Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-023

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Karin Linnebach** **Dr. Arnold Kapitz**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Sean Young from the Claimant Adviser Office ('CAO'); Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.**
HEARING DATE:	**October 24, 2018**
ISSUE(S):	**Whether the current back pain and symptoms are causally related to the MVAs of November 23, 2011 and September 10, 2012.**
RELEVANT SECTIONS:	**Section 170(1) and Section 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act').**

Reasons For Decision

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.

Background:

The Appellant was injured in a motor vehicle accident (MVA) on November 23, 2011. Following the MVA he reported neck and back pain and a laceration to his right knee. He missed a few days of work, but returned to work within a week.

On September 10, 2012, the Appellant was in a second MVA when the car he was driving struck a bear.

Following the MVAs, the Appellant sought treatment from his family physician, [text deleted] and from [Physiotherapy Centre]. Later, he sought treatment from a sports medicine specialist, [text deleted]. Computerized Tomography (CT) and Magnetic Resonance Imaging (MRI) investigation showed a herniated disc and osteophyte formation. He was referred to an orthopedic surgeon, [text deleted], who operated on the herniated disc.

On April 10, 2013, the Appellant contacted MPIC to discuss his claim, indicating that he had missed approximately 40 days of work due to neck and back pain and incurred costs for physiotherapy and medications.

The Appellant's case manager wrote to him on May 27, 2013 indicating that there was insufficient evidence to support a causal relationship between his current signs and symptoms and the MVA of November 23, 2011. Accordingly, there was no further entitlement to funding of his Personal Injury Protection Plan (PIPP) claim.

The Appellant filed an application for review of his case manager's decision and on November 27, 2013, an Internal Review Officer (IRO) for MPIC considered the effects of both the 2011 and 2012 MVAs. The IRO considered the Appellant's medical history dating back to November 23, 2009 and concluded there was no documented record of back pain prior to the MVA of November 23, 2011. However, incidents which occurred subsequent to

November 23, 2011, with resulting injuries, were found to be contributing factors to his current back pain and symptoms. The IRO cited an incident in January 2013, where the Appellant slipped and fell while shoveling snow, twisting his back. He also noted that following the November 23, 2011 MVA, the Appellant was off work for only one week and then did not return or present again for care or treatment of low back and left leg symptoms for four months. Following the bear accident, he did not present for care or treatment for six weeks, until October 25, 2012. The IRO concluded that based on the totality of the evidence presented, the Appellant's current symptoms of low back and radicular pain were unrelated to his MVA and, in all probability, the result of subsequent injuries and falls.

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

Issue:

The issue for the Commission is to determine whether the current back pain and symptoms of the Appellant are causally related to the MVAs of November 23, 2011 and September 10, 2012. Following consideration of the documentary evidence, testimony of the Appellant and submissions of the parties, this panel has concluded that the Appellant's back pain and symptoms are causally related to the MVAs and that he should be entitled to PIPP benefits as a result.

Documentary Evidence:

The parties submitted and relied upon reports from the Appellant's physiotherapist and general practitioner, CT and MRI reports, as well as reports from sports medicine physician [Appellant's

sports medicine specialist], orthopedic surgeon [Appellant's orthopedic surgeon], and MPIC's Health Care Services medical consultants [MPIC's family physician] and [MPIC's physiatrist].

General Practitioner

The panel reviewed brief reports and chart notes from [text deleted], the Appellant's general practitioner. Excerpts from the chart notes beginning in 2010, showed no history of reported back pain. After the 2011 MVA, the Appellant went to see his doctor the next day, complaining of neck and upper back pain and right knee pain with difficulty climbing stairs and a fair amount of limping. [Appellant's family physician] found good range of motion of the back but found the Appellant to be quite tender over the paraspinal muscles of the lumbar aspect on the left side. He diagnosed multiple strains of neck, back and knee and recommended over the counter anti-inflammatories and local therapy.

A week later, [Appellant's family physician] noted the Appellant was back to work with trouble navigating stairs, improvement of the back pain but a stiff neck.

The Appellant returned with complaints of left lower back pain in March 2012, with pain radiating into the buttocks and symptoms consistent with lower lumbar strain. Physiotherapy had not proved effective, according to the chart notes. A suggestion was made to try an alternative physiotherapy location. [Appellant's family physician]'s notes continued to reflect lower back pain symptoms and a CT scan "which demonstrated herniations". The notes showed that the Appellant was

missing some work and indicated that he wished to return to work, perhaps with some restricted duties.

[Appellant's family physician]'s first notes following the September 10, 2012 MVA were dated October 25, 2012, where the Appellant was complaining of "right-sided upper chest wall pain and tenderness over the rhomboids".

Complaints of back pain continued, with [Appellant's family physician] recommending Celebrex, Flexeril and exercises.

Physiotherapist

The panel reviewed chart notes of the Appellant's physiotherapist between April 10, 2012 and January 31, 2013, as well as reports dated April 5, 2012 and January 24, 2013.

The report of April 5, 2012 noted a three week history of lumbar and left leg pain. The Appellant's present history was noted as:

> Hx of low back pain, off and on over last (sic) , last 10 years. 3/52 was doing home demo work, next day pain down back of left leg. To ankle…

The Appellant's past history was listed as negative.

Scan abnormality was noted as:

> Suspect L L5/S1 disc bulge, S1 radicular signs, sluggish L S1 reflex, key mm weakness L S1

Physiotherapist chart notes did not reveal any specific notation of a history of lower back pain prior to 2012, or any visits to the physiotherapist pre-dating April 2012.

The physiotherapy report of January 24, 2013 reported a flare up of lower back pain with a history disc herniation. The diagnosis was of a "left disc irritation from compression in extension with slip while shoveling snow". The report noted that the pain appeared more from the injured disc on that day, as no radicular pain was noted, but there was local left lower back pain and bilateral SLR tension.

The notes from present history indicated that:

> This past weekend, slipped , jarred into back and left . felt immediate LB pain. Kept shoveling. Sat for approx 1 hr , couldn't get. Central pain. Kept going to work, not getting any better, has not seen MD.

The physiotherapist's chart notes showed treatment with some improvement between April 10, 2012 and May 22, 2012, with a later entry from January 31, 2013, describing ongoing improvement but still noting local left lower back pain with difficulty sitting and with disc irritation.

[Appellant's sports medicine specialist]

The panel reviewed a report dated September 16, 2014 from [text deleted], a sports medicine physician, to whom the Appellant was referred by his employer, [text deleted]. The panel was also provided with a chart note from [Appellant's sports medicine specialist] dated March 21, 2013.

[Appellant's sports medicine specialist]'s chart note indicated that the Appellant saw him due to:

> Back problems dating back to MVC last year…

[Appellant's sports medicine specialist] noted that the Appellant went back to work one week later but that "things seem to linger and then pain worsened around christmas(sic) – pain in back and (L) leg and now into (R) when pain is severe – horrible and shooting and needs to lie down on back".

[Appellant's sports medicine specialist] noted the Appellant's CT scan, diagnosis of "2 herniated discs" and the Appellant's experience of things getting worse again "this spring with pain in the central LL region". He noted the leg pain was worse with more walking and driving.

[Appellant's sports medicine specialist] charted the Appellant's previous history as "minor aches and pains".

Following his examination, [Appellant's sports medicine specialist] noted a possible diagnosis of "discogenic low back pain ? underlying arthropathy".

In response to a request for information from the CAO, [Appellant's sports medicine specialist] provided a narrative report dated September 16, 2014. This report set out the diagnosis of the Appellant's back and leg symptoms as secondary to lumbar pathology (disc extrusion and osteophyte complex) that compresses the left L5 and S1 spinal nerves.

It was [Appellant's sports medicine specialist]'s opinion that the "totality of the evidence does not support the position that the November 23, 2011 accident played a substantial/significant role in the development of the conditions noted above".

In support of this opinion, [Appellant's sports medicine specialist] cited documentation of pre-existing back problems as noted in the April 5, 2012 physiotherapy report (i.e., "low back pain on and off over the past ten years") and his own initial clinic notes (i.e., "past history of minor aches and pains"). [Appellant's sports medicine specialist] cited an absence of clinical findings suggestive of disc lesion shortly after the incident in question, the Appellant's ability to work at the fairly demanding job of power electrician, and evidence indicating that he did not develop symptoms suggestive of disc pathology or spinal nerve involvement until March 26, 2012. [Appellant's sports medicine specialist] noted information showing that the Appellant presented with a three week history of lumbar and left leg pain in April 2012 after doing home demo work for three weeks, as well as information obtained from the CT report showing a large calcified bridge osteophyte at the L5-S1 level. This type of pathology would require many years to develop.

[Appellant's sports medicine specialist] was of the opinion that the September 10, 2012 accident did not play a substantial or significant role in the development of these conditions, suggesting only a possible exacerbation of pre-existing back problems but not a significant exacerbation. He reviewed the MRI findings in comparison to the CT findings and noted progression over time in the absence of additional injuries, the September 10, 2012 accident, shoveling in January 2013 and the demands of the Appellant's occupation. He concluded:

> After reviewing [the Appellant]'s statement, the scenario he provided sounds plausible. Both accidents he was involved in could have perturbed the lumbar spine but it is difficult to determine to what extent. The medical evidence supports the position that [the Appellant]'s lumbar spine was not normal before the November 23, 2011 accident, even though he was not reporting any low back or leg symptoms prior to the accident. In other words, it is medically probable [the Appellant] would have continued to experience low back and possibly leg symptoms, on and off, even if he was not involved in either accident.

[Text deleted] (orthopedic surgeon)

[Appellant's orthopedic surgeon] provided two narrative reports, dated May 21, 2015 and January 5, 2017.

He provided a diagnosis of L4-5 disc herniation and L5-S1 disc ostheophyte. He described treatment by lumbar laminectomy and decompression surgery which had an excellent outcome and provided significant improvement in the Appellant's back and leg symptoms. [Appellant's orthopedic surgeon] stated:

> In my opinion, without having pre-accident imaging, and on a balance of probabilities, the November 2011 MVA likely caused or materially contribute(sic) to the lumbar disc herniation at L4-5 with nerve root involvement. The disc ostheophyte complex at L5-S1 would be a chronic condition. The fact the patient had no symptoms prior to the accident but had back and leg pain after the accident would favor the accident having a causative relationship to the disc herniation and the patient's symptoms.
>
> In my opinion, on a balance of probabilities, the September 2012 MVA likely contributed to the worsening of the lumbar disc herniation at L4-5.

In his report dated January 5, 2017, [Appellant's orthopedic surgeon] was asked to consider the position of MPIC's Health Care Services medical consultant which had relied upon factors such as the Appellant having a history of low back pain off and on over the last 10 years, the gap in the Appellant seeking medical care following the first MVA and reports of the Appellant doing home demo work in April 2012 and of shoveling in January 2013 where his left leg gave out, causing him to twist and catch himself from falling, with a resulting pain in his back.

[Appellant's orthopedic surgeon] stated that he had already made it fairly clear that the disc osteophyte complex on the Appellant's MRI was most certainly a chronic condition. However:

> … By the information that [the Appellant] passed along to me and on a balance of probabilities, it seemed quite clear that [the Appellant]'s disability escalated substantially after the accident, which on an anatomic basis is reasonable to support, because pre-accident stenosis and narrowing would limit the excursion of the nerve roots at that level, and during the accident would predispose [the Appellant] to a higher chance of having radicular symptoms post-accident…

[Appellant's orthopedic surgeon] stated that he was not aware that the Appellant had a history of low back pain on and off over the last 10 years. However, he indicated that the imaging changes that the Appellant presented with were clearly chronic in nature and would have predated the accident, so he would not be surprised that the Appellant had some degree of back pain on and off. Nor was he aware that the Appellant had previously received medical care or attended physiotherapy for his back pain or that he was doing home demo work. However, he concluded:

> Whether or not these issues pertain to [the Appellant]'s case, they do not alter my opinion that the November 2011 accident worsened [the Appellant]'s symptoms and lead(sic) to the surgery.

<u>Health Care Services Reports</u>

MPIC provided reports from [MPIC's family physician] and [MPIC's physiatrist], both Health Care Services medical consultants.

[Text deleted], a family physician, reviewed the Appellant's file for MPIC and provided two reports.

In a narrative report dated May 21, 2013, he reviewed the Appellant's history of the MVAs and back pain, through the notes of his family physician and physiotherapist, as well as information from [Appellant's sports medicine specialist]. Noting that the Appellant returned to work within a week after the MVA with no further physiotherapy or physician visits until March 26, 2012, [MPIC's family physician] identified a four month gap prior to presenting again for care and treatment for low back and left leg symptoms. He noted that visits to his family physician and physiotherapist in January 2013 related to having slipped on the ice while shoveling snow and wrenching his back into extension, causing a flare up of back symptoms with no radicular symptoms. He also reviewed the CT scan, which he believed indicated the Appellant's symptoms were caused by a large calcified osteophyte compressing the left S1 nerve root. He stated:

> … These symptoms appear to settle by May 2012 and the claimant was not seen again until he slips on the ice injuring his back in January 2013. The large gaps in care suggest that the claimant's symptoms were well controlled. When his symptoms did flare during 2012, they appeared to have been caused by a large calcified osteophyte compressing the left S1 nerve root.
>
> On the balance of medical probability, the claimant's current symptoms of low back and radicular pain were not related to the motor vehicle accident of November 23, 2011.

In a second narrative report dated July 10, 2015, [MPIC's family physician] was also asked to consider medical reports provided by [Appellant's sports medicine specialist] (September 16, 2014) and [Appellant's orthopedic surgeon] (May 21, 2015), in addition to the notes and reports of the family physician and physiotherapist.

[MPIC's family physician] criticized [Appellant's orthopedic surgeon]'s opinion:

> In his May 21, 2015 letter, [Appellant's orthopedic surgeon] opines that likely the November 2011 MVA caused the lumbar disc herniation at the L4-5 nerve root. He goes on to say that the fact that the patient had no symptoms prior to the

> accident but had back and leg pain after the accident would favor the accident having a causative relationship to the disc herniation and the patient's symptoms. This historical information that the claimant had no back pain prior to the motor vehicle accident and that the back and leg pain started after the accident was of course obtained from his patient. [Appellant's orthopedic surgeon] does not have access to the objective historical information available for this chart review. It appears that [Appellant's orthopedic surgeon] understood that the claimant did not have the ten year history of recurrent back pain that he reported to his physiotherapist. It also appears that [Appellant's orthopedic surgeon] does not understand that there were no medical or physical therapy visits for back or leg pain from November 30, 2011 to March 26, 2012. [Appellant's orthopedic surgeon] does not appear to have access to the information about the injury during home renovations that occurred three (sic) prior to the April 5, 2012 physiotherapy visit that resulted in low back and left leg symptoms.

[MPIC's family physician] opinion noted:

> The significant change in examination between the March 21, 2013 visit and the April 5, 2013 visit suggests that we were in the process of witnessing the disc herniation in progress. This does not have the appearance of a chronic injury since the November 23, 2011 motor vehicle accident nor is it likely related to the September 10, 2012 motor vehicle accident. This had the appearance of something that began a short while prior to the March 21, 2013 visit (i.e. this was likely instigated by the snow shoveling incident which is known to be a common cause of lumbar disc compression). The MRI scan of May 8, 2013 confirms the significant change from previous imaging…
>
> The claimant reported in his narrative that he didn't take time off of work during because he was trying to present a reliable image to his new employer. This doesn't explain why he didn't attend his physicians or physio during these time periods. In addition, his flare ups / new back injuries are strongly associated with his (sic) to house work related injuries.

[MPIC's family physician] concluded that there was no evidence associating the Appellant's March to May 2012 back and leg symptoms to the November 23, 2011 MVA or associating his January 2013 back and leg symptoms to either MVA. Rather, on the balance of medical probability, the claimant's ongoing back and leg symptoms in the L4-L5 disc protrusion were not related to the MVA.

A third narrative report was provided by [text deleted], a physiatrist and consultant with MPIC's Health Care Services. She was asked to review the file information along with the further report provided by [Appellant's orthopedic surgeon] (January 5, 2017).

[MPIC's physiatrist] stated:

> [Appellant's orthopedic surgeon]'s comments and opinions of January 5, 2017 indicate to this medical consultant that he has drawn primarily on history given to him by [the Appellant]. The spine surgeon made no reference to objective clinical examination data to reinforce his opinion regarding [the Appellant]'s symptom presentation other than to state that MRI evidence of lumbar pathology place his patient at risk of having radicular symptoms post [September 2012] MVC. This medical consultant shares the view that [the Appellant]'s longstanding, pre-existing lumbar pathology could increase his risk of having lumbar symptom irritation post-MVC and there is evidence, pointed out in earlier medical consultant review, of lumbar region pain post collision, which was much improved one week post MVC. [The Appellant] did have long standing history of intermittent lumbar symptoms and it may be that recurrent lumbar symptoms would be experienced whether or not he was involved in one or more MVC's. Important is that lumbar symptom exacerbation does not translate into increased risk of sustaining lumbar nerve / disc pathology or worsening pre-existing lumbar pathology secondary to MVC trauma.

[MPIC's physiatrist] agreed with the earlier medical consultant opinion that a causal connection between the L4-5 disc herniation and the MVC was not probable. In her view, the medical consultant had provided "salient comments" on the content of [Appellant's sports medicine specialist]'s argument against causation, including the claimant's history of low back pain off and on for the previous ten years, an absence of any neurological or disc causing findings in the lower back shortly after the accident in question, the Appellant's ability to work as a power electrician after the accident in question, an absence in symptoms suggesting disc pathology or spinal nerve involvement until March 26, 2012, a three week history of lumbar and left leg pain after home

renovation in April 2012, a CT report identifying a very large calcified bridge osteophyte, and a flare up of back and leg symptoms while shoveling snow in January 2013.

[MPIC's physiatrist] noted:

> This medical consultant's first comment is that [Appellant's sports medicine specialist] in his role of [employer] medical advisor and as practicing sport medicine physician, effectively provided a third party expert opinion against causation. Importantly, his opinion is based on extensive objective data.
>
> Second comment relates to risk factors for disc herniation. When a patient presents with symptoms and/or signs of lumbar pathology with accompanying leg radiculopathy, often there is no obvious trigger. Assuming awkward or prolonged postures (which could occur when doing modestly taxing home renovation work for example) can be enough of a trigger to provoke musculoligamentous, nerve, disc or bone irritation. Trauma forces associated with an MVC, may present as an obvious trigger but the totality of the evidence – which underwent earlier medical consultant review, argues against causation and, the new flagged documents in this medical consultant's opinion, do not provide evidence in favour of causation.

Testimony of the Appellant:

The Appellant provided oral testimony and was cross-examined by MPIC's counsel. He described the first MVA of November 23, 2011, explaining that after the initial impact between the two vehicles (which hurt) his van spun around and hit a large hydro pole (which really hurt). He indicated that at first he felt stiff and sore and went to see his own doctor, who told him this was common after an accident and that the problem was muscular.

The Appellant missed a few days of work following the accident. He was employed by [text deleted] as a power electrician. At the time of this accident, he was new to his placement at the generating station and was eager to make a good impression in this new posting. After a few days

off work, the pain in the knee went away but his neck remained stiff and he felt a constant pressure in his back.

The Appellant experienced a good deal of frustration in dealing with MPIC over the vehicle damage claim, which took a few months to resolve. Although his back was continuing to flare up and get worse from time to time, he tried to treat it with Advil, heat and cold. He was careful about his activities. He was very reluctant, he stated, to deal with MPIC again, due to the frustration he experienced during the vehicle damage claim, and so he did not file a PIPP claim at that time.

The Appellant went back to see his doctor again in March 2012. He was asked to explain that gap between the accident date and this attendance for treatment. He said that he had never been in an accident like that before or had an injury that didn't seem to want to heal. His doctor told him that it was muscular and so he used over the counter anti-inflammatories and muscle relaxants, as well as ice and warm compresses. He had just recently graduated as a certified power electrician and tried to avoid taking time off, wanting to leave a good impression and take advantage of opportunities with his employer.

The Appellant indicated that while his job was physical, he had apprentices working under him who knew that he had been in a car accident and who wanted to learn to do various tasks, so they did most of the heavy lifting.

Although his family physician kept telling him that the problem was muscular, when he began to get frustrated with that diagnosis family members urged him to seek alternative care.

He started attending for physiotherapy treatment. The Appellant testified that this was the first time he had ever attended for physiotherapy treatment.

Both in direct and cross-examination, the Appellant was asked whether he had a history of back pain. He indicated that, as he told the physiotherapist, he had been working at blue collar, physical type jobs for a number of years. Every so often, probably five or six times over the years, he may have experienced a sore back for a couple of days. He indicated that this never stopped him from doing his job duties or caused him to seek any kind of treatment, beyond some over the counter anti-inflammatories. He might sit in a hot tub or use an ice pack and the pain or strain would go away quickly. He indicated that prior to the MVAs he had never attended for any kind of imaging for his back.

On cross-examination, the Appellant was asked about and explained previous employment experience with heavier work, as an apprentice for [employer], as an animal welfare worker or even working around the house or at the lake cutting wood. He said that any irritation or strain always cleared up within a day or two. After the MVA, he described a different kind of pain and a scratchy, burning, irritated feeling in his back.

After the CT scan, when the Appellant learned that he had a herniated disc, he continued with physiotherapy treatment and planned a return to work with a removal of restrictions. He seemed to be seeing some improvement with the numbness and tingling in his legs. He described difficulty walking, as he suffered from a limp, and difficulty sitting. He described the exercises, therapy and

pain medication remedies which he was using. He was starting to feel better and running out of physiotherapy coverage. His wife still had not returned to work after the birth of their son and money was tight, so he stopped going to physiotherapy. He felt he was on the road to recovery; not a hundred percent better, but starting to feel comfortable and getting ready to return to work.

The Appellant also described the second MVA when he hit a bear. He described this accident as less dramatic and more of a surprise, as he had no idea of what he had hit. The Appellant estimated that he may have missed a couple of days of work after that accident and saw his doctor a couple weeks later when his back started to nag him again. He had numbness in his leg, pinching behind his knee and felt like someone was rubbing a fist into his backside.

The Appellant was asked to describe the incident which occurred when he was shoveling snow in January 2013. He said that his wife was shoveling snow and he went out to help her with it. There was a wind drift by the front door of the garage. As he stepped over the wind drift, his leg buckled. He caught himself from falling but that jarred his back. He stretched a little bit, finished up the shoveling and went to sit down. Afterwards he was so sore it was difficult to get up. He sought physiotherapy treatments and pain medication but it wasn't very helpful.

He also talked to the health department of [employer] to try and find another doctor who might be able to help him more, since he was starting to feel worse. He was then referred to [Appellant's sports medicine specialist]. It took some time to get an appointment with [Appellant's sports medicine specialist], who finally saw him in March 2013.

When he saw [Appellant's sports medicine specialist] he gave a history of the two car accidents and explained the work that he did. He told him that he had once been a pretty active guy, hiking, golfing and snowmobiling. [Appellant's sports medicine specialist] did some blood work and tested for a variety of things in order to rule out underlying issues. He also requested an MRI. It was the Appellant's understanding that this MRI disclosed a second disc herniation. He explained to [Appellant's sports medicine specialist] that his leg was extremely sore and that he was experiencing pins and needles in his foot. [Appellant's sports medicine specialist] asked him whether he would be prepared to consider surgery and when the Appellant indicated that he would, arrangements were made for him to see [text deleted], the orthopedic surgeon.

He later saw [Appellant's orthopedic surgeon] and they discussed the risks and implications of surgery. The Appellant described the effects of the surgery as being like "night and day" from the time he woke up in recovery. He believes his surgery was absolutely successful and that he had fantastic results. He is now able to snowmobile, golf, wrestle with his kids, work overtime, etc.

On cross-examination, the Appellant was asked about his visits to the physiotherapist and family physician and whether he had mentioned the MVAs to his caregivers in those initial assessments, as the MVAs were not mentioned in the chart notes. The Appellant indicated that while he could not control what was written in the chart notes, he had engaged in lengthy conversations regarding his history, back problems, his activity level and the MVAs. He stated that he could not explain why his family physician or physiotherapist did not note the MVAs in their chart notes, since he knew that they were both aware of the MVAs.

The Appellant was asked why he did not attend at the hospital following the MVAs and indicated that given everything that was going on at the time, and in particular with the driver of the other car in the first MVA, he just shrugged off his own pain. Knowing what he knows now he should not have done that.

The Appellant was asked about the gap between seeing his doctor in November 2011 and then not returning until March 2012. He admitted that this was because he was feeling better. His knee was better and his back and neck seemed like they were getting better to a certain point, as he tried to deal with it on his own using things like Robaxacet, Advil, hot and cold patches and an ObusForme. He admitted that this was the same way he had dealt with any back pain in prior years, but added that in this case it just wasn't getting any better, and the pain was travelling down his leg. He also admitted that when he did start taking more time off work, this was not a result of being told to do so by his doctors. Rather, he was struggling to deal with the pain and talked to his supervisor and health care services at [employer] about it.

The Appellant also admitted that he didn't really consider making an MPIC PIPP claim until 2013. He explained that he had never been on employment insurance, worker's compensation or anything like that in the past. He did not want to get involved with MPIC if he could avoid it as he was bitter about how they handled his motor vehicle damage claim. He did not even make inquiries in 2012, as he had always understood that if he did not miss seven consecutive days of work he would not qualify for Income Replacement Indemnity (IRI) benefits.

The Appellant explained that he changed his mind after a positive experience with a particular case manager at MPIC, but also admitted that at that point, the predominant reason for seeking assistance from MPIC was that he was worried about being out of other options.

On re-examination, the Appellant confirmed that he had never been in serious MVAs before. Any previous back pain that he may have experienced from chopping wood, or while working as an apprentice or at the [animal shelter] never caused him to consult a doctor or a physiotherapist or miss any work as a result.

Submission for the Appellant:

Counsel for the Appellant emphasized that none of the chart notes showed any documented record of back pain prior to the first MVA. Counsel submitted that any gaps in the Appellant seeking treatment following the MVA had been explained by the Appellant's eagerness to leave a good impression at work and his attempts to manage his injuries on his own. His doctor had told him that it was just muscular pain which would go away, so he persisted. The Appellant had never been in an accident like this before and had never had this level of involvement with MPIC or with having to attend doctors and physiotherapist on a recurrent basis for pain. He utilized and exhausted the coverage he had with his employer by running low on sick time and using up his vacation time, while attempting to manage his symptoms at home, following the instructions of his doctor and physiotherapist. When these things became too much for him to handle, he turned to his employer at [text deleted] who directed him to [Appellant's sports medicine specialist]. He followed this process which resulted in the referral to [Appellant's orthopedic surgeon] and his surgery.

Counsel submitted that references in the Appellant's chart notes to things such as shoveling snow and home renovations had been explained by the Appellant, who had provided a good account of his version of events. [Appellant's orthopedic surgeon] was given an opportunity to consider these events and it did not alter his opinion that the Appellant's condition was caused by the 2011 MVA and worsened by the 2012 MVA. Although recognizing that the Appellant suffered from some pre-accident stenosis and narrowing, with a chronic condition of osteophyte formation, [Appellant's orthopedic surgeon]'s report was clear that the MVAs were responsible for the Appellant's back pain symptoms. Counsel indicated that the Health Care Services report simply relied upon [Appellant's sports medicine specialist]'s opinion. Counsel took issue with the test which [Appellant's sports medicine specialist] had applied, in that he seemed to require that the MVAs played a substantial or significant role in the Appellant's symptoms, which in counsel's view was too high a test. He referred the panel instead to the test set out in the CAO's letter of March 11, 2015 to [Appellant's orthopedic surgeon], as to whether on a balance of probabilities (more likely to be true than not true) the MVA caused or materially contributed to the Appellant's condition.

Submission for MPIC:

Counsel for MPIC noted that the onus is on the Appellant to show that the IRO erred in concluding that the Appellant's back condition is not causally related to the MVAs.

MPIC relied upon several factors to support the decision of the IRO. Counsel noted that on the day of the first MVA in November 2011, although paramedics attended at the scene, the Appellant

declined hospital care. He saw his family doctor who documented that he had suffered multiple strains and taken three days off before returning to work. There was no evidence that the Appellant required modified duties at work.

The Appellant's back pain then improved, it was submitted. He did not visit the doctor again until March 2012, more then three months later, for unrelated reasons. Neither the MVA nor back pain were mentioned. This tells us, counsel submitted, that the injuries sustained in the MVA were minor and did not require medical attention.

Although MPIC accepts that the MVA may have caused a slight exacerbation of the Appellant's lower back pain at the time, the documentary evidence shows that by November 30, 2011 it was on its way to resolving.

The next indication of back pain occurred on March 26, 2012, almost four months after the MVA. This significant lack of reporting was highlighted across the three Health Care Services reviews found in the documentary evidence.

Counsel also pointed to [Appellant's family physician]'s chart notes which indicated that the Appellant had tried physiotherapy in the past and had not found it effective. The Appellant indicated that he had never been to physiotherapy before, but there was a discrepancy there with the chart notes. When the panel asked about the conclusion in the Internal Review Decision (IRD) that the Appellant did not have a pre-existing history of back problems, counsel for MPIC stated that any past history was still worth knowing contextually, even if it was not the driving force

behind the IRO's decision to deny benefits. It had been noted in the Health Care Services report and was therefore worth noting now.

Counsel also submitted that some of the reports, and in particular, that of [Appellant's orthopedic surgeon], were based upon subjective reporting by the Appellant to his caregivers. [Appellant's sports medicine specialist], acting in his role as a care provider, provided a forensic report in response to a CAO request. He pointed out, as did [MPIC's physiatrist], that sometimes there is no obvious trigger for back pain, particularly where degenerative changes are found in the imaging. Just because the accidents were severe, does not mean that severe injury was sustained. The Appellant did not attend at hospital, there was no sign of muscle strain early on, and his attendance to care providers came much later. People can come out of terrible accidents, it was submitted, without serious injury and this is what occurred with the Appellant.

Rather, counsel pointed to the pain the Appellant suffered following three weeks of home demo work in March 2012. This would favor a causation assessment showing that whatever back symptoms the Appellant suffered in March and April 2012 were mostly likely due to the home renovation he was doing.

Later, in April, the Appellant attempted a return to work. This implied that he was seeing improvement, and that the Appellant's back was behaving, although home demo work resulted in another exacerbation or flare up. This resolved by May or June.

The next note came in October 2012 and the Appellant did not attend for more physiotherapy until January 2014, eight months after the September 10, 2012 MVA involving the bear. At that time, the Appellant took only two days off work, there were no hospital visits or immediate care and no injury claim was pursued. This points to the fact that this incident was something minor for the Appellant's back.

The next complaint came in January 2013, more than four and a half months following the September 2012 MVA. No mention of either MVA was made. The MVA was not recorded in the general practitioner's chart notes. Rather, the chart notes referred to a back flare-up due to a slip while shoveling snow. Counsel submitted that this slip was downplayed in the Appellant's testimony, but it was significant enough to require attendance at the doctor.

In reviewing [Appellant's orthopedic surgeon]'s reports, counsel submitted they were not as reliable as the Health Care Services reviews or the report from [Appellant's sports medicine specialist]. The Health Care Services doctors and [Appellant's sports medicine specialist] had reviewed supporting medical documentation, while [Appellant's orthopedic surgeon]'s conclusions relied upon only the Appellant's reporting to him. [Appellant's orthopedic surgeon] was not made aware of the history of back problems which [Appellant's sports medicine specialist] had noted. Nor was he made aware of the home renovation and shoveling incidents.

While counsel conceded there may have been a possible irritation or exacerbation arising out of the MVAs, this resolved. When one looks at this case, it is clear that the Appellant's symptoms resolved following the first MVA. Other injuries occurred and those resolved as well. Then,

following an injury in 2013, the Appellant had surgery to address his condition. Counsel submitted that the Appellant had a physical job and had done physical jobs in the past. His back had been causing him complaints prior to the accident, which showed that complaints could come about without any triggering event.

Counsel submitted that the evidence before the Commission did not create a causal link between the MVAs and the back symptoms being reported by the Appellant. There was strong evidence that whatever back symptoms did arise were caused by other injuries or problems he was experiencing. The effects of the MVAs appeared to be relatively minor, and as such, it would be a fallacy to operate under the assumption that because something happened to his back after an MVA, then the MVA must be the cause. On that basis, counsel submitted that the IRD should be upheld.

Discussion:

The relevant provisions of the MPIC Act are as follows:

> **Definitions**
> 70(1) In this Part,
>
> **"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 »)
>
> **Reimbursement of victim for various expenses**
>
> 136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act,

> to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
>
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care.

The onus is on the Appellant to show, on a balance of probabilities, that his ongoing back pain and symptoms were causally related to the MVAs.

In denying entitlement to PIPP benefits arising out of these MVAs, MPIC has pointed to a number of factors including pre-existing back pain and conditions, lack of documented injury following the MVAs, gaps in reporting problems in the months following the MVAs, and subsequent incidents which may have contributed or caused the Appellant's back pain. Counsel relied upon narrative and medical reports on the Appellant's file disputing causation.

The panel has reviewed the documentary evidence and the testimony of the Appellant regarding all of these factors.

Pre-Existing Back Pain and Conditions

MPIC's position as to whether the Appellant's back pain was a pre-existing condition was not entirely clear. The IRO, in his decision dated November 27, 2013 stated:

> According to the medical history, dating back to November 23, 2009, there is no documented record of back pain prior to the motor vehicle accident of November 23, 2011. However, there are incidents subsequent to November 23, 2011, with resulting injuries, that may be contributing factors to your current back pain and symptoms.

Counsel for MPIC referred to comments and conclusions arrived at by [Appellant's sports

medicine specialist] and the Health Care Services consultants which referenced and relied upon the documentation of pre-existing back problems as medical evidence and the basis for the opinion that the MVAs did not play a substantial or significant role in the development of the Appellant's back condition.

For example, the panel considered the following statements:

a) [Appellant's sports medicine specialist]'s report dated September 16, 2014:

> Documentation of pre-existing back problems (even though [the Appellant] outlined in his statement that he did(sic) have a past history of back injury) as noted in the April 5, 2012 physiotherapy report (i.e., low back pain on and off over the past ten years) and in my initial clinic note (i.e., past history of minor aches and pains)…

b) [MPIC's family physician]'s Health Care Services review dated May 21, 2013:

> The claimant's family physicians notes were reviewed from April 2010 to April 2013…
>
> … A review of clinical notes from April 1, 2012 up until accident does not reveal any physician visits for back pain…

c) In a later review dated July 10, 2015, [MPIC's family physician] reviewed [Appellant's orthopedic surgeon]'s comments regarding causation, and stated:

> … This historical information that the claimant had no back pain prior to the motor vehicle accident and that the back and leg pain started after the accident was of course obtained from his patient. [Appellant's orthopedic surgeon] does not have access to the objective historical information available for this chart review. It appears that [Appellant's orthopedic surgeon] understood that the claimant did not have the ten year history of recurrent back pain that he reported to his physiotherapist…

d) [MPIC's physiatrist]'s Health Care Services review dated May 24, 2017:

> … In his January 5, 2017 report, [Appellant's orthopedic surgeon] acknowledged that he was unaware of [the Appellant]'s history of intermittent low back pain over the last ten years…

> …This medical consultant shares the view that [the Appellant]'s longstanding, pre-existing lumbar pathology could increase his risk of having lumbar symptom irritation post-MVC…
>
> … [the Appellant] did have long standing history of intermittent lumbar symptoms and it may be that recurrent lumbar symptoms would be experienced whether or not he was involved in one or more MVC's…

Assumptions regarding a pre-existing back condition appear to have been based upon two documents from the Appellant's file. The first was the Physiotherapy Initial Assessment report of April 5, 2012 which stated:

> … Present History: Hx of low back pain, off and on over last (sic) , last 10 years.
> Past History: Negative…

The second reference appears in [Appellant's sports medicine specialist]'s chart notes from a visit dated March 21, 2013 where, after noting "back problems dating back to MVA last year", [Appellant's sports medicine specialist] wrote:

> … PHx: minor aches and pains…

The Appellant was asked (both in direct and cross-examination) whether he had a 10 year history of back problems and to describe his history of minor aches and pains. The Appellant testified that he did have a history of minor aches and pains, sometimes following physical exertion (chopping wood) or heavy physical labor (as a power electrician, apprentice or in animal services). He described these as typical of everyday life. They were ordinary aches and pains associated with activity that cleared up within a few days. He had never had to take prescription medications, attend a physiotherapist or miss work as a result. The pain that he experienced following the MVAs

was different. He described the burning, itching nature of this pain, tingling sensation into his buttocks and legs, and the length of time it persisted.

The panel found that the Appellant provided this evidence in a forthright, consistent and credible manner, when asked about it several times. In contrast, MPIC's position that the Appellant suffered from a pre-existent history of back problems, was not consistently applied. The IRO and [MPIC's family physician] appear to have recognized that the Appellant did not have a history of visits to his family physician for back pain, and although the Appellant's evidence was that he had no prior history of seeing a physiotherapist before the MVAs, MPIC placed reliance upon a reference by the physiotherapist to a 10 year history of back pain and [Appellant's sports medicine specialist]'s reference to a history of minor aches and pains.

Chart notes obtained from the physiotherapist and from the family physician were consistent with the Appellant's evidence that he had not attended for physiotherapy or medical treatment for back pain before the MVA.

Accordingly, the panel accepts the Appellant's evidence that he did not have pre-existing back problems prior to the MVA.

Lack of Injury at the Time of MVA(s)

The Appellant testified describing both MVAs, noting how painful it was during the first MVA when he hit the pole, and in the second MVA when he hit the bear, even though he was relaxed at the time.

Both incidents were followed by visits to his family doctor.

MPIC took the position that the Appellant had not complained of anything but minor injuries following the MVA, which quickly resolved (with him returning to work within the week). The Appellant took the position that he did feel the effects of the injury immediately, but due to the shock of the incidents, his frustration and bitterness dealing with MPIC, and his eagerness to perform well with his new position at [employer], he had tried to underplay these injuries and work through them.

The panel finds that the MVAs were not minor and that the Appellant did suffer some initial injury in both.

Gaps in Seeking Treatment and Reporting Symptoms

MPIC pointed to an almost four month gap in the Appellant seeking treatment for his back condition (after the first week) following the initial MVA. Counsel for MPIC also pointed to a gap between the September 2012 MVA and his visit to his doctor in October 25th of that year, complaining not of back pain, but of chest wall pain.

The panel had the opportunity to hear the Appellant discuss these gaps in treatments during the course of his testimony. He explained that he had no experience with injury claims, having always worked hard and never having received insurance benefits from MPIC, workers compensation or employment insurance. His doctor repeatedly told him that the problem was muscular and that it would get better with time. He was the type of person who would then try to work through the

pain, without seeking physiotherapy or medical treatment. Following these MVAs, he tried to use every type of remedy or treatment suggested to him by his physiotherapist, doctors or others, including heat, ball therapy, foam rollers, medication and exercise, to try and alleviate the pain and improve his symptoms. The panel found the Appellant's testimony in this regard to be calm, credible and consistent.

His evidence was also borne out by the chart notes of his family physician as well as [Appellant's sports medicine specialist]'s note that:

> … initially did not think to o (sic) much with regard to the back
> went home and then noted some stiffness
> was assessed by MD and advised things were OK
> went back to work one week later
> things seem to linger and then pain worsened around christmas – pain in back and (L) leg and now into (R)
> when pain is severe - horrible and shooting and needs to lie down on back
> MD reassessed and dxed muscular problem…

This notation by [Appellant's sports medicine specialist] is similar to the description provided by the Appellant regarding his experience in the months following the first MVA.

The panel does not agree with the IRO's decision that the four month gap between the first MVA and presenting again for care and treatment for low back and left leg symptoms suggests that his accident related injuries were well controlled.

Subsequent Incidents

The IRD relied upon an incident which occurred in January 2013 when the Appellant "slipped and fell while shoveling snow and twisted" his back. The Health Care Services reviews, and

[Appellant's sports medicine specialist]'s report focused upon this incident, as well as the Appellant's report of performing home demo work for three weeks, as noted in the physiotherapy report of April 5, 2012.

The Appellant addressed both of these incidents in his direct testimony. He indicated that he was not performing home demo work, but was giving his father some assistance with his home renovations. He described showing his brother, who was performing much of the work at that time, how to run an electrical cable by running some of the cable himself. His evidence was that he did not participate in any demolition, sledge hammering, dry walling, lifting, etc. This evidence was not challenged on cross-examination.

The Appellant's description of the incident which occurred while he was shoveling snow was that while attempting to step over a wind drift, his leg, which had been troubling him as a result of his injuries, gave out under him, causing him to slip. He twisted his back when trying to right himself and avoid this fall.

The panel finds that the Appellant's detailed description of his home renovation work, unchallenged on cross-examination, was credible. Further, we find that, according to his account, the fall while snow shoveling was caused by the leg symptoms which arose for the first time in 2012 and according to the Appellant and his orthopaedic surgeon, were caused by the MVA.

Medical Reports

The panel has some concerns with the conclusions of [Appellant's sports medicine specialist], [MPIC's family physician] and [MPIC's physiatrist]. Each relied upon the physiotherapist report of April 5, 2012, which described a 10 year history of back pain. The Appellant denied a history of significant, ongoing back pain. This was borne out by the evidence contained in the physiotherapy and family doctor chart notes reviewed by [MPIC's family physician]. There were no past notations in these chart notes regarding back pain. This is consistent with the Appellant's testimony that he had never before sought medical or physiotherapy treatment, prescription medications or missed work time as a result of back pain.

[MPIC's family physician] and [MPIC's physiatrist] further relied on [Appellant's sports medicine specialist]'s notation that the Appellant had a past history of suffering from "minor aches and pains". The panel finds that minor aches and pains are not a significant pre-existing condition. We do not agree that a history of minor aches and pains should lead us to conclude that the Appellant's symptoms were caused by a pre-existing condition such as would negate a connection between his condition and the MVAs.

Rather, the panel has given greater weight to the reports of the orthopaedic surgeon who examined, assessed and surgically treated the Appellant's back condition. The surgeon reviewed and discussed the disc osteophyte complex shown on the MRI, indicating that this would most certainly represent a chronic condition. It was his view, however, that the November 2011 MVA likely caused or materially contributed to the lumbar disc herniation at L4-5 with nerve root involvement. His report dated May 21, 2015 noted that the patient's lack of symptomology prior to the MVA

favored a causal relation between the MVA and the symptoms. His second report, dated January 5, 2017 stated:

> … it seemed quite clear that [the Appellant]'s disability escalated substantially after the accident, which on an anatomic basis is reasonable to support, because pre-accident stenosis narrowing would limit the excursion of the nerve roots at that level, and during the accident would predispose [the Appellant] to a higher chance of having radicular symptoms post-accident.
>
> … Did I know that [the Appellant] had a history of low back pain on and off over the last 10 years? I do not recall this specifically being raised; however, the imaging changes that [the Appellant] presented with where clearly chronic in nature and would have predated the accident, so I am not surprised he would have had some degree of back pain on and off. I was not aware that [the Appellant] received medical care or attended a physiotherapy for his back pain and I was most certainly not aware that he was doing home demo work in 2012.
>
> Whether or not these issues pertain to [the Appellant]'s case, they do not alter my opinion that the November 2011 accident worsened [the Appellant]'s symptoms and lead(sic) to the surgery…

Counsel for MPIC warned the panel against becoming confused by the significant nature of the MVAs by erroneously concluding that due to their severity, the MVAs therefore must have caused the Appellant's condition. The panel does not believe however, that [Appellant's orthopedic surgeon] was confused in this way. He is an experienced orthopaedic surgeon who examined and assessed the Appellant, reviewed his history of pain, CT and MRI scans, performed surgery on him and evaluated its outcome. He was convinced, and expressed his opinion in two separate reports, that the MVA of November 2011 worsened the Appellant's symptoms and led to his surgery.

Accordingly, the panel finds that the Appellant has met the onus upon him showing, on a balance of probabilities, that his back pain and symptoms were caused by the MVAs and that he should be entitled to MPIC PIPP benefits as a result.

The parties have agreed, in the event the Commission determines causation in favour of the Appellant's position, that the issue regarding the type and quantum of benefits to which the Appellant is entitled should be referred back to the Appellant's case manager for determination. The Commission will retain jurisdiction in the event that the parties are unable to agree regarding this determination.

The decision of the Internal Review Officer dated November 27, 2013 is hereby overturned and the Appellant's appeal allowed.

Dated at Winnipeg this 29th day of November, 2018.

LAURA DIAMOND

KARIN LINNEBACH

ARNOLD KAPITZ