Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-134

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Mr. Colon C. Settle, Q.C.** **Mr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Keith Addison;** **the Appellant, [text deleted], appeared on his own behalf**
HEARING DATE:	**July 10, 2000**
ISSUE:	**(i) Whether Appellant entitled to income "top-up";** **(ii) Whether physiotherapy treatments terminated prematurely;** **(iii) Whether Appellant entitled to a cervical pillow.**
RELEVANT SECTIONS:	**Sections 81 and 136 of the MPIC Act, and Section 5 of Manitoba Regulation 40/94**

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

Reasons For Decision

The Appellant, [text deleted], sustained injuries in a motor vehicle accident on July 17, 1997, when his vehicle was rear-ended. At the time of the accident, the Appellant was employed as a light parts delivery and pick up person with [text deleted]. His attending physician, [text deleted], documented neck stiffness and tender lateral neck muscles, with the Appellant at less than full function due to the pain in his neck. The injury was classified as a Grade II Whiplash Associated Disorder, with diagnosis of cervical strain.

Initial recommended treatment included limiting work to six hours per day, stretching exercises, along with a prescription for a muscle relaxant and referral for physiotherapy.

The Appellant continued to attend [Appellant's doctor #1] monthly throughout 1997, due to the continuing soreness in his neck. [Appellant's doctor #1] then referred him to see [Appellant's physiatrist] at [text deleted] for an assessment as to whether trigger point injections would be of any benefit. [The Appellant] was seen by [Appellant's physiatrist] on February 2, 1998, and was diagnosed as suffering from myofascial pain, WAD type II. Needling of his neck was performed by [Appellant's physiatrist] on February 23, 1998 which provided him some symptomatic improvement. He continued to attend both [Appellant's physiatrist] and [Appellant's doctor #1] throughout 1998 for follow up care and monitoring of his progress.

At the hearing of his appeal, [the Appellant] advanced three separate issues for which he believed MPIC had incorrectly denied him benefits. The first issue involved the denial of a cervical pillow; the second matter involved ongoing physiotherapy and the last point dealt with income replacement indemnity.

Cervical Pillow

The Appellant claims that he required the use of a cervical pillow for neck support while sleeping. The use of a cervical pillow was authorized by his physiatrist, [text deleted], in a prescription dated February 2, 1998 and again by his treating physician, [text deleted], in a prescription dated April 30, 1999. MPIC denied coverage for the cervical pillow as it claimed that it was not a medical necessity. The Appellant testified that he subsequently obtained a cervical pillow at the expense of MPIC, following another motor vehicle

accident, when it was prescribed by his chiropractor. Although the issue would now appear to be moot, this Commission finds that MPIC should not have denied coverage for the cervical pillow as the Appellant was entitled to rely in good faith upon the recommendations of two of his treating physicians.

Ongoing Physiotherapy Treatments

[The Appellant] started attending physiotherapy treatments in August of 1997. MPIC terminated coverage for physiotherapy treatments as of March 17, 1998, as there were no findings of continuing improvement with the physiotherapy treatments. [The Appellant] testified that he continued to attend for physiotherapy treatments for approximately two months after MPIC discontinued coverage, as he felt that there was some improvement to his symptoms with the treatment.

In his report of September 17, 1998, [Appellant's physiatrist], summarizes the physiotherapy treatment that the Appellant had received as follows:

> He has been treated with physiotherapy, 3 times per week since August 1997 with no significant benefit. They have provided him with heat, TENS, massage, traction, and stretching exercises. Heat does provide some very temporary relief at best.

Further in his report, [Appellant's physiatrist] comments on his examination of the Appellant of February 23, 1998. He states that, "I advised him at that time that attendance at physiotherapy would be optional as he should be able to perform most exercises at home."

Based on the objective medical findings as related by [the Appellant's] treating physician, it would appear that the physiotherapy treatments after February 23, 1998 were elective,

and therefore MPIC's decision to discontinue coverage for physiotherapy treatment as of March 17, 1998 is confirmed.

Income Replacement Indemnity Benefits

At the time of the accident, [the Appellant] was working 6 hours per day, 30 hours per week as a delivery driver. He was in receipt of partial wage loss benefits from the Workers Compensation Board of Manitoba ("WCB") due to a workplace injury sustained to his lower back. Just prior to the accident, he was gradually increasing the hours he worked weekly as he had been given clearance by his physician, [text deleted], to work 40 hours per week. WCB's position was also that at the time of the motor vehicle accident, [the Appellant] was capable of working full-time (40 hours/week). [The Appellant] continued to work 6 hours per day after the motor vehicle accident and is claiming that he was unable to increase his hours to 8 hours per day due to the injuries sustained in the motor vehicle accident of July 17, 1997.

Initially, there appears to have been some issue as to the cause of the Appellant's inability to return to work on a full-time basis at 40 hours per week. MPIC's Internal Review Officer, in her decision letter of August 5, 1999, adopts the Adjuster's reasoning in this matter as it related to the cause of [the Appellant's] inability to return to work full-time (i.e. 8 hours/day). She states that, "[Appellant's physiatrist] does say that there is some need for restriction of work to six hours a day, however, he also states that this restriction is not due to the motor vehicle accident in question." However, it is clear that [Appellant's physiatrist's] conclusion that the inability to return to work eight hours per day was due to a previous work related injury effecting [the Appellant's] back, was based upon incorrect information he had been given by the Adjuster. In his report to MPIC dated March 15,

1999, [Appellant's physiatrist] states that, "Based on you telling me that he was unable to increase past 6 hours due to previous work compensation injury, …my only conclusion was that he was capable of returning to work at his pre-MVA level." [Appellant's physiatrist's] narrative report indicates that there were no significant physical findings prohibiting [the Appellant] from his pre-accident occupation as of May 7, 1998.

Counsel for MPIC submitted that it was MPIC's policy to "top-up" employment wages of a claimant if they were returning to work on a gradual basis, such that MPIC would pay benefits equal to the difference between the actual hours worked (by the claimant post-accident) and the full-time hours that the claimant was working before the accident. He argued that since [the Appellant] was working on a full-time basis at 30 hours per week before the accident and continued at the same level after the accident, there was no "top-up" to be paid. According to this policy, a "top-up" would only be paid to [the Appellant] if he had been working 8 hours per day prior to the accident and as a result of the accident had to decrease his hours.

The Commission finds that the strict application of this "top-up" policy to the case at hand leads to an unfair result for the Appellant. There was strong, uncontradicted evidence that the Appellant was capable of working on a full-time basis, 8 hours per day, just prior to the accident. Had it not been for the accident, we find that the Appellant would indeed have started working 40 hours per week as a parts delivery driver. Therefore, we find that [the Appellant] should receive a "top-up" benefit from MPIC for the two hours per day which he was unable to work due to the motor vehicle accident, from July 25, 1997 to May 7, 1998, when [Appellant's physiatrist] stated that there were no significant physical findings prohibiting [the Appellant] from his pre-accident occupation.

Dated at Winnipeg this 4th day of August, 2000.

YVONNE TAVARES

COLON C. SETTLE, Q.C.

LES F. COX