

# **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by N.B.  
AICAC File No.: AC-01-06**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Ms. Yvonne Tavares  
Ms. Deborah Stewart

**APPEARANCES:** The Appellant, N.B., appeared on her own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Mr. Dean Scaletta.

**HEARING DATE:** July 18, 2002

**ISSUE(S):**

1. Entitlement to coverage for chiropractic treatments beyond April 20, 2001;
2. Entitlement to reimbursement for mattress and box spring;
3. Entitlement to Income Replacement Indemnity ('IRI') benefits after October 1, 2000; and
4. The reason for reduction of the number of children in the Appellant's daycare.

**RELEVANT SECTIONS:** Sections 83, 84, 110(1)(c) and 138 of The Manitoba Public Insurance Corporation Act (the 'MPIC Act'), Section 8 of Manitoba Regulation 37/94, Sections 3(2) and 5 of Manitoba Regulation 39/94, and Section 10(1)(d)(iii) of Manitoba Regulation 40/94.

## **Reasons For Decision**

The Appellant, N.B., was involved in a motor vehicle accident on April 2, 1999, when the vehicle in which she was a passenger was broad-sided by another vehicle that had gone through a Stop sign at a high rate of speed. As a result of the injuries she sustained in that accident, she became entitled to certain benefits pursuant to the Personal Injury Protection Plan ('PIPP') contained in the MPIC Act and Regulations.

The Appellant is appealing three separate decisions of MPIC's Internal Review Officer with respect to the termination of her PIPP benefits. With regard to the Internal Review decision of January 5, 2001, she is appealing the Internal Review Officer's decision which confirmed her termination of IRI benefits as of October 1, 2000, and his decision that the reduction in the number of children attending her daycare was not related to any physical inability to provide care due to any injuries arising out of the motor vehicle accident of April 2, 1999.

With regard to the Internal Review decision of August 28, 2001, she is appealing the Internal Review Officer's decision which confirmed the termination of coverage for chiropractic treatments effective April 20, 2001. With regard to the Internal Review decision of March 7, 2002, the Appellant is appealing the Internal Review Officer's decision which denied her reimbursement for a mattress and a box spring.

**1. Entitlement to coverage for chiropractic treatments beyond April 20, 2001**

At the hearing of her appeal, the Appellant advised the Commission that she was abandoning her claim for reimbursement of chiropractic treatments beyond April 20, 2001. Accordingly, the Internal Review decision dated August 28, 2001 is hereby confirmed.

**2. Entitlement to reimbursement for mattress and box spring**

The relevant sections of the MPIC Act and Regulations with regard to the entitlement to reimbursement of a mattress and box spring are Section 138 of the MPIC Act and Section 10(1)(d)(iii) of Manitoba Regulation 40/94, which provide as follows:

Section 138 of the MPIC Act:

**Corporation to assist in rehabilitation**

**138** Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to

lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

Section 10(1)(d)(iii) of Manitoba Regulation 40/94:

**Rehabilitation expenses**

**10(1)** Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (d) reimbursement of the victim at the sole discretion of the corporation for
  - (iii) medically required beds, equipment and accessories.

There was insufficient evidence presented at the hearing of this matter that the mattress and box spring, for which the Appellant seeks reimbursement from MPIC, were medically required as a result of the injuries sustained in the motor vehicle accident of April 2, 1999. Accordingly, the Commission dismisses the Appellant's appeal with respect to this issue and confirms the decision of the Internal Review Officer, dated March 7, 2002.

Should the Appellant at a later date obtain additional evidence with regard to the medical requirement for a new mattress and box spring, as a result of the injuries she sustained in the motor vehicle accident, she may submit those to her case manager at MPIC directly for a fresh decision pursuant to the provisions of Section 171(1) of the MPIC Act, which provides as follows:

**Corporation may reconsider new information**

**171(1)** The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

### **3. Entitlement to Income Replacement Indemnity benefits from October 1, 2000**

At the time of the motor vehicle accident on April 2, 1999, the Appellant was a self-employed daycare operator. The medical records on the Appellant's file document that as a result of the collision, the Appellant experienced a variety of symptoms involving her left knee, right hip, lower back, neck and right third finger in conjunction with bruising involving her left cheek, and various abrasions. As a result of these injuries, she was unable to fully carry out her duties as a daycare operator. She therefore qualified for income replacement indemnity ("IRI") benefits in accordance with s. 83 and 84 of the MPIC Act.

After her accident, the Appellant was referred to physiotherapy for treatment of the injuries sustained in the accident. In the Initial Physiotherapy Report dated April 23, 1999, the Appellant was assessed for various symptoms involving her spine and left lower extremity. The therapist identified a decrease in spinal range of motion as well as a decrease in muscle strength. It was the therapist's opinion that the Appellant was able to perform modified duties and that she should avoid repetitive stair climbing, bending and lifting greater than 30 pounds.

The Appellant also regularly attended upon her family physician, Dr. St. Vincent, for treatment in respect of the injuries that she sustained in the accident. In an Initial Health Care Report based upon an examination performed on April 30, 1999, it is noted that the Appellant's clinical presentation was in keeping with myofascial pain and that she was able to perform modified work duties. In Dr. St. Vincent's August 9, 1999, report, he notes that the Appellant had received a course of physiotherapy but her progress had plateaued. Subsequent to this, she attended a massage therapist. Dr. St. Vincent's examination identified a tightness over the lumbar paraspinal muscles, as well as a limitation of thoracolumbar range of motion. It was Dr.

St. Vincent's recommendation that the Appellant discontinue massage therapy and attend Dr. Kisil for chiropractic adjustments.

In Dr. Kisil's July 29, 1999 report, he notes that the Appellant was assessed for symptoms involving her lower back and left foot. It was Dr. Kisil's opinion that the Appellant's clinical presentation was in keeping with a left-sided sacroiliac joint dysfunction, with concurrent strained and deconditioned stabilizers. It was his opinion that the Appellant was unable to perform her duties as a daycare operator. In Dr. Kisil's August 11, 1999, report, it is noted that the Appellant was provided a range of motion stretching program, with hopes of progressing to a stabilization and strengthening program. This was provided in conjunction with soft tissue therapy, mobilization stretches, and gentle manipulation.

On September 14 and 21, 1999, the Appellant underwent a third-party musculoskeletal examination with Mr. Singer, physiotherapist. At the examination, the Appellant presented with complaints of right shoulder girdle pain, frontal headaches, left lower back pain, left knee and leg pain, and sleep disturbance. Mr. Singer's examination identified a limitation of cervical and lumbar range of motion, in the absence of a neurological deficit in conjunction with limitation of right shoulder range of motion. It was Mr. Singer's opinion that the Appellant had features in keeping with regional muscular pain of the posterior shoulder girdle, as well as mechanical back pain. It was his opinion that the Appellant's sleep disturbance should be addressed prior to embarking upon a rehabilitation program. It was his opinion that following completion of the program, the Appellant would be able to resume her daycare business. It was his recommendation that she should be referred to Dr. Chernish in order to undergo an evaluation to determine whether she required any specific treatments to address her sleep disturbance.

In Dr. Kisil's December 20, 1999 report, he documents that the Appellant was still suffering from low back pain but that her examination did not identify any abnormalities, except for hypertonicity involving the paraspinal muscles. It is documented that her low back stabilizers were weak. Dr. Kisil outlined that the Appellant had returned to work in some capacity. It was his opinion that the Appellant still required further stabilization of the lumbar spine, and he recommended treatments for an additional four weeks.

An occupational therapy home assessment was carried out in January and February 2000 by Ms. Lorraine Mischuk, occupational therapist. The purpose of the assessment was to provide the Appellant with a home exercise program, review the job demands of her daycare, and provide education on body mechanics. Ms. Mischuk's examination identified tenderness on palpation of the muscles over the cervical and upper back areas. Cervical range of motion was noted to be mildly restricted. Upper extremity range of motion was within normal limits. Thorocolumbar range of motion was slightly limited. Ms. Mischuk noted that the critical physical demands of the Appellant's job required frequent standing and walking, as well as frequent lifting and carrying of younger children weighing up to 40 lbs. The Appellant was provided with a home stretching program and a strengthening program consisting of trunk stability exercises. Body mechanics for child care activities were also reviewed and reinforced by the occupational therapist.

The Appellant was subsequently referred to Dr. Hillel Sommer, physiatrist, by her family physician. In his report dated March 1, 2000, Dr. Sommer notes his impression that the Appellant's pain was likely mechanical. It was his opinion that her headaches and perhaps her back pain had been exacerbated by the chronic use of Tylenol No. 3, and it was his recommendation that she discontinue its use. He also recommended that she perform

strengthening exercises of the shoulder girdle and postural muscles, and this should allow her to actively participate in her work activities. In a subsequent report dated April 12, 2000, Dr.

Sommer noted that:

The occupational therapy assessment describes the critical job demands as ranging from light to medium work. Her main limiting factor for participating in such activity in full capacity is her ongoing symptoms and pain with spinal range of motion. As you will note, I did not evaluate the complete range of function as it applies to her work in the context of my examination. However, there is no medical contraindication to her performing bending and lifting activities. Her ability to perform these will be enhanced by regular participation and a reconditioning program such as a dynamic stabilization program. At this point, any workplace restrictions imposed are arbitrary as there are no specific medical contraindications which would preclude her from participating in all her workplace activities.

The Appellant's file was subsequently referred to MPIC's Health Care Services Team for a review and an assessment of the Appellant's occupational capacity. In his Inter-departmental Memorandum dated July 30, 2000, Dr. Michael MacKay concludes the following with regard to the Appellant's physical capacity:

**Impairment**

As a result of the medical conditions arising from the motor vehicle collision in question, N.B. developed a temporary partial impairment of physical function. It is noted that with the treatments provided to her, her impairment resolved to the extent that she was able to return to her occupational duties and increase her level of function. The present documents do not contain medical evidence identifying a condition arising from the collision in question which in turn results in a permanent impairment of physical function.

It appears that N.B.'s functional limitations at this time stem from her subjective complaints of pain. There is very little objective evidence identifying N.B. as being physically impaired.

**Disability**

As a result of the partial temporary impairment of physical function, N.B. was disabled from her occupational duties for a period of time. She was able to return to her occupational duties in December 1999 but as of July 5, 2000 it is noted that she is no longer working at her daycare position. The disability appears to stem from an impairment of function based on her subjective symptoms and perceived limitation of function. There is no documentation indicating that N.B. is impaired

to a level where she is unable to perform any of her occupational duties. There is insufficient documentation identifying N.B. as developing a permanent disability.

The file was also reviewed by Dr. Timothy Pethrick, chiropractic consultant to MPIC's Health Care Services team. In his Inter-departmental Memorandum dated September 20, 2000, Dr. Pethrick notes the following:

In reviewing Dr. Kisil's report dated September 1, 2000, although there are some functional deficits reported, these are not of a nature or severity that would preclude N.B. from continuing to work as a daycare operator. At most, her range of motion was restricted by 25% in the cervical and lumbosacral spines. No neurologic deficits were reported. Dr. Kisil reports that N.B. may have difficulty performing some tasks but that she is at work. He does not recommend discontinuing workplace activities. I discussed this with Dr. Kisil and he was in agreement.

Based on the reports of Dr. Pethrick, Dr. MacKay and Dr. Kisil, MPIC's case manager wrote to the Appellant on October 19, 2000, to advise her that she did not qualify for further top-up on her Income Replacement Indemnity, since she was capable of holding the employment determined for her pursuant to Section 106, that is, of a daycare operator. MPIC's case manager, in his decision dated October 19, 2000, informed the Appellant that:

The medical evidence along with your demonstrated ability to work confirms that you are able to perform your duties as a self-employed day care operator. Your income top up has been paid to October 1, 2000. You will no longer be entitled to Income Replacement Indemnity benefits beyond this date.

The case manager cited the fact that her declared income to MPIC from her daycare business had, in several instances, exceeded her entitlement to Income Replacement Indemnity. He also relied on the fact that the Appellant had managed her daycare business on her own for several days while her partner was away.

The Appellant sought an Internal Review of that decision. In his decision dated January 5, 2001, the Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review with respect to the termination of IRI benefits. In his decision, the Internal Review Officer noted the following:

While you continue to have significant ongoing complaints of pain and discomfort, the medical evidence, in my view, falls well short of establishing that you are entirely or substantially unable to perform the essential duties of your employment on account of any injuries arising out of the said accident. Accordingly I am upholding Mr. Halowaty's decision to terminate your IRI benefits effective October 1, 2000 and dismissing your Application for Review with respect to this issue.

The Appellant has now appealed from this Internal Review decision to this Commission regarding her entitlement to additional IRI benefits beyond October 1, 2000.

At the hearing of this appeal, the Appellant submitted that the decision to terminate her IRI entitlement as of October 1, 2000 was premature. She argued that, at that time, she was not able to carry out her full duties with regard to the operation of a daycare, as she simply could not carry out the twisting, bending and lifting requirements of that position. The Appellant is seeking IRI benefits to December 31, 2001. She advised that as of January 1, 2002, she was capable of operating her daycare.

Counsel for MPIC submits that the medical documentation and other notes on file support the decision to terminate the Appellant's Income Replacement Indemnity benefits effective October 1, 2000. Counsel for MPIC submits that by that point in time, the Appellant had been doing the daycare job (apart from a few weeks in July 2000) since December 1999. He notes that there is little support in the medical evidence for an ongoing inability to do the vast majority of her work-related duties. He notes that there were indications that certain bending, lifting and

twisting activities continued to be problematic, but none of the Appellant's care-givers provided any objective evidence contraindicating the types of activities that N.B. would have had to do, on a daily basis, with her own young children. Counsel for MPIC therefore concludes that the medical evidence in the summer of 2000 did not identify any functional impairments which would have prevented the Appellant from operating her daycare after October 1, 2000. Additionally, he notes that the medical evidence generated since that time does not identify any such impairments either. Accordingly, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision dated January 5, 2001 should be confirmed.

After a careful review of all of the evidence, both oral and documentary, we are unable to conclude, on a balance of probabilities, that the injuries sustained by the Appellant in the motor vehicle accident of April 2, 1999, prevented her from holding employment as a daycare operator from October 1, 2000, and thereafter.

There is a lack of objective medical evidence on the file which supports the Appellant's inability to perform her occupational duties. The opinions of Dr. Sommer and Dr. Kisil, at the relevant time, were that the Appellant should continue with her work-related activities. In addition, the fact that the Appellant was able to continue her daycare operation throughout the majority of her rehabilitation period (albeit with some assistance) suggests that she was capable of continuing her daycare activities. Moreover, there is no objective medical evidence at the relevant time to substantiate her inability to carry out her duties as a daycare operator. Accordingly, we find that the Appellant has failed to show, on a balance of probabilities, that she was unable to carry out her employment as a daycare operator from October 1, 2000 and thereafter.

For these reasons, the Commission dismisses the Appellant's appeal with respect to this issue and confirms the decision of MPIC's Internal Review Officer, bearing date January 5, 2001.

**4. The reason for a reduction of the number of children in the Appellant's daycare**

In her Notice of Appeal dated November 3, 2000, the Appellant submits that as a result of the injuries sustained in the motor vehicle accident, she had to reduce the number of children in her daycare. The reduction in children reduced her income from her daycare operation.

As a temporary earner, the relevant sections of the MPIC Act and Regulations to the determination of Income Replacement Indemnity benefits for the Appellant are as follows:

Section 84(1) of the Act:

**Entitlement to I.R.I. after first 180 days**

**84(1)** For the purpose of compensation from the 181<sup>st</sup> day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

Section 84(3) of the Act:

**Determination of I.R.I.**

**84(3)** The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering

- (a) whether the victim could have held the employment on a full-time or part-time basis;
- (b) the work experience and earnings of the victim in the five years before the accident; and
- (c) the regulations.

Section 5(1) and Section 5(2) of Manitoba Regulation 39/94:

**GYEI of a temporary or part-time earner for first 180 days**

**5(1)** The gross yearly employment income of a temporary earner or part-time earner for the first 180 days after the date of accident is the amount calculated under sections 2 and 3.

**GYEI of temporary earner or part-time earner after 180<sup>th</sup> day**

**5(2)** The gross yearly employment income for a temporary earner or part-time earner after the 180<sup>th</sup> day following the date of the accident is the greatest of the amounts determined under subsection (1) and sections 6 and 7.

Section 3(2) of Manitoba Regulation 39/94:

**GYEI from self-employment**

**3(2)** Subject to section 5, a victim's gross yearly employment income derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time:

- (a) for the 52 weeks before the date of the accident;
- (b) for the 52 weeks before the fiscal year end immediately preceding the date of the accident;
- (c) where the victim has operated the business for not less than two fiscal years before the date of the accident, for the 104 weeks before the fiscal year end immediately preceding the date of the accident divided by two;
- (d) where the victim has operated the business for not less than three fiscal years before the date of the accident, for the 156 weeks before the fiscal year end immediately preceding the date of the accident divided by three;

or according to Schedule C.

In accordance with the Regulations, MPIC determined that the greatest GYEI applicable to the Appellant was in accordance with Schedule C.

Pursuant to Section 3(2) of Manitoba Regulation 39/94, it is the historical performance of the business which determines the GYEI derived from self-employment. At the hearing of this matter, the Appellant agreed that Schedule C would have provided her the greatest GYEI for IRI

calculations, based on the historical revenues derived from her daycare operation. Accordingly, since the GYEI is calculated on a historical basis or pursuant to Schedule C, whichever is greater, the income which the Appellant would have derived from additional children potentially attending her daycare would not have been relevant to the calculation of her GYEI for IRI purposes. Accordingly, with respect to this issue, the decision of the Internal Review Officer, dated January 5, 2001, is hereby confirmed.

Dated at Winnipeg this 28<sup>th</sup> day of August, 2002.

---

**MEL MYERS, Q.C.**

---

**YVONNE TAVARES**

---

**DEBORAH STEWART**