

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-053

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Robert Malazdrewich
Ms Jean Moor

APPEARANCES: The Appellant, [text deleted], was represented by
[text deleted];
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: April 24, 25, May 9, 10, 29 and 30, 2012

ISSUE(S): Whether there is a causal relationship between the
Appellant's complaints of neck and shoulder pain, and
cervical disc herniation and the motor vehicle accident of
April 13, 2001.

RELEVANT SECTIONS: Sections 70(1), 71(1), 81(1)(a) 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.

Introduction:

The Appellant was involved in a motor vehicle accident on April 13, 2001. The hearing at the Commission began on April 24, 2012, a period of 11 years after the motor vehicle accident. Between the time of the motor vehicle accident and the appeal hearing, MPIC issued two case managers decisions and two Internal Review Officers decisions. There were also a number of medical reports filed in these proceedings as follows:

- [Appellant's doctor #1] – August 10, 2001; March 21, 2002; June 24, 2003; May 18, 2004; November 5, 2007;

- [Appellant's doctor #1], clinical Notes – April 25, 2001 to October 18, 2002;
- [Appellant's psychiatrist] – October 21, 2002, May 19, 2003; August 11, 2006;
- [Appellant's chiropractor #1] – July 10, 2002, September 13, 2002;
- [Appellant's doctor #2] – July 12, 2001; June 20, 2002;
- [Appellant's doctor #3] – February 27, 2002; June 17, 2002;
- [MPIC's doctor] – June 21, 2002; July 3, 2002; July 18, 2002; May 13, 2004; July 15, 2004; May 12, 2005; May 20, 2008; April 28, 2011;
- [Appellant's doctor #4] – August 19, 2002;
- [Appellant's physiotherapist #1] – March 28, 2002; April 23, 2002;
- [Appellant's physiotherapist #2] – August 27, 2001;
- [Appellant's neurosurgeon] – March 18, 2003; June 17, 2003; October 21, 2003; February 18, 2004; June 1, 2004; August 16, 2004; September 1, 2004; October 19, 2004; February 6, 2007; August 24, 2009; and
- [Appellant's doctor #5] – November 13, 2003.

Because of the length of time it took for the Appellant's claim to be brought to the Commission (11 years), the complexity of the issues and the number of medical and other reports that were filed in these proceedings, the Commission found it necessary, in rendering this decision, to set out at length in a chronological fashion the events that occurred leading to this hearing.

Reasons For Decision

On April 13, 2001, [the Appellant] was involved in a motor vehicle accident. The Appellant was proceeding south on [text deleted] when a third party entered the roadway from the Appellant's

left and collided with the Appellant's car. The Appellant testified that at the time of the accident his head struck the window of his car and his knee struck the dashboard.

The Appellant was [text deleted] years of age and employed on a full-time basis as a [text deleted] at the [text deleted] in [text deleted] and worked as a part-time [text deleted] with the [text deleted].

On April 14, 2001 the Appellant contacted MPIC to open a claim file. The case manager's file notes indicated that the Appellant had complained of a chipped tooth and that he was "quite sore".

In his August 30, 2002 Application for Review of the case manager's decision denying benefits, the Appellant asserted that:

1. The motor vehicle accident occurred on Good Friday and the doctor's office was not open until April 17, 2001.
2. On the date he was working as a [text deleted] he attended the [text deleted].
3. Although he did not have a medical appointment he spoke to [Appellant's doctor #2], who was having her lunch at that time.
4. He reported his motor vehicle accident injuries to [Appellant's doctor #2], and she quickly examined his neck and shoulders and wrote a prescription directing he should be off for work for a period of six weeks.
5. She further advised him to see his regular doctor in a week's time.

In a note to file dated April 23, 2001 the case manager reported a discussion with the Appellant as follows:

“Claimant has a chipped tooth, a sore neck and back. At this time he doesn’t think he will be going for treatment. He works full and part time and looks after the kids when his wife is working. He indicated he really doesn’t have the time and thinks it will get better on its own.

He figures he clenched his teeth together when he realized he was going to hit the t/p, he was going close to 70kms per hr. and knew he couldn’t stop in time. His head hit the drivers side window as well...”

On April 25, 2001 the Appellant attended the office of his personal physician, [Appellant’s doctor #1]. The Appellant advised [Appellant’s doctor #1] that he was involved in a motor vehicle accident a few weeks prior and that he was complaining of pain to his left patella. On examination, [Appellant’s doctor #1] indicated that the Appellant was suffering from some muscle or ligament pull which was probably not related to the motor vehicle accident since it had only happened in the last few days prior to seeing him.

[Appellant’s chiropractor #1] of the [text deleted] saw the Appellant on July 9, 2001.

[Appellant’s chiropractor #1’s] chart notes indicated that:

1. The Appellant reported pain to his upper back radiating to his left shoulder, arm and hand.
2. The patient history form completed by the Appellant indicated complaints of pain/stiffness in the neck, shoulder and jaw, and tingling or numbness in the hands.
3. The Appellant developed shoulder pain when he jumped off a ladder while painting in the week prior.

In the self-reporting part of a history sheet completed by the Appellant, he indicated that:

1. The injury was as a result of a collision.
2. His injury occurred while he was at work and he was not claiming Worker’s Compensation, and he may be considering an Autopac claim “if applicable”.

3. He had not been feeling good for 2 months.

On July 12, 2001 the Appellant saw [Appellant's doctor #2]. In her medical notes, [Appellant's doctor #2] stated that the Appellant informed her that he was involved in a motor vehicle accident a few months ago and that his right shoulder was sore since then. Over the past two weeks he had an increase in pain in his posterior shoulder, especially when lifting. [Appellant's doctor #2] reports in her clinical notes that the Appellant had a shoulder strain and that he was intolerant of NSAIDS, "so continue with Tylenol #3" and then she referred him for physiotherapy treatments.

On August 10, 2001 the Appellant saw [Appellant's doctor #1], who was his regular physician, who reported:

1. The Appellant had a sore right shoulder and pain in the muscles of the upper back area.
2. These complaints started about one week after the motor vehicle accident.
3. He was involved in a head-on collision. His head hit the side of the glass.
4. He had a right swollen knee one or two days later.
5. The Appellant subsequently started having pain to the shoulder and neck.
6. X-rays of the neck and upper thoracic spine and right shoulder were done.
7. The X-ray results indicated in respect of the cervical spine a slight straightening of the normal cervical lordosis.
8. There was also a slight degenerative narrowing of the C5-C6 interspace.

On August 27, 2001, 4½ months after the accident the Appellant saw [Appellant's physiotherapist #2], who reported that the Appellant:

1. Complained of significant pain in the right neck and upper back and arm.

2. Was diagnosed as having a strain/sprain and discogenic of the cervical spine.
3. The spinal disorder was classified as a Whiplash 3A.
4. Was recommended to take 3-4 weeks off work.

On January 4, 2002 the Appellant made an application to MPIC for payment of physio, medication, travel and wage loss.

On January 28, 2002 the Appellant advised the case manager that he had missed the odd day of work from his job at the [text deleted] and that he had quit his job as a [text deleted] in October 2001. The case manager made a decision to transfer the Appellant's file to MPIC's Rehabilitative Case Management Centre and a new case manager was assigned.

The Appellant met with the new case manager on February 28, 2002 and completed an Application for Compensation and provided the case manager with a list of days he had missed work from the [text deleted] and a copy of his letter of resignation from his job as a [text deleted] dated October 10, 2001.

[Appellant's doctor #1] provided a narrative report to the case manager dated March 21, 2002 and indicated that he saw the Appellant on September 14, 2001, December 6, 2001, January 16, 2002 and on March 13, 2002. [Appellant's doctor #1] further stated that:

1. Throughout the times he examined the Appellant, he was complaining of pain to his neck and shoulder.
2. When he was seen on March 13, 2002 the Appellant reported:
 - a. Continued complaints of pain to his neck and shoulder and numbness down to the right arm including the 4th and 5th fingers.

- b. When he put his hands on his head it hurt for the whole day and for many days and unless he was able to get better he would be unable to work at his [text deleted] duties.
- c. In his view he would be able to perform [text deleted] work.
- d. He was suffering from neurogenic and myofascial pain which had been triggered by the motor vehicle accident.
- e. He had informed [Appellant's doctor #1] that he did not suffer any of these symptoms prior to the motor vehicle accident.

[Appellant's physiotherapist #3], a physiotherapist at the [text deleted] provided a report to the case manager dated March 28, 2002 in respect of [Appellant's physiotherapist #2's] assessment of the Appellant on August 27, 2001 and stated:

1. The Appellant reported that he was involved in a motor vehicle accident where his vehicle "T boned" another car at 80 km/hour and was side swiped on the left side.
2. His head and body shifted to the left, he chipped a tooth and hit his head, without losing consciousness.
3. A couple of days later, he felt pain to his shoulder and the pain was getting worse.
4. The Appellant complained of chronic pain and difficulty sleeping.
5. The Appellant experienced "pins and needles sensation was noted in right fourth and fifth digit, and hypothenar eminence".

[Appellant's physiotherapist #3] further stated that neurological testing "revealed painless myotomal weakness in wrist flexion and triceps" and the Appellant complained of some "tingly sensation distal dorsal forearm".

On April 22, 2002, the case manager wrote to [MPIC's doctor], MPIC's Health Care Consultant and provided him with all the relevant medical reports that MPIC had received to date and requested that on review of the medical documentation [MPIC's doctor] provide his opinion on whether, on a balance of probabilities there was a cause and effect relationship between the Appellant's current symptoms and the motor vehicle accident.

In reply, [MPIC's doctor] provided an interdepartmental memorandum to the case manager on July 3, 2001. In this memorandum [MPIC's doctor] indicated that as a result of the motor vehicle accident the Appellant complained of pain in the neck, upper back, right shoulder, right knee and a chipped back tooth. [MPIC's doctor] reviewed the medical documentation on file and made the following comments:

- A) In respect of [Appellant's chiropractor #1's] report, [MPIC's doctor] noted that there was no indication in the self-reporting part of the history sheet that his symptoms related to the collision. This document indicated that the Appellant's injury occurred while at work and that he may be considering an Autopac claim "if applicable". [Appellant's chiropractor #1's] notes indicated that the Appellant's shoulder pain developed prior to this assessment after he "jumped off ladder with painting".
- B) In respect of [Appellant's doctor #1's] narrative report dated March 21, 2002, [MPIC's doctor] noted that the initial contact the Appellant had with [Appellant's doctor #1] on April 25, 2001 related to a complaint of the Appellant's pain to his left knee and he did not complaint about his right shoulder. The first time the Appellant complained of pain to his right shoulder to [Appellant's doctor #1] was on August 10, 2001, approximately four months after the motor vehicle accident.

Based on his review of the medical documentation, [MPIC's doctor] concluded that the Appellant's neck and right shoulder condition were not related to the motor vehicle accident on the balance of medical probabilities and was likely related to the documented injury which occurred one week prior to July 9, 2001.

Case Manager's Decision – July 16, 2002 – Right Shoulder and Neck:

Relying on [MPIC's doctor's] medical opinion, the case manager rejected the Appellant's Application for Compensation and stated:

“The medical information on file indicates the first time you reported having a problem with your right shoulder was to [Appellant's chiropractor #2] at [text deleted] on July 9, 2001. [Appellant's chiropractor #2], at that time, indicated the injury was related to an incident of you jumping off a ladder while painting. You indicated in the questionnaire that your injury was related to a workplace injury.

Documentation indicates your right shoulder condition is not related to your motor vehicle accident of April 13, 2001, therefore there is no entitlement to Income Replacement Indemnity, nor funding for chiropractic, physiotherapy, or trigger point injections...”

Application for Review:

The Appellant filed an Application for Review on August 30, 2002 and stated that:

1. He had seen [Appellant's doctor #2] the week following the motor vehicle accident during the course of his employment.
2. He informed [Appellant's doctor #2] of the motor vehicle accident and she quickly examined his neck and shoulder and wrote a note that he should be off work for 6 weeks.
3. At the time of the examination [Appellant's doctor #2] did not have his chart and when he later checked with the Clinic, he was advised there was no note on his chart relating to his visit with [Appellant's doctor #2].

4. Notwithstanding the pain he was experiencing he thought he could do his work and the injuries would heal on their own without any further medical treatment and that he could not afford to be without income.
5. He saw [Appellant's doctor #1] on April 25, 2001 and his main concern was his knee.
6. His injuries did not improve and that he continued to work because he needed to support his family although the pain was constant.
7. In July 2001 he saw a chiropractor as his pain had not improved and it had been two months since he really felt well.
8. He did not have a workplace injury and did not jump off a ladder while painting.
9. In respect of the notation that the injury occurred at work, this was a mistake on his part in attempting to convey the problem he was having at work.
10. One week before seeing the chiropractor he experienced serious pain while doing work on a ladder and that this was a continuation of pain resulting from the motor vehicle accident.
11. This pain was affecting his ability to do regular household activities and his regular job and that the pain would not go away unless he sought treatment.
12. He was seeing [Appellant's physiatrist], in respect of his condition.
13. [Appellant's physiatrist] informed him that in his view the injury was unequivocally related to the motor vehicle accident.
14. He requested [Appellant's physiatrist] to provide a written report.
15. His neck and shoulder injury were caused by the motor vehicle accident of April 13, 2001 and therefore believed that he was entitled to IRI benefits and funding for chiropractic, physiotherapy and trigger point injection treatments which he received.

[Appellant's physiatrist] provided a narrative report to MPIC dated October 21, 2002 in respect of his meeting with the Appellant for the first time on May 17, 2002, approximately 13 months after the motor vehicle accident. MPIC's Internal Review Officer summarized this report:

"...On examination, [Appellant's physiatrist] noted range of motion decreases of 25% in the cervical and lumbar areas, as well as reduced straight leg raising and motor strength of the upper and lower extremities. He initially diagnosed "musculoligamentous strain complicated by mechanical neck manifested by myofascial trigger points of several muscles". Treatment consisted primarily of trigger point injections and home exercise. At the fourth (and most recent, at the time of the report) visit on August 30, 2002, [Appellant's physiatrist] noted that the cervical ranges of motion were 15% restricted. Motor strength of the neck and shoulder girdle muscles was essentially unchanged. He did not comment on the lumbar ranges of motion.

[Appellant's physiatrist] concluded that you have C8 and T1 radiculitis and nerve root compressions resulting from disc herniations at C6-C7 and C7-C8. He does not comment on the likely cause of this condition and, in particular, does not indicate whether or not there is a probable causal connection between the accident and the condition. He indicates that he has made a referral for you to a neurosurgeon."

[Appellant's chiropractor #1] provided a letter to the case manager on September 13, 2002 wherein he stated that:

1. There may have been an error on his part in determining that the injuries were not related to the motor vehicle accident.
2. There was conflicting information in this letter relating to the commencement of the Appellant's pain to his neck and shoulder.
3. The Appellant injured himself one week prior to his consultation and the injury was focused in the neck and right region.
4. In the Appellant's questionnaire, he stated his symptoms had begun approximately two months earlier which coincides with the motor vehicle accident.
5. The Appellant was trying to convey to him that the injuries were being exacerbated by his present work related duties.

6. He indicated that the Appellant appeared to be sincere in this regard and he was of the opinion that he may have misunderstood and recorded the Appellant's injuries were due to the work.
7. He concluded that he could not, in good conscience, attest to whether the injury was or was not related to the motor vehicle accident.

Internal Review Officer's Decision – January 8, 2003 – Right Shoulder and Neck:

On January 8, 2003 the Internal Review Officer wrote to the Appellant confirming the case manager's decision of July 16, 2002 and dismissed the Appellant's Application for Review. In arriving at this decision, the Internal Review Officer reviewed a number of medical reports, including the reports from, [Appellant's physiatrist], [Appellant's doctor #1], [Appellant's doctor #2], [Appellant's chiropractor #1] and [Appellant's physiotherapist #2], together with a number of statements made by the Appellant and the case manager. In arriving at his decision, the Internal Review Officer concluded that the causal connection between the Appellant's complaints in respect of his right shoulder and neck and the motor vehicle accident was possible but was not probable. He further stated that since this falls short of the required standard of proof, he had no alternative but to uphold the decision of the case manager dated July 16, 2002 and dismiss the Application for Review.

Notice of Appeal – dated April 15, 2003 – Right Shoulder and Neck:

The Appellant filed a Notice of Appeal on April 15, 2003 and attached a statement wherein he indicated that:

1. [MPIC's doctor] erroneously concluded that the shoulder injury was sustained while the Appellant was at work.

2. [MPIC's doctor] misinterpreted [Appellant's chiropractor #1's] report of his injuries being a result of jumping off a ladder.
3. [Appellant's physiatrist] was not asked to provide a medical opinion by MPIC in respect of the causal connection between the motor vehicle accident and the Appellant's injuries.
4. In meetings with him [Appellant's physiatrist] made it clear that he believed the injuries were caused by the motor vehicle accident.

At the Appellant's request, [Appellant's physiatrist] provided a report to MPIC dated May 19, 2003 stating that in his opinion the accident of April 13, 2001 caused a disc herniation at C6, C7, C8 level causing compression of the C8 and T1 roots on the right side. He further stated:

“On the balance of probabilities, there is a casual (sic) relationship between the accident and the disc herniation causing a right C8 and T1 radiculitis.” (Underlining added)

[Appellant's physiatrist] referred the Appellant for a neurological consultation to determine whether or not a cervical intervention was warranted.

The Appellant was seen by [Appellant's Neurosurgeon], [text deleted]. [Appellant's neurosurgeon] provided a report to [Appellant's physiatrist] on March 18, 2003 where he noted that the Appellant's symptoms were progressing over time and he had developed quite severe symptoms of late. He referred the Appellant for an MRI.

In his report to [Appellant's doctor #1] on June 17, 2003 [Appellant's neurosurgeon] indicated:

“[the Appellant] returns today after his MRI scan. This confirms quite marked spondylosis with stenosis at multiple levels (C4-5 and C5-6, C6-C7), in particular C6-7 seems to be the most affected. Examining him he seems to be free of hard neurological fall out other than subjective weakness in the right hand.

I am going to refer him for an EMG and Nerve Conduction Studies to try and establish better the pattern of his fall out.”

On April 24, 2004 MPIC's case manager referred the Appellant's file back to [MPIC's doctor] for his opinion as to whether or not there was a relationship between the Appellant's neck and right shoulder condition (including the herniated disc) and the motor vehicle accident.

In response, [MPIC's doctor] provided an interdepartmental memorandum on July 15, 2004 in respect of the issue of causality. [MPIC's doctor] reviewed the relevant medical information and confirmed that in his opinion there was no causal relationship between the Appellant's complaints and the motor vehicle accident.

On May 18, 2004 [Appellant's doctor #1] wrote to the Appellant's legal counsel and indicated that in his opinion the Appellant's injuries outlined in his report of March 21, 2002 were caused by the motor vehicle accident of April 13, 2001.

On June 1, 2004 [Appellant's neurosurgeon] wrote to [Appellant's doctor #1] stating that he had met with the Appellant to discuss the latest MRI and future treatment options. [Appellant's neurosurgeon] indicated:

1. "His MRI confirms the presence of slight kyphosis at C5-6. There is a significant osteophyte and compression at that level. This results in some flattening of the patient's spinal cord. There is some neural foraminal narrowing bilaterally, the MRI report makes note of the left hand side but it is quite clear on the MRI that there is also on the right hand side."
2. The Appellant indicated to him that he wished to proceed with surgery.
3. He planned to do a level C5-6 anterior cervical decompression and fusion.

The appeal of the Internal Review Officer's Decision dated January 8, 2003 was scheduled to be heard before the Commission on September 27, 2004 but the hearing did not proceed.

Case Manager's Decision – July 21, 2004 – Disc Herniation; Right Shoulder and Neck:

The case manager wrote to the Appellant on July 21, 2004 and relying on the medical opinions of MPIC medical consultant concluded that there was no causal relationship between the Appellant's ongoing neck and shoulder problems, cervical herniated disc and the motor vehicle accident. In arriving at this decision, the case manager stated:

“The medical information was reviewed in regards to any causal relationship between your ongoing symptoms and difficulties which include the herniated disc and the motor vehicle accident injuries.

In his review, the case manager stated:

- Your neck and shoulder symptoms are related to combined cervical spinal stenosis.
- You have narrowing of your spinal canal and degenerative changes (osteophyte formation) and disc involvement.
- The effects resulted in narrowing of the spinal canal and nerve root openings, resulting in symptoms in your arm because of nerve root irritation or compression.
- The degenerative changes predated the accident as the osteophyte formation and degenerative narrowing take years to develop, and on a balance of probabilities, would not have developed as a result of the accident.
- Your belief the disc herniation was a result of the accident and your neck condition and cause of symptoms is not related to the accident.
- If disc herniation occurred at the time of the accident then symptoms would have developed immediately.
- First medical documentation occurred 3 months after the accident. The temporal association and description of the secondary injury, makes association between the collision and cervical disc herniation highly improbable.”

The case manager concluded by stating:

“Enclosed, for your information, is a copy of the Health Care Services review dated July 15, 2004.

Based on the above, your degenerative changes predated the motor vehicle accident collision injuries and there is no causal relationship between your ongoing symptoms and difficulties, including the herniated disc, and the motor vehicle accident in question.”

On September 1, 2004 [Appellant's neurosurgeon] wrote to the Appellant's legal counsel and commented upon the Appellant's disability in respect of disc herniation:

"In terms of continued disability, [the Appellant] is most likely to have ongoing issues relating to his cervical spine, given the protracted length of time with which he had discomfort and the fact that he is still somewhat asymptomatic after the fact. He certainly is not suited to any form of heavy physical labor and he would be regarded as being disabled from that and he is suited to more sedentary occupations."

On the issue of causality [Appellant's neurosurgeon] stated that without seeing the medical records prior to 2001 he was unable to provide a medical opinion as to the issue of causality.

On September 20, 2004, at the request of both legal counsels, the Commission adjourned the appeal hearing that was scheduled for September 27, 2004 to permit the parties time to deal with the issue as to the causal relationship between the disc herniation and the motor vehicle accident.

On March 9, 2005 the Internal Review Officer wrote to [MPIC's doctor] and provided him with the case manager's decision of July 21, 2004, the Application for Review and [Appellant's neurosurgeon's] September 1, 2004 report. The Internal Review Officer indicated that the central issue for the current Internal Review is whether there was a probable connection between the motor vehicle accident of April 13, 2001 and the herniated disc. The Internal Review Officer stated:

"For the purposes of your assessment, I am going to ask you to:

1. Assume that there was no intervening workplace injury between the date of the motor vehicle accident and the first documented reports of neck difficulties in July, 2001;
2. Comment on the incidence of these conditions here in the general population; and,
3. Comment on the severity of the pain likely to have been experienced by the claimant if the disc herniations had, in fact, been caused by the motor vehicle accident."

On May 12, 2005, [MPIC's doctor] reviewed the medical package and provided that there was no causal relationship between the disc herniation and the motor vehicle accident.

In response to [MPIC's doctor's] report of May 12, 2005, the Appellant's legal counsel wrote to the Internal Review Officer on June 17, 2005 wherein she expressed her disagreement with [MPIC's doctor's] main conclusions. The Appellant's legal counsel disagreed that the evidence supports two of [MPIC's doctor's] main conclusions in his response being firstly, that the Appellant did not suffer from symptoms related to his neck soon after the accident and, secondly that the period of disability did not correspond with the motor vehicle accident.

The Appellant's legal counsel indicated that:

1. Although [MPIC's doctor] did note that the Appellant had forwarded complaints to MPIC's case manager on April 23, 2001, he rejected this information since [Appellant's doctor #1's] notes of the Appellant's first appointment on April 25, 2001 do not specifically make reference to the neck pain.
2. The Appellant did discuss his neck complaints with [Appellant's doctor #1], however these complaints were not documented by [Appellant's doctor #1].
3. The Appellant did see [Appellant's doctor #2], [Appellant's doctor #1's] colleague, during the week of April 17, 2001 regarding his neck and shoulder injury and that [Appellant's doctor #2] did write a note indicating the Appellant should take the next six weeks off.
4. Despite the neck pain the Appellant continued to work and indicated that he thought his injuries would heal on their own without treatment and that his family could not afford him to be without income if he was absent from work.

In respect of the second issue raised by [MPIC's doctor], the Appellant's legal counsel stated that:

1. The Appellant's supervisor at his [text deleted] job provided a letter on November 29, 2002 which indicated that the Appellant had cancelled shifts, as well as to schedule work on the second truck rather than the primary truck and because of lack of improvement in his condition, the Appellant ended his employment as a [text deleted].
2. [MPIC's doctor] did not take into account the extensive medical information provided to MPIC predating the accident which indicated that there was medical evidence establishing that the Appellant did not suffer from any significant spondylosis prior to the motor vehicle accident.
3. [MPIC's doctor] did not take into account the medical records of [Appellant's doctor #6] and [Appellant's doctor #1] which established the Appellant did not indicate any neck complaints prior to the motor vehicle accident.

Internal Review Officer's Decision – July 20, 2005 – Disc Herniation; Right Shoulder and Neck:

The Internal Review Officer confirmed the case manager's decision of July 21, 2004 and dismissed the Appellant's Application for Review. The Internal Review Officer reviewed [Appellant's doctor #6's] clinical notes and [Appellant's physiatrist's] report of May 19, 2003 wherein he stated that in his opinion the disc herniations at C6-C7 and C7-C8 were accident related.

In arriving at his decision, the Internal Review Officer relied on the medical opinion of [MPIC's doctor]. He reviewed [MPIC's doctor's] July 15, 2004 report wherein he concluded that had the herniation occurred at the time of the accident there would have been significantly severe

symptomatology and [MPIC's doctor] had concluded that this had not occurred. [MPIC's doctor] also indicated that the period of disc herniation did not correspond directly with the motor vehicle accident.

In arriving at his decision, the Internal Review Officer stated:

“Various medical practitioners have told me over the years that disc herniations are not necessarily symptomatic. A disc herniation can develop slowly over time, with no discernible consequences in terms of pain generation or impairment of function. It would not be evident on plain film x-rays.

A disc herniation can also result from a significant traumatic event, such as a motor vehicle accident, or from an ordinary activity of daily living, such as lifting a can of paint or bending over to retrieve an item from the trunk of a car. The pain that results from a disc herniation caused in either of these manners has three basic features – it is immediate, it is severe, and it is disabling. (Underlining added)

With all due respect to [the Appellant], and [Appellant's physiatrist] and [Appellant's doctor #1], I find the analysis by [MPIC's doctor] to be quite compelling in this case. As with my decision regarding the right shoulder condition, I have concluded that a causal connection between the cervical disc herniations and the accident is possible, but not probable. Again, as this falls short of the required standard to prove in cases of this type, I am confirming the decision of the case manager dated July 21, 2004.”

Appeal:

The relevant provisions of the MPIC Act provide:

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...

Application of Part 2

71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

Entitlement to I.R.I.

[81\(1\)](#) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

Notice of Appeal – Disc Herniation:

The Appellant filed a Notice of Appeal dated October 13, 2005.

On May 25, 2006 the Appellant's legal counsel wrote to [Appellant's neurosurgeon] in reference to his report of September 1, 2004. In this report [Appellant's neurosurgeon] had stated that:

1. One must consider the temporal course of events in order to establish whether or not there was a causal relationship between the Appellant's symptoms and the motor vehicle accident.
2. The Appellant was under the impression he had no symptoms prior to the motor vehicle accident and that the accident precipitated his complaint.
3. The Appellant's symptoms could be attributable to the motor vehicle accident if one was able to establish positively a temporal relationship of symptoms.
4. That medical records prior to April of 2001 would be very useful to him in order to establish whether in fact the Appellant had suffered any of his symptoms prior to the motor vehicle accident.

In response, the Appellant's legal counsel provided [Appellant's neurosurgeon] with records related to the Appellant's medical history. The records included those of [Appellant's doctor #1], [Appellant's doctor #6] from July 27, 1999 to September 12, 2000, and [Appellant's doctor #7] from May 30, 1997 to May 21, 1998. The Appellant's legal counsel asked [Appellant's neurosurgeon] to review the information and advise whether or not it was probable that the

Appellant's complaints and symptoms were attributable, in whole or in part, to the motor vehicle accident.

On October 6, 2006 [Appellant's neurosurgeon] responded to the request of the Appellant's legal counsel and provided his opinion on causality. [Appellant's neurosurgeon] stated:

"Thank you for looking into the matter and I understand from your enclosures from [Appellant's doctor #1], [Appellant's doctor #6] and [Appellant's doctor #7] to support the patient's understanding that his symptoms occurred following the accident.

The best one could do is indicate that the patient's symptoms relate to his spondylosis in the cervical spine, which indeed might have been precipitated by motor vehicle accident, particularly in light of the fact that he was not symptomatic prior to the incident. More than this, one cannot do with any degree of certainty.

I understand in terms of the legal profession that a balance of probability is all that is required in cases like this and I do suspect that based on that, you do indeed have a strong case to suggest that the motor vehicle accident had indeed precipitated [the Appellant's] problem." (Underlining added)

[Appellant's physiatrist] wrote to [Appellant's doctor #1] on August 11, 2006 and stated:

"I saw [the Appellant] in [text deleted] on August 11th, 2006 with a history of recurrence of right cervical upper arm pain for the last three months. The pain starts in the right side of the neck and radiates to the right shoulder, up to the elbow. He cannot hold objects for prolonged periods and has started dropping things from his right hand. He has noticed numbness in the right hand. His right upper arm pain is more than the neck pain."

[Appellant's physiatrist] further stated:

"Clinically there is no myotomal, dermatomal or stretch reflex abnormalities.

IMPRESSION: Clinically he has mild right C7 radiculitis with musculoligamentous strain of the lower cervicothoracic spine."

In response to questions from the Appellant's legal counsel, [Appellant's doctor #1] provided a report on November 5, 2007 and stated that:

1. The Appellant had to discontinue work in the [text deleted] field due to suffering from too much pain.

2. The Appellant's complaints and symptoms were attributable in whole to the motor vehicle accident of April 13, 2001.
3. His prognosis was that the Appellant would never get better.

On May 20, 2008, [MPIC's doctor] provided an interdepartmental memorandum to the Internal Review Officer advising that he had reviewed the reports from [Appellant's physiatrist], [Appellant's neurosurgeon] and [Appellant's doctor #1]. [MPIC's doctor] disagreed with the medical opinions of [Appellant's physiatrist], [Appellant's neurosurgeon] and [Appellant's doctor #1] regarding the issue of causal relationship between the Appellant's disc herniation and the motor vehicle accident and confirmed his previous opinion that there was no causal connection.

In a letter dated August 24, 2009, [Appellant's neurosurgeon] wrote to the Appellant's legal counsel and stated:

"I would like to reiterate that this young man presented to me with features of cervical spondylosis in 2004. He relates this quite specifically to a motor vehicle accident of April 2001. The records, which you have forwarded to me, would be in support of the temporal relationship between the trauma and the onset of his symptoms." (Underlining added)

On April 28, 2011 [MPIC's doctor] provided an interdepartmental memorandum to the Internal Review Officer and commented on [Appellant's neurosurgeon]'s August 24, 2009 letter. [MPIC's doctor] disagreed with [Appellant's neurosurgeon] and for the reasons outlined in several of his other reports, concluded that there was no causal relationship between the Appellant's disc herniation and the motor vehicle accident.

On April 20, 2012 [Appellant's physiatrist] provided a report to the Appellant's legal counsel. [Appellant's physiatrist] was requested to review a number of reports from [Appellant's chiropractor #2] and [Appellant's chiropractor #1] who were chiropractors; the medical reports of [Appellant's doctor #1] and [Appellant's doctor #2]; the clinical notes of [Appellant's doctor #1]; and [MPIC's doctor's] reports of July 3, 2002, July 18, 2002, July 15, 2004, May 12, 2005 and May 20, 2008; as well as the records of [Appellant's doctor #6] and [Appellant's doctor #7].

In this report, [Appellant's physiatrist] indicated that the Appellant was referred to him by [Appellant's doctor #1], the Appellant's family physician.

[Appellant's physiatrist] initially assessed the Appellant and noted he suffered from musculoligamentous strain complicated by mechanical neck pain manifested by myofascial trigger points of several muscles. He also noted that clinically he had some symptoms of radiculitis, but did not have any major compression of the nerve root of the cervical spine. The treatment included trigger point injections, stretching exercises and application of local moist hot packs.

[Appellant's physiatrist] continued to treat the Appellant and saw him on June 14, 2002, August 2, 2002 and August 30, 2002. [Appellant's physiatrist] indicates that the Appellant underwent a CT scan of the cervical spine on August 15, 2002 and showed at C5-C6, C6-C7 and C7-T1 level disc degeneration, intervertebral osteophytes with disc protrusions/herniations at these levels with osseous narrowing of the neuro-foramina. As a result of the findings [Appellant's physiatrist] referred the Appellant to [Appellant's neurosurgeon] for his opinion.

In his report [Appellant's physiatrist] indicated that several questions had been raised by the case manager and Internal Review Officer and [MPIC's doctor], which he proceeded to answer. The first question raised was whether the Appellant's complaints of neck, shoulder and arm symptoms were related to the motor vehicle accident or were they caused by a work related injury. He reviewed the reports of [Appellant's doctor #1] who saw the Appellant on August 10, 2001 and noted the Appellant's complaints of right shoulder and neck problems. He also reviewed [Appellant's chiropractor #1]'s letter of September 13, 2002 which indicates that he may have erred when determining that the Appellant may have injured himself during the course of his employment. [Appellant's physiatrist] stated:

“After reviewing all reports, my opinion is that his symptoms of neck pain, shoulder and right arm tingling and numbness were on the balance of probability related to the motor vehicle accident of April 3rd, 2001.” (Underlining added)

The Commission noted that contrary to [MPIC's doctor's] opinion, [Appellant's physiatrist] was of the view that the onset of disc herniation may not commence immediately after an accident but can develop slowly over a period of time. [Appellant's physiatrist] stated:

“There has been documentation that his symptoms started not immediately after the motor vehicle accident and started may be a few days after or a few weeks after the motor vehicle accident. It is not uncommon after motor vehicle accident particularly whiplash injuries some patients start their symptoms a few days to a few weeks after the motor vehicle accident. There are so many elements involved after the accident, how individual who was involved in a motor vehicle accident was treated whether it was from manipulations which may cause further ligamentous strain or injuries and may convert a bulging disc in to disc herniation or protrusions or extrusions.” (Underlining added)

The next question that was addressed by [Appellant's physiatrist] was whether there was a cause and effect relationship between the development of spinal pain leading to cervical spinal stenosis and ultimately surgery. [Appellant's physiatrist] stated that:

“The X-rays of the neck and upper thoracic spine, right shoulder ordered by [Appellant's doctor #1] done in August 2001 showed slight straightening of the normal cervical lordosis, the heights of the cervical vertebra are not remarkable. There is at least, slight degenerative narrowing of the C5-C6 interspace. There is slight degenerative narrowing

of the C5-C6 interspace. There is slight degenerative narrowing of 7th and 8th interspace. The impression of the radiologist was degenerative narrowing of the C5-C6 and T7-T8 indicating that he had disc degeneration of the C5-C6 and T7-T8.”

[Appellant’s physiatrist] stated that this was further complimented by the CT Scan of the cervical spine dated the August 15, 2002 which indicated significant disc degeneration, facet joint arthritis and degree of spinal stenosis and disc herniations. The CT Scan which was done four months after the motor vehicle accident showed significant disc degeneration, formation of intervertebral osteophytes and disc herniations from C5 to T1 levels. [Appellant’s physiatrist] further stated:

“It is unusual to see these kind of findings in a person of [text deleted] years of age. In my opinion he had pre-existing asymptomatic disc degeneration with intervertebral osteophytes, but the motor vehicle accident of April 13th, 2001 aggravated his pre-existing asymptomatic spondylosis of the cervical spines and caused also disc herniation/protrusion causing further narrowing of the intervertebral foramina and central spinal canal making asymptomatic spondylosis to symptomatic stenosis particularly causing compression of the right C7-C8 and T1 nerve roots. Post-MVA (whiplash injuries) longitudinal ligaments by injuries; annular tears and occult anterior vertebral end plate fractures usually occur at multiple levels.” (Underlining added)

[Appellant’s physiatrist] referred to two medical studies which indicated that patients had acute cervical disc herniations causing cord compression after whiplash injuries and there was good evidence that motor vehicle accidents/whiplash injuries could cause disc herniations.

[Appellant’s physiatrist] noted:

“He did not improve with conservative treatment and required surgical decompression done by Dr. Neil Berrington. To further summarize in my opinion, he had asymptomatic spondylosis of cervical spines due to disc degeneration the accident of April 13th, 2001 causing flexion, extension and rotational injury to the spine including to the discs and ligaments in the muscles, leading to weakness of the support of the spine and further contributing to disc herniation and spinal stenosis. On the balance of probabilities, there is a good cause and effect relationship of this accident to make him symptomatic due to spinal stenosis and disc herniations. In the reports of [Appellant’s doctor #1] dated March 21st, 2002 to [text deleted], he was well documented on several occasions of August 22nd, 2001 that he received physiotherapy and chiropractic treatments, on September 14th, 2001, he documented point tenderness in the right periscapular area and he recommended injection treatment.” (Underlining added)

[Appellant's physiatrist] also reviewed the reports of [Appellant's doctor #1] wherein he concluded that the Appellant was suffering from neurogenic myofascial pain which had been triggered by the motor vehicle accident. [Appellant's physiatrist] also stated:

"[MPIC's doctor] in his letter dated May 20, 2008 to [text deleted], Internal Review Officer under the conclusion states that there is a possible association between the claimant's cervical spinal pain and the motor vehicle collision in question.

In my opinion, the review of all these reports indicates that he had on-going symptoms and some signs of musculoligamentous strain, myofascial pain, nerve root inflammation of right C7, C8 and T1 at the lower cervical and upper thoracic spine due to disc herniation and stenosis.

In conclusion, on review of my reports and chart, review of all submitted reports, it is my opinion that the accident of April 13th, 2001 caused the neck injury complicated by disc herniations at C6-C7, C7-C8, and C8-T1 level causing compressions of the C7-C8 and T1 nerve roots. On the balance of probabilities, there is a casual relationship between the accident and the disc herniation causing C7-C8 and T1 radiculitis." (Underlining added)

The appeal hearing took place on April 24 and 25, May 9, 10, 29 and 30, 2012.

Appellant's Testimony:

The Appellant testified that he was employed at the time of the motor vehicle accident as a [text deleted] at the [text deleted] and also worked part-time as a [text deleted].

He also testified that:

1. On April 14, 2001 he contacted MPIC and opened a file and advised the case manager of the motor vehicle accident and complained of a chipped tooth and that he was quite sore.
2. He did not see a doctor immediately after the motor vehicle accident. The accident occurred on Good Friday, and his doctor's office was closed until the following Tuesday, April 17.
3. He did not feel that the injury required that he attend the Emergency Room of the hospital as a result of the motor vehicle accident.

4. On April 17 while working as a [text deleted] he attended the clinic where his personal physician, [Appellant's doctor #1], practiced. When he arrived at the clinic he bumped into [Appellant's doctor #2] (who was not his doctor) and informed her of the motor vehicle accident and that his neck and shoulder were sore.
5. [Appellant's doctor #2] quickly examined him and wrote out a prescription for him to be off work for six weeks and that he should see his regular doctor and prescribed Tylenol #3 tablets for his pain.
6. He did not have an appointment with [Appellant's doctor #2] and she did not appear to make any notes or have a chart when she examined him.
7. When he subsequently checked at the clinic, he found there were no chart notes relating to his visit with [Appellant's doctor #2].
8. The Appellant explained that he had pain to his neck, but having regard to his own background as a [text deleted], he believed that these injuries would heal on their own without any further treatment.
9. He testified that he tried to see [Appellant's doctor #1] but he was on vacation.
10. He could not afford to take time off work as he was living from paycheque to paycheque and needed the income.
11. He contacted his case manager again on April 23, 2001 and advised her that he had a chipped tooth and a sore neck and back. He also informed her that he did not have time to attend at a doctor and thought he would be getting better without medical treatment.
12. However, he did see [Appellant's doctor #1] on April 25, 2001 to discuss his smoking problem and complained of pain to his leg. During the course of this visit he did advise [Appellant's doctor #1] about the injury to his neck and back.

13. Notwithstanding his failure to immediately obtain medical attention for his ongoing shoulder pain, he did modify his work by cancelling shifts and scheduling changes when he was available for work.
14. In respect of his [text deleted] employment, he scheduled only on the second truck rather than the primary truck to [text deleted].
15. He saw [Appellant's chiropractor #1], on July 9, 2001. He acknowledged that when he filled out the self-reporting form at the chiropractor's office he was a little confused.
16. He initially thought that since he was coming from work when the motor vehicle accident occurred, that he was still working and that is why he indicated that it was a workplace injury.
17. He did not believe this was a workplace injury and indicated on the form that he would be making an Autopac claim "if applicable".
18. He reported to the chiropractor that he had pain in his upper back, shoulder, arm and hand.
19. He further indicated that it had been two months since he felt good, which referred to the time of the motor vehicle accident.
20. He denies advising [Appellant's chiropractor #1] that he jumped off a ladder while painting and hurt himself.
21. He discussed with [Appellant's chiropractor #1] his inability to carry out his duties both at home and at work due to his shoulder and neck pain
22. He did advise [Appellant's chiropractor #1] that they used ladders while at work.
23. [Appellant's chiropractor #1] must have misunderstood his statements and subsequently clarified his remarks.
24. He saw [Appellant's doctor #2] on July 12, 2001, three months after the motor vehicle accident and complained to her about his persistent pain to his neck and shoulder.

25. [Appellant's doctor #2] advised him to continue to take Tylenol 3.
26. He was miserable if he had to work with his arms up and testified to the amount of pain he suffered and that he was unable to carry out any of the duties, either inside or outside the home.
27. He saw four different caregivers during the months of July and August.

The Appellant further testified that:

1. [Appellant's doctor #1] referred him to [Appellant's physiatrist] who carried out trigger point injections to decrease his pain. After one year, [Appellant's physiatrist] referred him to [Appellant's neurosurgeon].
2. [Appellant's neurosurgeon] conducted CT, MRI and conduction tests and subsequently performed back surgery on him.
3. Subsequent to the surgery in 2004 the Appellant felt 50% better and considerably better after two years (in 2006).
4. In consultation with [Appellant's neurosurgeon] he quit his [text deleted] job in September but continued to work at the [text deleted] .
5. He was not able to work full-time and missed at least one week due to his pain. He ended his employment at the [text deleted] in 2003, one year prior to the back surgery.
6. Subsequently for approximately two months he worked with his father [text deleted].
7. He and his wife subsequently purchased a [text deleted] in [text deleted] , Manitoba which she ran, while he looked after their daughter and handled the business accounts.
8. In October 2006 he was able to work only about 8 hours per week. In the same month his wife separated from him and left the business with him.
9. He sold the business in 2010 and subsequently worked for [text deleted] as [text deleted] for 15 hours per week.

10. They accommodated him and did not send him to places where heavy lifting was required.
11. He had a large acreage with a small green space but he could not care for it after the motor vehicle accident.
12. He now lives in [text deleted] and has joint custody of his daughter with his former wife.

The Appellant was cross-examined by MPIC's legal counsel and stated that:

1. He saw a few doctors several months after the motor vehicle accident.
2. He actually believed that the injuries would resolve themselves and he was unable to take any time off from work because of his financial situation.
3. He also advised MPIC's legal counsel that he felt sore in his neck and back shortly after the accident and this condition continued to get worse and he finally realized that he needed medical treatment.
4. The pain continued and got worse and as a result he was required to have surgery.
5. Prior to the motor vehicle accident he did not have chronic pain to his neck and back and it was only after the motor vehicle accident that this chronic condition began.

[Appellant's former wife's] Testimony:

[Appellant's former wife] testified that:

1. She was married to the Appellant from [text deleted] to 2006.
2. They had one daughter [text deleted].
3. They lived on [text deleted] and she was employed [text deleted].
4. In April 2001, the Appellant phoned her that he was involved in a motor vehicle accident and when he came home he was shaken, sore and tired.
5. The next day he was sore all over.

6. He continued to have neck and shoulder pain.
7. They were short of money and as a result the Appellant continued to work after the motor vehicle accident and did not take any time off work.
8. He was unable to see [Appellant's doctor #1] right away as he was not available because he was on holidays in May and June 2001.
9. He consistently complained of back, shoulder and neck pain and used Tylenol and prescriptions that he received from [Appellant's doctor #1].
10. Prior to the motor vehicle accident the Appellant was very active around the house, did the garbage, shovelling, gardening, mowing and turning the soil.
11. After the accident the Appellant did not do any physical duties around the house.
12. There was no painting done and she had no knowledge that the Appellant was involved in a workplace accident.
13. She advised that there was also no accident involving a ladder at work or at home, to her knowledge.
14. Financially, they lived paycheque to paycheque. She did not qualify for maternity leave benefits. They barely got by financially even though he worked on two jobs.
15. As a result of his missing time from work, she had to get a full-time job and work opposite shifts as they could not afford childcare.
16. He often came home early because of the pain and this affected his paycheque.
17. She saw no sustained improvement in his condition when he was receiving medical treatment.
18. Mainly the Appellant took Tylenol to relieve the pain.
19. After the surgery she did not see a marked improvement.
20. They bought a [business] in [text deleted] which was approximately 10 minutes from their home.

21. She did the [text deleted] in the [business] and her husband did the books and looked after their daughter.
22. When she separated from the Appellant he took over the [business] with the staff doing the work until they sold it in 2010.
23. They separated in 2006 and have joint custody of their daughter.
24. She indicated that she saw no improvement in the Appellant's condition from the time of the accident to their separation in 2006.

[Appellant's Doctor #1's] Testimony:

[Appellant's doctor #1] testified at the hearing and stated:

1. He practiced medicine [text deleted] as a general practitioner and had been in practice for 44 years.
2. The Appellant was at his office on April 25, 2010 regarding his desire to quit smoking.
3. During the course of this visit, the Appellant complained to him about a sore knee which he indicated did not appear to be related to the motor vehicle accident.
4. He did not recall the Appellant complaining about neck or shoulder pain and acknowledged that he may have erred in not actually reporting the Appellant's statements.
5. There were problems with the medical records at the Clinic and since there was a change in the manner in which they were being kept, medical documents could have been lost or misplaced.
6. He saw the Appellant on August 10, 2001 and at that time he complained about a sore right shoulder.

7. He was informed by the Appellant that this pain had started one week after the motor vehicle accident.
8. Initially the Appellant had a swollen knee one or two days after the motor vehicle accident.
9. Subsequently he started having pain to his neck and shoulder.
10. He X-rayed the Appellant at that time.
11. He did not conduct a neurological examination on the Appellant.
12. He diagnosed the Appellant as having a WAD 2 Whiplash.
13. He continued to see the Appellant on several occasions in 2001 and 2002.
14. The Appellant continued to have pain in his neck and back and he had physiotherapy treatments and was prescribed anti-inflammatories, but none of these treatments were able to resolve the Appellant's complaints of pain.

[Appellant's doctor #1] testified that he saw the Appellant on March 13, 2002 and stated:

1. The Appellant complained of pain and indicated that if he did not get better he would be unable to go back on [text deleted] duty.
2. He noted numbness in the Appellant's right arm, including the 4th and 5th fingers and the Appellant continued to complain about his neck and back pain.
3. He knew the Appellant was having neurogenic and myofascial pain as a result of the motor vehicle accident.
4. The Appellant advised him that he did not suffer any of these symptoms prior to the motor vehicle accident.
5. He was the Appellant's physician prior to the motor vehicle accident and noted that the Appellant had no prior musculoskeletal problems.

6. He was also of the opinion that a disc herniation could be caused by the motor vehicle accident and that the Appellant may not have felt immediate pain for a period of time.
7. It was not necessary that there be immediate extreme pain with a disc herniation arising from a motor vehicle accident.

[Appellant's Physiatrist's] Testimony:

[Appellant's physiatrist] testified at the hearing and stated that:

1. He assessed the Appellant on May 17, 2002 and subsequently saw him June 14, 2002, August 2, 2002 and August 30, 2002.
2. His initial diagnosis was of musculoligamentous strain complicated by mechanical neck pain manifested by myofascial trigger points of several muscles.
3. He treated the Appellant primarily with trigger point injections and home exercises.
4. He subsequently concluded on August 30, 2002 that the Appellant had a C8 and T1 radiculitis and nerve root compression resulting from disc herniations at C6-C7 and C7-C8.
5. In his view there was a probable connection between the Appellant's muscular strains and myofascial pain, disc herniation and the motor vehicle accident.

[Appellant's physiatrist] further testified that:

1. After reviewing [MPIC's doctor's] medical reports, he disagreed with [MPIC's doctor's] opinion as to the onset of the Appellant's disc herniation.
2. Pain sensation is affected by many factors such as lifestyle, family and social issues.
3. Epinephrine released by shock of an incident often dulls the effects of pain sensation.

4. The Appellant had existing asymptomatic disc degeneration with osteophytes and that the motor vehicle accident of April 13, 2001 aggravated the pre-existing asymptomatic spondylosis and caused the disc herniation.
5. Whiplash injuries can result in subsequent disc herniation.
6. He disagreed with [MPIC's doctor] in respect of the lack of medical documentation to establish a causal relationship between the Appellant's complaints of neck and shoulder injury pain and the motor vehicle accident.
7. He also disagreed with [MPIC's doctor's] testimony that in [MPIC's doctor's] experience motor vehicle accidents only rarely cause disc herniations and that the vast majority of injuries following an accident are whiplash associated disorders without evidence of disc herniation and that development of disc herniation is rare.
8. He stated that in his medical experience, and after examining the relevant medical literature, he concluded that as a result of a whiplash a person could suffer disc herniation.

[MPIC's Doctor's] Testimony:

[MPIC's doctor] testified before the Commission and reviewed his own medical opinions that were in his various reports to MPIC. [MPIC's doctor] further testified that:

1. There was no medical documentation following the motor vehicle accident of April 21, 2001 to support the Appellant's position that there was a causal relationship between the motor vehicle accident and the Appellant's constant complaints in respect of his neck and shoulder pain, which can be attributed to his disc herniation.
2. The Appellant claimed that he saw [Appellant's doctor #2] a few days after the motor vehicle accident but there is no medical documentation to support this claim.

3. However, there was a report from [Appellant's doctor #2], in a letter dated June 20, 2002 to MPIC's case manager wherein she indicated that she saw the Appellant on July 12, 2001, approximately three months after the motor vehicle accident, complaining of persistent pain to his right shoulder from the time of the accident.
4. The Appellant saw [Appellant's doctor #1] on April 25, 2001, approximately 12 days after the motor vehicle accident in respect of his desire to quit smoking and reported only a complaint to his knee and did not complain of neck pain caused by the motor vehicle accident.
5. The first documented instance of pain the Appellant had in respect of his neck and back was at his attendance at the [text deleted] on July 9, 2001 where he was seen by [Appellant's chiropractor #1], approximately three months after the motor vehicle accident when he reported pain to his back, left shoulder, arm and hand.
6. The Appellant completed a self-reporting history which indicated that his complaints of pain took place at work and that he may be considering an Autopac claim "if applicable".
7. An examination of [Appellant's chiropractor #1's] chart notes indicate that:
 - a) The Appellant developed shoulder pain one week prior to seeing [Appellant's chiropractor #1].
 - b) He had "jumped off a ladder with painting".
 - c) This demonstrated that the Appellant's complaints of his right shoulder condition were non-collision related.
8. The Appellant saw [Appellant's doctor #1] in respect of complaints to his neck and back, four months after the motor vehicle accident.
9. If the Appellant had suffered a disc herniation as a result of the motor vehicle accident, it would be reasonable to expect that his symptoms would develop immediately and not three months after the accident.

10. The development of the cervical radicular symptomatology three months after the motor vehicle accident would be improbable, not only on a temporal basis but would be unlikely to have occurred at the time of the accident having regard to the Appellant's symptoms.
11. It is his experience that motor vehicle accidents only rarely cause disc herniations and the vast majority of injuries following an accident are Whiplash Associated Disorders without evidence of disc herniation and that development of disc herniation is rare.

Submission:

MPIC's legal counsel submitted that the Appellant has failed to establish on a balance of probabilities a causal connection between the motor vehicle accident and the Appellant's chronic neck and shoulder pain and the disc herniation which resulted in surgery.

MPIC's legal counsel asserted that there was no temporal relationship between the motor vehicle accident and the Appellant's neck and shoulder pain and disc herniation. MPIC's legal counsel further submitted that:

1. At the time of the motor vehicle accident the Appellant got out of the car and approached the other driver and observed that the driver was stumbling and appeared impaired, exchanged particulars, and called the police to report the accident.
2. These activities do not reflect the actions of someone who was severely injured in a motor vehicle accident.
3. The Appellant did not suffer from a concussion, did not appear to be in shock or complain of neck and shoulder pain at that time.
4. The Appellant went home after the accident, did not visit a hospital and did not seek medical attention of any kind.

5. He went to work the next day and alleged that he saw [Appellant's doctor #2] but there is no medical documentation to support this claim.
6. On April 25, 2001 he saw [Appellant's doctor #1] to stop smoking and complained of a left patella pain but said nothing about neck or shoulder pain.
7. During the month of May there is no documentation of any significant neck or other injury.
8. Fifty-seven days occurred between the motor vehicle accident and his first visit to a chiropractor, when the Appellant reported he was injured when jumping off a ladder one week prior to that visit.
9. The Appellant did initially complain of soreness to his neck and a chipped tooth to the case manager but he did not see a medical doctor in respect of his motor vehicle accident injuries for several months.
10. The first documentation in respect of the Appellant's complaints to his neck and back occurred on July 9, 2001 when he saw [Appellant's chiropractor #1] (approximately three months after the motor vehicle accident) with reports of pain to his back, left shoulder, arm and hand.
11. In his self-report to [Appellant's chiropractor #1] he stated that he was involved in a workplace injury.

MPIC's legal counsel further submitted that the Appellant was not a credible witness and stated:

1. The Appellant testified that he saw [Appellant's doctor #2] on April 17, 2001 to complain about pain to his neck and shoulders but there is no documented report that she examined him at that time.
2. The Appellant testified that he did report to [Appellant's doctor #1] on April 25, 2001 that he was involved in a motor vehicle accident, that he struck his left patella on the

- dashboard and hit his head on the window, causing pain to his neck and shoulder, but there was no reported documentation of this communication by [Appellant's doctor #1]
3. Contrary to [Appellant's chiropractor #1's] report, he did not advise him that one week prior to seeing him he jumped off a ladder causing injury to his neck and shoulder.
 4. The significant delay in seeking medical attention demonstrated he was not injured in the motor vehicle accident.
 5. Based on [MPIC's doctor's] medical opinion, had the Appellant's disc herniation occurred as a result of the motor vehicle accident, he would have suffered from immediate pain to his neck and shoulder, but he did not make such a complaint at that time.
 6. The Appellant failed to complain of radicular symptoms after the motor vehicle accident and it is not probable to have developed cervical radicular symptomatology three months after the motor vehicle accident.

MPIC's legal counsel further submitted that, having regard to the lack of medical documentation to support the Appellant's complaints related to the motor vehicle accident and the conflict between his testimony, the medical reports of [Appellant's doctor #2], [Appellant's doctor #1] and [Appellant's chiropractor #1], the Commission should reject the Appellant's assertion that the injuries he suffered were due to the motor vehicle accident. In these circumstances, [MPIC's doctor's] medical opinion should be given greater weight on the issue of causality than the medical opinions of [Appellant's doctor #1], [Appellant's physiatrist] and [Appellant's neurosurgeon].

MPIC's legal counsel therefore submitted that the Appellant's appeal should be dismissed and the Internal Review Officer's Decision dated January 8, 2003 confirmed.

Discussion:

The Commission rejects MPIC's position that:

1. There was no causal relationship between the motor vehicle accident and the Appellant's complaints of pain to his neck and shoulder and the disc herniation.
2. There was a lack of medical documentation to support the temporal connection between the motor vehicle accident and the Appellant's complaints.
3. The Appellant was not a credible witness and his testimony on the issue of causality should be rejected.

The Commission accepts the submission of the Appellant's legal counsel that:

1. There was a causal relationship between the Appellant's injuries to his neck and shoulder and his disc herniation and the motor vehicle accident.
2. There was ample medical documentation to establish that there was a temporal relationship between the motor vehicle accident and the Appellant's complaints to his shoulder and neck.
3. The Appellant testified in a candid fashion and accepts his testimony in respect of any conflict between his testimony and MPIC's position on the issue of causality.

Temporal Relationship:

The Commission finds that the Appellant did injure his neck and shoulder as a result of the motor vehicle accident and he did report these complaints in a timely fashion.

The Commission notes that the Appellant, in his testimony, stated:

1. He did contact MPIC's case manager one day after the accident, on April 14, 2001 and complained of a chipped tooth and of soreness. This is corroborated by the case manager's note to file.
2. He did not see a doctor immediately after the motor vehicle accident because he felt that the pain to his neck and shoulder was not serious and would resolve itself.
3. The motor vehicle accident occurred on Good Friday and his doctor's office was closed until the following Tuesday, April 17, 2001.

The Commission accepts the Appellant's testimony that:

1. He did see [Appellant's doctor #2] on April 17, 2001, several days after the motor vehicle accident and that he did report to her of pain to his neck and shoulder as a result.
2. This visit was informal in nature and that [Appellant's doctor #2] did not report it in her chart.
3. [Appellant's doctor #2] prescribed Tylenol #3 at that time.

The Commission notes that the Appellant's testimony in this respect is corroborated by [Appellant's doctor #2's] clinical note in respect of the Appellant's appointment with her on July 12, 2001 when he complained of a sore right shoulder. In her clinical note [Appellant's doctor #2] reported that the Appellant "continue with Tylenol #3". The Commission finds that [Appellant's doctor #2's] clinical notes corroborate the Appellant's testimony when he first visited [Appellant's doctor #2] on April 17, 2001 and discussed the injuries he sustained in the motor vehicle accident, she prescribed Tylenol #3 to relieve the shoulder and neck pain.

The Commission further notes that in a note to file on April 23, 2001, MPIC's case manager recorded that the Appellant complained about a chipped tooth, sore neck and back.

The Commission accepts the Appellant's testimony that when he saw [Appellant's doctor #1] on April 25, 2001, he did complain about his left knee and also about neck pain following the motor vehicle accident. [Appellant's doctor #1], who practiced for 44 years and was the Appellant's personal physician prior to the motor vehicle accident, testified that the Appellant was a credible person.

In his testimony, [Appellant's doctor #1] acknowledged that he may have made an error in not reporting the Appellant's complaints since there were problems with the clinic records as there was a change in the manner in which they were kept because the clinic was going through a process of computerization of records. He further testified that some documents could have been lost or misplaced. Having regard to the Appellant's direct testimony:

1. That he did complain to [Appellant's doctor #1] on April 25, 2001 of injuries to his neck following the motor vehicle accident.
2. [Appellant's doctor #1's] testimony that there may have been an error in his failure to report these complaints, or that the medical records containing these complaints were lost.
3. The Commission accepts the Appellant's testimony in this respect.

The Commission therefore finds that the Appellant complained on April 25, 2001, not only of pain to his left patella but also of pain to his neck as a result of the motor vehicle accident.

The Appellant's testimony that he suffered an injury to his neck and shoulder as a result of the motor vehicle accident is corroborated by the testimony of his former wife, who testified at the hearing that:

1. When he returned home after the motor vehicle accident he complained that he was shaken and was sore and tired the next day.

2. He consistently complained of back, shoulder and neck pain and used Tylenol to relieve his pain.
3. Prior to the motor vehicle accident he was active around the house, removing garbage, shovelling snow, gardening and hoeing and turning the soil.
4. After the motor vehicle accident he did not do any physical duties around the house.

The Appellant testified that:

1. He did not take time off work initially, but due to his injuries he did modify his work by cancelling shifts and scheduling when he was unavailable to work at the [text deleted] .
2. In respect of his [text deleted] employment he scheduled only on the second truck rather than the primary truck to [text deleted].

The Appellant's testimony in this respect was corroborated by the Appellant's former wife who testified that:

1. As a result of the Appellant missing time from work, she got a full-time job and worked opposite shifts as they could not afford child care.
2. He often came home early because of his pain and that this affected their paycheque.
3. He was unable to take full time off work as he could not afford it.
4. They lived paycheque to paycheque, and she did not qualify for maternity leave benefits and they barely got by even though he worked two jobs.

The Commission notes that the Appellant's T-4 slips for 2001 in respect of his employment at the [text deleted] and at [text deleted] corroborate his low earnings.

The Commission notes that MPIC did not challenge the testimony of either the Appellant, or his former wife in this respect.

The Commission therefore finds that:

1. The Appellant did make a timely complaint in respect of his motor vehicle accident injuries to MPIC's case manager on April 14, 2001 and April 23, 2001 and to [Appellant's doctor #2] on April 17, 2001 and to [Appellant's doctor #1] on April 25, 2001.
2. There was ample evidence to establish that there was a temporal relationship between the injuries to the Appellant's shoulder and the motor vehicle accident.
3. For these reasons the Commission rejects the Internal Review Officer's decision of January 8, 2003 that because the Appellant did not make any timely complaints in respect of the injuries sustained in the motor vehicle accident there was no temporal relationship between these injuries and the motor vehicle accident.

Ladder Accident/Workplace Injury:

[MPIC's doctor], relying on [Appellant's chiropractor #1's] chart notes, concluded that the Appellant's complaints of neck and back pain were not due to the motor vehicle accident, but to the Appellant jumping off a ladder and hurting his back while painting at work. [MPIC's doctor] also relied on the Appellant's self-reporting notes to [Appellant's chiropractor #1] where he indicated that his injury took place at work one week prior to his visit.

The Commission accepts the Appellant's testimony that:

1. He informed [Appellant's chiropractor #1] that as a result of the injuries sustained in the motor vehicle accident he was unable to carry out his employment duties, such as climbing a ladder or raising his hands over his head.
2. He did not inform [Appellant's chiropractor #1] that he jumped off a ladder and injured himself.
3. [Appellant's chiropractor #1] must have misunderstood his explanation pertaining to his difficulties in carrying out his employment duties due to the injuries he sustained in the motor vehicle accident.

[Appellant's chiropractor #1] corroborated the Appellant's testimony in this respect. The Commission notes that:

1. On September 13, 2002, [Appellant's chiropractor #1] provided a letter which indicated that after reviewing the information in the Appellant's file and after discussions with him, stated "there may have been an error on my part in determining his injuries as not related to a motor vehicle accident. While my records do not indicate the injury being due to a motor vehicle accident, his initial questionnaire does."
2. [Appellant's chiropractor #1] further stated that the Appellant was trying to convey that the injuries were being exacerbated by his present work-related duties and indicated that the Appellant appeared to be sincere in this regard and he was of the opinion that he may have misunderstood and recorded that the Appellant's injuries were due to the work.
3. [Appellant's chiropractor #1] concluded his letter by stating that he could not in good conscience attest to whether the injury was or was not related to the motor vehicle accident.

The Commission, having regard to [Appellant's chiropractor #1's] acknowledgement that he may have erred in his report relating to the ladder incident, accepts the Appellant's testimony that he did not jump off a ladder one week prior to seeing [Appellant's chiropractor #1] and injure himself.

The Commission also accepts the Appellant's testimony that he was confused when he completed the initial questionnaire. The Appellant testified that:

1. He thought that since the injuries were sustained in a motor vehicle accident on his way home from work, this was a workplace injury.
2. At the same time the Appellant reported in the questionnaire that he would be making an application to Autopac if applicable.

The Appellant's contradictory statement on the questionnaire confirms the Appellant's confusion when completing the questionnaire. Subsequent to completing the questionnaire, the Appellant made an application for compensation to MPIC and did not apply for benefits from the Workers Compensation Board. The Appellant's conduct established that he did not believe the injuries to his neck and shoulder occurred in the workplace.

The Commission further noted that in [Appellant's chiropractor #1's] chart notes he does not state that the Appellant injured himself as a result of jumping off a ladder. The Commission also notes in cross-examination [MPIC's doctor] acknowledged that he inferred from [Appellant's chiropractor #1's] chart notes that the Appellant jumped off a ladder and injured his shoulder. In his cross-examination, [MPIC's doctor] did acknowledge that there was no direct statement by [Appellant's chiropractor #1] in this respect. The Commission therefore finds that [MPIC's

doctor] misinterpreted [Appellant's chiropractor #1's] statements and erroneously concluded that the Appellant's shoulder injury was a result of jumping off a ladder while at work.

Having regard to:

1. [Appellant's chiropractor #1's] acknowledgement that he may have misinterpreted the Appellant's report of difficulties in carrying out his employment duties and mistakenly attributed them to workplace injuries; and
2. [MPIC's doctor's] misinterpretation of [Appellant's chiropractor #1's] chart notes, the Commission rejects [MPIC's doctor's] opinion that the Appellant's complaints to his neck and shoulder were not due to the motor vehicle accident but due to jumping off a ladder at the beginning of July 2001.

The Appellant's position that he did not injure himself by jumping off a ladder is further corroborated by the medical report from [Appellant's doctor #2] dated June 20, 2002 wherein she indicated that she saw the Appellant on July 12, 2001, two days after [Appellant's chiropractor #1] saw the Appellant. The Appellant did not report to [Appellant's doctor #2] that approximately nine days before seeing her he jumped off a ladder and hurt himself. Rather he reported that he was injured in a motor vehicle accident. In her report of the Appellant's visit to her on July 12, 2001 [Appellant's doctor #2] stated:

“He was seen by me in the office on July 12, 2001 approximately 3 months after his accident. He was complaining of persistent pain in his right shoulder, since the time of the accident. Examination of his shoulder revealed full active range of motion, with no bony tenderness. There was tenderness over his right trapezius and suprascapular muscles.”

[Appellant's doctor #2's] report corroborates the Appellant's testimony that he did not advise [Appellant's chiropractor #1] that the pain to his right shoulder was due to the ladder incident,

but was due to events which occurred several months before he saw [Appellant's chiropractor #1].

The Commission notes that when the Appellant realized the shoulder pain was not going to resolve itself without medical intervention; he did seek attention from [Appellant's doctor #1], [Appellant's chiropractor #1] and [Appellant's doctor #2] and ultimately [Appellant's physiatrist] who referred him to [Appellant's neurosurgeon] (who performed surgery on his back). The Commission finds that the delay in seeking medical intervention on a timely basis by the Appellant was for other reasons as outlined herein and not because his injuries were not a result of the motor vehicle accident.

Disc Herniation:

[MPIC's doctor] concluded that the Appellant could not have sustained a disc herniation as a result of the motor vehicle accident because he did not make a timely complaint in respect of the motor vehicle accident. In his view, if the Appellant had suffered from a disc herniation, he would have immediately complained and he did not do so.

The Commission however, finds that [MPIC's doctor] erred in coming to this conclusion. The Commission notes that [Appellant's doctor #2] and [Appellant's doctor #1] initially examined him and noted the Appellant's complaints of pain to his shoulder and neck. As a result, the Appellant saw [Appellant's doctor #1] on September 14, 2001, December 16, 2001, January 16, 2002, March 13, 2002 and he noted the Appellant's complaints, not only of pain to his neck and shoulders but numbness down his right arm, including his 4th and 5th fingers and pain to his right shoulder. This was corroborated by the physiotherapist who provided a report to the case

manager and indicated that the Appellant experienced “pins and needles sensation was noted in his right fourth and fifth digit...”

[MPIC’s doctor’s] medical opinion that there was no causal connection between the Appellant’s disc herniation and the motor vehicle accident is contradicted by [Appellant’s doctor #1], [Appellant’s physiatrist] and [Appellant’s neurosurgeon].

[Appellant’s doctor #1], who is an experienced medical practitioner, was the Appellant’s personal physician before the motor vehicle accident and continued to treat him after the motor vehicle accident. In his testimony, [Appellant’s doctor #1] indicated that the Appellant could have developed a disc herniation as a result of a C8 and T1 radiculitis, not immediately after the motor vehicle accident but over a period of time. [Appellant’s doctor #1’s] testimony contradicted [MPIC’s doctor’s] testimony in that respect. Based on his personal examination and the history obtained from the Appellant, [Appellant’s doctor #1] was satisfied that there was a causal connection between the motor vehicle accident and the Appellant’s complaints.

[Appellant’s physiatrist], a physiatrist who has been practicing his specialty for approximately 44 years, saw the Appellant at [Appellant’s doctor #1’s] request on May 17, 2002 and on several occasions thereafter. He treated the Appellant with trigger injections. As a result of his personal examination, [Appellant’s physiatrist] concluded that the Appellant had a C8 and T1 radiculitis root compression resulting from disc herniation at C6-C7 and C7-C8.

[Appellant’s physiatrist] disagreed with [MPIC’s doctor’s] opinion as to the onset of the Appellant’s disc herniation. [Appellant’s physiatrist] was of the view that the onset did not necessarily have to occur immediately after the motor vehicle accident, but could develop over a

period of time. He testified that pain sensation is affected by many factors such as lifestyle, family and social issues. He also testified that epinephrine, released by shock of an incident, often dulls the effects of pain sensation. [Appellant's physiatrist] concluded that the Appellant had existing asymptomatic disc degeneration with osteophytes and that the motor vehicle accident of April 13, 2001 aggravated the pre-existing asymptomatic spondylosis and caused the disc herniation.

Based on [Appellant's physiatrist's] personal examination of the Appellant on several occasions and the personal history obtained from him, he concluded that there was a causal connection between the motor vehicle accident and the Appellant's disc herniation causing C8 and T1 radiculitis.

The Commission notes that the Internal Review Officer, in his decision of July 20, 2005, related that various medical practitioners advised him that over the years disc herniations are not initially symptomatic and can develop slowly over a period of time and would not be evident on plain film X-rays.

[Appellant's physiatrist] also disagreed with [MPIC's doctor's] opinion on the effects of whiplash injuries. Contrary to [MPIC's doctor's] opinion, [Appellant's physiatrist] was of the view that whiplash injuries could result in disc herniation.

[Appellant's physiatrist] referred the Appellant to [Appellant's neurosurgeon] who operated on the Appellant. [Appellant's neurosurgeon] is an experienced neurosurgeon who was satisfied, upon examination of the Appellant's medical history, that he did not suffer from any neck, back

or shoulder problems prior to the motor vehicle accident and concluded that the disc herniation was caused by the motor vehicle accident.

[Appellant's physiatrist], [Appellant's doctor #1] and [Appellant's neurosurgeon] all saw the Appellant personally on a number of occasions and were able to obtain information from the Appellant and assess his credibility. There is nothing in the reports from these three doctors which indicated that the Appellant exaggerated or misinformed them in respect of the motor vehicle accident and the injuries arising therefrom. The three doctors all concluded that the Appellant was a credible person and accepted the Appellant's complaints that his injuries were caused by the motor vehicle accident. The medical opinions of [Appellant's physiatrist], [Appellant's doctor #1] and [Appellant's neurosurgeon] corroborate the Appellant's testimony on the issue of causality.

On the other hand [MPIC's doctor] did not personally examine the Appellant and therefore did not have an opportunity of assessing his credibility.

In these circumstances, the Commission gives greater weight to the medical opinions of [Appellant's physiatrist], [Appellant's doctor #1] and [Appellant's neurosurgeon] on the issue of causality, than it does to the medical opinion of [MPIC's doctor].

Decision:

For the reasons outlined herein, the Commission has established that on a balance of probabilities that there is a causal connection between the motor vehicle accident and the Appellant's complaints of chronic pain to his neck and shoulder and his disc herniation. As a result, the Commission allows the Appellant's appeal and rescinds the Internal Review Officer's

decision of January 8, 2003 in respect of the right shoulder and neck and the Internal Review Officer's decision of July 20, 2005 in respect of the Appellant's disc herniation.

Dated at Winnipeg this 17th day of July, 2012.

MEL MYERS, Q.C.

ROBERT MALAZDREWICH

JEAN MOOR