



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by W.B.
AICAC File No.: AC-02-89**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Mary Lynn Brooks
Ms. Barbara Miller

APPEARANCES: The Appellant, W.B., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Mark O'Neill.

HEARING DATE: December 1, 2004

ISSUE(S): Whether the Appellant is entitled to further benefits under
the Personal Injury Protection Plan ('PIPP')

**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

W.B. (hereinafter referred to as the "Appellant"), was involved in a motor vehicle accident on December 17, 1999. The Appellant attended at his family physician on January 5, 2000 with complaints of increased headaches, left elbow pain, decreased grip strength in the left hand, lower thoracic spine (region) soreness and left heel pain and instability. The physician noted the Appellant did not attend at the hospital after the motor vehicle accident but rather proceeded with his intended plans of going to a hockey game. As a result of his examination the Appellant's family physician diagnosed left shoulder tendonitis and neck strain and recommended physiotherapy.

The Appellant attended Darcy Reynolds, physiotherapist, on March 13 and 17, 2000. The physiotherapist noted complaints of neck pain, left shoulder pain with limited mobility and weakness, and left lateral elbow pain. As a result of this examination, the physiotherapist diagnosed a cervical strain consistent with a WAD 2 injury, myofascial headaches, Grade 2 shoulder strain and recommended eight weeks of physiotherapy treatment. The Appellant discontinued treatment after three treatment weeks.

The Appellant attended the office of Darcy Reynolds, a physiotherapist, on January 23, 2001 with complaints of bilateral shoulder pain. In a Health Care Provider Progress Report to MPIC, dated January 25, 2001, the physiotherapist reported that the Appellant had informed him that he had discontinued his previous physiotherapy treatment because he felt that the pain symptoms would resolve on their own. This report also indicates that the physiotherapist, after assessing the Appellant, diagnosed rotator cuff tendinosis and myofascial neck pain and recommended further treatment.

The case manager referred the Appellant's claim to Dr. Fougere, Medical Consultant for MPIC's Health Care Services, who recommended a second trial of physiotherapy treatment be allowed and if resolution did not occur a second opinion would be obtained. Dr. Fougere also recommended that clinical notes be obtained from the Appellant's family physician in order to determine whether there was a pre-existing medical history associated with the Appellant's shoulder complaints. The family physician did provide MPIC with his clinical notes for the period dating six months prior to December 17, 1999.

The case manager subsequently requested Dr. Fougere to provide a medical opinion as to the necessity of further physiotherapy treatment in respect of the injuries sustained in the motor vehicle accident. Dr. Fougere examined the Appellant's MPIC file and provided an Inter-Departmental Memorandum dated May 22, 2001. She stated:

DISCUSSION/OPINION

As a result of the December 17, 1999 motor vehicle collision, the claimant suffered soft tissue injuries to the neck and left side of his body which would not be considered severe and which typically would not result in chronic disability. It is noted that he suspended physiotherapy treatment after three sessions, indicating that he felt his symptom complaints would resolve on their own. The claimant had a noted history of surgery to the left shoulder with the inciting pathology unspecified. The fact that he did not follow up for assessment with his family physician for his shoulder complaints until February 2001, suggests that he was not significantly disabled from the left shoulder injuries sustained as a result of the motor vehicle collision.

When he did re-attend his physician in February 2001, he complained of bilateral shoulder pain and it is noted that the right shoulder was causing the claimant the most distress. His right shoulder symptoms/dysfunction would not be related to the motor vehicle collision. His referral to the orthopedic surgeon for assessment, presumably relates to the right shoulder as this was the shoulder that was examined and injected with corticosteroid on the visit of February 20, 2001.

On the balance of probabilities, the symptoms/dysfunction related to the claimant's shoulder girdle region that caused him to follow up with his family physician in February 2001, are not related to the injuries sustained in the motor vehicle collision. If the claimant had had persistent dysfunction with the left shoulder following the motor vehicle collision, it would be expected that he would have followed up both with his physiotherapist and his family physician. Further, it is noted that the claimant had a pre-existing history of left shoulder pathology which resulted in left shoulder surgery although the details of this history are not on file. With regards to the right shoulder, there is no relationship with complaints relating to the right shoulder and the motor vehicle collision. (underlining added)

RECOMMENDATIONS

Further physiotherapy treatment is not a medical necessity as a result of injuries sustained in the motor vehicle collision.

Case Manager's Decision

As a result of receiving Dr. Fougere's report, the case manager wrote to the Appellant in a letter

dated August 9, 2001 and stated that:

1. a member of MPIC's Medical Services Team had reviewed all of the medical information on MPIC's file and had concluded that, on the balance of probabilities, any present symptoms or dysfunction related to the Appellant's left shoulder region cannot be attributed to his motor vehicle accident of December 17, 1999.
2. with regards to the Appellant's right shoulder symptoms there was no medical evidence to show a causal relationship with the Appellant's complaints and the motor vehicle accident.
3. there was insufficient medical evidence to support a causal relationship between the Appellant's current symptoms and the motor vehicle accident and he was therefore not entitled to receive any further benefit under the PIPP.

The Appellant was referred by his family physician to see Dr. Peter MacDonald, Orthopaedic Surgeon, who provided a report to MPIC on February 26, 2002. Dr. MacDonald indicated that he had seen the Appellant on September 5, 2001 and on December 12, 2001. Dr. MacDonald further stated in his report:

. . . He had a motor vehicle accident on December 17th, 1999. He also has a history of previous AC separation years ago. The motor vehicle accident seemed to injure both shoulders. This caused him to have pain and decreased function and a sensation that his shoulders were coming out of joint. He has had treatment including physiotherapy and injections which have not benefited him. (underlining added)

Dr. MacDonald indicated that:

Clinical examination revealed subacromial crepitus and a full range of motion with no wasting or weakness. Xrays showed mild osteoarthritic changes involving the AC joints with inferiorly directed spurs. There was also calcification between the distal clavicle and coracoid related to previous trauma.

An MRI was done which showed a right insertional tear of the supraspinatus and moderate AC arthrosis. . . .

MPIC referred Dr. MacDonald's reports, together with the x-ray and MRI reports, to Dr. Fougere and requested that she advise the case manager whether, in her opinion, the Appellant's shoulder problems were causally related to the motor vehicle accident of December 17, 1999. Dr. Fougere, in her report to MPIC dated March 25, 2002, stated:

The surgeon saw the claimant for the first time approximately two years after the motor vehicle collision. Unless the surgeon was privy to medical information that is not on file, it is likely that a history of bilateral shoulder involvement as a result of the motor vehicle collision, was based on the history that he took from the claimant. As indicated previously, involvement of the right shoulder is not suggested from the medical documents that have been reviewed.

Dr. Fougere concluded that it was improbable that the Appellant's flare ups of symptoms could be related to the December 17, 1999 motor vehicle accident.

Internal Review Officer's Decision

The Appellant had filed an Application for Review dated October 3, 2001 in respect of the case manager's decision.

The review hearing was conducted by telephone on December 5, 2001. On May 21, 2002 the Internal Review Officer wrote to the Appellant confirming the case manager's decision of August 9, 2001 denying Personal Injury Protection Plan benefits to the Appellant. In his decision the Internal Review Officer indicated that the only new medical material that appeared inconsistent with Dr. Fougere's analysis was Dr. MacDonald's suggestion as contained in his report to MPIC dated February 26, 2002 that:

. . . “the motor vehicle accident seemed to injure both shoulders.” As Dr. Fougere points out, that suggestion must have come out of the history that Dr. MacDonald took from you, and it is inconsistent with the medical documentation made immediately following your car accident.

The Internal Review Officer further stated that:

1. Dr. Fougere noted the Appellant’s assertion that as a result of the motor vehicle accident the Appellant injured his left shoulder;
2. a course of physiotherapy prescribed shortly after the motor vehicle accident that was supposed to last for several weeks was dropped by the Appellant after only a few sessions;
3. at the hearing the Appellant had insisted that both his shoulders were bad following the accident and that he had in fact complained about his right shoulder problems to both his doctor and his physiotherapist;
4. neither the Appellant’s doctor nor his physiotherapist had noted any complaints in respect of the Appellant’s right shoulder.

The Internal Review Officer concluded:

I have carefully considered what you told me at the hearing and I do not think that it provides a sound basis for disregarding Dr. Fougere's advice on what is, after all, essentially a medical issue. Dr. Fougere's two opinions continue to provide a sound basis for the decision of August 9, 2001. Accordingly, this Review will confirm that decision.

Appeal

The Appellant filed a Notice of Appeal on July 30, 2002. The appeal hearing took place on December 1, 2004 and the Appellant represented himself and Mr. Mark O’Neill acted as legal counsel for MPIC.

At the commencement of the hearing an issue arose as to the jurisdiction of the Commission to hear this appeal. The Appellant appealed the decision of the Internal Review Officer who had confirmed the case manager's determination that the Appellant was not entitled, as a result of the motor vehicle accident on December 19, 1999, to receive any benefits provided for by the PIPP under the MPIC Act. The Appellant indicated to the Commission that he was not seeking a specific benefit for the payment of IRI or reimbursement for medical treatment, or reimbursement for any other expenses a person who is injured in a motor vehicle accident may be entitled to claim.

The Commission, after some discussion with the Appellant and MPIC's legal counsel, determined that:

1. what the Appellant was seeking was a declaration from the Commission that he would be entitled to claim future benefits under the MPIC Act if any problem arose in respect of the injuries he sustained to both shoulders in the motor vehicle accident;
2. as a result, the Appellant was not claiming a specific benefit at that time from MPIC.

MPIC's legal counsel, after initially raising a concern about the Commission's jurisdiction to determine causation, indicated that for the purpose of expediting the appeal hearing would not object to the jurisdiction of the Commission to determine the issue of causation. The Appellant, of course, had no objection to the Commission's jurisdiction in this respect. Since both parties did not object to the Commission's jurisdiction to determine the issue of causation, the Commission proceeded to hear both parties on this issue.

The Appellant, in his submission to the Commission, indicated that as a result of the motor vehicle accident which occurred on December 17, 1999 he suffered injury to both his left and

right shoulders that has resulted in persistent pain and decreased function to both shoulders. The Appellant further stated that:

1. prior to the motor vehicle accident he did not have any problems with both shoulders in respect of shoulder pain or decreased function.
2. the problems in respect of both shoulders occurred subsequent to the motor vehicle accident.
3. his position is supported by the medical opinion of Dr. Peter MacDonald, an orthopaedic surgeon, who in a report to MPIC dated February 26, 2002 stated “*The motor vehicle accident seemed to injure both shoulders.*”

MPIC’s legal counsel, in his submission to the Commission, stated that:

1. a review of the medical evidence clearly established that the Appellant failed to provide sufficient medical evidence to establish a causal relationship between the Appellant’s current complaints and the motor vehicle accident.
2. as a result, the Appellant has failed to establish, on the balance of probabilities, that there was a causal relationship between his complaints in respect of both shoulders and the motor vehicle accident.
3. having regard to the totality of the evidence the Commission should accept the detailed medical analysis provided by Dr. Fougere in her two reports in respect to the issue of causation and reject Dr. MacDonald’s suggestions in respect of this matter.

Discussion

The Commission notes that there is disagreement between Dr. Fougere and Dr. MacDonald on the issue of causation. For the following reasons the Commission gives greater weight to the medical opinion of Dr. Fougere than it does to the opinion of Dr. MacDonald:

1. It was improbable that as a result of the motor vehicle accident the Appellant could have injured both shoulders as a result of the manner in which the Appellant was holding the steering wheel at the time of the collision;
2. The Appellant asserted that both shoulders were hurt following the accident, which was contradicted by the Appellant's report to both his physician and physiotherapist;
3. An examination of the Appellant's medical records indicated that after the accident the Appellant had initially complained about a problem to his left shoulder only and the medical records did not indicate that he had complained at that time about a problem to his right shoulder;
4. Dr. Fougere, in her report to MPIC dated May 22, 2001 notes that the Appellant's family physician, after examining the Appellant on January 5, 2000 (a period of 17 days after the motor vehicle accident) reported that the Appellant had complained only about left elbow pain and, as a result of this examination, the Appellant's physician had diagnosed left shoulder tendinitis and neck strain;
5. The Appellant did not complain to his physician, a period of 17 days after the motor vehicle accident, that he had any problem with his right shoulder.
6. A physiotherapist had examined the Appellant on March 13 and 17, 2000, which was a period of 84 days after the motor vehicle accident, and noted that the Appellant had complained only of left shoulder pain with limited mobility and had recommended eight weeks of physiotherapy;
7. The Appellant did not report to the physiotherapist, 84 days after the motor vehicle accident, of any problems to his right shoulder.

8. The Appellant, after three physiotherapy treatments, as reported in the Health Care Provider Progress Report dated January 25, 2001, felt his pain symptoms would resolve on their own;
9. The Appellant did not complain about bilateral shoulder pain until he attended his physiotherapist on January 23, 2001, which is a period of approximately 13 months after the motor vehicle accident, who diagnosed a rotator cuff problem;
10. The Appellant subsequently saw his personal physician on February 12, 2001 who diagnosed that the Appellant had a rotator cuff tear and referred the Appellant for an assessment by an orthopaedic surgeon, Dr. Peter MacDonald;
11. Dr. Fougere, in her report dated May 22, 2001, concluded on the balance of probabilities that the “. . . *symptoms/dysfunction related to the claimant’s shoulder girdle region that caused him to follow up with his family physician in February 2001, were not related to the injuries sustained in the motor vehicle collision.*”;
12. The case manager accepted Dr. Fougere’s analysis and on this basis the case manager, in her August 9, 2001 decision, correctly denied any PIPP benefits to the Appellant.
13. Dr. Fougere, in her Inter-Departmental Memorandum dated March 25, 2002, reviewed the narrative medical report of Dr. Peter MacDonald, dated February 26, 2002, and correctly concluded that Dr. MacDonald had seen the Appellant for the first time approximately two years after the motor vehicle accident and when taking the Appellant’s history made the comments that “*the motor vehicle accident seemed to injure both shoulders*”, and correctly concluded that Dr. MacDonald’s suggestion was inconsistent with the medical documentation.

Decision

The Commission, after a careful review of all of the documentation filed at the hearing, and after hearing the submissions of both the Appellant and MPIC's legal counsel, rejects the Appellant's position in respect of causation. The Commission determines that the Appellant's evidence in respect of causation is inconsistent and contradictory and is not supported by the objective medical evidence submitted to the Commission. In these circumstances, the Commission accepts the detailed analysis of Dr. Fougere on the issue of causation as outlined in her two medical reports dated May 22, 2001 and March 25, 2002 and rejects Dr. MacDonald's comments in respect of this issue.

Dr. Fougere, who had the opportunity of examining all of the medical evidence, has clearly demonstrated that it was improbable that the Appellant's complaints in respect of both of his shoulders were related to the motor vehicle accident. On the other hand, Dr. MacDonald does not appear to have examined any of the medical reports on file, initially examined the Appellant approximately two years after the motor vehicle accident had occurred, and had relied only on the Appellant's reports to him in determining the issue of causation. The Commission therefore, in these circumstances, gives greater weight to the medical opinion of Dr. Fougere than it does to the medical opinion of Dr. MacDonald in determining the issue of causation.

The Commission therefore determines that:

1. the Appellant failed to establish, on the balance of probabilities, that his bi-lateral shoulder pain was causally connected to the motor vehicle accident.
2. the Internal Review Officer correctly determined that the Appellant was not entitled to receive any PIPP benefits.

It is for these reasons, as outlined above, that the Commission confirms the decision of the Internal Review Officer dated May 22, 2002 and dismisses the Appellant's appeal.

Dated at Winnipeg this 30th day of December, 2004.

MEL MYERS, Q.C.

MARY LYNN BROOKS

BARBARA MILLER