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Indexed as:
A.S. (Re)

IN THE MATTER OF an appeal by A.S.
AICAC File No.: AC-99-32

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[1999] M.A.I.C.A.C.D. No. 25

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), L.J. Goodspeed, and
F.L. Cox
Heard: July 7, 1999.
Decision: July 19, 1999.
(21 paras.)

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Issue(s) :

1. Whether income replacement indemnity benefits were properly terminated; and
2. whether the appellant is entitled to further chiropractic treatment.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993,
c. 36, ss. 110(1)(a) and 136(1)(a).
Regulation 40/94, s. 5.
Regulation 37/94, s. 8.

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Appearances:

Manitoba Public Insurance Corporation ('MPIC') represented by
Tom Strutt.
The appellant, A.S., represented by C.G. Labman and Marla
Singer.

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**MAIC 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

THE FACTS:

[para1] The appellant was a passenger, riding in the front seat of a vehicle on January 7, 1997 when it was rear-ended while turning right into an intersection; an accident had occurred in front of A.S.'s vehicle, which had to stop quickly to avoid collision, only to be hit from the rear by the vehicle following. She attended at the office of her family physician, Dr. D. Tsang, the next day and was diagnosed with neck strain and lower lumbosacral strain. A.S. was described by Dr. Tsang as having less than full function due to the foregoing symptoms; Dr. Tsang determined that she was unable to return to her regular job because of stiffness in her neck and lower back, pain and restricted movement. He prescribed Naproxen and Tylenol 2 and referred her for physiotherapy. At the time of the accident, A.S. was employed as a cleaner at the [Text deleted], working on a casual, part-time basis, an average of 16 hours a week.

[para2] A.S. attended Main Physiotherapy and Wellness Clinic on January 16, 1997. Ms Linda Robertson, her physiotherapist, reported on January 16th that A.S. had experienced a WAD II injury with increased muscle tension in her neck and all regions of the back and decreased cervical and thoracolumbar range of motion. In a later, clarifying report dated May 30, 1997, Ms Robertson confirmed that A.S. had also complained of right lower extremity pain, following her exercise program at the gym on January 30th, 1997. Ms Robertson, noting that this had occurred after her report of January 16th, added that the appellant had described "the pain and paresthesia as radiating through the posterior aspect of the right lower extremity (and not necessarily isolated just to the right knee). This pain limited the progression of the exercise program in the gym." She further reported that A.S. was continuing to receive physiotherapy treatments for the low back, upper back and right knee region and received some acupuncture treatments on her knee.

[para3] On the advise of Dr. Tsang, and as a result of having undertaken the return to work rehabilitation program, the appellant attempted to return to work on February 22nd at her usual sixteen hours per week. She continued physiotherapy while she was at work, but experienced a great deal of discomfort because of the aggravation to her right leg.

[para4] The appellant spoke with her adjuster, Mr. D. Yarish on May 6th, 1997 regarding her inability to continue work as of May 3rd. She told him about the knee problem and that Dr. Krocak, her new physician as of April 30th, had expressed the belief that the knee injury was accident-related. Mr. Yarish questioned the causation of her knee problem that had never been reported on the initial reports of either Dr. Tsang or Ms Robertson. After considerable communication between Mr. Yarish, Dr. Krocak, the appellant, Ms Robertson and MPIC's Medical Consultants, Drs. McKay and Baron, Mr. Yarish concluded that the knee

injury was not caused by the MVA. He therefore wrote to the appellant on July 23rd, 1997, indicating that she did not qualify for IRI benefits because it could not be substantiated that the knee injury was related to the motor vehicle accident. A.S. filed an Application for Review.

[para5] Her last physiotherapy appointment was on August 14, 1997, when A.S. chose to discontinue therapy because it was causing her discomfort throughout the rehabilitation program; the severity of her symptoms had fluctuated between May 3rd and August 14th, dependent upon her activities. After an attempt to go without treatment, the increased pain in her right hip and knee necessitated relief so she tried chiropractic treatments with Dr. D.A. Morin, commencing on October 6, 1997.

[para6] MPIC requested a report from Ms Robertson, who replied on December 2nd, 1997 and, after further discussion with Mr. Yarish, again on December 30, reiterating that A.S. had, indeed, complained two weeks after the accident, of pain in the right knee and there was a noticeable limiting factor with her progress in gym exercises. She reported that after two minutes duration on a stationary bicycle or a sport rider, A.S.'s right knee pain became more pronounced. Ms Robertson also noted that "a right knee contusion from the dashboard at the time of impact in her MVA was suspected."

[para7] On December 3, 1997, A.S. finally received the decision of MPIC's Internal Review Officer to the effect that, on a balance of probabilities, her knee injury was a result of her motor vehicle accident and that income replacement benefits were to be paid to her, covering the period from May 3rd until August 14th, 1997, the date A.S. withdrew from her physiotherapy. A.S. was notified on January 26, 1998, of the amount of her IRI (\$189.90 bi-weekly) and that the coverage for her chiropractic treatments was under investigation.

[para8] On March 10th, '98, MPIC asked Dr. Morin to report on his treatment program, any objectively noted improvements and the basis for further chiropractic care. Dr. Morin did not respond until May 12th; his letter of that date only referred to subjective complaints of pain and discomfort and did not reflect any material, objective findings. Also, since Dr. Morin had also not provided a treatment plan, frequency of treatments nor discharge dates, Mr. Yarish decided, upon the advice of Dr. Russell Baron, MPIC's chiropractic consultant, that an adequate trial of chiropractic care had been provided and that there was no need for further care. As a result, A.S. was notified on June 16, 1998, that payment for chiropractic treatments would be terminated as of the date of that letter.

The Issues.

[para9] The issues before us are as follows:

- Was MPIC justified in terminating A.S.'s income replacement benefits on August 14th, 1997?
- Is A.S. entitled to continuance of chiropractic treatments beyond June 16th, 1998?

The Law:

[para10] The relevant sections of the Act and Manitoba Regulations are these:

Events that end entitlement to I.R.I.

110 (1) A victim ceases to be entitled 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;...

Reimbursement of victim for various expenses

136 (1) Subject to the regulations, the victim is entitled, to the extent that...she is not entitled to reimbursement under the Health Services Reimbursement 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 para-medical care...

Meaning of unable to hold employment
(Regulation 37/94, Section 8)

A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Medical or paramedical care
(Regulation 40/94)

5...the Corporation shall pay an expense incurred by a victim...for the purpose of receiving medical or paramedical care...

- (a) when care is medically required and is dispensed by a physician,...(or)...chiropractor...

[para11] Was A.S., at the date of termination of her IRI, able to hold her former employment? A.S. was examined by Dr. J.E. Irving, orthopaedic surgeon, on October 29th, 1998. He reported that her right knee had a good range of motion, there was no effusion and previous x-rays were normal. He noted that, although she had normal alignment of her lower extremity, her quadriceps bilaterally were poorly developed. It was his clinical diagnosis that she was experiencing right patellofemoral pain.

[para12] He stated that "this is a nonspecific clinical entity, usually caused by weak quadriceps muscles and often initiated by trauma. The prognosis for this condition is extremely variable and is usually directly related to the effort the patients put in to rehabilitating their quadriceps, with those who are successful in rehabilitating their quadriceps doing much better with respect to their pain. ...It does not appear from the history that I obtained that her right knee was directly injured in the accident, but it is more likely that she was less active after the accident. Her quadriceps became further deconditioned and that is what caused the patellofemoral pain...individuals with patello-femoral pain should be able to get back to a cleaning type of job within six months of a car accident with no abnormalities on a MRI (which there were not) but each person's response to this pain is extremely variable and some patients will be incapacitated with the condition." Dr. Irving added that he could not specifically say in A.S.'s case whether she was capable of returning to work but that, as a general rule, with six months of rehabilitation it should certainly be possible.

[para13] Ms Robertson's report made it clear that A.S. still required intervention on August 14th, 1997, but had withdrawn because of what A.S. perceived as her lack of continuing improvement and the pain in following through with her exercises.

[para14] Mr. Strutt, counsel for the insurer, cited the above-noted Section 8 of Manitoba Regulation 37/94. He submitted that it was very doubtful that A.S.'s knee was injured in the accident and more likely that the problem arose from congenital deconditioned quadriceps. He suggested that the motor vehicle accident just provided an opportunity for that pre-existing condition to express itself. Clearly, this statement would support the premise that the knee condition was, in fact, caused by the motor vehicle accident - albeit indirectly.

[para15] We accept the view of Dr. Irving that the knee condition experienced by A.S. was not a result of direct trauma, but that her poorly developed quadriceps became further deconditioned after the motor vehicle accident and as

a result of it. As well, there is an indication that the type of exercise prescribed for her may well have caused further aggravation.

[para16] We find, on a slim balance of probability, that A.S. was not, in fact, ready to go back to work on August 14, 1997, due to the condition of her knee - a condition that had been triggered by her motor vehicle accident.

[para17] Dr. Irving, orthopaedic surgeon, indicated that six months would have been a reasonable timeframe for recovery from A.S.'s type of injury and that after this period of rehabilitation she would have been able to return to her pre-motor vehicle accident status. We regard the six month rehabilitative period suggested by Dr. Irving as an appropriate guideline and accordingly the May 3rd commencement date for IRI benefits should be continued until November 3, 1997, to reflect that recovery period.

[para18] The remaining issue is whether A.S. is entitled to continuance of chiropractic treatment beyond the termination date of June 16, 1998, when MPIC terminated that benefit. Dr. Morin reported, on October 13, 1998, that A.S.'s injury had been resistant to treatment and her progress has been very unclear. He noted that her knee had remained tender and congested but that treatments had not produced the expected amount of progress.

[para19] Based upon the candid report of Dr. Morin, supported by the views of Dr. Irving, we are of the view that A.S. had achieved the maximum therapeutic benefit from her 36 chiropractic treatments over an 8 month period, especially in the absence of any material, objective improvement. We find that MPIC was justified in terminating A.S.'s chiropractic benefits when it did.

DISPOSITION:

[para20] For the foregoing reasons, the Commission orders MPIC to pay A.S. Income Replacement Indemnity benefits from August 15th, 1997, to November 3rd, 1997, both inclusive. She is also entitled to interest on the IRI calculated at the statutory rate to the date when the appropriate funds are actually remitted to her.

[para21] A.S. will not be entitled to reimbursement of chiropractic costs incurred after June 16th, 1998.

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