

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-34**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Paul Johnston
Mr. Leslie Marks

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

HEARING DATE: June 13 and December 22, 2008

ISSUE(S): Was there a causal relationship between the Appellant's knee
injury and the motor vehicle accident?

RELEVANT SECTIONS: Section 70(1) of The Manitoba Public Insurance Corporation
Act ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY
AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S
PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION
HAVE BEEN REMOVED.**

Reasons For Decision

[The Appellant], was involved in a motor vehicle accident on April 10, 2005. As a pedestrian he was walking on Main Street in [Text deleted], Manitoba when he was struck by a passing motorist and sustained multiple injuries.

The Appellant testified at the hearing that he began to experience problems with his right knee a week or so after returning to work. As a result of the problems to his knee, he saw chiropractor, [Appellant's chiropractor] on May 4, 2005. [Appellant's chiropractor] submitted a Primary

Health Report to MPIC indicating a diagnosis of a suspect lateral meniscal tear of the knee. There was also documentation in respect of limited knee range at the time.

The Appellant subsequently saw a physiotherapist, [text deleted], who submitted a Primary Health Report to MPIC dated June 15, 2005. In this report, [Appellant's physiotherapist] indicated that the Appellant's symptoms seem to be confined to his right knee and he noted that the Appellant had a limited range of his right knee. As well, [Appellant's physiotherapist] diagnosed a right knee strain,? lateral meniscal tear.

On August 11th, 2005 the Appellant attended at [Appellant's chiropractor's] for an assessment of his right knee. In a Narrative Report dated February 24, 2006, [Appellant's chiropractor] reported that he had seen the Appellant on several occasions prior to the motor vehicle accident in respect of the Appellant's complaints dealing with problems with his right knee. In this report, [Appellant's chiropractor] stated:

1. On December 15 and 17, 2003, he saw the Appellant with respect of a right teres minor strain when the Appellant was playing hockey.
2. On January 24, 2004 he treated the Appellant with respect to complaint to the right posterior knee pain due to physical activities.
3. On March 4th and 8th, 2004 he saw the Appellant with respect of right knee pain a result of tae kwon do and Ukrainian dancing.
4. During the month of March 2004 that he saw the Appellant on several occasions in respect of his right knee pain and back pain caused by a fall while downhill skiing.
5. In the months of April and May 2004, he saw the Appellant in respect of right knee pain.

On May 4, 2005, [Appellant's chiropractor] reported that the Appellant presented himself to his office after being hit in a motor vehicle accident. The Appellant complained about a number of things, including pain to his right knee. [Appellant's chiropractor] diagnosed a radial tear of the posterior lateral meniscus.

On August 11th, 2005, [Appellant's chiropractor] saw the Appellant after he had "jumped up and landed down" on his knee. "I tore or popped something." The Appellant at that time was being treated by [Appellant's physiotherapist], a physiotherapist who had referred him to a specialist. [Appellant's chiropractor] advised the Appellant to obtain an MRI of his right knee. [Appellant's chiropractor] again diagnosed a posterior lateral meniscal tear.

[Appellant's chiropractor] concluded his letter of February 4, 2006 by stating:

To specifically answer your question about his right knee. My notes show no prior meniscal tear to his right knee prior to the MVA but there are positive test results May 4, 2005, post MVA. Therefore his knee pain is directly related to his MVA.

The Appellant saw [Appellant's orthopaedic surgeon] who was an orthopaedic surgeon. In a report dated January 15, 2006, [Appellant's orthopaedic surgeon] stated that:

1. He had seen the Appellant who had been involved in a motor vehicle accident a few months ago
2. Since that time he has been having difficulty and pain with his right knee getting stuck and clicking.
3. X-ray assessment of this patient was normal. However, an MRI assessment was done and shows a complete ACL disruption.

4. The Appellant accepted [Appellant's orthopaedic surgeon's] recommendation to have an arthroscopic reconstruction of his ACL.

[Appellant's doctor], the Appellant's personal physician provided a report to MPIC, dated February 21, 2006 that stated although it is difficult to say with certainty, it is likely that the Appellant's injury to his right knee is related to his motor vehicle accident.

MPIC requested [MPIC's doctor], a general practitioner, to review the Appellant's medical file and provide his opinion as to whether or not there was a medically probable causal connection between the Appellant's right knee injury and the motor vehicle accident. [MPIC's doctor], in his report to MPIC dated April 19, 2006, stated that:

1. There could not be a medically probable causal connection between the accident and the meniscal tear diagnosed by [Appellant's chiropractor] because the January 25, 2006 MRI demonstrated there was no meniscal tear.
2. With respect to the ACL tear, [MPIC's doctor] concluded that there was clear objective MRI evidence of its existence.
3. A history of a mechanism of injury (jumping and landing with popping or a tear) was entirely consistent with an ACL tear.
4. There was no clinical science into this particular diagnosis until after the August 2005 incident described by [Appellant's chiropractor] in his Narrative Report of February 24, 2006.
5. The documentation of the Appellant's knee did not identify findings consistent with an ACL tear following the motor vehicle accident and in his opinion on the balance of probabilities there was no cause and effect relationship between the Claimant's right ACL tear and the motor vehicle accident.

CASE MANAGER'S DECISION

On July 27, 2006 the case manager wrote to the Appellant and advised him based on [MPIC's doctor's] opinion there was no cause and effect relationship between the Appellant's right knee (ACL) tear and the motor vehicle collision of April 10, 2005.

On August 16, 2006 the Appellant made application for review of the case manager's decision to the Internal Review Officer.

On November 9, 2006 [MPIC's doctor] wrote to the Internal Review Officer confirming his initial opinion that there was a probability that the Appellant sustained his ACL tear subsequent to the motor vehicle accident. As a result, he stated that no probable cause and effect relationship between the Claimant's ACL tear and the motor vehicle accident had been established.

INTERNAL REVIEW OFFICER'S DECISION

On January 24, 2007, the Internal Review Officer wrote to the Appellant confirming the case manager's decision and dismissing the application for review. In her decision, the Internal Review Officer reviewed the medical report of [MPIC's doctor] of April 19, 2006 and November 9, 2006 and adopted [MPIC's doctor's] opinion that there was no causal relationship between the motor vehicle accident and the ACL tear.

On March 12, 2007 the Appellant filed a Notice of Appeal wherein he stated that:

1. As a result of the motor vehicle accident there was an injury to his right heel and it took about one month for this injury to heal before he was able to walk.

2. It was only after he was able to walk did he notice he had a problem with his right knee.
3. He had some problems with his right knee for a time before the accident but it was a different problem as noted by his Chiropractor and these problems did not inhibit his physical activities or abilities.
4. Disagreed with [MPIC's doctor's] opinion that the ACL tear occurred in the month of August 2005 when his knee popped out.
5. He believed his right knee injury occurred at the time of the accident because up until then he was an active member of [Text deleted] in [Text deleted] and danced with the semi-pro Ukrainian dancing group, [Text deleted].
6. "Since the accident, I haven't been able to dance, do taekwando or any other sports due to the injury of my right knee."
7. "[MPIC's doctor's] decision is based on probabilities. I know for a fact that after the accident it has been physically impossible for me to dance, do taekwando and any other sports....."

APPEAL HEARING

The relevant provision of the MPIC Act is Section 70(1) which states:

Section 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 »)

The appeal hearing commenced on June 13th, 2008. The Appellant represented himself, and Mr. Dean Scaletta was legal counsel for MPIC.

The Appellant testified at the appeal hearing and essentially repeated the statements he made in his Notice of Appeal. In his submission to the Commission, the Appellant requested that his appeal be allowed.

MPIC's legal counsel did not call any witnesses and in his submission reviewed the medical reports of [MPIC's doctor] and requested, based on [MPIC's doctor's] medical opinion, that the Appellant's appeal be dismissed.

At the conclusion of the submissions by both parties, the Commission recessed the proceedings for a short period of time, and after reconvening the hearing the Commission advised both parties that the Commission had decided that they wished to obtain an independent assessment by an orthopaedic surgeon on the issue of causality. The hearing was adjourned pending a report by an orthopaedic surgeon.

On July 24, 2008 the Commission wrote to [text deleted], an orthopaedic surgeon, and provided him with all of the relevant medical reports which were filed in the appeal proceedings. The Commission requested [independent orthopaedic surgeon] to interview the Appellant and provide the Commission with his opinion as to whether or not there was a causal relationship between the Appellant's ACL tear to his right knee and the motor vehicle accident.

On August 26, 2008, [independent orthopaedic surgeon] provided his report to the Commission, a copy of which was sent both to the Appellant and to Mr. Scaletta.

In his report, [independent orthopaedic surgeon] stated that:

1. Prior to the motor vehicle accident the Appellant had some problems with his knee but he was able to return to playing hockey, baseball and tae kwon do without a problem.
2. “.... there were no major giving away episodes. This is not consistent with an ACL tear at least of the complete nature. It could have been a partial ACL tear.”
3. “Also of note is that after the accident in August 2005, he did have an injury on August 11th, 2005. He had jumped and landed on to his knee and felt something tore or popped at that time. Physical examination revealed swelling of the knee with difficulty weight bearing.”
4. “We also have a chiropractor’s physical findings from May 4th, 2005 which are suggestive of a possible lateral meniscal tear.”
5. “The claimant was unable to resume sporting activities between the time of the accident and the time of the August 2005 injury. It would suggest that the injury as a result of the motor vehicle accident was indeed substantial.”
6. After a general examination of the Appellant he noted that there is an incision which is consistent with a right ACL reconstruction.
7. The Appellant’s x-rays that he reviewed were negative and consistent with the previous ACL reconstruction.

(underlining added)

[Independent orthopaedic surgeon] concluded his report by stating:

At the present time, [the Appellant] is doing well post ACL reconstruction. I will review his file and I have made the following conclusions:

1. There is a possibility of a pre-accident injury in 2003 which may have done some ACL damage, although not enough to produce clinical giving away.
2. The motor vehicle accident in 2005 likely enhanced the situation in his knee by producing further ACL deep damage causing giving away of sports.
3. The accident in August 2005, where he jumped down caused secondarily some traumatic pivoting episode in the knee which could have occurred because of the damage to the ACL from April 2005.

In summary, I feel that the only probability is that the ACL injury was enhanced at the time of the April 2005 accident and that the surgery to the ACL was necessitated by that accident. (underlining added)

The appeal hearing was reconvened on December 22, 2008. The Appellant at the time of the appeal hearing was residing in [Text deleted], Saskatchewan and participated at the hearing by teleconference.

MPIC's legal counsel reviewed all of the relevant medical reports and in his submission stated:

1. [Appellant's chiropractor] was incorrect in concluding that the motor vehicle accident caused a meniscal tear and that the meniscal tear was aggravated by the incident of August 2005.
2. The MRI report indicated that the Appellant never suffered from a meniscal tear but from an ACL tear which required surgical repair.
3. [Appellant's doctor's] opinion should be viewed with caution because he had no knowledge of pre-accident problems with his right knee that was seen by [Appellant's chiropractor] prior to the motor vehicle accident.
4. [Appellant's orthopaedic surgeon's] opinion should be viewed with caution because he did not have any knowledge of the problems the Appellant had with his knee prior to the motor vehicle accident.

MPIC's legal counsel reviewed [independent orthopaedic surgeon's] report, and indicated he was troubled with respect to a number of issues:

1. ...
2. Four lines further down, [independent orthopaedic surgeon] purports to rely upon the contents of a police report that – according to the referral letter from the Chief Commissioner dated July 24, 2008 – was never provided to him.
3. In the next paragraph, [independent orthopaedic surgeon] writes that [the Appellant] described “some giving way and popping in the knee”, starting a few weeks post-accident. There is, in fact, no record of any complaints for “giving way” or “popping” at any time prior to the August, 2005 incident.

4. On Page 3, [independent orthopaedic surgeon] states that [the Appellant] was “unable to resume sporting activities between the time of the accident and the time of the August 2005 injury”. There is no evidence of this assertion in the material. Although [the Appellant] testified that he was “having problems” before August, there was no evidence that he had given up his usual summer sporting activities due to any right knee problems.
5. [Independent orthopaedic surgeon] is the only practitioner involved in the matter to suggest that [the Appellant] sustained some sort of ACL injury before the motor vehicle accident. Not even [MPIC’s doctor] makes this suggestion.

MPIC’s legal counsel further stated that the onus was on the Appellant to establish a balance of probabilities that there was a causal relationship between the ACL tear in his right knee and the motor vehicle accident of April 10, 2005 and that the weight of the evidence does not support the existence of the requisite medically-probable relationship. MPIC’s legal counsel therefore submitted that the appeal should be dismissed.

DISCUSSION

The Commission rejects MPIC’s legal counsel’s comments in respect of [independent orthopaedic surgeon’s] report.

[Independent orthopaedic surgeon’s] Comments Re: Police Report

The Commission notes that [independent orthopaedic surgeon] in his report referred to a police report and stated:

I reviewed this individual’s case and did an independent on August 26th, 2008. [the Appellant] is a [text deleted]-year-old who had a chief complaint of right knee problem as a result of a motor vehicle accident which occurred on April 10th, 2005. At that time, he was a pedestrian walking down the shoulder of a road in [Text deleted], Manitoba. He does not remember the details of the accident, but he was struck by a car on the right hand side. According to police report, he likely twisted around with the impact on the right side of his body and impacted his right face resulting in facial fractures and fracture of the skull. He had lacerations to the right forehead as well.

The Commission acknowledges that the Highway Traffic Act Report which is contained in the documentary evidence filed at the appeal hearing did not contain any of the information that the

Appellant provided to [independent orthopaedic surgeon] in relation to “police report.” However, during the course of the second appeal hearing the Commission asked the Appellant to respond to this issue. In response, the Appellant testified that in [independent orthopaedic surgeon’s] interview with him he advised [independent orthopaedic surgeon] that the police had verbally informed him as to the manner in which he was hurt in the motor vehicle accident. The Commission therefore concludes that the “police report” referred to by [independent orthopaedic surgeon] in his medical report was based on a verbal report from the police to the Appellant and was not based on an official written police report. The Commission therefore rejects MPIC’s legal counsel’s criticism of [independent orthopaedic surgeon’s] comments in respect of the “police report” contained in his medical opinion.

Paragraph #3 – Record of Any Complaints

MPIC’s legal counsel was correct in asserting there is no record of any complaint of any “giving away and popping in the knee” at any time prior to the April 10, 2005 motor vehicle accident or starting a few weeks post-accident. In support of his position, MPIC’s legal counsel refers to Tab 46 the Primary Health Care Report by [Appellant’s chiropractor], Tab 44 the Treatment Plan Report by [Appellant’s chiropractor], the Primary Health Care Report signed by the physiotherapist, [Appellant’s physiotherapist], and the Narrative Report by [Appellant’s chiropractor], Tab 16.

The Commission notes that both [MPIC’s doctor] and [independent orthopaedic surgeon] were requested to provide an opinion as to whether or not there was a causal connection between the meniscal tear and motor vehicle accident. [MPIC’s doctor] did not interview the Appellant and therefore did not have an opportunity to ask the Appellant whether or not the Appellant had any

problem with his right knee before or after the motor vehicle accident. On the other hand, [independent orthopaedic surgeon] had the opportunity of interviewing the Appellant in order to determine whether or not there was a causal connection between the motor vehicle accident and the Appellant's ACL tear to his right knee. As a result it was important for [independent orthopaedic surgeon] to obtain a history of any problems the Appellant had with his right knee before and after the motor vehicle accident in order to determine the issue of causality. During the course of [independent orthopaedic surgeon's] discussion with the Appellant, he was informed by the Appellant that there was "some giving away and popping in the knee" starting a few weeks post accident.

The Commission notes that in respect of [Appellant's chiropractor's] Primary Health Care Report, Treatment Plan Report and [Appellant's physiotherapist's] Physiotherapy Report, MPIC did not request either [Appellant's chiropractor] or [Appellant's physiotherapist] to provide an opinion as to whether or not, in their view, there was a causal relationship between the ACL tear and the motor vehicle accident.

The Commission further notes that [Appellant's chiropractor's] Narrative Report dated February 24, 2006 was in response to a request by the case manager in a fax to [Appellant's chiropractor] dated February 16, 2006. In the case manager's fax request, [Appellant's chiropractor] was not requested to provide an opinion as to the causal relationship between the ACL tear and the motor vehicle accident but was requested to provide a medical history up to two years prior to the accident and how that history related to the injuries sustained in the motor vehicle accident as well as details concerning treatment.

As a result, neither [Appellant's chiropractor] nor [Appellant's physiotherapist] were required when interviewing the Appellant, to determine whether or not there was a causal relationship between the motor vehicle accident and the ACL tear. The purpose of the reports from [Appellant's chiropractor] and [Appellant's physiotherapist] was not to determine the issue of causality, but to provide MPIC with a narrative report on their physical examination of the Appellant's right knee.

The Commission therefore finds for these reasons there was no record of any complaints of "giving away or popping" in the reports of [Appellant's chiropractor] and [Appellant's physiotherapist], while there was such a record in [independent orthopaedic surgeon's] medical report.

Paragraph #4 – No Record of the Appellant's Knee Problems Post Motor Vehicle Accident

[Independent orthopaedic surgeon], in his report, stated that the Appellant advised him that he was unable to resume sporting activities between the time of the accident and the time of the August 2005 injury. MPIC's legal counsel acknowledges that the Appellant testified at the appeal hearing that he was having right knee problems after the motor vehicle accident prior to the August 5th injury.

The Commission notes that neither [Appellant's chiropractor] nor the physiotherapist [Appellant's physiotherapist], were requested by MPIC to comment on the issue of causality. It was, therefore, not relevant for either of them to discuss with the Appellant the impact of the motor vehicle accident on the Appellant's physical activity after the motor vehicle accident prior to the August 5th injury.

As well, although [MPIC's doctor] was requested to comment on the issue of causality, he did not interview the Appellant and, therefore, had no opportunity to discuss with him the impact of the motor vehicle accident on the Appellant's physical activity having regard to his right knee. Since [independent orthopaedic surgeon] was asked to comment on the issue of causality, he did have the opportunity to interview the Appellant and it would have been important for him to determine whether or not the Appellant was having any knee problems after the motor vehicle accident and prior to the August 2005 injury. The Commission finds that during the course of [independent orthopaedic surgeon's] interview with the Appellant, the Appellant advised him of his knee problems after the motor vehicle accident.

The Commission notes that the Appellant's statements to [independent orthopaedic surgeon] in respect of his knee problems after the motor vehicle accident are consistent with his statement which is attached to his Notice of Appeal dated March 12, 2007 wherein he stated:

[MPIC's doctor], who is employed by MPI, reviewed my case saying he believes the injury probably happened in August 2005 when my knee popped out. I believe it happened at the time of the accident because up until then I was an active member of [Text deleted] in [Text deleted] and danced with the semi-pro Ukrainian dancing group, [Text deleted]. Since the accident, I haven't been able to dance, do taekwando or any other sports due to the injury of my right knee.

The Appellant's testimony at the appeal hearing that his knee problems commenced after the motor vehicle accident and prior to the August 5th injury are consistent with the statements in his Notice of Appeal and in his statements to [independent orthopaedic surgeon]. For these reasons, the Commission rejects MPIC's legal counsel's submission that there was no record of the Appellant's knee problems post motor vehicle accident.

MPIC's legal counsel is critical of [independent orthopaedic surgeon's] medical opinion because he is the only practitioner involved to suggest that the Appellant sustained some sort of ACL injury prior to the motor vehicle accident.

The Commission finds that [independent orthopaedic surgeon] had a factual basis to come to the conclusion that the Appellant possibly had a pre-accident injury in 2003 which may have done some ACL damage, though not enough to produce a clinical giving away.

The Commission notes that [independent orthopaedic surgeon] had an opportunity of reviewing [Appellant's chiropractor's] Narrative Report dated February 24, 2006 and had the opportunity of interviewing the Appellant. As a result he reported that the Appellant had some knee problems as a result of a skiing accident two (2) years prior to the motor vehicle accident. [Independent orthopaedic surgeon] stated in his report that the Appellant had twists and minor swelling and used crutches for one (1) week. [Independent orthopaedic surgeon] further stated:

... He saw a chiropractor at this time. He, however, was able to return to hockey, baseball, and tae kwon do without a problem, and there were no major giving away episodes.

As a result, [independent orthopaedic surgeon] concluded that the Appellant did not suffer from an complete ACL tear, but there could have been a partial ACL tear at that time. The Commission therefore concludes that [independent orthopaedic surgeon] did have a factual basis to come to this conclusion and rejects MPIC's legal counsel submission on this issue.

MPIC's legal counsel is critical of [independent orthopaedic surgeon's] conclusion that the only probability was that the ACL injury was "enhanced" by the motor vehicle accident, thereby necessitating the subsequent surgery. MPIC's legal counsel noted that [independent orthopaedic surgeon's] previous three statements in his report were couched in language of "possibility, likely, could have" rather than probability.

The Commission notes that [independent orthopaedic surgeon], in his report indicated that he had considered the impact of the skiing injury on the Appellant's right knee prior to the motor vehicle accident, the impact of the motor vehicle accident on the Appellant's right knee and the impact on the Appellant's right knee as a result of the August 5th injury and concluded that the motor vehicle accident materially contributed the occurrence of the ACL injury and the resulting surgery. [Independent orthopaedic surgeon], having examined the history of the Appellant's knee injuries prior to the motor vehicle accident, at the time of the motor vehicle accident and at the time after the motor vehicle accident determined on a balance of probabilities there was a causal connection between the motor vehicle accident and the ACL injury to the Appellant's right knee.

The Commission finds [Appellant's chiropractor's] opinion does support [independent orthopaedic surgeon's] opinion that as a result of the motor vehicle accident the Appellant did suffer significant injury to his knee. [Appellant's chiropractor] concluded that after examining the Appellant's knee several weeks after the motor vehicle accident there was a possible lateral meniscal tear to the right knee. Although [Appellant's chiropractor] was incorrect in his diagnosis it is clear that he concluded that as a result of the motor vehicle accident, the Appellant suffered a significant injury to his right knee and this injury was connected to the motor vehicle accident. This finding supports [independent orthopaedic surgeon's] conclusion that as a result

of the motor vehicle accident the Appellant suffered a significant injury to his right knee which prevented him from resuming his sporting activities between the time of the motor vehicle accident and the August 5th injury.

There is a dispute between [MPIC's doctor] and [independent orthopaedic surgeon] as to the causal relationship between the ACL injury and the motor vehicle accident. [MPIC's doctor] concluded that the ACL injury was solely the result of the August 5th, 2005 accident, and not in whole or in part as the result of the motor vehicle accident. Central to [MPIC's doctor's] conclusion was his finding that there was no previous documentation which demonstrated that, as result of the motor vehicle accident, the Appellant had a problem with his right knee and as a result he concluded that the ACL tear to the Appellant's right knee was solely caused by the August 2005 accident.

[Independent orthopaedic surgeon], on the other hand, found that there was previous documentation which demonstrated that the motor vehicle accident materially contributed to the Appellant's ACL tear to his right knee. [Independent orthopaedic surgeon], as a result of interviewing the Appellant and reviewing [Appellant's chiropractor's] Narrative Report, concluded that two (2) years prior to the motor vehicle accident the Appellant was involved in a significant skiing injury. [Independent orthopaedic surgeon] reported that the Appellant had "twists and minor swelling and he used crutches for one week."

[Independent orthopaedic surgeon] also reported that notwithstanding this injury, the Appellant was able to continue with sporting activities of hockey, baseball and tae kwon do without a problem and there were no giving away episodes. He therefore concluded based on this information that although the Appellant had not suffered an ACL tear, the injury was consistent

with possible partial ACL tear. [Independent orthopaedic surgeon] also reported as the result of his interview with the Appellant and in a review of [Appellant's chiropractor's] report the Appellant had a significant injury as a result of the motor vehicle accident and he therefore could not resume his sporting activities between the time of the motor vehicle accident and the time of the August 2005 injury.

The Commission further notes that as a result of [independent orthopaedic surgeon's] interview with the Appellant, the Appellant advised him that after the motor vehicle accident he did not have any problems with his right knee initially, but a few weeks later he noticed some giving away and popping in his knee. As a result of obtaining this history, [independent orthopaedic surgeon] concluded that the motor vehicle accident in 2005, "...likely enhanced the situation in his knee by producing further ACL deep damage causing giving away of sports."

[Independent orthopaedic surgeon] noted that after the motor vehicle accident in August 2005, the Appellant had an injury on August 11, 2005. He stated:

He had jumped and landed on to his knee and felt something tore or popped at that time. Physical examination revealed swelling of the knee with difficulty weightbearing.

[Independent orthopaedic surgeon] noted that [Appellant's chiropractor's] physical findings from his May 4, 2005 report were suggestive of a possible lateral meniscal tear. [Independent orthopaedic surgeon] therefore concluded that the injury the Appellant suffered in the motor vehicle accident was indeed substantial. Based on the Appellant's discussion with [independent orthopaedic surgeon] and [independent orthopaedic surgeon's] review of the medical reports on file he concluded:

3. The accident in August 2005, where he jumped down caused secondarily some traumatic pivoting episode in the knee which could have occurred because of the damage to the ACL from April 2005.

In summary, I feel that the only probability is that the ACL injury was enhanced at the time of the April 2005 accident and that the surgery to the ACL was necessitated by that accident.

The Commission finds that [independent orthopaedic surgeon's] opinion as to causality is based on his interview with the Appellant and his review of [Appellant's chiropractor's] Narrative Report. The Commission further finds that [MPIC's doctor] did not have the opportunity like [independent orthopaedic surgeon], in interviewing the Appellant and based his medical opinion on a paper review of the medical reports on the MPIC file. [Independent orthopaedic surgeon], however had the advantage, not only of reviewing the relevant medical reports, but also interviewing the Appellant and obtaining a medical history in respect of the Appellant's right knee.

The Appellant testified in a direct and unequivocal fashion and the Commission finds he was a credible witness. He testified that:

1. Prior to the motor vehicle accident he had a significant injury to his right knee as a result of his skiing accident, but was able to continue his sporting activities.
2. A few weeks after the motor vehicle accident there was a popping in his knee and a giving away which prevented him from resuming his sporting activities.
3. He testified in August 2005 he jumped up and landed down on his knee and that he tore or popped something.
4. Subsequently, he testified that he had surgery on his right knee for an ACL tear.

The Commission finds that the Appellant's testimony is consistent with the statement attached with his Notice of Appeal with respect to the injuries he sustained to his right knee in the motor vehicle accident.

[Independent orthopaedic surgeon], unlike [MPIC's doctor], had the opportunity of interviewing the Appellant and concluded he was a candid person and accepted the Appellant's information as to the past history of his right knee. [Independent orthopaedic surgeon] is an experienced orthopaedic surgeon who has in the past provided forensic medical opinions on the issue of causality. His medical report corroborates the testimony of the Appellant. [MPIC's doctor], on the other hand, did not interview the Appellant, was unable to obtain any information from the Appellant in respect of the past history of his right knee, and was therefore unable to assess the credibility of the Appellant.

For these reasons, the Commission gives greater weight to the opinion of [independent orthopaedic surgeon] than it does to [MPIC's doctor] on the issue of causality.

The Commission, after a careful review of the testimony of the Appellant and the medical reports filed in the proceedings finds that the Appellant has established a balance of probabilities that the motor vehicle accident materially contributed to the ACL tear that the Appellant suffered to his right knee. As a result the Commission rescinds the decision of the Internal Review Officer dated January 24, 2007 and allows the Appellant's appeal.

Dated at Winnipeg this 16th day of January, 2009.

Mr. Mel Myers, Q.C.

Mr. Paul Johnston

Mr. Leslie Marks