



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-48

PANEL: Ms Laura Diamond, Chairperson
Ms Mary Lynn Brooks
Ms Deborah Stewart

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

HEARING DATE: October 3, 2005

ISSUE(S):

1. Entitlement to funding for retraining
2. Entitlement to Income Replacement Indemnity benefits benefits beyond September 29, 2002
3. Entitlement to coverage for medical expenses beyond September 29, 2002

RELEVANT SECTIONS: Sections 81(1), 110(1)(a) and 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) 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], was injured in a motor vehicle accident on October 20, 2000. At the time of the accident, the Appellant was off work due to soft tissue injuries to her neck and shoulders, which she had sustained at her employment as a Health Care Aide, but was almost ready to return to work without restrictions.

Following the accident, the Appellant complained of migraine headaches, pain to the back of the neck and pain in her wrists. She was treated by her chiropractor, [text deleted], and was in receipt of Income Replacement Indemnity ('IRI') benefits from MPIC following recovery from her work related injury, on November 14, 2000.

In November of 2000, the Appellant's main complaint was severe persistent low back pain. [Appellant's orthopedic surgeon #1], [text deleted], examined her on December 22, 2000. He diagnosed:

- a) a musculoligamentous acceleration/extension strain of the lumbosacral spine;
- b) a strain of the left knee joint;
- c) a strain of the left wrist.

[Appellant's orthopedic surgeon #1] noted:

4. & 5. Full recovery from these injuries could be anticipated in a period from six to eight weeks to four months maximum, and return to work depending on job requirements.

I have discussed return to work with this patient and she has agreed with a provisional return to light duties full time from mid-January 2001. Restrictions should be in position for six weeks.

These include no single lift of a resident from bed to chair or chair to standing.

No repetitive stooping and lifting of weights exceeding 10 kg.

The Appellant continued with chiropractic care and, in January, 2001, began a graduated return to work program. The Appellant worked, with restrictions, and continued to increase her work hours. She continued to report pain in her mid-back and was attending for chiropractic treatment, sometimes twice per day.

The Appellant was experiencing difficulties with her return to work program, so remained off work for an assessment at the [rehab clinic]. In April 2001, she began a multi-disciplinary rehabilitation and work hardening program at the [rehab clinic], involving approximately fifty (50) visits between April and December 2001.

Following a Functional Capacity Evaluation, she began a second graduated return to work program in August 2001 which continued until November 2001, at which time the Appellant was unable to continue due to low back pain.

The Appellant moved to [text deleted] in December of 2001, and was involved in a second accident, in [text deleted], on May 17, 2002.

She began attending for treatment with [text deleted], [Appellant's orthopedic surgeon #2], [text deleted] in October 2002. Initially, [Appellant's orthopedic surgeon #2] diagnosed degenerative disc disease. Following a bone scan, MRI, EMG/NC study and CT scan, the Appellant was found to have a "normal distribution of activity" and "no abnormal uptake". A small central disc protrusion at L2-3 with mild broad based disc bulges at L3-4 and L4-5, and a broad based central disc protrusion at L5-S1 were detected. The EMG/NC study and CT scan showed normal lumbar spine with normal disc spaces at all levels "without significant disc bulge, focal protrusion or central or foraminal stenosis".

However, on October 2, 2002, [Appellant's orthopedic surgeon #2], commenting on his review of the Appellant's MRI and CT scan investigations, opined that the Appellant suffered from facet joint syndrome of the lumbar spine. He also recommended a rheumatology consultation.

[Appellant's orthopedic surgeon #2] performed a facet joint injection with fluoroscopy on November 8, 2002. He noted that the Appellant had little tolerance for the injection procedure and reported minimal improvement in her pain. However, in a return visit to his office on January 15, 2003, he reported that according to the patient and her husband, the Appellant had an excellent response to the previous injection. He recommended that a repeat injection be performed.

IRI and Medical Expenses

On September 19, 2002, the Appellant's case manager determined that as of September 29, 2002 the Appellant was able to hold the employment that she had at the time of the accident. The Appellant's entitlement to IRI benefits and coverage for medical expenses was terminated effective September 29, 2002.

The Appellant sought an Internal Review of this decision. On December 31, 2002, an Internal Review Officer for MPIC reviewed these two issues. He reviewed a report from [text deleted], [Appellant's physiatrist], which found that although the first accident had aggravated the Appellant's prior work related injuries, the "Findings were subjective primarily. There were no objective findings".

The Internal Review Officer also relied upon a report by [rehab clinic's doctor] (who had treated the Appellant at the [rehab clinic]) dated March 6, 2002, regarding her participation in the [rehab clinic] program. [Rehab clinic's doctor] opined that as of December 3, 2001, there was no objective evidence of a medical condition, attributable to the first accident, which would have impaired the Appellant's ability to return to her pre-accident employment.

The Internal Review Officer noted that as the CT scan performed on February 5, 2002 showed no abnormalities, any abnormalities which showed up on the MRI in August 2002 did not have a causal relationship to the first accident. He concluded that the opinions of [Appellant's physiatrist] and [rehab clinic's doctor] should be accepted, and that the Appellant was not prevented, by accident related injuries, from returning to her pre-accident employment by September 29, 2002.

The Internal Review Officer also found that MPIC had paid for one hundred and seventy (170) chiropractic treatments in the fourteen (14) months immediately following the accident, without an appreciable degree of improvement, and that further chiropractic treatment was not medically required as a result of the accident.

Job Retraining

The Appellant also sought job retraining benefits, taking the position that, as a result of the injuries sustained in the accident, she was unable to perform the duties of her pre-accident profession as a nursing assistant.

The Appellant's case manager wrote to her on June 27, 2003. The case manager noted that the medical information on file indicated that there was no objective evidence of a medical condition which would impair her ability to return to her pre-accident employment, and that MPIC was no longer responsible for any ongoing disability.

The Appellant also sought an Internal Review of this decision. On October 9, 2003, an Internal Review Officer for MPIC upheld the case manager's decision noting:

In light of my conclusions regarding your ongoing entitlement to IRI, however, it is highly unlikely that I would have concluded that you were entitled to PIPP funding for retraining even if I had had the jurisdiction to deal with the matter.

There has been no new information – medical or other – provided to MPI since I rendered my decision dated December 31, 2002.

My views with respect to your entitlement (sic) PIPP funding for retraining which were expressed in my February 11, 2003 letter have not changed.

I am therefore confirming the decision of the case manager dated June 27, 2003 at this time.

It is from these decisions of the Internal Review Officer which the Appellant has now appealed.

Submissions

Appellant's Submission

The Appellant submitted that the physicians she saw early in her treatment misdiagnosed her condition. As the Appellant's file clearly shows that the correct diagnosis was facet joint syndrome, the medical opinions of the physicians, who opined that the Appellant was recovered from the injuries sustained in the accident, were in error.

It was submitted that the Appellant had not recovered from the accident by March 2002 when [rehab clinic's doctor] supported the notion that the Appellant could return to work. Indeed the Appellant had not recovered and still suffered unbearable pain in this period, continuing to see a chiropractor in (text deleted) from December 2001 to April 2002.

Although [Appellant's physiatrist], in [text deleted], had suggested that the Appellant needed further screening tests, MPIC's decision to discontinue the Appellant's IRI benefits failed to consider all of the facts.

The Appellant submitted that she did not receive relief from her pain until [Appellant's orthopedic surgeon #2] diagnosed facet joint syndrome and treated her with facet joint injections. The Appellant had all the symptoms of facet joint syndrome following the accident, but it was missed by her caregivers. Although she suffered pain following the car accident in [text deleted], this pain had the same character as the pain she already had and was simply a continuation of the pain in her lower back that had not been relieved since the motor vehicle accident of October 2000.

It was submitted that the Appellant did not have any major problems with her back prior to the accident in 2000, and then did not have any relief from her pain until after the facet joint injections. Accordingly, the Appellant submits that MPIC should be responsible for providing IRI compensation and treatment benefits until she regained capacity to work which, at the earliest, was at the time of the post-injection follow-up report by [Appellant's orthopedic surgeon #2] on January 15, 2003. Except for the effects of the accident, she was willing and able to work, even in the (text deleted), and should have been entitled to IRI for this period.

On the issue of retraining, the Appellant noted that due to a subsequent diagnosis of cancer, the Appellant had a large piece of bone in her left tibia removed and a full knee replacement. As such, it is not clear whether the Appellant would ever be able to work as a nurse's aide. However, it was noted that the Appellant had requested retraining before the cancer was diagnosed, due to the effects of her facet syndrome.

Submission of MPIC

Counsel for MPIC relied upon the following points to support the Internal Review Officer's decisions to deny further benefits.

- The Appellant had a history of back injuries, including extensive chiropractic treatment, right up until the motor vehicle accident.
- The motor vehicle accident was of a mild nature. It involved a rear end collision with damages of approximately \$300, and the Appellant was seatbelted.
- Although [Appellant's orthopedic surgeon #2] diagnosed facet joint syndrome in his reports, he failed to make any analysis regarding the causation of the Appellant's symptoms in this regard.
- The Appellant showed pain focused behaviour throughout her treatment and there was evidence of psychological stressors contributing to the delay in her recovery. Further, a Functional Capacity Evaluation performed suggested that the Appellant was self-limiting. [text deleted], MPIC's chiropractic consultant to its Health Care Services Team, analyzed the Appellant's complaints and videotapes of her activities and concluded that the tapes demonstrated that she had abilities beyond her stated capacities.
- The Appellant's caregivers could find no objective findings. They were all supportive of a gradual return to work, leading to a full return to work with no specified restrictions.
- Radiological investigations (for example, an x-ray dated January 22, 2001) disclosed no objective findings.
- Both [rehab clinic's doctor] and [Appellant's physiatrist] expressed difficulty in identifying any objective findings. [Rehab clinic's doctor] concluded, in a report dated March 6, 2002 that

It is my opinion that it is not medically probable for [the Appellant] to still be experiencing low back symptoms as a result of the incident in question

considering the circumstances surrounding the incident as well as the limited examination findings noted during her various assessments.

Counsel for MPIC submitted that the evidence of the Appellant's caregivers was supportive of the decision to terminate her benefits. There was no evidence to the contrary, other than the Appellant's subjective belief that her symptoms were caused by the motor vehicle accident. Looking at the totality of the medical evidence, the Appellant had not established, on a balance of probabilities, that the decision of the Internal Review Officer was wrong.

Discussion

The onus is on the Appellant to show, on a balance of probabilities, that she required further medical treatment because of the accident. The relevant sections of the MPIC Act and Regulations are as follows:

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

Manitoba Regulation 40/94:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

Entitlement to IRI ends when a claimant is able to hold the employment that she held at the time of the accident.

Events that end entitlement to I.R.I.

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

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

The onus is also on the Appellant to show that she was unable to continue full time employment as a result of the accident.

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;

(b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;

(c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

A claimant's entitlement to benefits regarding retraining for new employment only arises where the claimant is unable because of the accident to hold the employment that he or she held at the time of the accident.

The panel has reviewed the medical evidence on the file, the testimony of the Appellant, and the submissions made at the hearing by the Appellant and counsel for MPIC.

The panel notes that the evidence of [Appellant's orthopedic surgeon #1] [text deleted], who cared for the Appellant, supported the Appellant's involvement in a return to work program. He stated on May 7, 2001:

I had a frank discussion with your patient. I feel I am unable to help her. I am not sure why she has not recovered from a soft tissue strain of the neck and lower back in August 2000; I am not sure if she continues to attend for chiropractic treatments, and as there has

been no change in her symptomology, I am not inclined to order any specific investigations such as CT or MRI scan examinations.

[MPIC's doctor] conducted a thorough review of the Appellant's file on June 15, 2005. After reviewing and analyzing all of the medical documentation, [MPIC's doctor] concluded:

Motor vehicle collision-generated pathology that would have prevented the claimant from returning to previous employment was not uncovered, despite extensive assessment and investigation; based on the documentation reviewed. Substantial functional overlay, notably persistence with focusing on disability, and placement of self-imposed barriers to progressing to an uneventful return to pre-existing functional status, characterizes the documentation reviewed. Decisions to end IRI benefits, and coverage for medical expenses, as of September 29, 2002, appear appropriate based on documentation review. By extension, the decision not to support the claimant with retraining is appropriate, given that a medical basis to support retraining is not evident, and that issues involving motivation and self-limiting behavior do not justify vocational retraining.

When the Appellant sought treatment from an orthopaedic surgeon in [text deleted], [Appellant's orthopedic surgeon #2], she was diagnosed with facet joint syndrome. However, [Appellant's orthopedic surgeon #2] did not see her until October 2, 2002, almost two years after the motor vehicle accident in [text deleted]. As well, the Appellant had also been injured in a subsequent motor vehicle accident, in [text deleted], on May 17, 2002, prior to her examination by [Appellant's orthopedic surgeon #2].

[Appellant's orthopedic surgeon #2] provided reports on October 2, 2002, post operatively on November 8, 2002 and on January 15, 2003.

Although his reports make note of the Appellant's two motor vehicle accidents and a history of lifting-related injuries in the past, he does not provide an analysis as to the cause of the patient's facet joint syndrome. His reports provide no analysis as to which, if any, of the Appellant's

motor vehicle accidents caused the Appellant's symptoms, or what indeed were the causes or possible causes of her facet joint syndrome.

As [Appellant's orthopedic surgeon #2] was the only one of the Appellant's caregivers who diagnosed and referred to the Appellant's symptoms as facet joint syndrome, there is, accordingly, a lack of medical evidence to support the Appellant's position that her facet joint syndrome symptoms were caused by the motor vehicle accident in Canada.

As a result of this lack of medical evidence, the panel finds that the Appellant has failed to meet the onus upon her to show, on the balance of probabilities, that the motor vehicle accident of October 2000 was the cause of her continuing symptoms and that she should be entitled to further PIPP benefits as a result.

As noted above, the onus is on the Appellant to show, on a balance of probabilities, that her continuing symptoms were caused by and are a result of the motor vehicle accident of October 20, 2000. The Commission has reviewed all of the medical and other documentation presented by the Appellant and counsel for MPIC and is of the view that the Appellant has failed to establish, on a balance of probabilities, that her continuing symptoms were caused by the motor vehicle accident of October 20, 2000. Accordingly, the Commission finds that she is not entitled to IRI benefits or medical coverage beyond September 29, 2002, or to funding for retraining. Accordingly, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decisions of MPIC's Internal Review Officer bearing dates December 31, 2002 and October 9, 2003.

Dated at Winnipeg this 31st day of October, 2005.

LAURA DIAMOND

MARY LYNN BROOKS

DEBORAH STEWART