Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-115

PANEL:	**Mr. J. Guy Joubert, Chairperson** **Mr. Paul Johnston** **Mr. Robert Malazdrewich**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk of the Claimant Adviser Office.** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.**
HEARING DATES:	**April 25, and April 30, 2013**
ISSUE(S):	**Whether the Appellant is entitled to further chiropractic funding.**
RELEVANT SECTIONS:	**Section 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation 40/94.**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

A. PRELIMINARY COMMENTS

The crux of this matter is whether there is sufficient objective medical evidence in the Appellant's chiropractors' chart notes to support a finding that further chiropractic care treatments are medically required as contemplated by the MPIC Act, Regulations and the test for determining supportive care. Unfortunately, the parties in these proceedings did not call chiropractic or medical experts to testify in support of their positions which testimony would have been of assistance to this Commission.

B. BACKGROUND

At the time of the accident on August 28, 2006, the Appellant was [text deleted]. He was a pedestrian when he was struck by a stolen SUV motor vehicle. The impact of the accident propelled the Appellant against a tree and as a result he suffered numerous injuries including soft tissue injury to the neck and back, right hip pain, painful ribs, multiple contusions and lacerations, anxiety and post-traumatic stress disorder. Pursuant to the Personal Injury Protection Plan (PIPP) MPIC provided the Appellant with various benefits including physiotherapy treatments and chiropractic treatments.

The Act and Regulations provide 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.

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, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant;

An accepted test for determining supportive care sufficient to establish a "medical requirement" for chiropractic treatment includes the following elements:

1. The initial treatment must provide a benefit and the claimant must be at a maximal medical benefit;
2. The condition deteriorates in the absence of a therapeutically relevant timeframe;
3. The condition improves with the resumption of treatment;
4. Alternative approaches have been attempted without success;
5. An appropriate home-based program is in place; and
6. Risks (especially reliance upon a passive treatment) are out-weighed by the benefits.

1. Case Manager Decision Letters

On June 21, 2007, the Appellant's chiropractor issued an Initial Chiropractic Report sufficient to justify MPIC's authorization of up to 40 chiropractic treatments.

Six months later on December 21, 2007 MPIC then issued a case manager decision letter wherein it informed the Appellant that:

> "As of this date, [Appellant's Chiropractor] has not provided any further evidence suggesting that you require treatment beyond the maximum 40 visits."

As a result of this decision, MPIC turned down funding for further treatments however it advised the Appellant that should his chiropractor provide a report at a later date the same would be reviewed.

Subsequent to the issuance of this case manager decision letter, the Appellant's chiropractor provided MPIC with a Chiropractic Track II Report and requested additional treatment.

On February 5, 2008 MPIC issued another case Manager decision letter wherein it advised the Appellant it had approved a maximum of 10 in-clinic chiropractic visits.

Following a review of the Appellant's file by a member of its Health Care Services, MPIC issued another case manager decision letter on March 14, 2008 wherein it informed the Appellant that: "the medical information on file supports that additional treatment is not "medically required".

The Case Manager went on to state that: "… there is no entitlement to further funding of chiropractic treatment once you have completed the 10 treatments which were approved as of January 1, 2008".

The Appellant appealed this case manager decision.

2. Internal Review of the Case Manager Decision Letter

On September 24, 2008 MPIC issued an Internal Review Decision which affirmed the case manager decision letter dated March 14, 2008 (although this letter was referred to as dated March 15, 2008). The Internal Review Officer found there was ample evidence on file to conclude that all funding for chiropractic treatments should cease.

In reaching the decision, the Internal Review Officer considered the evidence of MPIC's Chiropractic Consultant. In particular, the Chiropractic Consultant had noted in a memorandum dated March 14, 2008 that:

> "I have reviewed this file in order to respond to [case manager's] request for an opinion regarding the medical requirement of chiropractic treatment in Phase 5 of Track II. Available for review was the Manitoba Public Insurance injury file. Recently received was a report from the attending chiropractor, [Appellant's Chiropractor], dated February 12, 2008. This reports pain in the low back, right hip, and right shoulder at 10/10. This is a significant increase over the levels of 7/10 reported on December 21, 2007. Ranges of motion appear to have increased marginally in both the cervical spine and low back. Revised Oswestry was reported to be 46% compared to 32% as reported in December, although this latter figure is not clear whether this is a score out of 50 or a percentage score. Neck Disability is currently given at 38%.
>
> There does not appear to be significant, sustained or progressive improvement in [the Appellant's] condition despite chiropractic treatment extending over a period of June 2007. He has to date received over 60 chiropractic treatments. Despite

> this he continues to report pain at 10/10 in all levels. In my opinion, because of this absence of evidence in support of improvement, continuation of chiropractic treatment in Phase 5 of Track II would be considered elective rather than required."

In addition, the Appellant's file was subsequently reviewed by the Chiropractic Consultant in a memorandum dated September 11, 2008 wherein similar conclusions were reached as follows:

> "I have previously reviewed this file. Specifically, I provided a memorandum dated March 14, 2008. In that memorandum, I noted that, although there has been marginal increase in ranges of motion and status inventories, outweighing this information was the claimant's report of pain levels at 10/10 for all areas of injury. To that date, [the Appellant] had received over 60 chiropractic treatments. I was of the opinion that after 60 chiropractic treatments, with pain reports at maximal levels, chiropractic care would not be considered medically required.
>
> [Appellant's Chiropractor's] report was reviewed. [Appellant's Chiropractor] summarizes information from his reports which has been reviewed. He indicated that [the Appellant] has continued chiropractic treatment since that time. There is no additional information supplied by [Appellant's Chiropractor] that would change my opinion as previously expressed and summarized above."

The Appellant appealed the Internal Review Officer decision.

C. THE POSITION OF THE PARTIES

1. The Appellant

The Appellant's position is that he is entitled to further chiropractic treatment because the same is medically required when taking into account his age at the time of the accident, the nature of the accident and injuries sustained. The Appellant submits that MPIC's Chiropractic Consultants did not properly apply the facts to the Act, Regulations and the test for determining supportive care. Overall, the Appellant argues that all elements of the test for supportive care have been established. These elements and the Appellant's further arguments are as follows:

(a) Initial Treatment Provides Benefit and Appellant Must be at Maximal Benefit

The Appellant submits that initial chiropractic treatments provided a benefit by improving function and controlling pain. While things have improved he finds that he must nonetheless see the chiropractor approximately every two weeks for maintenance purposes. He testified that this "seems to work" and that he still has problems doing things however his son does help out. To this extent he argues that he has reached a maximal benefit. He also points out that his chiropractor's chart notes are deficient other than to state the Appellant had "much improved" with essentially the balance of the chart notes relating to objective findings being for the most part "cut and pasted" for lengthy periods of time.

(b) Deterioration in Absence of Therapeutically Relevant Timeframe

Regarding his physical condition deteriorating in the absence of a therapeutically relevant timeframe, the Appellant argues that after he ceased treatment in March and April 2012 (at the request of MPIC), he had documented his own evidence of a decrease in function and increase in pain levels. He kept a record of his activities and pain levels on a calendar during the time period in question. While from one point of view such evidence is subjective because it is based upon the Appellant's own charting (and not his chiropractors'), he submits the same ought to be considered sufficient to meet this part of the test. Even though this evidence is based upon the Appellant's own impressions, the fact that his chiropractor did not record the same (which would have been based upon the Appellant's descriptions) does not make the notations any less "objective". In essence the Appellant is arguing there is no real difference between him recording something or his chiropractors doing the same thing but based upon what he relates to them.

(c) Improvement Following Resumption of Treatment

With respect to the third element pertaining to his condition improving following the resumption of treatment, the Appellant testified that this was indeed the case and furthermore, his own notes recorded on his calendar supports this, as do the notes of his chiropractor to some extent. While his condition improved in the sense of managing pain and movement, it was not permanent.

(d) Alternative Approaches Attempted Without Success

The Appellant was afforded some 41 physiotherapy treatments which he alleges were improving his condition however these treatments were later terminated by MPIC. The Appellant was also provided with some support regarding aqua therapy in the form of pool passes however this was also terminated. In that regard the Appellant argued that access to the pool provided him with some relief as noted in his own calendar chart notes. Overall there were alternative approaches to his treatment that were attempted.

(e) Appropriate Home-based Program in Place

The Appellant argued that he has a home-based program in effect that includes daily walks, going to the pool on a weekly basis and doing some weights. While this program is on-going the Appellant points out that he requires additional chiropractic support to help maintain a reasonable level of activity.

(f) Risks (Especially Reliance upon Passive Treatment) are Out-weighed by Benefits

The Appellant is of the view that reliance upon chiropractic treatment as a passive treatment is outweighed by the benefit the same provides to him. He points out that he is not a young man (he is now approaching [text deleted]). He was [text deleted] at the time of the accident and after 41 physiotherapy sessions and over 60 chiropractic treatments he has not returned to a normal life that is pain free. The Commission was also directed to evidence that shows that as a result of the accident the Appellant suffered a partial thickness tear of the right gluteus medius tendon at its attachment to the greater trochanter (hip). In a letter dated June 16, 2012 from [Appellant's Doctor] who is a family physician, he stated that the injury was likely caused by the accident and could not be surgically repaired. He also stated the same would be chronic in nature and would require on-going conservative treatment such as physiotherapy.

Overall, the Appellant submits that he has clearly established the need for on-going chiropractic care.

2. MPIC

MPIC's arguments centered in part on the deficiencies in the chart notes of the Appellant's chiropractors as being "cut and pasted" especially with respect to objective notations of the Appellant's condition. As such, it was submitted, the same could not be relied upon as demonstrating any objective findings with respect to the Appellant's state of health. In addition, MPIC pointed out these chiropractors had a duty to keep accurate records which are legally binding documents. Based upon these apparently deficient documents presently before the

Commission, the objective notations therein should be given little if any weight to maintain the Appellant's position.

With respect to the elements of the test for supportive care, MPIC argued as follows:

(a) Initial Treatment Provides Benefit and Appellant Must be at Maximal Benefit

MPIC noted that its Chiropractic Consultant indicated in a Report dated June 5, 2012 the Appellant had earlier advised his chiropractor on February 12, 2008, that he was experiencing pain at a threshold of 10/10 which had been a significant increase over reported pain levels in December, 2007. In addition it appeared the "Revised Oswestry" results, a low back disability questionnaire, had also increased. Overall, the Chiropractic Consultant found that:

> "… In reviewing the file in totality, it is noted that the claimant demonstrated a worsening of symptoms with chiropractic treatment. Therefore, by definition, supportive care would not be recommended and any additional chiropractic treatment would be considered elective in nature."

In light of the above, MPIC believes that the Appellant has not met the first test in that the chiropractic treatments do not provide any benefit, in fact they have the opposite effect.

(b) Deterioration in Absence of Therapeutically Relevant Timeframe

It is argued there is no objective information to support a finding that there was a deterioration of the Appellant's condition following the temporary termination of treatment in March and April, 2012. MPIC's Chiropractic Consultant noted in a Report dated June 7, 2012 that:

> "… The only information on file that allows us to consider if the condition did deteriorate is that of the claimant's self-reported log which begins on March 1, 2012 and ends on June 5, 2012… In summary, the log submitted by the claimant is good in providing information from a subjective standpoint, however, the absence of status inventory scoring from the practitioner does not allow us the ability to objectify the information."

MPIC submits that without objective information there can be no finding of deterioration following cessation of treatment.

(c) Improvement Following Resumption of Treatment

It was pointed out to the Commission that following resumption of chiropractic care on May 4, 2012, records of the Appellant's chiropractors only demonstrated short term relief with symptoms re-surfacing shortly after treatment. In light of this MPIC and its Chiropractic Consultants were of the view there was no sustainable improvement.

(d) Alternative Approaches Attempted Without Success

MPIC submitted that the Appellant underwent 41 physiotherapy treatments and over 60 chiropractic treatments resulting in no significant improvement. In other words the Appellant has reached a plateau from a medical perspective and that there is nothing further to offer him.

(e) Appropriate Home-based Program in Place

MPIC acknowledged that the Appellant attended at a local pool on a regular basis, he walked each day and did some weights

(f) Risks (Especially Reliance upon Passive Treatment) are Out-weighed by Benefits

It was argued the chiropractic treatments the Appellant received were patient directed and not chiropractor directed in that they were always sought at the instance of the Appellant for pain

control. It was alleged the treatments never provided the Appellant with any sustained benefit and as a result by definition supportive care was not warranted.

In essence MPIC's position is that there is ample evidence to reach the conclusion that chiropractic care is not medically required pursuant to the Act, Regulations and the test for determining supportive care.

D. DECISION – ISSUE UNDER APPEAL

Whether the Appellant is entitled to further chiropractic funding?

After considering all evidence and arguments of the parties, on a balance of probabilities, we find in favour of the Appellant who we also find to be an articulate, credible and forthright individual. The Appellant has established all six elements of the test for determining that supportive chiropractic care is medically required.

At this juncture, we take notice that while the Appellant's chiropractors may not have consistently recorded his progress in their chart notes in accordance with standards commonly accepted and expected in the profession, this deficiency over which the Appellant had no control, does not in our view fatally prejudice him in these proceedings.

The information recorded in the chiropractors' charts, although deficient in certain respects especially the parts that were "cut and pasted", nonetheless generally described the Appellant's on-going issues as was also corroborated to some extent by [Appellant's Doctor's] assessment. This information and [Appellant's Doctor's] assessment, together with the Appellant's testimony

and his own progress notes charted in a calendar (which we find to be sufficiently objective) were all probative in our view. While the reports of MPIC's Chiropractic Consultants were useful to this Commission, we attach less weight to the same especially since its authors did not have the opportunity to physically examine and assess the Appellant in conjunction with all other medical evidence.

Pursuant to Sections 184(1)(a) and (b) of the Act, we rescind the decision of the Internal Review Officer dated September 24, 2008 and find that on a balance of probabilities the Appellant is entitled to on-going chiropractic treatment as the same is medically required according to the evidence, the Act, Regulations and the test for determining supportive care. In addition, the Appellant is entitled to re-imbursement for chiropractic treatments he paid out-of-pocket since termination of the benefit by MPIC. Such re-imbursement to include interest as may be prescribed by the Act and Regulations.

Dated at Winnipeg this 17th day of July, 2013.

GUY JOUBERT

PAUL JOHNSTON

ROBERT MALAZDREWICH