

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-09**

PANEL: Mr. Mel Myers, Q.C., Chairperson

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

HEARING DATE: March 14, 2007

ISSUE(S): Entitlement to funding for chiropractic treatment

RELEVANT SECTIONS: Section 136(1)(a) 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] was involved in a motor vehicle accident on May 22, 2003. As a result, the Appellant suffered a soft tissue injury to her neck. The Appellant was diagnosed by several physiotherapists with having a WAD II injury and had physiotherapy treatments for a period of one (1) year subsequent to the accident which were funded by MPIC.

The Appellant testified at the appeal hearing and stated that the physiotherapy treatments did not resolve her neck injuries and, as a result, she sought chiropractic treatment from [Appellant's chiropractor] who provided a Treatment Plan Report to MPIC dated July 13, 2004.

MPIC requested their chiropractic consultant, [text deleted], to review [Appellant's chiropractor's] report and to determine, based on the medical information as to the Appellant's current signs and symptoms related to the motor vehicle accident, whether the chiropractic treatment was medically required.

[MPIC's chiropractor] reviewed the Appellant's file and provided a note to MPIC dated August 10, 2004, wherein he noted that the Appellant had received one (1) year of physiotherapy treatments and concluded that it was not likely that further direct intervention would supply significant benefit and was therefore not medically necessary. As a result, MPIC's case manager accepted [MPIC's chiropractor's] advice and advised the Appellant on August 13, 2004 that MPIC would not fund any further chiropractic treatments. In response, the Appellant applied for a review of the case manager's decision on September 15, 2004.

[MPIC's chiropractor] was again requested to review the Appellant's claim and he provided an Inter-Departmental Memorandum to MPIC dated November 1, 2004 confirming his position that chiropractic care would not likely provide additional therapeutic benefit to the Appellant. In his memorandum [MPIC's chiropractor] indicated that:

1. the Appellant had been treated by four (4) different physiotherapist, all of whom noted neck pain with headaches and none reported any neurological deficits.
2. according to the physiotherapy reports the Appellant was considered to be at full function without symptoms.

3. he had reviewed the x-ray reports in respect of the Appellant supplied by [text deleted], a chiropractic radiologist. This x-ray indicated that the Appellant had a straightened cervical lordosis.
4. [Appellant's chiropractic radiologist] did not note any post-traumatic findings.
5. there was little evidence in the biomedical literature that a straightened cervical lordosis can be attributed to trauma or carries significant clinical importance.

[MPIC's chiropractor], in his memorandum, further stated that:

1. the Appellant was, as of June 2004, discharged from physiotherapy treatment as asymptomatic and at that time she had essentially recovered from her motor vehicle accident injuries.
2. he had reviewed [Appellant's chiropractor's] report of July 13, 2004 and concluded that the Appellant's presentations to [Appellant's chiropractor] were significantly different from her presentation to the several physiotherapists who had treated her in respect of her motor vehicle accident injuries.
3. it was not likely that the Appellant's motor vehicle accident required any additional treatment, chiropractic or otherwise.

Internal Review Officer's Decision

The Internal Review Officer reviewed the entire medical file, adopted [MPIC's chiropractor's] chiropractic opinion in her written decision dated November 17, 2004, concluded that the medical information on the Appellant's file indicates that chiropractic care was not medically required due to the accident and, as a result, confirmed the case manager's decision.

Notice of Appeal

The Appellant filed a Notice of Appeal on March 3, 2006. On July 6, 2006, in support of the Notice of Appeal, [Appellant's chiropractor] provided a report to MPIC. His report was reviewed by [MPIC's chiropractor] who, in an Inter-Departmental Memorandum dated February 7, 2007 stated that the submitted information did not change his prior opinion.

Appeal

The relevant provisions of the MPIC Act and Regulations in respect of this appeal 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;

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;

At the appeal hearing the Appellant testified that:

1. prior to the motor vehicle accident she never had any neck problems, constant headaches or sleep disturbances.

2. as a result of the motor vehicle accident she suffered an injury to her neck which caused severe neck pains, stiffness, tightness and severe and continuous headaches which resulted in sleep disturbances on a regular basis.
3. at the time of the motor vehicle accident she was working in a bar and, as a result of the injuries sustained in the motor vehicle accident, she could not carry out her duties as a server and could only work as a bartender.
4. although she was in a great deal of pain on a regular basis she was unable to quit working because she required the income to earn a living and, as a result, had no choice but to continue working with pain.
5. she saw several physiotherapists during the first year of the motor vehicle accident, but none of the physiotherapy treatments were successful in relieving her of the neck problems, constant headaches and sleep disturbances.
6. as a result, she attended at the office of [Appellant's chiropractor], [text deleted], who successfully treated her in respect of her neck pain, constant headaches and sleep disturbances.
7. due to the difficulties in working at the bar due to her neck injury she decided to change her job and successfully completed a hairdressing course over the next two (2) years to become a hairstylist.

The Appellant further testified that:

1. at the time MPIC refused funding for chiropractic treatments on August 13, 2004 these treatments had not resolved her neck problems.
2. after a period of approximately one (1) year of receiving chiropractic treatments from [Appellant's chiropractor], she made an eighty-five (85%) percent recovery in respect of the neck pain and headaches and sleep disturbances and, as a result, she was able to

- reduce the number of chiropractic treatments she received from [Appellant's chiropractor].
3. she continued to receive chiropractic treatments from [Appellant's chiropractor] on a reduced basis for the purpose of maintaining her medical condition and not for the purpose of seeking an improvement of her medical condition in respect of her neck pain, headaches or sleep disturbances.
 4. at the same time she was receiving chiropractic treatments from [Appellant's chiropractor], she was receiving massage therapy treatments.

[Appellant's boyfriend] testified at the hearing that:

1. prior to the motor vehicle accident he became the Appellant's boyfriend and subsequently they commenced to live together.
2. the Appellant, prior to the motor vehicle accident, did not have any neck problems, constant headaches, or sleep disturbances.
3. after the motor vehicle accident he observed the physical difficulties the Appellant had in respect of her neck problems and noted her complaints to him in respect of her neck pain, headaches and sleep disturbances.
4. the physiotherapy treatments did not appear to assist the Appellant but the chiropractic treatments did over a period of time essentially resolve these difficulties.

MPIC did not call any witnesses.

Submission

In her submission to the Commission the Appellant stated that:

1. she had no neck problems prior to the motor vehicle accident and, as a result of the motor vehicle accident she suffered severe neck pain, constant headaches and sleeping disturbances.
2. the physiotherapy treatments funded by MPIC were not successful and it was only when she received chiropractic treatments did her neck problems, headaches and sleep disturbances resolve themselves.
3. she continues to have neck pain of a minor nature, sees the chiropractor as well as a massage therapist from time to time, and their treatments maintained her present physical condition.
4. she had suffered a great deal of neck pain, headaches and sleep disturbances during the first year following the accident but was unable to stop working because she needed to make a living.
5. after working as a hairstylist for some period of time she found this work to be too difficult having regard to her neck pain and now is employed at a firm who supplies products to hairstylists.

The Appellant concluded her submission by stating that:

1. [Appellant's chiropractor] acknowledged her inability to pay for her chiropractic treatments, treated her, and deferred payment of his fees.
2. she requested the Commission to reverse MPIC's decision to refuse to fund her chiropractic treatments.

MPIC's legal counsel submitted that:

1. the Commission should accept [MPIC's chiropractor's] opinion that [text deleted], the Appellant's last physiotherapist, who had provided a Health Care Report to MPIC

dated May 9, 2004 wherein he indicated the Appellant's current function was at full function without symptoms.

2. [MPIC's chiropractor] was correct in concluding that the Appellant at that time had recovered from her motor vehicle accident injuries and that chiropractic treatments were not medically necessary.
3. as a result, the Appellant did not establish, on a balance of probabilities, that the chiropractic treatments were medically required.
4. the Commission should confirm the Internal Review Officer's decision and dismiss the Appellant's appeal.

Discussion

The Commission notes that the physiotherapy reports of June 17, 2003, August 25, 2003 and January 22, 2004 all noted that the Appellant was suffering from a WAD II injury as a result of the motor vehicle accident.

In *Whiplash Injuries, Current Concepts in Prevention, Diagnosis, and Treatment of the Cervical Whiplash Syndrome* by Robert Gunzburg, M.D., Ph.D. and Marek Szpalski, M.D., the authors describe the symptoms in respect of WAD grade I, WAD grade II and WAD grade III. In respect of the WAD grade 1 classification the authors describe common synonyms to include complaints of pain, stiffness, or tenderness only, but no physical signs. In respect of WAD grade II, the authors indicate that this classification includes neck complaints and musculoskeletal signs. Under the heading of this classification the authors describe the common symptoms to include whiplash, cervical sprain, headaches of cervical origin and under clinical presentation they state:

Usually presents to a physician in the first 24 hours after an accident

Nonspecific radiation to the head, face, occipital region, shoulder, and arm from soft-tissue injuries
Neck pain with limited range of motion due to muscle spasms

The Commission finds the diagnosis by the physiotherapists, [Appellant's physiotherapist #2], dated June 17, 2003, [Appellant's physiotherapist #3], dated August 25, 2003 and [Appellant's physiotherapist #1], dated May 9, 2004, were consistent with the description of a WAD grade II neck injury as set out in the above mentioned textbook. It should also be noted that [text deleted], [Appellant's chiropractor], did not specify WAD grade II injury in his report of July 13, 2004 but he did specify a cervical sprain/strain which, in the Commission's view, is consistent with a WAD grade II injury.

The Commission notes that the Internal Review Officer, in her decision to confirm the case manager's decision not to fund the chiropractic treatments, based her decision on [MPIC's chiropractor's] chiropractic opinions. In this respect the Commission agrees with [MPIC's chiropractor] that:

1. none of the physiotherapy reports indicated any neurological deficit.
2. [Appellant's chiropractor's] reports in respect of the Appellant's neurological deficits at the left C7 level are inconsistent with the reports of the physiotherapists who treated the Appellant during the first year following the motor vehicle accident.

[Appellant's chiropractor] noted that the Appellant's x-ray report indicated a straightened cervical lordosis, and he opined that there is little evidence in the biomedical literature that a straightened cervical lordosis can be attributed to trauma or carry a significant clinical importance. The Commission notes the Appellant did not challenge [MPIC's chiropractor's] opinion in this respect.

However, the Commission disagrees with [MPIC's chiropractor's] conclusion that based on [Appellant's physiotherapist #1's] report of May 9, 2004, the Appellant had essentially recovered from her motor vehicle accident injuries and was asymptomatic at that time. [MPIC's chiropractor], in his Inter-Departmental Memorandum dated November 1, 2004 states:

My opinion is unchanged. [The Appellant] was, as of June 2004, discharged from physiotherapy as asymptomatic. At that time, she was essentially recovered. Her presentation to [Appellant's chiropractor] is significantly different. It is not likely that her motor vehicle accident injuries require any additional treatment, chiropractic or otherwise. My opinion of August 10, 2004 is unchanged.

The Commission further notes that this essential finding by [MPIC's chiropractor] was the basis of the Internal Review Officer's decision in refusing to fund the chiropractic treatments. The Internal Review Officer, in her decision, states:

[MPIC's chiropractor] again reviewed your file and provided a report dated November 1, 2004. [MPIC's chiropractor] wrote that he reviewed the Physiotherapy notes which documented treatment with four different Physiotherapists. He wrote that all the notes indicate neck pain with headache but no mentioned problems in other spinal areas. He noted that no neurological deficits were reported and only occasional pain symptoms were reported. He noted that according to the Physiotherapy reports, you are considered to be at full function without symptoms.

The Commission notes that [Appellant's physiotherapist #1] examined the Appellant on May 5, 2004, approximately one (1) year after the motor vehicle accident, and classified the Appellant's neck injury as a WAD II injury. He further reported that the Appellant was still experiencing occasional headaches, sleep disturbances, stiffness, aching and she was not able to fully participate in her school activities. In his report [Appellant's physiotherapist #1] indicated that his diagnosis in respect of the Appellant was "resolving cervical sprain and strain" but did not state that the Appellant had resolved her WAD II injuries that she sustained in the motor vehicle

accident. The Commission therefore finds that [Appellant's physiotherapist #1's] statement that the Appellant was "at full function without symptoms" is inconsistent with his opinion that at that time:

1. she was still suffering from headaches, sleep disturbances, stiffness and aching;
2. she was not able to fully participate in her school activities;

As a result, [Appellant's physiotherapist #1's] diagnosis that the Appellant's medical status on May 5, 2004 as "resolving her cervical sprain and strain" is therefore in conflict with his statement that she was "at full function without symptoms".

In view of the significant contradictions in [Appellant's physiotherapist #1's] report there is a great deal of ambiguity in this report as to whether or not the Appellant had fully recovered from her motor vehicle accident injuries when [Appellant's physiotherapist #1] examined her on May 4, 2004. The Commission finds that [MPIC's chiropractor] failed to consider these significant contradictions in [Appellant's physiotherapist #1's] report when he concluded that the Appellant, in the month of June 2004, was asymptomatic and that at that time she had essentially recovered from her motor vehicle accident injuries. The Commission further finds that [Appellant's physiotherapist #1's] ambiguous report should have caused [MPIC's chiropractor] to recommend to MPIC to arrange for an independent examination by a physiotherapist or a chiropractor in order to determine the Appellant's medical status. Upon receiving this report [MPIC's chiropractor] and MPIC would have been in a much better position to determine whether or not to fund the Appellant's chiropractic treatments. Unfortunately the Internal Review Officer accepted [MPIC's chiropractor's] flawed report and refused to fund the Appellant's chiropractic treatments.

The Commission also notes that the Appellant testified, and in cross-examination strongly disagreed, with [Appellant's physiotherapist #1's] report dated May 9, 2004, in which he stated that the Appellant's current status was at full function without symptoms. The Appellant testified that:

1. at the time [Appellant's physiotherapist #1] examined her on May 4, 2004 the physiotherapy treatments had not resolved her severe, consistent pain, the stiffness and tightness of her neck, her constant headaches, her sleep disturbances, and her inability to participate in school activities.
2. Due to her motor vehicle accident injuries she was unable to continue as a server and bartender and commenced a hairstylist course.

The Commission finds that the Appellant's testimony was not consistent with [Appellant's physiotherapist #1's] statement that on May 4, 2004 the Appellant was full function without symptoms but is consistent with his diagnosis of a "resolving cervical sprain and strain".

The Commission notes that the decision of the Internal Review Officer, when confirming the case manager's decision that MPIC was justified in refusing to fund chiropractic treatments on the ground that this treatment was not medically required as the result of a motor vehicle accident pursuant to Section 5 of Manitoba Regulation 40/94, was based on the opinion of [MPIC's chiropractor] who accepted [Appellant's physiotherapist #1's] report. The Commission further notes that there is a significant conflict between the testimony of the Appellant as to her medical status on May 4, 2004 and the statement of [Appellant's physiotherapist #1] that she was "at full function without symptoms". On this crucial issue MPIC had the opportunity to call [Appellant's physiotherapist #1] to rebut the testimony of the Appellant in respect of his finding that she had fully recovered from her motor vehicle accident injuries, but MPIC failed to do so.

[MPIC's chiropractor], in arriving at his opinion that the Appellant was asymptomatic and had essentially recovered in June of 2004, did not personally examine the Appellant but conducted a paper review. As a result, [MPIC's chiropractor] did not have the opportunity of examining and interviewing the Appellant and therefore was not in a position to assess her credibility.

However, the Commission did have an opportunity of observing the Appellant during her examination-in-chief and cross-examination, and during the course of her submission to the Commission, therefore the Commission did have an opportunity of assessing the Appellant's demeanor and her credibility. The Commission finds that the Appellant testified in a clear, convincing and unequivocal fashion both in examination-in-chief and in cross-examination and the Commission was impressed with the Appellant's testimony and finds her to be a credible witness.

The Commission is satisfied that the Appellant was in a great deal of pain as a result of the motor vehicle accident but did not seek to apply to MPIC for Income Replacement Indemnity ('IRI') benefits. Instead, the Appellant dealt with her pain by modifying her work activities (server to bartender). When she was unable to continue as a bartender she did not seek IRI benefits from MPIC at that time, but made a career change by returning to school to become a hairstylist and successfully completed that course.

At the same time, while seeking to minimize the effects of the motor vehicle accident injuries in respect of her employment, she also sought to find effective medical treatments to resolve her motor vehicle accident injuries and was successful in this respect by discontinuing physiotherapy treatments and commencing chiropractic treatments and massage therapy. Her recovery from

her motor vehicle accident injuries were confirmed by her chiropractic in his report dated July 6, 2006. The Commission finds that the Appellant's conduct subsequent to her motor vehicle accident not only corroborates her testimony at the hearing, but establishes that she was not a malingerer.

For the reasons outlined herein the Commission finds that in all issues in dispute between MPIC and the Appellant with respect to the Appellant's entitlement to chiropractic treatments, the Commission:

1. accepts the evidence of the Appellant that she had not recovered from her motor vehicle accident injuries and was entitled to have chiropractic treatments funded by MPIC;
2. rejects MPIC's position in respect of this issue.

In *Whiplash Injuries, Current Concepts in Prevention, Diagnosis, and Treatment of the Cervical Whiplash Syndrome* (supra), the authors at page 124 state:

Whiplash injuries usually result in neck pain and headache, sometimes associated with other symptoms such as visual or auditory disturbances, muscular weakness, concentration impairment, and sleep disturbances. Most patients recover within a few weeks to a few months. However, persistent neck pain and headaches after 1 or 2 years are reported by 15% to 40% of the patients. In some of these chronic cases, severe organic lesions such as discal herniations, anterior annular tears, occult vertebral endplate fractures, or segmental instability are sometimes demonstrated a few months after injury. This group of patients may require surgery. . . . Most studies indicate that pure malingering for financial gain is rare and that most of these chronic patients are not cured by a verdict. . . (underlining added)

The Commission finds that the Appellant did not suffer from such problems as severe organic lesions or segmental instability referred to by the above-mentioned authors. Nevertheless, the Commission finds that the Appellant does fall within the class of the 15% to 40% of persons as

described by the authors in the above mentioned text who suffered neck pain and headaches one (1) year after the motor vehicle accident and therefore concludes that she was medically required to receive chiropractic treatments.

The Appellant testified that approximately one (1) year after receiving chiropractic treatments she had made an eighty-five (85%) recovery and, as a result, reduced the number of chiropractic treatments she was receiving. She further testified that after some period of time she had essentially recovered from the motor vehicle accident injuries and has further reduced these chiropractic treatments which she now receives only from time to time.

Decision

The Commission therefore finds, for the reasons outlined herein, that the Appellant has established, on a balance of probabilities, that chiropractic treatments were medically necessary pursuant to Section 5 of Manitoba Regulation 40/94 in order to resolve the motor vehicle accident injuries that she sustained. The Commission directs MPIC to reimburse the Appellant for the cost of the chiropractic treatments for the period of time it took until the chiropractic treatments were no longer medically necessary pursuant to Section 5 of Manitoba Regulation 40/94. The Commission refers this matter back to MPIC's case manager in order to conduct the appropriate investigation to determine the amount owing for the said chiropractic treatments.

If the parties are unable to resolve this dispute within two (2) months of receipt of this decision, then either party may, upon reasonable notice, request the Commission to reconvene and conduct a hearing as to the amount of compensation that would be payable in respect of the said chiropractic treatments. The Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated November 17, 2004.

Dated at Winnipeg this 3rd day of April, 2007.

MEL MYERS, Q.C.