

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-17-016**

PANEL: Pamela Reilly, Chairperson
Nikki Kagan
Linda Newton

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was represented by Jack Burke-Gaffney.

HEARING DATE: June 3, 2021

ISSUE(S): Were the Appellant's Income Replacement Indemnity (IRI) benefits correctly reduced?

RELEVANT SECTIONS: Sections 70(1), 110(1)(a) and 116(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

Background:

On July 11, 2016, the Appellant was a passenger when the driver of the vehicle lost control at highway speeds, resulting in the vehicle 'bouncing' between cement side guards, before stopping (the "MVA"). The Appellant was not wearing his seat belt as he was trying to sleep in the back seat. He was tossed from side to side with the motion of the vehicle.

The day after the MVA, the Appellant attended the hospital emergency because his left leg bruising had worsened to become a large painful hematoma that impeded his ability to walk. The treating physician diagnosed complex fluid collection in his left leg and discharged him the following day with a recommendation that he use crutches, mild compression and ice to treat the swelling. He was to follow up with his family MD in [text deleted].

Upon returning to [text deleted], the Appellant experienced ongoing pain in his left leg and later, his right knee, which prevented him from performing his work duties. MPIC paid IRI benefits, which were then reduced pursuant to a Percentage of Duties (“POD”) assessment that determined the Appellant’s level of function had improved enough to allow him to perform 62.5% of his duties. The Appellant disagreed with that assessment and decision, which he then appealed to the Commission.

Issue:

Were the Appellant’s IRI benefits correctly reduced?

Decision:

The panel finds that the Appellant has not established, on a balance of probabilities, that MPIC incorrectly reduced his IRI benefits. The panel confirms the IRD and dismisses the appeal.

Appellant testimony

The Appellant testified that he had worked since the age of [text deleted]. As a young man, he worked four part-time jobs to financially support his wife and four children before starting two [text deleted] businesses. He worked hard at managing and operating his two businesses to ensure that he would never need government assistance, before retiring after 35 years. At the time of the MVA he was [age]. He was [age] at the time of the hearing.

The Appellant said that he had no complaints about the rate that MPIC paid him while he recuperated from his MVA injury. However, he maintained that when his IRI was reduced, he was not yet able to return to work even at the reduced capacity determined by MPIC. He asked that the Commission reinstate his full IRI benefits from the time of

reduction, up to and including the time that he completed his rehabilitation; that is, between September 2, 2016 to February 26, 2017.

In response to panel questions, the Appellant confirmed that the accident occurred at 2:00 a.m. near [text deleted], as he and his brother (who was driving) were returning from a fishing trip. The tow-truck driver gave them a ride to [text deleted] to overnight in a hotel, after which their sister arrived and drove the Appellant to [text deleted]. According to the medical records, the Appellant attended the hospital emergency in [text deleted] on July 12th because of pain and swelling in his left leg. (The Appellant initially testified that he hurt his right leg and left knee, and that his right leg was his biggest concern. However, he later referred to his left leg, and affirmed this correction in cross-examination.)

With further prompting from the panel, the Appellant said that his wife arrived from [text deleted], and after two to three days they flew home to [text deleted]. He said his leg was so painful he couldn't walk. Specifically, his "left leg was completely numb" and he had "significant pain" in his right knee. Upon returning to [text deleted], he submitted a claim to MPIC and went to rehabilitation to treat his painful leg and knee. The Appellant started to use a cane but could not recall for which leg he needed support. He said he currently used a cane for age related instability.

The Appellant confirmed that his two [text deleted] businesses were [text deleted] and [text deleted]. He sold [text deleted] to a former employee, but at her request, he came out of retirement six months before the MVA, to run that business while she recuperated from a health issue. He said that after the MVA he did not return to [text deleted] because, during his rehabilitation, the new owner had recovered enough to resume the business.

Appellant cross-examination

In response to MPIC Counsel's question, the Appellant confirmed that a substantial portion of his [text deleted] management work duties was sedentary, for example, sitting during telephone calls with site managers and staff. Further, being 'the boss', meant he could take breaks as needed and generally work flexible hours.

MPIC Counsel reviewed the July 12, 2016 [text deleted] Health Services (“HS”) hospital emergency record, which did not document right knee complaints. The Appellant admitted that he did not recall having right leg pain while in the [hospital]. He clarified that his main concern was his left leg because he could not walk and the doctor could not detect a pulse.

Hospital staff monitored the Appellant overnight and the next morning detected a pulse in his left leg, at which point he was released. He thought that he was provided with crutches, which were recommended on his release. He could not recall if the doctor recommended a cane but the Appellant said he needed one, which may be why he started to use it. He thought that the cane probably increased his functional capacity otherwise he would not have continued to use it.

When questioned further about the HS emergency record that indicated the Appellant had a right knee brace, the Appellant explained that he suffered from drop foot, which impeded his ability to move his ankle up and down. He disagreed that he used a right knee brace. He used a right ankle brace to keep his right foot straight, which alleviated the drop foot problem. The Appellant agreed that his MPIC Application for Compensation made no reference to his right leg, but simply reported “left leg injuries – laceration to left lower leg. Left leg bruised.” He agreed that his left leg and later right knee pain improved over the course of 2016.

The Appellant agreed with MPIC Counsel’s suggestion that he visited his [text deleted] doctor when he had a specific complaint in order to obtain a diagnosis and treatment. His doctor did not necessarily, for example, test for function or range of motion (ROM). By contrast, MPIC sent the Appellant to occupational therapist (OT) [text deleted], for the specific purpose of assessing the Appellant’s level of function. She then compared his level of function with his job demands to estimate what percentage of duties he was able to perform. The Appellant agreed that [OT] “would give [him] a bit of testing” to see if he could move or lift his leg, or bend his knee. He agreed that his tolerance for sitting, was not an issue, and he could stand for 15 minutes with support.

The Appellant confirmed that [OT]’s September 11, 2016 POD assessment (the “September POD Assessment”) recorded his left leg pain as 2/10 on a 10 point scale,

but could not specifically recall the assessment. He disagreed with the statement in the December 21, 2016 report from [physiotherapy centre] that, during his previous nine weeks of physiotherapy (i.e., at [physiotherapy centre #2]), he did not receive any treatment for his left leg. The Appellant said that he had physiotherapy on both legs.

He agreed with the September POD Assessment that he was able to drive, but in response to the statement that he was able to walk 10-15 minutes without aid, he replied: "She only spent very little time at my house. I don't think she ever saw me or asked me if I could walk 15 minutes without a walking aid." He stated that the visits only lasted "15 minutes." In response to MPIC Counsel's question asking if he disputed that [OT] conducted the functional assessment tests, the Appellant reviewed page 4 of the September POD Assessment, and while he agreed with all of her written findings, he stated, "She was never in my place for 45 minutes" (as documented).

MPIC Counsel referred the Appellant to [OT]'s December 4, 2016 POD assessment in which she recorded that she discussed and explained her September POD Assessment with the Appellant. [OT] documented that, "[The Appellant], at time of assessment, noted that he was in agreement with each percentage." Counsel asked the Appellant if he agreed with this statement to which he replied, "I guess if it says I did, but I can't recall. It's been a long time. I'm sorry, I can't recall all of these things."

The Appellant's brother was now running the [text deleted] business. The Appellant agreed that he had resumed some work duties in the form of accompanying his brother during the drive to [text deleted] work sites. He said that but for the MVA he would "for sure" still be working at [text deleted] "for quite a bit longer." (The panel noted the comment in the September POD Assessment, which stated that the Appellant did not want to return to work at [text deleted], "but may end up assisting with tasks here and there.")

MPIC Counsel reviewed the Initial Therapy Report from the [physiotherapy centre #2] physiotherapist ("PT") dated October 25, 2016, which indicated, among other things, that; the Appellant's return to work would not adversely affect his condition; that he was not precluded from travelling to his workplace; that his condition did not prevent him

performing required tasks; and a return to work did not pose a safety or health risk to himself or his co-workers. The Appellant did not specifically dispute the comments, but did say that the PT was unaware that he required an ankle brace, therefore implying that the report lacked weight.

The Appellant further replied that he still felt unable to return to work as of December 2016 despite the nine weeks of physiotherapy. He said that it was only after he completed the additional therapy sessions at [physiotherapy centre], in February 2017, that he felt capable of trying a return to work. In general, the Appellant said that he disregarded the Percentage of Duty reports because they did not mean anything to him.

The Appellant explained as follows:

“All I knew is that I wasn’t able to go to work, not able to walk properly, so I disregarded it all. So, they didn’t mean anything to me...I guess, the only thing that’s important to me is, ‘can I walk or not.’”

Appellant closing submissions:

In rebuttal and closing submission, the Appellant emphasized that he appreciated the therapy he had received from [physiotherapy centre]. He never missed a session and received treatment for both legs (for example, exercise and acupuncture). He completed four weeks of therapy and was told by the therapy team that he required two additional weeks. To him, this meant he was not able to return to work.

MPIC closing submissions:

MPIC Counsel reminded the panel that the Appellant bears the onus of proving, on a balance of probabilities, that the MVA caused an injury to his right knee (which was one basis upon which the Appellant alleged he could not work), and that MPIC incorrectly reduced his IRI benefits. MPIC did not dispute the need for ongoing therapy by [physiotherapy centre]. However, an ongoing need for therapy does not preclude a partial resumption of duties.

Counsel noted the Appellant’s inconsistent statements, for example, apparently telling [OT] that he did not want to return to work at [text deleted] service, compared with his testimony in which he said he surely would have continued to work at [text deleted] for many years, but for his injuries.

Counsel submitted that MPIC reduced the Appellant's full IRI benefits based upon [OT]'s August 1, 2016 Percentage of Duties Assessment (the "August POD Assessment"), which concluded that the Appellant was able to perform an average of 62.5% of his pre-MVA work duties. Counsel submitted that the August POD Assessment appeared to give the Appellant the benefit of the doubt, in that [OT] accepted his subjective pain reports. Counsel pointed out that, although based upon the August Assessment, the IRI reduction did not take effect until September 2, 2016.

MPIC Counsel submitted that none of the POD Assessments were contradicted. In fact, [OT] specifically reviewed the findings in her September POD Assessment with the Appellant. Other than the amount of time [OT] recorded that she spent with him, the Appellant agreed with her assessed conclusions.

Counsel submitted that based upon the POD Assessments, which showed improvement in the Appellant's functioning, the IRI should probably have been reduced sooner. The medical evidence showed that the Appellant's left leg complaints resolved relatively quickly, while his right knee pain developed months later. Further, there is no medical evidence that proves the Appellant's right knee complaints were causally related to his MVA. Nonetheless, most of the Appellant's loss of function and therapy, dealt with his right leg.

Counsel referred to the MPIC medical Health Care Services ("HCS") consultant report in which the consultant, after reviewing the Appellant's file, concluded that "the evidence does not support a medically probable cause and effect relationship between the [MVA] and the documented right knee problems." The HCS consultant further concluded that the evidence did not support the Appellant's position that he was medically impaired and unable to perform his pre-MVA work duties. The only medical record in support of the Appellant's inability to return to work was a brief paragraph from his treating MD, dated December 6, 2016 which simply stated, as follows:

This gentleman has been medically unable to work since July 11 2016. He has been assessed today and remains unfit to return to work for an indefinite period of time. He continues to be unable to do the substantial duties of his job.

This letter did not diagnose a condition that was causally related to the MVA. MPIC Counsel submitted that the Appellant had not discharged his burden to prove his appeal, on a balance of probabilities, and therefore the Commission should dismiss his appeal.

Legislation:

The applicable sections of the MPIC Act and Regulations are as follows:

Definitions

70(1) In this Part,

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, . . .

Events that end entitlement to I.R.I.

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

- (a) Victim is able to hold the employment that he or she held at the time of the accident;

...

I.R.I. reduction if victim earns reduced income

116(1) Where a victim who is entitled to an income replacement indemnity holds employment from which the victim earns a gross income that is less than the gross income used by the corporation to compute his or her income replacement indemnity, the income replacement indemnity shall be reduced by 75% of the net income that the victim earns from the employment.

Substantive Issues:

Did MPIC correctly reduce the Appellant's IRI benefits?

Discussion:

Credibility and reliability

The Appellant testified in a straight forward manner. He did not embellish his testimony, although there may have been some exaggeration about the POD Assessments. He appeared to listen carefully and answer the questions that were put to him, to the best of his ability. His testimony was generally consistent. However, the panel did note some inconsistencies between the Appellant's testimony and the documents. The Appellant apologized for these inconsistencies and admitted that he could not recall details from

many years ago. This is understandable. MPIC Counsel noted the inconsistencies between the Appellant's recollection and the documentary evidence.

The panel found the Appellant credible. The panel understands that memory fades with time and details are difficult to recall. The Appellant admitted that he had not refreshed his memory by reviewing the indexed file, and he had never paid attention to the POD Assessments. The panel found, therefore, that some of the Appellant's testimony was unreliable, and so relied more on the documentary evidence as opposed to the Appellant's recollections.

Analysis and Findings

The panel believed that the Appellant is, and has been, a hard worker all of his life. He started and then managed his own [text deleted] businesses for 35 years, in what appeared to be a very 'hands-on' manner. He realized the importance of treating his employees well and ensured that their jobs were secure, once he retired. He readily came out of retirement at the request of his former employee, the new owner of [text deleted], to assist in the business until her health improved.

The Appellant's position was that since the MVA he had been unable to walk, at least without pain. He was unable to perform 100% of his management duties and felt that, until such time as he was, he should receive full IRI benefits. MPIC's position was that the POD Assessments showed that the Appellant was able to perform a certain percentage of duties, and therefore reduced the IRI benefits in accordance with the percentages established in the August POD Assessment.

The panel considered the medical records from Alberta Health Services ([hospital] emergency), which documented the Appellant's left leg hematoma. The Appellant admitted that when he went to the hospital emergency, his only concern involved his left leg. The Appellant also testified that he had significant pain in his right knee but this is not documented. All of the examinations, tests and imaging at this attendance related to his spine, and the left leg and knee. The collective imaging is diagnosed as follows:

Mild medial compartment and severe patellofemoral joint space narrowing with chondrocalcinosis and mineralization noted in the

suprapatellar recess. Findings may relate to underlying CPPD arthropathy. No acute vertebral fracture or traumatic malalignment.

Upon his return to [text deleted], the Appellant's MD recorded on the July 18, 2016 Primary Health Care Report, that the Appellant's MVA related complaints were "abrasion" to "left lower leg" with symptoms of "left knee/leg pain", leading to a Clinical Diagnosis of "contusion and hematoma left knee and lower leg." A handwritten side note records, "tender right medial knee [illegible]". However, the only "Physical Signs" recorded in the Primary Health Care report are "Limited Knee ROM left". Interestingly, there are no right knee complaints recorded in the MDs corresponding chart note of the same date.

The July 21, 2016 Application for Compensation form, signed by the Appellant, records his MVA injuries as, "left leg injury - laceration to left lower leg, left leg bruised". His MDs chart note, also dated July 21, 2016 records "Swelling and ecchymosis [i.e., bruise] right knee and lower leg slightly down still tense." The panel noted that, other than July 21, no previous chart note referenced 'right knee and lower leg swelling'.

The July 27, 2016 chart note reads in part, "The swelling and tenseness in the left knee and lower leg starting to dissipate somewhat. His elevation of the foot definitely improves matters... Swelling definitely stops at the knee joint." There is no reference on July 27, 2016 to any right knee complaints. The panel noted that the references in the July 21 chart note of swelling and bruising of the 'right' knee and lower leg, is strikingly similar wording to chart notes referencing the left knee. The panel considered the July 21, 2016 chart note to be an anomaly, which likely incorrectly recorded the 'right', rather than the 'left' knee and leg.

The chart note of August 17, 2016 records that the Appellant has "...Less swelling and tightness in his left thigh... Still some pitting edema left lower leg." There is no reference to right leg or knee pain. The Appellant's chart note of September 12, 2016 then records, "He's tender over the medial aspect of the right knee he says as a result of a motor vehicle accident in which he was involved..." His MD sent him for a right knee x-ray. The x-ray report reads in part, as follows:

...There appears to be very minimal narrowing of the medial femorotibial compartment likely due to early OA. No significant associated bony changes are seen. Meniscal chondrocalcinosis is noted

The medical evidence, based upon the imaging results from both Alberta and Manitoba, for both of the Appellant's knees, shows that he suffers from osteoarthritis (i.e., OA) and pseudo-gout (i.e., chondrocalcinosis, or CPPD). None of the medical opinions or records causally link these conditions to the Appellant's MVA.

The panel considered the POD Assessments of [OT]. The Appellant admitted that he could not recall the meeting in which [OT] reviewed her findings with him, but did not dispute that this occurred. The Appellant did not dispute her narrative assessments, except to dispute the amount of time spent. He testified that her visits were only 15 minutes and denied that any visit lasted 45 minutes.

As MPIC Counsel pointed out, [OT] is a registered occupational therapist who is governed and bound by her professional code of ethics. The panel finds it unlikely that [OT] spent no more than 15 minutes for each assessment, and it is more likely that the Appellant simply does not accurately recall how long she spent. The panel therefore found the POD Assessments reliable.

Finally, the panel considered the HCS opinion, which concluded, based upon a complete review of all information contained in the Appellant's file that the only medical condition caused by the MVA was his lower left leg contusion/hematoma, and the right knee problems are not causally related to the MVA.

The HCS consultant noted a number of the Appellant's pre-existing health conditions (for example, bilateral knee osteoarthritis and bilateral knee chondrocalcinosis – i.e. pseudo-gout) that might also adversely affect his overall health. Further, the evidence did not support the position that the MVA aggravated or enhanced these pre-existing health conditions.

The HCS consultant also opined that the Appellant did not suffer MVA related objective physical impairments that prevented him from performing his pre-MVA work duties, as

of the date of the August POD Assessment. The panel accepted these opinions and conclusions.

The panel finds that the Appellant's MVA caused his left leg hematoma which gradually resolved. The panel believed that the Appellant experienced pain when walking or climbing stairs, but finds that these symptoms did not prevent him from performing some of his managerial duties, which were mostly sedentary. While the Appellant may not have achieved a 100% return of function, the PIPP scheme provides benefits based upon the percentage of function and duties that may be performed. It is not an 'all or nothing' payment scheme and MPIC adjusts IRI benefits in accordance with the percentage of duties determined from assessments. In this case, the panel finds that MPIC did not err in relying upon the percentages found in the August POD Assessment and, in accordance with those percentages, correctly reduced the Appellant's IRI benefits.

The panel finds that the Appellant's right knee pain was not causally related to the MVA. The panel also finds, based upon the conclusion of the HCS consultant that the Appellant's pre-existing health conditions were not aggravated or enhanced by the MVA, and it is more likely that his pre-existing health conditions led to his persistent impairments after the August POD Assessment.

Disposition:

The panel finds that the Appellant has not proven, on a balance of probabilities, that MPIC incorrectly reduced his IRI benefits. The panel therefore upholds the Internal Review Decision of December 28, 2016 and dismisses the appeal.

Dated at Winnipeg this 5th day of August, 2021.

PAMELA REILLY

NIKKI KAGAN

LINDA NEWTON