



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by L.K.
AICAC File No.: AC-03-122-LG**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Laura Diamond
Ms. Deborah Stewart

APPEARANCES: The Appellant, L.K., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Morley Hoffman.

HEARING DATE: May 5, 2004

ISSUE(S): Entitlement to funding for further physiotherapy and
chiropractic treatments and benefits.

RELEVANT SECTIONS: Section 136(1) (d) of the Manitoba Public Insurance
Corporation Act (the 'MPIC Act') and Section 5(a) 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

L.K. (hereinafter referred to as the 'Appellant') was involved in a motor vehicle accident October 4, 2000 and, as a result, suffered injuries to his neck and back. The Appellant was able to return to work after 3 weeks but subsequently has had chronic persistent disabilities of the upper and low back, neck pain, as well as headaches. The Appellant was treated by various doctors and has received physiotherapy and chiropractic treatments funded by MPIC.

The case manager requested Dr. Pethrick, Chiropractic Health Care Consultant for MPIC, to review the Appellant's medical file to determine whether on going chiropractic treatments were medically required and whether the claimant would benefit from further chiropractic or massage therapy treatments. On April 11, 2003 Dr. Pethrick provided an Inter-departmental Memorandum to the case manager wherein Dr. Pethrick compared the revised Oswestry Low Back Pain and Disability Questionnaire and Neck Disability Index scores from December 14, 2002 to February 4, 2003 and found that the Appellant's condition did not deteriorate without chiropractic treatment. As a result, Dr. Pethrick concluded there was very little basis upon which to continue chiropractic treatment.

On May 6, 2003 MPIC requested Dr. Brad Baydock to review the medical necessity of physiotherapy treatments for the Appellant. Dr. Baydock provided a report to the case manager, dated July 4, 2003, wherein he stated that the Appellant had received a great deal of in-clinic physiotherapy in the past but the claimant continued to have a measureable functional deficit that could respond to further therapy and recommended a further ten in-clinic visits to provide the claimant with a strengthening program. Dr. Baydock further stated that further in-clinic therapy would not be medically indicated thereafter.

The case manager wrote to the Appellant on July 8, 2003 based on the medical opinions of Dr. Pethrick and Dr. Baydock, and concluded that the Appellant had reached a plateau in his recovery and that additional chiropractic treatment was not a "medical necessity". In respect to physiotherapy treatments, the case manager indicated having attended 20 physiotherapy treatments MPIC would provide no further funding beyond July 4, 2003.

Internal Review Officer's Decision

The Appellant made application for review of the case manager's decision. On July 29, 2003 the Internal Review Officer issued her decision, confirmed the case manager's decision and dismissed the Application for Review. The Internal Review Officer, in arriving at her decision, adopted the medical opinion of Dr. Pethrick as set out in his Inter-departmental Memorandum dated April 11, 2003 and Dr. Baydock's medical opinion as set out in his report dated July 4, 2003.

On October 13, 2003 the Appellant filed a Notice of Appeal with the Commission and submitted that he disagreed with the decision of the Internal Review Officer and enclosed a report from his chiropractor, Dr. Wendy Seed, critical of the medical report of Dr. Pethrick and requested that MPIC continue to fund his chiropractic treatments.

Dr. G. Storoschuk, who had been treating the Appellant in respect of his injuries, referred him to Dr. E. Hobson, a neurologist at the Winnipeg Clinic, and requested that Dr. Hobson assess the Appellant's chronic headaches following the motor vehicle accident. Dr. Hobson provided a report to Dr. Storoschuk, dated November 7, 2003, in which he reported that he had examined the Appellant on November 6, 2003 and he was unable to find any neurological problem attributed to the Appellant's chronic pain complaints. Dr. Hobson also opined that, having regard to the diffused muscular pain problems of the Appellant, local physiotherapy unfortunately would not likely provide any sustained benefit.

The Commission received a further written submission from Dr. Seed, the Appellant's chiropractor, dated September 24, 2003. As a result, MPIC's legal counsel requested Dr. Pethrick to review the report of Dr. Seed dated September 24, 2003. In an Inter-departmental Memorandum to MPIC's legal counsel, dated April 26, 2004, Dr. Pethrick indicated that upon

reviewing the new information provided by Dr. Seed, his opinion had not changed. Dr. Pethrick indicated that the Appellant continued to have persistent pain complaints and that the treatments provided by Dr. Seed did not appear to improve the overall condition of the Appellant. Dr. Pethrick further stated:

.....He continues to have persistent pain complaints which appear to be at about the same level as historically. This is supported by the description of the claimant's condition as provided by Dr. D. Hobson, a local neurologist, who saw [L.K.] on November 6, 2003 and describes him in a narrative report dated the following day.

Medical necessity of treatment, especially in the late stages, is judged not only on the existence of objective indicators for treatment but on the demonstration of improvement as a result of treatment. In [L.K.'s] case, the bulk of evidence supports a conclusion that he has failed to progress with care.

The information reviewed does not change my opinion as expressed in my memo of April 2003.

APPEAL

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

Section 136(1) of the Act:

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:

- (d) such other expenses as may be prescribed by regulation.

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

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances;

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

The Appellant appeared on his own behalf before the Commission and Mr. Morley Hoffman attended as MPIC's legal counsel. The Appellant testified before the Commission and stated that the only treatment which provided relief to him in respect of the chronic pain from his neck and back were the chiropractic and physiotherapy treatments and that funding had been terminated by MPIC. The Appellant acknowledged that these treatments did not medically improve his physical condition but minimized the pain and permitted him to maintain his quality of life. The Appellant therefore submitted that, in his view, MPIC was not justified in terminating funding for the physiotherapy and chiropractic treatments and that they should be reinstated.

MPIC's legal counsel submitted that, having regard to the medical reports of Dr. Pethrick, Dr. Baydock and Dr. Hobson, further physiotherapy and chiropractic treatments were not medically required. Mr. Hoffman further submitted that the Appellant has failed to establish, on a balance of probabilities, that these treatments did improve the Appellant's medical complaints.

At the conclusion of submissions by the Appellant, and by MPIC's legal counsel, the Commission panel recessed for a short period of time and thereafter reconvened the hearing and advised both parties that there were no psychological reports filed in evidence before the Commission. The Commission therefore wished to determine whether, as a result of the motor vehicle accident of October 4, 2000, the Appellant had suffered psychological injuries which prevented the Appellant from obtaining the benefit of chiropractic and physiotherapy treatments. The Appellant consented to being assessed by a psychologist selected by the Commission panel who would provide a report to the Commission and to both parties.

On May 27, 2004, the Commission provided Dr. Lesley Enns with 33 medical reports from the

Appellant's file and requested that Dr. Enns examine the Appellant, review the enclosed material and answer the following questions:

As you may be aware, the Automobile Injury Compensation Appeal Commission was established in March 1994 as a tribunal to which any person, injured in a motor vehicle accident and dissatisfied with a decision of the Manitoba Public Insurance Corporation ('MPIC') respecting their benefits, may appeal. Subject to a limited right of appeal to the Manitoba Court of Appeal, the decisions of this Commission are final. It is in this context that I write to you now.

The Commission heard an appeal by [L.K.] on May 5, 2004 from the attached Internal Review Decision (attached hereto and marked as "A") of Ms. Dianne Pemkowski, dated July 29, 2003 in respect of [L.K.'s] entitlement to funding for further physiotherapy and chiropractic treatment benefits resulting from his motor vehicle accident of October 4, 2000.

In order to decide this issue the Commission wishes to consider whether, on a balance of probabilities, [L.K.], as a result of the motor vehicle accident, suffered any psychological injuries which may have affected his treatment in respect of his physical injuries. For your reference, I am enclosing herewith the following documents which were filed at the appeal hearing and which deal essentially with the physical status of the Appellant in relation to the motor vehicle accident: (see note above re 33 medical reports).

You will note from an examination of the above mentioned documents that there does not appear to be any assessment made as to whether or not [L.K.] suffered any psychological injuries as a result of the motor vehicle accident on October 4, 2000 and, if he did, whether such injuries if any prevented [L.K.] from obtaining the benefit of chiropractic or physiotherapy treatment. The Commission is requesting that you examine [L.K.], review all of the relevant material contained in the enclosed binder and advise us:

1. Whether or not the motor vehicle accident, which occurred on October 4, 2000, caused or materially contributed to any psychological injuries that [L.K.] may have suffered and, if so, what the assessment is.
2. If [L.K.] was suffering from any psychological injuries as a result of the motor vehicle accident whether or not those injuries prevented [L.K.] from obtaining the benefit of chiropractic or physiotherapy treatment.
3. What specific treatment would have been appropriate on October 4, 2000 and thereafter in respect of any specific psychological injury suffered at that time?
4. The objective basis of any of your opinions in respect of the above matters.

On September 20, 2004 the Commission received Dr. Enns' report, dated September 17, 2004, a copy of which was provided to both the Appellant and MPIC's legal counsel, requesting that

they provide any written comments to the Commission.

Dr. Enns in her report indicated that:

1. the Appellant was suffering from a pain disorder associated with both psychological factors and general medical condition, a moderately severe Major Depressive Disorder;
2. in her opinion the motor vehicle accident of October 4, 2000 contributed to the development of these two psychological disorders.
3. the Major Depressive Disorder likely prevented the Appellant from undertaking the necessary home based physiotherapy/chiropractic treatment program which would have helped him to heal.
4. the chronic insomnia that the Appellant suffered from was also associated with the depression and chronic pain and interfered with muscular healing and attributed to his general feelings of pessimism and inability to participate in his treatment.

Dr. Enns further noted that the Appellant's physical condition had not been improving within the expected duration of time and it would have been appropriate for him to have been referred for a psychological/psychiatric assessment which could have identified the developing symptoms of a Major Depressive Disorder and a risk of his developing a Chronic Pain Disorder.

Feelings of worry, doubt and general "helplessness and hopelessness" tend to be characteristic of individuals who are suffering from a Major Depressive Disorder, and these likely prevented [L.K.] from undertaking the necessary home-based physiotherapy/chiropractic treatment program which would have helped him to heal. Chronic insomnia, which he has indicated is also a predominant symptom, and which is known to be associated with both depression and chronic pain, in addition to interfering with muscular healing, also would have contributed to his general feelings of pessimism and inability to participate in his treatment. Longstanding personality characteristics which might have caused him to be mistrustful of others and which would have been exacerbated by his failure to physically improve may also have prevented his hearing the message that, although the more difficult physiotherapy procedures may initially have hurt, hurt does not necessarily lead to harm.

When it was noted that [L.K.'s] physical condition was not improving within the expected duration of time, it would have been appropriate for him to have been referred for a psychological or psychiatric assessment which could have identified the developing symptoms of a Major Depressive Disorder and the risk of developing a chronic Pain Disorder.

Ideally, [L.K.] should then have been offered medical treatment, such as antidepressant medications, which could have helped to alleviate his symptoms, including, in particular his inability to sleep. As I noted previously, in his letter dated November 7, 2003 to Dr. G. Storoschuk, [L.K.'s] neurologist, Dr. Hobson, suggested a trial of the antidepressant amitriptyline to help restore a more normal sleep cycle. [L.K.] has indicated to me that, to date, he has not tried this medication. Results from the current assessment suggest that [L.K.], who tends to somaticize his feelings and is not naturally a psychologically insightful or trustful individual, would likely not benefit from traditional psychotherapy methods. He might, however, have benefited from participation in a structured, multidisciplinary psycho-educational program which teaches pain management techniques, such as is available at the Wellness Centre at Seven Oaks Hospital, or through the program offered by the Associated Rehabilitation Consultants of Canada Ltd. (ARC), had this been offered to him.

The Commission notes that Dr. Enns was critical in her report as to the medical treatment provided to L.K. as a result of the injuries sustained in the motor vehicle accident. Dr. Enns stated that ideally the Appellant should have been offered medical treatment, such as antidepressant medications, which could have helped to alleviate his symptoms including, in particular, his inability to sleep. Dr. Enns also indicates that the Appellant might have benefited from participation in a structured multi-disciplinary Psycho-Educational Program which teaches pain management techniques such as those available at the Wellness Centre or through Associated Rehabilitation Consultants of Canada Ltd. (ARCC).

The Appellant replied to the Commission by letter dated September 28, 2004 and was highly critical of Dr. Enns' report and re-iterated his position that MPIC should cover all future chiropractic and physiotherapy treatments.

MPIC's legal counsel, in a letter to the Commission dated September 22, 2004, in reply to Dr.

Enns' medical report, stated:

Regardless of [L.K.'s] psychological condition, the reports of Dr. Pethrick, Dr. Baydock, and Dr. Hobson all support the fact that further physiotherapy/chiropractic treatment was not medically required. This treatment was not helpful and not improving [L.K.'s] symptoms. Indeed, Dr. Pethrick noted incidental variation in [L.K.'s] status despite Dr. Seed's comments. Because of the lack of improvement with treatment, further physiotherapy/chiropractic treatment cannot be justified and the decision of the Internal Review Officer must be upheld.

In my view, there is no need for any further hearings regarding this matter. I believe the decision should be upheld and the file referred back to the case manager to deal with the issues raised by Dr. Enns.

Discussion

The Commission, after a careful review of the documentary evidence it has received, the testimony of the Appellant, the submissions of both the Appellant and MPIC's legal counsel, determines that the Appellant failed to establish, on a balance of probabilities, that the chiropractic and physiotherapy treatments were medically required pursuant to Section 5(a) of Manitoba Regulation 40/94. The Commission finds that there was ample evidence before the Internal Review Officer for her to conclude in her decision dated July 29, 2003 that the Appellant had plateaued in his recovery and that additional chiropractic and physiotherapy treatments would not improve the Appellant's medical condition. It is for this reason that the Commission accepts the medical opinions of Dr. Baydock and Dr. Pethrick and rejects the medical opinion of Dr. Seed.

The Commission notes that Dr. Enns in her report states that the motor vehicle accident of October 4, 2000 contributed to the development of the Appellant's pain disorder associated with both psychological factors and general medical condition and a moderately severe major depressive order. Dr. Enns further comments that a timely psychological assessment and appropriate treatment flowing from that assessment may

have assisted the Appellant to recover in whole or in part in respect of his significant psychological problem.

DECISION

In summary, the Commission rejects the Appellant's appeal and confirms the decision of the Internal Review Officer dated July 29, 2003. The Commission agrees with MPIC's legal counsel that the Appellant's file be referred back to the case manager to address the issues raised by Dr. Enns in her letter to the Commission dated September 17, 2004.

Dated at Winnipeg this 17th day of November, 2004.

MEL MYERS, Q.C.

LAURA DIAMOND

DEBORAH STEWART