

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-133

PANEL: Ms Laura Diamond, Chairperson
Ms Diane Beresford
Mr. Paul Johnston

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

HEARING DATE: March 13, 2007

ISSUE(S):

1. Whether Appellant's current complaints are causally related to the motor vehicle accident entitling him to Personal Injury Protection Plan benefits;
2. Entitlement to Personal Care Assistance benefits in August 2002 and after left hand surgery;
3. Entitlement to reimbursement for podiatry care;

RELEVANT SECTIONS: Section 70(1) of *The Manitoba Public Insurance Corporation Act* (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], was struck by a motor vehicle, while jogging on April 20, 2002.

As a result of this incident, the Appellant was in receipt of certain Personal Injury Protection Plan ('PIPP') benefits under the MPIC Act, including massage therapy and physiotherapy.

However, MPIC took the position that the Appellant did not qualify for further benefits because the evidence did not support a connection between the Appellant's symptoms and the motor vehicle accident, and because the MPIC Act did not provide for such benefits.

The Appellant had a history of previous injuries and complaints prior to the motor vehicle accident, including a "slip and fall" accident at a [text deleted] store on December 3, 2001.

On August 20, 2002 the Appellant's case manager determined that the Appellant did not qualify for personal care assistance benefits. On August 28, 2002 the case manager determined that the Appellant was not entitled to reimbursement of expenses for podiatry care.

These decisions were reviewed by an Internal Review Officer for MPIC on November 5, 2002. The Internal Review Officer upheld the case manager's decision which denied further personal care assistance benefits. The Internal Review Officer found that the Appellant did not qualify for personal care assistance benefits on the basis of the grids prepared by the occupational therapists, and that the evidence did not support a connection between the Appellant's requirement for personal care assistance and the motor vehicle accident.

As well, the Internal Review Officer upheld the decision of the case manager in regard to podiatric care, as podiatric care is not "medical or paramedical care" within the meaning of Section 5 of Manitoba Regulation 40/94 to the MPIC Act. The Internal Review Officer also found that an assessment of all the medical evidence pertaining to the Appellant's claim concluded that the symptoms he complained of predated the motor vehicle collision and were not caused by the collision. Thus, the Appellant was not entitled, under the MPIC Act, to any of the benefits he sought.

On November 1, 2002 the Appellant's case manager determined that the Appellant was not entitled to any further PIPP benefits (such as prescriptions, acupuncture, whirlpool therapy, travel expenses, massage therapy, physiotherapy etc), as no causal relationship could be made between his current symptomology at that time and the motor vehicle accident of April 20, 2002.

The case manager also concluded that there was no evidence that the Appellant's left hand had been injured in the car accident and that he is not entitled to any PIPP benefits arising out of symptoms involving his left hand.

An Internal Review Officer for MPIC confirmed this determination, in an Internal Review decision dated December 3, 2003. The Internal Review Officer reviewed the evidence surrounding the motor vehicle collision as well as the medical evidence and concluded that any injuries or symptoms which the Appellant might continue to have were not in any way related to the incident of April 20, 2002.

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

Background

Evidence at the hearing and on the file showed that the Appellant was injured in a "slip and fall accident" at a [text deleted] store on December 3, 2001. Falling on his left hip, the Appellant sustained injury to his left shoulder and left leg. Medical examination following this incident also discovered that the Appellant suffered from osteoarthritis. The Appellant underwent treatment with his family practitioner, [text deleted], as well as massage therapy and physiotherapy. He was also seen by a neurologist, [text deleted], who concluded that he could not find any neurological defect or evidence of an organic neurological basis for the Appellant's

symptoms, [Appellant's neurologist] ordered tests for a possible nerve root lesion or a carpal tunnel syndrome in his left hand.

Although the Appellant continued to see [Appellant's doctor #1] in regard to his injuries as late as April 4, 2002, about two (2) weeks prior to the accident, he was able to resume jogging. On April 20, 2002 he was jogging across a road entering onto [text deleted], when a vehicle rolled through a stop sign and the bumper of the car hit the claimant as he was jogging in front of the vehicle.

A witness to the incident stated that the claimant was not in contact with the vehicle, but the Appellant stated that the vehicle hit him on the left hip and left leg, and that his left hand made contact with the vehicle.

Later that day, the Appellant attended at [hospital] Emergency Department for treatment in regard to the motor vehicle accident. He was also treated by his family doctor and received treatment from a massage therapist and physiotherapist.

On October 30, 2002, the Appellant underwent surgery to his left wrist. The surgeon, [text deleted], indicated, in a report dated December 29, 2004 that, as a result of "demonstrated instability due to tearing of the pisitriquetral ligaments resulting in a chondromalacia of the articular surface of the pisiform", the Appellant's left pisiform bone was excised with resulting good pain relief and no further functional impairment of his hand.

The Appellant sought benefits from MPIC for personal care assistance and podiatry care as a result of the motor vehicle accident and the surgery to his left hand. He also sought further

treatment benefits. However, MPIC has taken the position that any further symptoms or injuries suffered by the Appellant, including his left hand condition, were not a result of the motor vehicle accident, but rather, are a result of pre-existing unrelated conditions.

Evidence and Submissions for the Appellant

The Appellant testified at the hearing into his appeal. Oral testimony was also given by his primary care physician, [text deleted].

The Appellant testified that he had an accident in [text deleted] in December of 2001. He noted that it took him some time to recover and a few months until he felt well. He underwent physiotherapy and, around the second week of April, he started walking. He experienced some pain at the beginning but continued, and within a couple of weeks began jogging. He stated that he started jogging about two (2) weeks before the accident and jogged seven (7) days a week, for approximately ten (10) kilometers each day.

He described the incident which occurred on April 20, 2002. He indicated that while he was jogging, a car failed to stop at a stop sign and struck him between the knee and his quadricep area. He limped away and went home. His wife then took him to the [hospital] Emergency. He testified that he was in terrible pain and could not walk. He was on crutches, did not go to work, was looked after by his wife, and could not sleep. He was also prescribed morphine. He testified that he was in bad shape for months and months, lost weight and could not eat properly. He saw his family doctor, [text deleted], who gave him some anti-inflammatory medication which did not help.

He testified that initially the pain in his leg was so great that he did not pay any attention to the pain in his left hand. He indicated that his hand had made contact with the motor vehicle. Sometime later, he mentioned to [Appellant's doctor #1] that he was having pain in his little finger, which was very sore. An associate of [Appellant's doctor #1], [Appellant's doctor #2], took x-rays and referred him to [Appellant's surgeon], who operated on his hand on October 30, 2002.

The Appellant testified that after the surgery, his hand felt better. However, he continued to have problems with his leg. When MPIC denied him further treatment, he went to see [Appellant's physiatrist], and pursued further treatment with physiotherapy, acupuncture and massage therapy. He also did stretching exercises.

Counsel for MPIC referred the Appellant to reports from an accident reconstruction specialist which indicated that, although he had earlier reported that the motor vehicle hit him on his left hip, the motor vehicle had actually hit him lower in the leg. At the hearing, the Appellant maintained that he had never claimed to have been hit on his hip, but rather, took the position that he had always claimed to have been hit lower, near the knee area, but that the impact traveled upward into his hip.

When asked by counsel for MPIC whether (as indicated by the accident reconstruction report, following interviews with the witness) the Appellant had actually merely placed his hand on the hood of the vehicle prior to contact with the vehicle, the Appellant indicated that the witness was not correct, and that his left wrist was hit by the car. He did not recall whether he indicated to [Appellant's doctor #2], [Appellant's neurologist], [Appellant's physiatrist], or other caregivers that he had weakness and difficulties with his left hand prior to the motor vehicle accident.

[Appellant's doctor #1] gave evidence regarding the Appellant's slip and fall in December 2001 and his subsequent treatment and recovery. He indicated that in reviewing the Appellant's medical records, it was apparent the Appellant had been having difficulties with his left side both prior to and after that fall of December 2001.

However, he indicated that following recovery from the accident at [text deleted], the Appellant was able to begin jogging again.

When [Appellant's doctor #1] saw the Appellant following the motor vehicle accident, the Appellant was limping and complaining of pain in his left hip and the whole of his thigh on the left side. He had pain in his left groin and left hand as well. He described the treatment he recommended for the Appellant's symptoms and his surgery on October 30, 2002 for his left hand.

Upon cross-examination he indicated that, even prior to the Appellant's fall at [text deleted], the Appellant was having possible neck and disc problems. His medical records indicate that such difficulties with the cervical spine dated back to 1994. The Appellant's medical records show that he had suffered from some discogenic back pain prior to both the [text deleted] accident and the motor vehicle accident. [Appellant's doctor #1] indicated this was likely due to osteoarthritic changes. However, his medical records do not show complaints regarding pain in his left fingers prior to the motor vehicle accident.

He indicated that it was difficult to determine how much of the Appellant's symptoms were due to degenerative changes and what was a result of the [text deleted] accident and/or the motor vehicle accident.

The Appellant submitted that the evidence showed that the symptoms in his leg and his hand were all caused by the motor vehicle accident of April 20, 2002. Prior to the motor vehicle accident he was recovered from earlier difficulties and had resumed jogging. He had no problems and no pain. MPIC had failed to provide him with treatments he required to put him back into the physical state he was in prior to the motor vehicle accident and had failed to provide him with the assistance he required during recovery.

Submission by MPIC

Counsel for MPIC took the position that the symptoms complained of by the Appellant in this appeal were present prior to the motor vehicle accident, and that the incident on April 20, 2002 did not cause or aggravate any of these symptoms.

Counsel relied upon an Inter-departmental Memorandum dated February 19, 2007 from [MPIC's doctor #1] and [MPIC's doctor #2] of MPIC's Health Care Services Team. This Memorandum reviewed the Appellant's pre-accident status, including his slip and fall accident on December 3, 2001. It states:

Reviewer Comment

In summary of the claimant's pre-accident status: As seen on x-ray, the claimant was experiencing osteoarthritic changes of his cervical spine prior to the slip and fall accident he sustained on December 3, 2001 suggesting ongoing chiropractic degenerative changes in his cervical spine at the time. It is also probable that his neurological complaints such as paresthesia into his left arm were present before the accident. Based on massage and physiotherapy records between December 10, 2001 and January 3, 2002, clinical documentation confirms significant restrictions in range of motion in both upper and

lower limbs as well as pain in his cervical spine, left shoulder, chest, temporal mandibular joints, or his left hip.

The Memorandum also reviewed descriptions of the accident, the Appellant's physiotherapy and athletic therapy, his examination and treatment by [text deleted], [Appellant's neurologist], and by [Appellant's doctor #1] and [Appellant's doctor #2]. X-rays taken in August of 2002 were also reviewed. [MPIC's doctor #1] and [MPIC's doctor #2] stated:

Reviewer Comment

It is very possible that the claimant sustained some damage to his left hip prior to his slip and fall accident on December 3, 2001, considering that his primary physician, [Appellant's doctor #1], has documented left hip pain since October 13, 2000. . .

Also:

Reviewer Comment

Cervical spondylosis is osteoarthritis of the cervical spine and is known to be a chronic condition that presents over years demonstrating that these x-ray findings were probably not the result of an acute process. It is also possible that this cervical osteoarthritis of his cervical spine may have been impinging a cervical nerve root that contributed to the claimant's neuropathic complaints in his left arm.

. . . There was associated uncovertebral osteoarthritis (which is osteoarthritis in the small synovial joints between adjacent l

. . . There was associated uncovertebral osteoarthritis . . . This second x-ray demonstrates that there was no probable causal relationship between the motor vehicle accident in question and the claimant's cervical vertebral pathology.

The Memorandum also reviewed various accounts of the motor vehicle accident, including the Appellant's version and statements obtained from the witness:

Reviewer Comment

It is important to note that the witness at the scene of the accident on April 20, 2002, did not observe any contact between the claimant and the vehicle. This evidence reinforces the previous medical documentation and clinical objective findings that all complaints by the claimant are not probably or causally related to this accident but instead related to prior injuries or natural degenerative processes. The osteoarthritic degenerative changes seen in his cervical spine x-rays taken December 6, 2001 clearly demonstrated a chronic process taking place. . .

The Memorandum also recognizes inconsistencies with the primary physician's documentation considering the claimant's functional abilities just prior to the motor vehicle accident in question:

On March 20, 2002 the patient was seen by [Appellant's neurologist] in neurology. On March 25, 2002 the patient had "pain in the left hip to his left leg, left shoulder pain radiating to his elbow, arm and head, his foot felt numb, pain in the left lower back, and neck pain left side".

Reviewer Comment

The pre-motor vehicle accident documentation from [Appellant's neurologist] in neurology demonstrates that the claimant had objective clinical neurological findings very similar to the neurological findings documented post motor vehicle accident. This demonstrates that there were no new objective clinical findings as a probable consequence of the motor vehicle accident in question.

MPIC's Health Care Consultants noted complaints documented on the Appellant's file from March 25 and April 4, 2002 regarding "numbness in his fingers and hands, had left lower back pain, left shoulder and left upper arm pain with reduced range of motion, and left lower leg weakness, complaining of parasthesia in the L4-L5 distribution".

The Memorandum concludes:

Given the described mechanism of the motor vehicle accident in question on April 20, 2002, and the similarity of documented symptoms both before and after the motor vehicle accident, it is improbable that a cause and effect relationship regarding the claimant's injuries and the event in question exists.

On the basis of the current information available, it is in my opinion based on the balance of probability, the claimant's present complaints are not causally related to the motor vehicle accident in question. . .

The evidence does not document that the left hand surgery was a probable consequence of the collision in question.

In viewing the documents on file, counsel for MPIC pointed that out that the complaints and symptoms of the Appellant pre and post-motor vehicle accident were the same. These involved pain in his left hip, left groin, a feeling of a tight ball in his left buttock, and left hand finger parasthesia.

Counsel for MPIC also submitted that the various accounts of the mechanism of the accident showed that the motor vehicle did not hit the Appellant's left wrist, finger or hip. All accounts indicated that contact occurred when the vehicle was stopping and as such there would have been very light contact, and only to the leg, well below the hip.

Further, the Appellant's reporting of his symptoms to various caregivers show inconsistencies throughout.

Counsel for MPIC also stressed that just because the Appellant was able to resume jogging following the [text deleted] accident, does not mean that he was symptom free. In fact, the medical documentation and [Appellant's doctor #1's] evidence indicate that the Appellant had had issues with his left side before 1994. There were problems at the L4-L5 level, along with cervical spine degeneration and parasthesia in his left hand, prior to the motor vehicle accident.

In addition to questions of causation, counsel for MPIC pointed out inconsistencies between the Appellant's reporting of his need for personal care and his observed function and demeanor during the Occupational Therapy Assessment. She noted that the Appellant did not score the minimum five (5) points on the grid necessary to qualify for personal care assistance and that the reports of the therapist examining him noted he had the functional ability to jump out of his chair while yelling at her. She ultimately concluded that personal care assistance was not required.

In regard to podiatry care, counsel for MPIC noted that the Appellant had been given a long handled nail clipper to assist with cutting his toe nails. She submitted that this was sufficient, and that the Appellant did not have a prescription for podiatry care, nor was it medically required under Regulation 5(a). Further, podiatry care is not one of the benefits listed under Section 5(a) of Regulation 40/94.

In any event, none of the benefits sought by the Appellant, she submitted, arise out of symptoms or injuries caused by the motor vehicle accident in question.

Discussion

In order to qualify for PIPP benefits, the Appellant must establish, on a balance of probabilities, that he suffered bodily injury caused by an automobile or the use of an automobile.

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, but not including bodily injury caused

(a) by the autonomous act of an animal that is part of the load, or

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile;

The onus is on the Appellant to establish, on a balance of probabilities, that the care and expenses he seeks are medically required as a result of injuries sustained in a motor vehicle accident.

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;
- (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

We have reviewed the evidence and submissions of the Appellant and counsel for MPIC and concluded that there is no causal relation between the conditions and symptoms complained of by the Appellant and referred to in the case managers' decisions of August and November 2002 and the motor vehicle accident of April 20, 2002.

We find that the Appellant has failed to establish, on a balance of probabilities, that these symptoms and complaints are related to the motor vehicle accident of April 20, 2002. We find, on a balance of probabilities, that the problems with the Appellant's left wrist and hip were a result of pre-existing conditions or injuries and were not impacted by the motor vehicle accident.

There is substantial evidence regarding a long standing history of complaints by the Appellant to his caregivers regarding pain in his left hip and groin, as well as numbness or parasthesia of the little fingers in his left hand. These complaints were recorded by his caregivers and, in some instances, substantiated by medical and radiologic examination, prior to April 20, 2002. Some of the complaints and medical findings date back to his fall in December 2001, but some pre-date even this event, dating back, in some instances, to as early as 1994.

We agree with counsel for MPIC that the symptoms and complaints of the Appellant before and after the motor vehicle accident were essentially the same. The evidence does not support a connection between the Appellant's left hip and left hand problems and the motor vehicle accident. Accordingly, we find that the Appellant has failed to establish, on a balance of probabilities, a connection between his condition and the motor vehicle accident, and as such, he is not entitled to PIPP benefits in that regard.

Further, we find that the Appellant has failed to establish, on a balance of probabilities, that he required personal care assistance in or after August 2002, as a result of the motor vehicle accident.

We also find that the Appellant has failed to establish, on a balance of probabilities, that he required or was entitled to podiatric care in or after August 2002, as a result of the motor vehicle accident.

Accordingly, we hereby dismiss the Appellant's appeal, and confirm the Internal Review decisions dated November 5, 2002 and December 3, 2003.

Dated at Winnipeg this 15 day of May, 2007.

LAURA DIAMOND

DIANE BERESFORD

PAUL JOHNSTON