



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by A.B.
AICAC File No.: AC-98-141**

PANEL: Mr. Mel Myers, Q.C., Chairman
The Honourable Armand Dureault
Mr. Bill Joyce

APPEARANCES: The Appellant, A.B., appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: April 14, 2003, October 28, 2003 and October 29, 2003

ISSUE(S): Entitlement to reimbursement of:
1. further chiropractic treatment benefits;
2. further care or benefits in respect of Appellant's right
shoulder complaints; and
3. Further care benefits with respect to the Appellant's eye
complaints.

RELEVANT SECTIONS: Sections 127, 131, 136(1)(a) and 70(1) of the Manitoba Public
Insurance Corporation Act ('MPIC Act') and Sections 2 and
5 of Manitoba Regulation 40/94

**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

A.B. (hereinafter referred to as the "Appellant"), was involved in a motor vehicle accident on August 1, 1998 which resulted in three separate appeals to the Commission in respect of the following matters:

1. Entitlement to reimbursement of further chiropractic treatment benefits;
2. Entitlement to a permanent impairment award and funding for home care activities relating to right shoulder complaints;
3. Entitlement to care benefits with respect to the Appellant's eye complaints.

1. Entitlement to reimbursement of further chiropractic treatment benefits

The Appellant was involved in a motor vehicle accident on August 1, 1998 and sustained a soft tissue strain type injury to her neck, shoulders and back. The Appellant had been involved in a previous motor vehicle accident on April 27, 1995 and the Manitoba Public Insurance Corporation ('MPIC') had provided funding for chiropractic treatments in respect of injuries sustained by the Appellant in this accident. On December 9, 1997 MPIC terminated funding of chiropractic treatments effective December 16, 1997.

As a result of the motor vehicle accident of August 1, 1998, chiropractic benefits were again reinstated by MPIC in respect of the injuries the Appellant sustained in this accident. The Appellant attended for chiropractic treatments with Dr. A Seguin from August 4, 1998 to December 16, 1998 and subsequently attended chiropractic treatments with Dr. L. Petrilli commencing on February 15, 1999. Dr. L. Petrilli provided MPIC with a report dated June 5, 1999 which indicated moderate to severe tenderness with painful limitation of 30-80% of her expected range of movement.

Subsequently, the case manager arranged for a third party chiropractic examination with Dr. Brian Lecker on August 25, 1999. Dr. Lecker provided a written report to MPIC dated August 27, 1999 wherein he stated at page 6:

3. With regards to treatment, she indicated that she is not any better and

subsequently, I believe that she has reached maximum therapeutic benefit. She indicated that she would like to try physiotherapy which in my opinion, would be a viable option if time framed (4 to 8 weeks) and if it was geared to active exercise, consistent with her age and activity levels. Long term passive interventions in my opinion, will not have any lasting effect. If therapy is pursued, I believe that she would be able to self-manage thereafter. At the same time, I would also suggest that she could benefit by becoming involved in a senior's exercise program. (underlining added)

In conclusion, she is not disabled and I do not believe that she sustained any permanent physical impairment. She will however quite likely have a continuance of various pains/symptoms many of which, pre-exist her last accident, with many of her musculoskeletal symptoms being associated with degenerative joint arthrosis, at multiple levels. Overall, her functional prognosis is good.

The case manager, upon receipt of that report, requested Dr. Tim Pethrick, Chiropractic Consultant, MPIC Claims Services Dept., to review the medical file and Dr. Lecker's third party examination report. Dr. Pethrick, in his Inter-Departmental Memorandum to MPIC dated September 24, 1999, states:

I have reviewed the file contents provided to me, including a recent third party examination report from Dr. Brian Lecker.

Based on the available evidence, it seems clear that the claimant has not benefited in a significant and sustained way from her chiropractic care to date. On examination with Dr. Lecker, she told him as much. The most recent report from the attending chiropractor, Dr. L. Petrilli, dated June 1999 reports moderate to severe tenderness with painful limitation of 30-80% of her expected range of movement. Her status inventories, as completed for Dr. Lecker, are in the high eighties. Following over one year of care, it is difficult to understand how this would represent any improvement from her immediate post accident condition.

Given this lack of improvement with chiropractic care, it would be reasonable to transfer her treatment to treatment under another paradigm. Since there is strong suggestion of pain focus reported by Dr. Lecker, it would be most sensible that this be a time limited activity-based program graduating to self-management. The physiotherapy program that Mr. Millar has described in his recent memo would be such a program.

It is noted that the claimant has significant pre-existing spondyloarthropathy which may account for a large part of her ongoing symptoms and signs.

The case manager wrote a letter to the Appellant dated October 29, 1999 and advised her that based on MPIC's chiropractic consultant, MPIC was not prepared to fund further chiropractic care since such treatment was unlikely to be of any further therapeutic benefit to the Appellant.

The Appellant applied for a review of the case manager's decision dated May 25, 2002. On July 3, 2002 the Internal Review Officer issued a decision upholding the case manager's decision and dismissing the Application for Review.

The Internal Review Officer, in her decision dated July 3, 2002, states at page 2 of her decision:

On August 25, 1999 you attended for a third party chiropractic examination with Dr. Brian Lecker. As a result of that examination he wrote a report dated August 27, 1999. It was Dr. Lecker's opinion that you had reached maximum therapeutic benefit from chiropractic treatment. This means that your condition was not improving while receiving that treatment. Dr. Lecker also advised "long-term passive interventions in my opinion, will not have any lasting affect". I have attached a copy of Dr. Lecker's report for your information.

Dr. Timothy Pethrick a Chiropractic Consultant employed by Manitoba Public Insurance then reviewed your file on September 24, 1999. Dr. Pethrick agreed that you had a lack of improvement with chiropractic care and therefore you should no longer have chiropractic treatment funded as it was not medically required or a medical necessity as a result of your accident of August 1, 1998. Both Dr. Pethrick and Dr. Lecker recommended physiotherapy treatment which you did receive after the decision letter of October 29, 1999. For your information I have attached a copy of Dr. Pethrick's CARS note dated September 28, 1999.

After reviewing this information and the other medical reports on your file, it is my decision that you had reached maximum therapeutic benefit from chiropractic treatment in 1999 and as a result I am confirming Don Miller's decision letter that chiropractic benefits would no longer be funded by the Manitoba Public Insurance Corporation as a result of your accident of August 1, 1998.

The Appellant appealed this decision to the Commission.

APPEAL

The following sections of the MPIC Act and Regulations are as follows:

Section 136(1) of the MPIC Act which provides that:

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.

Section 5(a) of Manitoba Regulation 40/94 which provides that:

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 submitted that the chiropractic treatments made her feel better and therefore she requested MPIC to reinstate funding in respect of these chiropractic treatments. Counsel for MPIC argued, having regard to the opinions of Dr. Lecker and Dr. Pethrick, the Appellant had reached maximum therapeutic benefit from chiropractic treatments and MPIC was justified in terminating the funding of these treatments effective October 29, 1999.

Upon a careful review of all of the documentary evidence made available to it, and upon hearing the submissions made by the Appellant and counsel on behalf of MPIC, the Commission finds the Appellant has not established, on a balance of probabilities, that chiropractic treatments were medically required after MPIC terminated the funding of these treatments on October 29, 1999.

Having regard to the chiropractic opinions of Dr. Pethrick and Dr. Lecker, the Commission agrees with the decision of the Internal Review Officer, dated July 3, 2002, that the Appellant had reached maximum therapeutic benefit from chiropractic treatments on October 29, 1999 and that MPIC was justified in no longer funding these treatments to the Appellant as a result of the motor vehicle accident on August 1, 1998.

As a result, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer dated July 3, 2002.

2. Entitlement to reimbursement of further care or benefits in respect of Appellant's right shoulder complaints

As indicated earlier in this decision the Appellant was involved in a motor vehicle accident on August 1, 1998. The Appellant was treated at the Emergency Room of the [text deleted] Hospital in respect of the injuries and complained of headaches and sore chest associated with the shoulder restraint. X-Rays were taken at that time and the radiologist reported that the Appellant's cervical spine demonstrated degenerative disc disease of a lower cervical spine. The attending room doctor's diagnosis was whiplash at that time.

The Appellant subsequently saw her personal physician, Dr. Krahn, who in a report dated September 2, 1998 indicates the Appellant, as a result of the motor vehicle accident, suffered a soft tissue injury to her cervical spine.

The Appellant, prior to the accident on August 1, 1998, had been treated for several years by Dr. M. Sharif, an orthopaedic surgeon, in respect of a long standing cervical spondylosis condition.

As a result of the motor vehicle accident of August 1, 1998 Dr. Toews referred the Appellant to Dr. Sharif for assessment on August 20, 1998, approximately 20 days after the motor vehicle accident in question. Dr. Sharif, in a report to Dr. Toews dated September 2, 1998, states:

Her musculoskeletal examination was rather unremarkable apart from slight localised tenderness around the lower cervical spine with mild limitation of range of motion.

I had a chance to review her recent x-rays of the cervical spine which showed long standing cervical spondylosis.

With a diagnosis of recovering soft tissue injury to the cervical spine, [A.B.] was encouraged to continue with local heat application and range of motion exercises. No doubt that an occasional course of oral analgesics and muscle relaxant would be beneficial in her case.

Dr. Karen Toews, who was the Appellant's family physician in September 1999, in a report dated October 26, 2000, referred to various complaints that the Appellant had and provided an opinion that she did not feel the Appellant's status was causally related to the motor vehicle accident. Dr. Toews further notes in her report that she had recently referred the Appellant to Dr. Engel, who was an orthopaedic surgeon, for an opinion on the Appellant's right shoulder complaints.

Dr. Engel, in a report to Dr. Toews dated December 12, 2002, indicated that the Appellant had numerous complaints in respect of her right shoulder pain, aches and stiffness and the Appellant "notes this occurred post-motor vehicle accident". Dr. Engel had x-rays taken of the Appellant's right shoulder, diagnosed that the Appellant was suffering from a large rotator cuff tear and subsequently arranged for an MRI arthrogram. Dr. Engel was of the view that having regard to the massive nature of the tear, combined with the Appellant's age of 70, surgery would not be successful to repair the rotator cuff tear and he recommended non-operative treatment to treat the tear. (underlining added)

The Appellant subsequently saw Dr. Curtis Krahn who concluded that the massive rotator cuff tear was caused by the motor vehicle accident. MPIC received Dr. Krahn's report and provided same to Dr. Fougere, MPIC's Medical Consultant, for her review. In an Inter-Departmental Memorandum dated October 16, 2001 Dr. Fougere indicated in her view Dr. Krahn's opinion should be noted within the context of all the medical opinions that have been documented on file and within this context, on the balance of probabilities, the Appellant's current medical status cannot be said to be related to injuries sustained in the motor vehicle accident.

On December 7, 2001 the case manager wrote to the Appellant indicating that, having regard to the medical opinion of MPIC's Medical Consultant, MPIC was unable to find any causal relationship between the motor vehicle accident and her right shoulder complaints and, as a result, MPIC was unable to fund any further care or benefits with respect to the motor vehicle accident.

The Appellant attended at the [text deleted] Hospital where a physiotherapy assessment occurred on March 5, 2001. An examination of the therapist's clinical note entries indicate with regard to the right shoulder the therapist took a history from the Appellant of torn muscles in the shoulder. The therapist documented limited range of motion for the right shoulder, and documented limited internal and external rotation accompanied by pain to the right side.

The case manager requested that Dr. Fougere, MPIC's Medical Consultant, review the medical file to determine whether a causal relationship exists between the Appellant's documented rotator cuff tear and the motor vehicle accident. Dr. Fougere provided an Inter-Departmental Memorandum, dated February 13, 2002, and concluded that the rotator cuff tear was not caused by the motor vehicle accident. Dr. Fougere reviewed the independent chiropractic evaluation

conducted by Dr. Lecker on August 25, 1999 where the Appellant reported that her neck, headaches, upper and middle back areas and interscapular were not improving. She advised Dr. Lecker that both shoulders were sore and also described paresthesia to both hands. Dr. Lecker notes that there was no documentation by the chiropractor of functional deficits related to the shoulder joints as one would have expected from the described “massive rotator cuff tear”. Dr. Lecker in his report concluded that the clinical findings indicated underlying degenerative capsular pattern, as reflected by “ranges of motion bilaterally [that] were somewhat restricted without significant pain on abduction and both internal and external rotation”.

Dr. Fougere further stated in her Inter-Departmental Memorandum dated February 13, 2002:

The chiropractor suggested in his report that the claimant’s shoulder presentation was consistent with degenerative (osteoarthritic changes) and functionally this was manifested as some loss of range of motion to the glenohumeral joints. The absence of significant pain in the movements that involve the rotator cuff muscles, is not consistent with a substantial rotator cuff tear. The chiropractor’s clinical findings, on the balance of probabilities, indicate that the structural pathology associated with the claimant’s right rotator cuff, occurred in a period after his examination.

Not specifically commented on in my previous report, is a physiotherapy assessment (therapist’s name is not decipherable) which is included in clinic note entries submitted to file for the visit of March 5, 2001. The therapist headed his/her clinic note with ‘Right Shoulder’ and the therapist took a history from the claimant of torn muscles in [the right] shoulder. The therapist documented limited range of motion for the right shoulder, documenting limited internal and external rotation accompanied by pain for the right side.

Editor’s Comment

The therapist’s findings for March 5, 2001 were markedly different than the chiropractor’s documented findings for August 1999 indicating a change in clinical status in the interim. It is this reviewer’s opinion that the therapist’s March 5, 2001 findings, on the balance of probabilities, are not related to motor vehicle collision injuries.

OPINION

Based on a second review of this file to readdress the question of causality regarding the claimant’s right shoulder pathology, and notwithstanding that the claimant’s seatbelt would have crossed her right shoulder, it is this writer’s opinion that the documented rotator cuff tear was not causally related to the motor vehicle collision.

The Appellant had made application to have the decision of the case manager reviewed by an Internal Review Officer.

An Internal Review hearing was held on March 28, 2002 and the Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review.

The Internal Review Officer in her decision dated April 8, 2002, confirmed the case manager's decision of December 7, 2001 and dismissed the Application for Review. In arriving at her decision the case manager relied on the medical opinion of Dr. Fougere and stated:

. . . The physiotherapist documented limited range of motion for the right shoulder, with limited internal/external rotation accompanied by pain for the right side. In reviewing both of these reports Dr. Fougere noted that the findings of Dr. Lecker in August of 1999 and the findings of the physiotherapist on March 5th, 2001 are markedly different. Therefore, the rotator cuff tear must have happened after your examination by Dr. Lecker in August of 1999 which means that it happened over one year after your motor vehicle accident.

The Internal Review Officer concluded her report by saying:

As a result, Dr. Fougere comes to the conclusion that your right rotator cuff tear is not related to your motor vehicle accident but rather to some other event. I see no medical evidence on the file that contradicts Dr. Fougere's conclusion and I in fact agree with her conclusion. As a result, it is my decision that your eye complaints and your right rotator cuff tear were not caused by your motor vehicle accident of August 1st, 1998 and therefore The Manitoba Public Insurance will not cover any funding that arises from those complaints.

The Appellant filed a Notice of Appeal on May 13, 2002.

On November 4, 2002 Dr. Engel provided a medical report to the Commission. In this report Dr. Engel reiterates his comments in his earlier reports and also states:

- 1.) The patient's motor vehicle accident directly caused this lady's rotator cuff tear and subsequently all the pain disability and limitations that this patient suffers (sic).
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- 5.) The prognosis of the patient is poor. This lady will continue to have night pain, activity pain, arm weakness and may over time developed a cuff arthropathy. This is an arthritis of the glenohumeral joint that can occur in response to a massive rotator cuff tear.

The Internal Review Officer provided Dr. Engel's report to Dr. Fougere. Dr. Fougere, after reviewing Dr. Engel's report provided an Inter-Departmental Memorandum to the Internal Review Officer dated January 6, 2003 and disagreed with Dr. Engel's opinion as to causality. Dr. Fougere found that the medical documentation on file does not support the Appellant's pain complaints in the acute post-motor vehicle collision including right shoulder pain complaints nor did any of the initial medical documents comment on right shoulder functional deficits presumably due to the fact that the shoulder problems were not raised as an issue.

The Internal Review Officer provided Dr. Engel with Dr. Fougere's Inter-Departmental Memorandum and requested an explanation from Dr. Engel as to the basis of his opinion as to the causal relationship issue. Dr. Engel was provided with a number of other reports that MPIC had received which had not earlier been provided to Dr. Engel.

On April 24, 2003 Dr. Engel provided a medical report to the Internal Review Officer setting out his reasons on the issue of causality. Dr. Engel stated that the objective evidence establishing that the rotator cuff tear was caused by the motor vehicle accident on September 1, 1998 was:

- 1.) The patient had no rotator cuff tear as of January 6, 1998 only seven months before the motor vehicle accident of question.
- 2.) The patient complained of shoulder complaints on 4 different Health Care Reports soon after the motor vehicle accident (seven days to four months post motor vehicle accident).
- 3.) The MRI scan confirms that this was a massive rotator cuff tear, the kind that is caused by trauma.

- 4.) The shoulder injured was the right shoulder which was mentioned on two occasions in the Health Care Reports soon after the motor vehicle accident.
- 5.) The symptoms and signs complained by the patient soon after the motor vehicle accident which were recorded on the Health Care reports were consistent with a rotator cuff tear.

On the balance of probability it is my medical opinion that [A.B.'s] rotator cuff tear was caused by the motor vehicle accident of August 1, 1998.

Dr. Fougere was requested by MPIC to review Dr. Engel's medical report dated April 24, 2003 on the issue of causality. Dr. Fougere provided a lengthy report to MPIC dated May 26, 2003 and rejected Dr. Engel's opinion on causality and reaffirmed her initial opinion that the Appellant's rotator cuff injury was not caused by the motor vehicle accident. Dr. Fougere stated in her report that after reviewing the manner in which the Appellant suffered the injury and reviewing the medical literature in respect to rear end collisions on the shoulder joint and shoulder girdle states *"In this writer's opinion, on the balance of probabilities, the mechanism described in the motor vehicle collision suffered by [A.B.], does not support that the claimant's rotator cuff injury resulted from the rear end collision."*

Dr. Fougere concluded that the Appellant's documented symptom complaints and objective examination findings do not support the diagnosis of rotator cuff tear caused by the motor vehicle accident on September 1, 1998. In support of that position Dr. Fougere reviewed the medical reports of Dr. Seguin, the Emergency Room physician, and Dr. Roy, as well as the report of Dr. Sharif, and stated:

[A.B.] was assessed by four medical professionals with the requisite skills to provide informed diagnostic opinions and all of whom had the benefit of questioning and examining [A.B.] in the initial period post-motor vehicle collision. None of the four clinicians diagnosed rotator cuff pathology.

Dr. Fougere further stated:

Having reviewed the medical documentation relating to the weeks following the motor vehicle collision, it is this writer's opinion that the claimant did in fact suffer soft tissue injury to the neck, posterior trunk and anterior chest wall region and did not suffer a right rotator cuff tear. This also is the opinion offered by the professionals who attended [A.B.] in the acute period post-motor vehicle collision.

Dr. Engel, in his report dated April 24, 2003, stated:

- 2.) The patient complained of shoulder complaints on 4 different Health Care Reports soon after the motor vehicle accident (seven days to four months post motor vehicle accident).

Dr. Fougere takes issue with Dr. Engel's findings and states as follows:

In point #2, the surgeon refers to [A.B.'s] shoulder complaints in the immediate period post-motor vehicle collision. The non-medical (layperson's) definition of "*shoulder*" has been commented on above and is consistent with a broad anatomical region which includes the upper thoracic region, superior shoulder girdle region, shoulder joint, superior anterior chest wall and upper arm.

Dr. Engel further stated:

- 3.) The MRI scan confirms this was a massive rotator cuff tear, the kind that is caused by trauma.

In respect of this issue, Dr. Fougere stated:

Comment #3 refers to the claimant's MRI findings of a massive rotator cuff tear which by its size, would be trauma induced. Presuming trauma as the underlying cause, the MRI findings in no way contribute to establishing a temporal association with the August 1, 1998 motor vehicle collision. The presumption of underlying trauma in instances of complete tears is not supported from literature review. Having reviewed the literature and discussed this issue – in particular "*massive*" rotator cuff tears, with a leading presenter on rotator cuff pathology (CASM conference, Winnipeg, June 2003), there is widespread agreement that complete/full thickness rotator cuff tears are a natural, age related occurrence. Prevalence increases markedly after age 50 years. In one study, partial or full thickness tears were present in over 50% of study populations in the seventh decade and in over 80% for those of 80 years of age. In another study on cadavers, examining only for full thickness tears, 17% of subjects (53 female, 26 male), average age 77.8 years, had complete tears. Prevalence increased with age so that 30% of those over age 60 had complete tears.

Dr. Engel, in his report of April 24, 2003 states:

- 4.) The symptoms and signs complained by the patient soon after the motor vehicle accident which were recorded on the Health Care reports were consistent with a rotator cuff tear.

Dr. Fougere states:

In point #5, the surgeon opines that the symptoms and signs reported by [A.B.] after the motor vehicle collision were consistent with a rotator cuff tear. This reviewer has attempted to show that literature findings indicate that the symptom complaints described by [A.B.] in fact are typical of a whiplash-type injury. There is an absence of specific clinical examination findings documented to support that in fact a massive rotator cuff tear resulted from the motor vehicle collision.

MPIC also obtained an assessment from Dr. Victor de Korompay, an Orthopedic Surgeon, dated September 12, 2003. In this report Dr. de Korompay states:

It is over two years since the car accident which was alleged to have caused her rotator cuff tear which occurred before plain x-rays were obtained of her shoulder which showed the evidence of the proximal migration of the right humeral head compatible with a rather massive cuff tear. By massive, this indicates size, not severity. These can occur as a single acute traumatic event but these are usually also accompanied by very significant signs and symptoms. Patients have a definite traumatic episode with onset immediately of severe pain in association with quite profound weakness of the shoulder. These are not a difficult diagnosis to make. More commonly what occurs in patients who are more elderly, as this woman is, is that this is a gradual attritional process; the cuff wearing away. It is often accompanied by maintenance of reasonably good function with episodic mild exacerbations and improvements in the shoulder symptomatology. Patients usually maintain quite a reasonable or sometimes full range of motion and often maintain quite reasonable function in spite of fairly marked radiological changes. On the balance of probabilities, it is much more likely that in fact this is the process that has occurred in this woman to account for her right shoulder findings at this time and not as claimed, the result of a single traumatic episode secondary to the motor vehicle accident. (underlining added)

APPEAL

The relevant provisions of the MPIC Act in respect of a permanent impairment award and reimbursement for home care expenses are:

Section 127 of the MPIC Act provides that:

Lump sum indemnity for permanent impairment

127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

Section 131 of the MPIC Act provides that:

Reimbursement of personal assistance expenses

131 Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

Section 2 of Manitoba Regulation 40/94 provides that:

Reimbursement of personal home assistance under Schedule A

2 Subject to the maximum amount set under section 131 of the Act, where a victim incurs an expense for personal home assistance that is not covered under *The Health Services Insurance Act* or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

At the appeal hearing, which took place on April 14, 2003, October 28, 2003 and October 29, 2003, the Appellant was unrepresented by legal counsel and MPIC was represented by Mr. Terry Kumka. At this hearing the Appellant testified that as a result of the motor vehicle accident on September 1, 1998 she suffered from a rotator cuff injury to her right shoulder, which caused her a great deal of pain and she was unable to carry out household duties and activities on her farm where she resided with her husband. In regard to her age and the massive rotator cuff tear, Dr. Engel informed her that surgery would not be successful and the rotator cuff tear would be of a permanent nature. As a result the Appellant has requested that MPIC provide her with a permanent impairment award and reimbursement for home care expenses.

In support of her position, Dr. Engel testified on behalf of the Appellant and initially confirmed the medical opinions which have been referred to earlier in this decision. Dr. Engel asserted that in his opinion the motor vehicle accident caused the rotator cuff tear in the Appellant's right shoulder.

However, in cross-examination by counsel for MPIC Dr. Engel testified that he did not recall examining the medical report of Dr. Sharif, dated September 2, 1998. In this report Dr. Sharif confirmed that he had examined the Appellant twenty days after the motor vehicle accident in question and she did not complain about any pain consistent with a rotator cuff tear. Dr. Engel acknowledged that, having regard to Dr. Sharif's diagnosis approximately twenty days after the motor vehicle accident in question, he reversed his position and concluded that the rotator cuff tear was not caused by the motor vehicle accident of September 1, 1998.

In her submission to the Commission the Appellant argued that notwithstanding Dr. Engel's testimony, the motor vehicle accident did cause the rotator cuff tear to her right shoulder, that this condition would be of a permanent nature and that she was therefore entitled to a permanent impairment award and financial assistance in respect of home care services.

DECISION

The Commission is satisfied, on a balance of probabilities, that based on the medical evidence that was presented to it, and after hearing the testimony of the Appellant and Dr. Engel, that the motor vehicle accident on September 1, 1998 did not cause the rotator cuff tear to her right shoulder. The Appellant's primary expert witness, Dr. Engel, reversed his position and agreed with Dr. Fougere and Dr. Victor de Korompay that the motor vehicle accident did not cause the

rotator cuff tear. As a result the Commission accepts the medical testimony of Dr. Fougere, Dr. de Korompay and Dr. Engel on the issue of causality and rejects the Appellant's testimony on this issue.

The Commission finds, having regard to the medical evidence and testimony of the witnesses that was presented at the appeal hearings, that as a result of the motor vehicle accident of September 1, 1998 the Appellant suffered a whiplash injury to her shoulder and neck and that sometime after the motor vehicle accident she suffered a tear to the rotator cuff of her right shoulder, which was not caused by the motor vehicle accident.

The Commission wishes to emphasize that it found the Appellant to be a credible, straightforward witness and the Commission acknowledges that the Appellant has suffered a significant rotator cuff tear injury to her right shoulder which is causing her a great deal of pain and has affected the quality of her life. However, the Commission does not conclude, on the balance of probabilities, that the Appellant's complaints in respect of the rotator cuff tear was caused by the motor vehicle accident. As a result, the Appellant is not entitled to receive a permanent impairment award in respect of the rotator cuff tear, nor is she entitled to receive home care benefits from MPIC. As a result, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer dated April 8, 2002.

3. Entitlement to further care benefits with respect to the Appellant's eye complaints

The Appellant is appealing the decision of the Internal Review Officer dated January 11, 2001 which confirmed the case manager's decision that MPIC would not provide any benefits relating to the Appellant's eye complaints relating to mileage for attendance for those treatments or

permanent impairment benefits. The relevant sections of the MPIC Act and Regulations are as follows:

Section 136(1)(a) of the MPIC Act which provides that:

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;

Section 70(1) which provides that:

Definitions

70(1) In this Part,

"**accident**" means any event in which bodily injury is caused by an automobile;

As a result of the motor vehicle accident on August 1, 1998 the Appellant complained about an injury to her eye arising out the motor vehicle accident and sought compensation from MPIC in respect of these complaints relating to reimbursement for mileage for attendance in respect of the treatments, and for permanent impairment benefits.

Dr. Toews, who initially saw the Appellant subsequent to the motor vehicle accident in respect of her eye complaints, advised the case manager in a letter dated October 26, 2000 that “. . . *present complaints (right shoulder pain, watery eyes, urinary urgency and abdominal pain, ringing in her ears, epistaxis, excess mucous and blurry vision) are not related to her accident of August 15, 1998.*” (underlining added)

Dr. Peggy Hung, who took over the care of Dr. Toews’ patients in September of 1999, in her report to MPIC dated July 4, 2000 stated that “*In December 1999, [A.B.] complained of*

headaches and ringing in the ears as well as a self-perceived right eyebrow deformity which she feels is due to the accident. She was insisting on a CT scan of her entire body to look for injuries related to the 1998 accident.”

Dr. Hung further states in this report:

She is diabetic and has high cholesterol and is generally non-compliant with her medications. She had a complete physical done in April 2000, after which I referred her to an Ophthalmologist to assess for diabetic changes to her retinae. At that time, she insisted on a CT of her head, so Dr. Long (Ophthalmology) took the liberty of referring her to Dr. Dominique (Neurology). Dr. Dominique feels that there are no significant neurological findings and that there is no concrete evidence to link her symptoms with the above accident. He has ordered a CT scan of her head for thoroughness.

I have to agree with his assessment that it would be difficult to attribute her current symptoms to her accident of August 1, 1998. (underlining added)

Dr. Adrian L.H. Long, an ophthalmologist, saw the Appellant on May 15, 2000 and October 19, 2002 and provided a report to MPIC dated October 19, 2000 which stated:

I have only seen this patient on one occasion, and that was on May 15, 2000. She told me that she has had diabetes for twenty years, and had had an eye examination two weeks before. She also said that her right eye had been lazy for many years. There was also a history of trauma, sustained during a motor vehicle accident.

A complete eye examination was carried out. Vision corrected to 20/200 in the right eye and 20/25-2 in the left. There was slight drooping of the right upper eyelid. Both pupils reacted normally and the interior of each eye also appeared normal.

Intraocular pressure was normal, with no evidence of glaucoma. The refraction was also assessed and her present spectacles were found to be quite adequate. No further tests were performed.

She had also stated that her eyes had been slightly watery and uncomfortable and I gave her a topical allergy drop, but no other treatment.

I did however, refer her to Dr. Francis Dominique, Neurologist because of the drooping of the right upper lid. I suspect however, that this was not due to the motor vehicle accident. I found no evidence of ocular trauma. (underlining added)

Dr. Dominique provided a report to Dr. Long dated June 2, 2000 confirming that there were no significant neurological findings and that there was no concrete evidence to link the Appellant's symptoms to the accident of August 1, 1998.

Dr. A. G. Macrodimitris, an ophthalmologist, in a report dated June 13, 2000 stated that the Appellant had advised him that she was involved in a motor vehicle accident in 1998 and that the Appellant had complained about generalized headaches since the accident, went to several emergency departments and her own doctor but nothing was discovered. Dr. Macrodimitris further states:

In regards to her right eye she is aware that this eye has been weak since birth. On examination she did indeed show a mild puffiness of the eyelids slightly more so on the right eye. I think this is probably due to blepharochalasis.

Dr. Macrodimitris could find no evidence that the Appellant's complaints in respect of her eyes were connected to the motor vehicle accident in 1998.

The case manager, upon receipt of the above mentioned medical reports, forwarded them to MPIC's Medical Services Consultant for an assessment. Upon receipt of a report from MPIC's Medical Services Consultant the case manager wrote to the Appellant and informed her that MPIC was unable to determine a causal relationship between the eye complaints and the motor vehicle accident and as a result MPIC was unable to fund any care with respect to the Appellant's eye complaints or any travel costs related to the injury.

The Appellant made an Application for Review with the Internal Review Office, dated November 10, 2000.

In a letter to the Appellant dated January 11, 2001 the Internal Review Officer wrote to the Appellant and advised her that she was upholding the case manager's decision confirming the decision of July 19, 2000 and confirming there was no medical evidence to relate her eye complaints to the motor vehicle accident of August 1, 1998. The Internal Review Officer referred to the medical reports of Dr. Peggy Hung, Dr. Francis Dominique, Dr. Macrodimitis, Dr. Karen Toews and Dr. Long and stated:

From my review of the file I note that no health care practitioner states that your eye complaints are due to the motor vehicle accident and in fact, they say that your eye complaints not accident related. Therefore, it is my decision that your eye complaints are not related to your motor vehicle accident of August 1, 1998. As a result, you will receive no benefits related to the eye complaints, such as treatment or mileage for attendance to those treatments or permanent impairment benefits for your eyes. As a result, I am confirming your Case Manager's decision of July 19, 2000.

The Commission is very sympathetic to the Appellant's complaints as to the problems she had in respect of her eyes and finds the Appellant to be a credible, straightforward witness. However, the Commission agrees with the decision of the Internal Review Officer that there is no medical evidence to support the Appellant's eye complaints due to the motor vehicle accident. Upon a careful review of all of the documentary evidence available to it and upon hearing the submissions by the Appellant and by counsel on behalf of MPIC, the Commission finds the Appellant has not established, on a balance of probabilities, that pursuant to Section 136(1)(a) of the MPIC Act, MPIC is required to reimburse the Appellant for treatment in respect to her eye complaints or mileage for attendance for those treatments or permanent impairment benefits for her eyes.

As a result the Commission dismisses the Appellant's appeal and confirms MPIC's Internal Review decision dated January 11, 2001.

Dated at Winnipeg this 9 day of December, 2003.

MEL MYERS, Q.C.

HONOURABLE ARMAND DUREAULT

BILL JOYCE