He did not recall apologizing to the Appellant or the Appellant saying he couldn't move. The officers did not believe he was injured or they would have called an ambulance. The Appellant did not ask the officers to follow him home.

Submission for the Appellant:

The Appellant reviewed the evidence of Officer [text deleted]. He submitted that it was “pretty hard to fathom” that the officer recalled seeing the headlights of the scooter but not his taillights. In the Appellant's view, the officer and his partner were so engrossed and distracted by the pedestrians on the corner of [text deleted] Street and [text deleted] Avenue that they somehow missed the taillight on the scooter as they quickly “whooshed” right by him.

The Appellant submitted that the officer spoke to the two pedestrians for much longer than 10 to 15 seconds, as Officer [text deleted] had testified. Then they abruptly ended their conversation and walked to the back of the car to aid the Appellant. He submitted that after he went on his way, they were still not satisfied with the answers they got from the pedestrians and went back to speak to them. He submitted that the officers were totally obsessed with the two pedestrians such that they were not even aware that the Appellant had fallen down behind their cruiser car.

The Appellant reiterated his claim that he had asked the officers to call an ambulance which they never did. He was laying there in pain, not knowing what was going on.

The Appellant also submitted that it had been impossible for him to go around the cruiser car when it stopped and that is why he crashed. He braked and swerved as much as he could to try and go around the car but he couldn't and crashed. When he called for an ambulance and had no response from them, he concluded that they were as much in awe of what had happened as he was.

The Appellant submitted that he had only been five inches away from the cruiser car. Both officers had assisted him up and he had asked them to follow him home because he was in trauma. As long as he was sitting on the scooter, he was okay and didn't even know he had a broken leg, because leg motion is not required for gas and brake on the scooter, so he could drive it. He drove the scooter home, but when he stepped off with his leg, he collapsed to the ground.

The Appellant submitted that his daughter's testimony had been honest. Although she had the time frame wrong and there were a few differences between her written statement and her testimony, he explained that it had been late at night and dark out and that she was excited and worried about him. She is not good with time or hours, but what she said happened was exactly what had happened. She came over with her boyfriend and lifted him off the ground.

When asked to comment regarding his daughter's evidence that she had arrived to find him sitting on the stairs, he confirmed that yes he had been sitting on the stairs and that his daughter and her boyfriend then assisted him into the van and took him to the emergency room. He emphasized that he had not coaxed his daughter on what to say or gone over her written statement with her at all. Her evidence was honest.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant bore the onus of establishing, on a balance of probabilities, the following:

1. That the movement of the cruiser car caused the Appellant's fall.
2. That it was in fact the fall behind the cruiser car that caused the Appellant's hip fracture injury.

Counsel submitted that the movement of the cruiser car cannot be said to have caused the Appellant's first fall. The Appellant had taken issue with how the police parked the car, but the officer's testimony stated that they passed the Appellant at least a block or two before they parked. It was after they parked that the Appellant fell. Counsel submitted that section 71(2) of the MPIC Act requires that an automobile has to be in motion to be considered involved in a MVA with a motorized mobility aid, special mobile machine or power assisted bicycle. In this regard, she reviewed the evidence of the police officer that after passing the scooter, he did not have any concerns when he switched lanes and parked that there would not be enough time for the scooter to go around him. He was aware of the bike as he had already passed him a block or two behind him before he eventually saw the pedestrians. It was not a situation where they cut right in front of the Appellant and parked their car.

The Appellant in his testimony had said a few different things. He said that the officers parked their car 5 to 10 seconds after passing him and at one point said that the officers were parked 3 to 4 seconds before he fell over. On cross-examination, he said that the officers parked at least 15 seconds before he fell and agreed that in 15 seconds one can do a lot. Counsel submitted that a lot

was done. Officers parked their car, had a conversation with pedestrians from inside the car and were able to determine nothing nefarious was going on. Then in response to a shocked look on the pedestrians' faces and being told someone had fallen, they brought their attention to the back of the cruiser car. Accordingly, it was MPIC's position that the cruiser had already been parked for 10 to 15 seconds when the Appellant approached it. Therefore, the movement of the cruiser car did not cause the Appellant's fall and it falls within the exceptions under section 71(2)(b)(ii) of the Act. The Appellant would only be entitled to PIPP benefits for a bodily injury as a result of a MVA caused by a fall from his power assisted bike if an automobile in motion was involved. If the car is parked and someone crashes into it, there is no coverage.

Rather, counsel suggested that there were several alternative reasons why the Appellant fell that day. She cited his inexperience in operating the scooter which had just been purchased that day. It was his first time driving it home from dialysis treatment and in fact, his first time going home from dialysis by himself, instead of on a bus or getting a ride.

She cited a Health Care Services medical consultant review which listed a number of symptoms which may be experienced when an individual suffers hypotension as a result of dialysis treatments. The medical records indicated that the Appellant had been unable to get through a full course of treatment that day due to hypotension. The Appellant had completed a sentencing notice of appeal on the Court of Queen's Bench in [text deleted], which indicated that he gets weak and dizzy everyday when he has dialysis. Accordingly, she submitted that in this instance, the Appellant had fallen off his scooter due to dizziness and weakness and not because of any movement caused by the parked cruiser car.

Counsel also submitted that in the event the panel accepts that the movement of the cruiser car meets the definition of an automobile in motion that caused the Appellant's fall, it had not been established that it was *that* fall which caused the left hip fracture injury.

Counsel referred to the evidence of Officer [text deleted] that the Appellant had not been screaming or crying in pain. He said that maybe the Appellant's voice sounded a bit forced so that there may have been some pain, but the Appellant never indicated that he was injured, was in pain, or complained of any pain or injuries. He did not tell the officers he could not move and never exhibited any behavior which would have led the officer to believe he was injured. Even though the Appellant denied or refused an ambulance, the officer said that if he had thought the Appellant was injured he still would have called for one. The officer testified that he helped the Appellant stand up and that he was able to stand and get onto his scooter on his own. He was able to drive off and the officers watched him driving for about two blocks. He appeared to be fine.

Counsel submitted that the Appellant's evidence does not make sense. He said he was a 9 out of 10 on a pain scale and had asked the police to call an ambulance. They did not respond even though he could not get up and walk around. He said he was carrying a cell phone but did not call 911 to ask for an ambulance because he felt he was stepping over the officers' boundaries and that they should have been the one to call. That does not really make sense, she submitted. Nor did the Appellant choose to go back to the hospital, which was nearby, on his scooter. Instead, he testified that when he got home he stepped off his bike and fell over because he couldn't put any pressure on his leg. We do not have any evidence that this is the result of his fall behind the cruiser, after

which he was able to climb back onto his scooter. It was only his daughter who testified she saw him screaming and crying in pain; this was not going on before the officers after the first fall.

Counsel also questioned a period of time that was unaccounted for between the encounter with the officers and his triage at the hospital. Given that his daughter was unable to recall when she took him to the hospital and that all she could recall was that it was dark out, counsel suggested that something else may have happened in the intervening time.

Counsel submitted that Officer [text deleted] was a reliable, forthright witness who was candid when he could not recall things. His testimony made sense. The Appellant, on the other hand was often evasive in answering questions and his demeanor on the witness stand should be considered in assessing his credibility. As well, a list of some of the Appellant's criminal convictions for fraudulent activities was also a relevant factor in assessing the testimonial reliability of the witness, along with his demeanor, appearance, tone of voice and general manner. Therefore, she submitted that the Appellant's convictions for crimes of dishonesty are relevant factors to consider when assessing his credibility.

The Appellant had testified that he was rarely weak and dizzy following dialysis and was evasive in answering questions surrounding the sentencing notice of appeal where he complained that he should have a reduction in sentence because he was dizzy and weak everyday after dialysis. Other inconsistencies like denying ever being short of breath during dialysis or suffering from muscle cramps should also be taken into account.

Accordingly, MPIC took the position that it was not the movement of the cruiser car which caused the Appellant to fall, as the cruiser had already been parked for 10-15 seconds before the Appellant's fall and the Appellant had just finished his dialysis, where he exhibited symptoms of shortness of breath and low blood pressure. After this incident with the cruiser car, he was able to operate his scooter home, following his interaction with trained officers who assessed that he appeared to be fine at that time and, refusing an ambulance. The evidence did not support the Appellant's contention that his hip injury occurred in the fall behind the police cruiser and submitted that it was very likely that the second fall at home had caused the injury.

Accordingly, she submitted that the Appellant's appeal should be dismissed and the decision of the IRO upheld.

Discussion:

The relevant provisions of the MPIC Act are as follows:

Definitions

70(1) In this Part,

"accident" means any event in which bodily injury is caused by an automobile;
(« accident »)

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused

(a) by the autonomous act of an animal that is part of the load, or

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile; (« dommage corporel causé par une automobile »)

General Provisions - Bodily injury to which Part 2 does not apply

71(2) Notwithstanding subsection (1), this Part does not apply to bodily injury that is

(a) caused, while the automobile is not in motion on a highway, by, or by the use of, a device that can be operated independently and that is mounted on or attached to the automobile;

(b) the result of an accident that is caused by one of the following:

... (ii) as defined in *The Highway Traffic Act*, a self-propelled implement of husbandry, motorized mobility aid, special mobile machine or power-assisted bicycle ...

unless an automobile in motion — other than a vehicle described in subclauses (i) to (vi) — is involved in the accident

The onus is on the Appellant to show, on the balance of probabilities, that the IRO erred in concluding that the Appellant was not entitled to PIPP benefits as the injury to his hip was not caused by an automobile or the use of an automobile as defined by the MPIC Act.

The panel has carefully reviewed the documentary evidence and statements on the Appellant's indexed file as well as the testimony of the Appellant, his daughter, and the police officer. The panel finds as a result that the Appellant has failed to show, on a balance of probabilities, that the incident which occurred behind the cruiser car caused the injury to his left hip.

A [hospital] consultation form dated August 3, 2014 noted the Appellant fell from his scooter twice and was unable to weight-bear.

Throughout the course of the hearing, the panel heard evidence regarding these two falls. The first occurred behind the cruiser car, with the second occurring once the Appellant arrived at his home. Following a review of all the evidence on the file, as well as the testimony at the hearing, the panel is unable to conclude that, on a balance of probabilities, the first fall behind the cruiser car was the cause of the Appellant's injury to his left leg and hip.

Evidence heard by the panel surrounding the aftermath of the fall behind the cruiser car came from the Appellant and the police officer. As illustrated above, there were marked differences and divergences in their evidence. Accordingly, the panel undertook a careful review of the evidence of all three witnesses concerning both falls and assessed that evidence in light of the witnesses' prior accounts of the incidents, found in the documentary evidence in the Appellant's indexed file.

Documentary Evidence

The First Fall:

Evidence of the Appellant:

1. On August 9, 2014, the Appellant provided an account of the accident in a traffic accident report. He stated:

On August 1, 2014 at about 11:10pm I was driving my brand new electric scooter east on [text deleted] approaching [text deleted]. I was in the bike lane and my lights were on. As I approached the intersection a police car came up on my left and cut in front of me to stop to[sic] pedestrians at the corner. I had to slam on my brakes and swerved to my left to avoid a collision. My scooter fell over and I hit the ground on my left side. My scooter fell on top of me. I was helped up by the officers and rode my scooter home where I collapsed...

2. On November 17, 2014, the Appellant provided a declaration for his MPIC claim:

... A police vehicle passed me in the right curb lane and then cut into the bike lane and stopped on an angle towards the curb. They stopped right at the corner of [text deleted]. It appeared they were stopping to confront two individuals that were standing on the roadway, in my bike path lane. I tried to stop by braking and swerving to the left. As I got closer to the police vehicle I knew I wasn't going to be able to stop so I ditched the bike. I didn't actually hit the police vehicle, but rather came to rest just behind it. The accident happened very fast, within two or three seconds. As I was laying there I saw two officers get out of the vehicle and talk with the two people they stopped for. I don't think they even saw me. I laid there for a while and the police officers came to see me after they were done with the other two individuals. They lifted the bike off me and moved it away and shut it off. I asked them to call an ambulance, but they didn't. I asked the officers to lift me up, but I couldn't put any pressure on one of my legs. They

help[sic] me onto the scooter at my request. I asked them to follow me to make sure I got home safely. They ended up not following me but I did make it home. When getting off the bike I fell again...

3. On January 17, 2017, Winnipeg Police Service provided an incident report which included records of Division [text deleted] Staff Sergeant's contact with the Appellant, first by phone and then when he attended the [police headquarter].

a) The Appellant, by phone provided the Sergeant with details of a MVC incident on Friday, August 1 at approximately 23:10 hours, when he was travelling on [text deleted] approaching [text deleted] on a motorized scooter:

- ... He was cut off by a police cruiser causing him to collide with it.
- The collision caused him to be thrown from his scooter...

b) The Sergeant's report goes on to describe contact with the Appellant at the [police headquarter] on August 9, 2014 regarding the incident of August 1.

- ... As the 2 people approached the south curb a police car came up on his left and cut in front of him and stopped at a 45 degree angle.
- This caused him to slam on his brakes.
- He swerved to the left causing him to miss the cruiser car by inches.
- The scooter fell over on top of him and he fell onto his left side.
- The officers got out of the car and went to talk with the 2 people for about a minute.
- He was unable to get up or move.
- As the officers walked back to the car they saw him and asked him if he was ok...

The Sergeant noted the Appellant's information that at no time did he actually collide with the cruiser car.

4. The Appellant completed an Application for Compensation with MPIC on October 20, 2014, in which he stated:

... At corner of [text deleted] and [text deleted] St. My bike lane was blocked, in which I had no choice to apply full brakes in order not to strike rear of police cruiser [text deleted]. I was not able to stay upright, and fell over on my thigh, and scooter on top of me. The two officers aided me and my scooter up. I requested an ambulance, but they never contacted one...

5. The case manager recorded notes from an investigation/discussion with the Appellant by telephone on September 4, 2014:

Claimant advised that he was riding his electric scooter when a police car drive[sic] up beside him and cut him off because they were trying to pursue some individuals that were further ahead on the road. Claimant stopped his scooter abruptly and flew off the scooter, which fell over.

The officers talked to the individuals them[sic] came back and noticed that the claimant was lying on the ground.

Claimant advised that he asked the officers to call an ambulance but the officers did not. They lifted the scooter right side up and helped claimant back onto the scooter. He asked the officers to follow him back to his apartment but the officers refused. Claimant rode his scooter back to his apartment then called his daughter from outside his building...

Evidence of the Police Officer:

A Winnipeg Police Service Collision Review Board Report was completed by the driver of the cruiser, Officer [text deleted], on November 3, 2014. It stated:

On 2014-08-01 at approximately 2300 hrs this unit was driving east bound [text deleted] Av approaching [text deleted] St and saw suspicious activity at [text deleted] St. Cst. [text deleted] [text deleted] (driver) changed lanes over from number 2 lane to number 3 lane and parked the cruiser car at [text deleted] St and spoke with pedestrians.

Approximately ten to fifteen seconds later a male stopped his electric bicycle (scooter style) behind this unit's cruiser car and fell over with the bicycle. This unit exited the car to assist the male. The male advised he was okay, and did not require medical assistance. This unit could see no damage to the electric bicycle. The bicycle did not contact the cruiser car. This unit assisted the male to his feet, and onto his bicycle.

The male drove away eastbound on [text deleted] Av. This unit concluded our conversation with pedestrians and drove away east bound on [text deleted] Av.

Inconsistencies

The evidence of the Appellant, as set out above, contained numerous inconsistencies between his earlier reports and his testimony at the hearing. He told several different versions of the events. In particular, his evidence varied on points such as:

- Whether he collided with the police car
- Whether a collision caused him to be thrown from his scooter
- Whether the scooter fell over on top of him or whether he flew over the handle bars
- Whether the incident occurred at [text deleted] Street or [text deleted] Street

Differences

The evidence of the Appellant and the police officer differed on the following points:

- Whether the officers got out of the vehicle and talked to the pedestrians before coming back to talk with the Appellant two minutes later or whether the police officers talked to the pedestrians through the vehicle window for 10 to 15 seconds and were then alerted to his presence on the ground, getting out of the car and going around to him
- Whether the Appellant was writhing in pain and screaming or whether he twice told the police officers that he was okay, in a slightly tight voice
- Whether the Appellant asked for an ambulance and was refused or whether the police officers offered to call an ambulance which the Appellant declined, saying he was fine
- Whether the Appellant asked the two officers to lift him off the ground and set him on his scooter or whether one police officer helped him off the ground with two hands to a standing position while the other lifted up his bike, followed by the Appellant climbing onto the scooter with the assistance of one officer holding his hand
- Whether the Appellant asked the police officers to follow him or not.

The Second Fall:

Evidence of the Appellant:

1. In his traffic accident report dated August 9, 2014 the Appellant stated:

... I was helped up by the officers and rode my scooter home where I collapsed. My daughter took me to the hospital...

2. In his declaration to MPIC dated November 17, 2014, the Appellant stated:

... They ended up not following me but I did make it home. When getting off the bike I fell again...

3. a) In his statement to the Sergeant via telephone on August 6, 2014, the Appellant did not mention a second fall.

b) In his statement given at the [police headquarter] on August 9, 2014, the Appellant indicated:

- ... He made it home and collapsed in front of the apartment block at [text deleted] and couldn't move again
- He called his daughter and her boyfriend picked him up and they took him to the emergency room at [hospital]...

Evidence of the Appellant's daughter:

The Appellant's daughter provided a signed written statement on June 14, 2017. It stated as follows:

At 23:10 hrs. I got a call from my dad from in the front of [text deleted] Street. My dad said he collapsed in front of his house with a broken leg and that he couldn't move and that he needed me to take him to [text deleted] emergency. So me and my boyfriend [text deleted] left [Appellant's daughter's boyfriend] house at [text deleted] [text deleted] Ave and drove directly to my dad's house [text deleted] St. in about 5 min; and found my dad lying on the ground in front of his building, with the bike lying on top of him. He couldn't move and he was in a lot of pain. So we picked him up and set him in my boyfriends van and transported him to the [hospital] emergency just before 12:00. I drove my dad to [hospital] emerg; and [Appellant's daughter's boyfriend] followed behind on my dad's scooter; and took it home after, to make it safe...

The panel finds that there were numerous inconsistencies between the documentary evidence and testimony of both the daughter and the father, in regards to the second fall and its aftermath. The daughter's description of various details such as the time of the incident and how and where she found her father were different in her statement and her testimony. Both of these differed from the Appellant's version of the story.

Having regard to the inconsistencies within the Appellant's own evidence as well as the clear and consistent evidence of the police officer which differed on various points, the panel has given greater weight to the evidence of the police officer. We find that the Appellant has not credibly established that he exhibited severe pain following the fall behind the cruiser car, that he was unable to stand or weight-bear and that he asked the police officers to call him an ambulance. We do not find that he has provided credible testimony that two officers lifted him off the ground and placed him on his scooter.

Rather, the panel accepts the evidence of the police officer that the Appellant did not exhibit severe pain behavior other than a slightly tight voice, that he said he was okay and declined the offer of an ambulance, was helped to a standing position on his feet by one officer and mounted his bike with minimal assistance.

Nor do we find the evidence of the Appellant and his daughter to be reliable in regard to the description and circumstances of the second fall as a result of inconsistencies in the various accounts provided.

Accordingly, although the parties do not agree on the issue of whether the incident behind the cruiser car was an *accident* pursuant to the definitions of an accident under section 70 and 71(2) of the MPIC Act, the panel does not find it necessary to decide this question. A thorough review of the evidence has led the panel to the conclusion that the Appellant has failed to establish that it was this incident behind the cruiser which caused his injury.

The panel reviewed and heard contradictory evidence from the Appellant, his daughter and the police officer. When faced with such variations in evidence, the Commission must reasonably subject each story to an examination of its consistency with the probabilities that surround the situation. The Commission considers whether the story of a witness is in harmony with the preponderance of probabilities which a practical and informed person would recognize as reasonable in that place and in those conditions.

The numerous inconsistencies between the Appellant's and his daughter's versions of events left the panel unable to rely on the Appellant's description of either fall. We have accepted the evidence of the police officer regarding the circumstances surrounding the first fall. As a result, we find that, on the balance of probabilities, the Appellant has failed to meet the onus open him of showing that his left hip and leg injury resulted from the incident behind the cruiser car. Therefore, the Commission concludes that the Appellant has failed to establish, on a balance of probabilities, that his injuries were caused by an automobile or the use of an automobile as defined by the MPIC Act.

Accordingly, the decision of the Internal Review Officer dated December 23, 2014 is hereby upheld.

Dated at Winnipeg this 30th day of July, 2018.

LAURA DIAMOND

TREVOR ANDERSON

LEONA BARRETT