

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-05-17**

**PANEL:** Ms Laura Diamond, Chairperson  
Mr. Wilf De Graves  
Ms Deborah Stewart

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf, together with a [text deleted] interpreter, [text deleted]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

**HEARING DATE:** March 18, 2008

**ISSUE(S):** Whether the Appellant is entitled to have his Income Replacement Indemnity benefits reinstated

**RELEVANT SECTIONS:** Sections 110(1) and 117(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

**Reasons For Decision**

The Appellant was injured in a motor vehicle accident on August 18, 2002. At the time of the motor vehicle accident he was employed as a [text deleted].

Following confirmation from the Appellant's orthopaedic surgeon, [text deleted], on October 9, 2002, that the Appellant was able to return to his pre-accident work, he received a decision from his case manager, on October 10, 2002, that he was therefore no longer entitled to IRI benefits.

The Appellant did not apply for an Internal Review of that decision, but did not go back to work as a [text deleted]. By July 13, 2003, he claimed that he still suffered from a sore neck that prevented him from working, as a result of his August 2002 motor vehicle accident. He claimed that he had suffered a relapse and sought to have his Income Replacement Indemnity ('IRI') benefits reinstated.

The Appellant's case manager reviewed his file and, on February 20, 2004 provided him with a decision letter rejecting his claim. She based her decision on medical evidence on the Appellant's file which indicated that the Appellant's current complaints related to pre-existing problems and not to the motor vehicle accident.

The Appellant sought internal review of this decision. On November 10, 2004, an Internal Review Officer for MPIC confirmed the case manager's decision of February 20, 2004. He found that the evidence did not support the Appellant's position that he suffered a relapse in July of 2003 and that the Appellant's subjective complaints were based upon problems which pre-existed the motor vehicle accident.

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

### **Evidence and Submission for the Appellant**

The Appellant testified, with the assistance of a [text deleted] interpreter, at the appeal hearing. He took the position that because he only received three (3) weeks of therapy following the motor vehicle accident in 2002, his condition did not heal sufficiently. He continued to have problems as a result of the motor vehicle accident, from which he never fully recovered.

The Appellant saw [Appellant's Psychiatrist], and was referred for more physiotherapy, with [Appellant's Physiotherapist] at [text deleted], from February to June 2006. He testified that his recovery was very good there, and added that acupuncture treatments at the time helped him as well.

It was his position that his continuing inability to work was due to the motor vehicle accident and that MPIC should provide him with IRI benefits.

The panel also reviewed reports from the Appellant's family physician, [text deleted], his chiropractor, [text deleted], and from [Appellant's Psychiatrist].

The Appellant's general practitioner, [text deleted], provided a report on August 25, 2003 stating that he believed the Appellant was suffering from cervical strain which was attributable to his recent injury, exacerbating his underlying condition, but could not give objective evidence as to what the extent of his pre-injury state was, as he was not involved in his care at that time.

[Appellant's Doctor] reported again on November 7, 2003, advising that he believed the Appellant "was suffering from chronic neck pain prior to the accident of August 18, 2002" up until that time. It was his view that the incident of June 2003 exacerbated his symptoms, but that multilevel degenerative disc disease was present prior to August 18, 2002.

[Appellant's Chiropractor] provided reports dated May 24<sup>th</sup> and October 11<sup>th</sup>, 2005. He stated, in his May 24, 2005 report:

Although I did not have the opportunity to examine [the Appellant] prior to the MVA in 2002 nor immediately following the accident, it is my opinion that there is in all probability direct causation between the motor vehicle accident of August 18, 2002 and the ongoing neck problems the patient currently experiences. The patient states that there was no new injury from the time of discharge from physiotherapy and the present time. The patient also disputes the assertion that he had neck problems to this extent prior to the accident.

[Appellant's Psychiatrist] provided reports dated April 27<sup>th</sup> and October 16<sup>th</sup>, 2006. He also provided a copy of an MRI which he had requested be performed for the Appellant. He indicated that the MRI showed "*Multilevel cervical spondylitic changes*" and concluded that:

. . . Based on [the Appellant's] presentation his chronic neck pain would appear to be related to the degenerative changes noted on his cervical imaging studies (referred to as spondylosis) and according to the history that he provided the motor vehicle collision was a factor in the development of those symptoms. If the temporal relationship described by [the Appellant] is accurate indicating that he did not have symptoms prior to the collision, but that immediately subsequent to the collision the symptoms began, his presentation would be considered a chronic whiplash-associated disorder. As indicated in a previous report, the chronicity with which he presents with is atypical, but a small percentage of individuals with whiplash-associated disorders do go on to have chronic symptoms.

[Appellant's Psychiatrist] was of the opinion that the present and pre-existing degenerative changes could result in a prolonged recovery following a motor vehicle collision, and that he did not anticipate that the Appellant would be able to resume employment above the sedentary level.

He noted:

. . . However, there are no absolute medical contraindications based on the objective examinations, including the CT scan that would preclude him from working at least at a "*light*" level.

The Appellant submitted that he was damaged by the motor vehicle accident and that he was not capable of working and could not go back to work until he got the help he needed, through sixteen (16) months of intense therapy. As his work takes him out of town, he was not able to

work during that sixteen (16) month period. He returned to work in October 2006 and has continued to work since that time.

### **Evidence and Submission for MPIC**

[MPIC's Doctor], a medical consultant with MPIC's Health Care Services Team, testified at the Appellant's hearing. She is a specialist in the musculoskeletal field, and has experience as a consultant with MPIC and the Worker's Compensation Board, reviewing files and providing medical opinions.

[MPIC's Doctor] testified regarding her review of the Appellant's medical file and the reports which she provided to MPIC.

In particular, [MPIC's Doctor] reviewed reports provided by [Appellant's Orthopaedic Surgeon] who had treated the Appellant for many years.

[Appellant's Orthopaedic Surgeon] provided a report, following the motor vehicle accident, on October 9, 2002. At that time, he had advised the Appellant to return to work on October 7, 2002. He noted pre-existing conditions of anxiety and degeneration of the cervical, dorsal and lumbosacral spine. He stated that in his opinion, the effects of the motor vehicle accident of August 8, 2002 would be terminated on October 7, 2002.

In my opinion, the effects from this accident are terminated on October 7, 2002, and thereafter I regard his complaints as those from his pre-existing conditions. Whether he can return to his usual duties, I have left up to him.

[Appellant's Orthopaedic Surgeon] reported again on December 1, 2003. He had interviewed and examined the Appellant on July 10, 2003, approximately three (3) weeks after he stopped

working. [Appellant's Orthopaedic Surgeon] noted that x-rays of the cervical spine taken July 10, 2003 showed degenerative changes in the cervical spine as well as spur formation on the anterior of multiple vertebral bodies.

[Appellant's Orthopaedic Surgeon] stated:

...

2. His complaints noted on July 10, 2003, and November 25, 2003, are not related to the motor vehicle accident of August 18, 2002. His complaints are partly due to his pre-existing conditions and to his state of tension and anxiety.
3. Treatment that was recommended for July 10, 2003, and November 25, 2003, are not related to the motor vehicle accident of August 18, 2002.
4. He has a chronic state of tension and anxiety which is not related to the accident. He has pre-existing degenerative changes in his cervical spine and cervical discs. He had a work incident about July 2003. In my opinion, these are responsible for his ongoing symptomatology.
5. Current complaints – These are not related to the motor vehicle accident of August 18, 2002. His ongoing complaints are related to his pre-existing conditions, to the work incident about July 2003, and to his pre-existing state of tension and anxiety. He may require treatment for his pre-existing conditions.

...

In my opinion, the effects of the accident of August 18, 2002, have long since ceased to play any part in the production of his symptomatology.

[MPIC's Doctor's] evidence, as well as the medical reports prepared by her after reviewing [Appellant's Orthopaedic Surgeon's] report, concluded that [Appellant's Orthopaedic Surgeon], who had treated the Appellant for some time, was in the best position to provide an opinion regarding the Appellant's condition. [MPIC's Doctor] agreed with his conclusions.

She noted that while physicians must acknowledge a patient's pain, it must be put into perspective, particularly when considering whether the patient could return to work, and what was causing his pain symptoms. In her view, the Appellant had pre-existing complaints, and having regard to the nature of the injury, the lapse of time, and the comments of [Appellant's

Orthopaedic Surgeon], it was her view that the Appellant had returned to his base line condition by October of 2002. His complaints in July of 2003 and following, did not prevent him from working, and did not arise out of the motor vehicle accident.

Counsel for MPIC addressed the issue of whether the Appellant was entitled to receive IRI benefits beyond July 2003 on account of injuries arising out of a previous motor vehicle accident in October 1999 or the accident of August of 2002. The question was whether the Appellant experienced a relapse related to either motor vehicle accident after July 2003 that would entitle him to further benefits.

Counsel for MPIC submitted that he did not. It was submitted that for the most part, the Appellant's injuries in the 1999 motor vehicle accident were confined to his lower back and he was ultimately determined capable of returning to work in February of 2001. At the time of the August 18, 2002 motor vehicle accident, he had been back at work since June 2002.

The motor vehicle accident of August 18, 2002, involved the Appellant's left shoulder and his neck. He was treated by a therapist and his physicians, who referred to pre-existing degenerative changes which were present in the Appellant's spine, including his cervical spine.

Counsel submitted that [Appellant's Orthopaedic Surgeon] had been the Appellant's physician since the 1980's. [Appellant's Orthopaedic Surgeon] confirmed that the Appellant was unable to work as a result of the motor vehicle accident of August 18, 2002 but that he was able to return to work on October 7, 2002. The effects of the motor vehicle accident were terminated at that point.

The Appellant's family physician, [text deleted], also recognized the existence of the Appellant's pre-existing complaints, although it was his view that the motor vehicle accident had exacerbated symptoms from this condition.

The Appellant saw [Appellant's Orthopaedic Surgeon] again in 2003. It was again [Appellant's Orthopaedic Surgeon's] stated opinion that the Appellant's complaints related to his pre-existing conditions, including degenerative changes and chronic tension and anxiety not related to the motor vehicle accident. His opinion was that the effect of the motor vehicle accident of August 18, 2002 had long since ceased to play a part in the Appellant's symptomology.

This opinion was confirmed by [MPIC's Doctor's] reports and by her testimony at the hearing.

In regard to [Appellant's Physiatrist's] opinions, counsel for MPIC noted that [Appellant's Physiatrist] had expressed a reluctance to review documents from the Appellant's file and that he had not done a detailed review of the causal connection between the motor vehicle accident and the Appellant's symptoms. As well, he did not see the Appellant until October 2004, compared to [Appellant's Orthopaedic Surgeon], who saw him over a lengthy period of approximately twenty (20) years, and in a timely fashion in and around the motor vehicle accident of August 2002 and the summer of 2003.

Counsel submitted that although the Appellant, in his own mind, seemed to connect his most recent physiotherapy treatments in 2006 with his recovery, this did not entitle him to IRI benefits from July 2003, on account of the motor vehicle accident.



Counsel submitted that the panel should accept the views of [Appellant's Orthopaedic Surgeon] and [MPIC's Doctor] and submitted that the decision of the Internal Review Officer should be upheld.

### Discussion

#### **Events that end entitlement to I.R.I.**

**110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;
- (b) the victim is able to hold the employment referred to in subsection 82(1) (more remunerative employment);
- (c) the victim is able to hold an employment determined for the victim under section 106;
- (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;
- (e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;
- (f) the expiration of a time that is fixed under Subdivision 1 (sections 81 to 105);
- (g) the victim dies.

#### **Entitlement to I.R.I. after relapse**

**117(1)** If a victim suffers a relapse of the bodily injury within two years

- (a) after the end of the last period for which the victim received an income replacement indemnity, other than an income replacement indemnity under section 115 or 116;  
or

(b) if he or she was not entitled to an income replacement indemnity before the relapse, after the day of the accident;  
the victim is entitled to an income replacement indemnity from the day of the relapse as though the victim had been entitled to an income replacement indemnity from the day of the accident to the day of the relapse.

This onus is on the Appellant to show, on a balance of probabilities, that he is entitled to the reinstatement of his IRI benefits, as a result of an inability to work due to injuries sustained in the motor vehicle accident.

The panel has reviewed the evidence presented at the hearing, the documentary evidence on the file, and the submissions of the parties.

We agree with the submission of counsel for the Appellant that the Appellant has failed to establish that, in July of 2003 and following, he was unable to work as a result of injuries sustained in the motor vehicle accident. Although the panel has reviewed all of the medical evidence presented, we must give great weight to the opinion of [Appellant's Orthopaedic Surgeon] that the Appellant recovered from the effects of the motor vehicle accident in October 2002. [Appellant's Orthopaedic Surgeon] saw him in close proximity to the motor vehicle accident of August 2002 and was of the view, in October 2003, that he had recovered from that motor vehicle accident. [Appellant's Orthopaedic Surgeon] was very familiar with the Appellant's psychological state as well as with his degenerative changes and provided a clear opinion, both in October 2002, and then again in December of 2003, that the Appellant's complaints in 2003 were not related to the motor vehicle accident.

According to [Appellant's Orthopaedic Surgeon]:

1. Findings and observations from November 25, 2003, are noted in this report.
2. His complaints noted on July 10, 2003, and November 25, 2003, are not related to the motor vehicle accident of August 18, 2002. His complaints are partly due to his pre-existing conditions and to his state of tension and anxiety.
3. Treatment that was recommended for July 10, 2003, and November 25, 2003, are not related to the motor vehicle accident of August 18, 2002.
4. He has a chronic state of tension and anxiety which is not related to the accident. He has pre-existing degenerative changes in his cervical spine and cervical discs. He had a work incident about July 2003. In my opinion, these are responsible for his ongoing symptomatology.
5. Current complaints – These are not related to the motor vehicle accident of August 18, 2002. His ongoing complaints are related to his pre-existing conditions, to the work incident about July 2003, and to his pre-existing state of tension and anxiety. He may require treatment for his pre-existing conditions.

Although [Appellant's Physiatrist] provided his opinion that, based upon information provided by the Appellant, he suffered a chronic whiplash-associated disorder, possibly with recovery, prolonged by the pre-existing degenerative changes, he did not have the opportunity to examine the Appellant until quite some time after the motor vehicle accident. As well, he was not in a position, as [Appellant's Orthopaedic Surgeon] was, able to comment upon the Appellant's pre-existing history, and condition at the time of the motor vehicle accident in 2003.

Accordingly, the panel finds that the Appellant, in July of 2003 and following, was not prevented from working as a result of a relapse of symptoms arising out of the motor vehicle accident.

Accordingly, we confirm the Internal Review Officer's decision of November 10, 2004, and dismiss the Appellant's appeal.

Dated at Winnipeg this 16<sup>th</sup> day of April, 2008.

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**LAURA DIAMOND**

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**WILF DE GRAVES**

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**DEBORAH STEWART**