



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by P.S.
AICAC File No.: AC-04-26**

PANEL: Ms. Laura Diamond, Chairperson
Mr. Paul Johnston
The Honourable Mr. Wilfred De Graves

APPEARANCES: The Appellant, P.S., was represented by Ms. Cathy Sherman;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Dean Scaletta.

HEARING DATE: December 13, 2004 and January 18, 2005

ISSUE(S): 1. Entitlement to further Income Replacement Indemnity
benefits; and
2. Entitlement to further chiropractic treatment benefits.

RELEVANT SECTIONS: Sections 136(1) and 81(1) of The Manitoba Public Insurance
Corporation Act ('MPIC Act') and Section 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

The Appellant, P.S., was injured in a motor vehicle accident on August 23, 2001. While cycling, he was rear-ended by a motor vehicle, injuring his lower back and sustaining a fractured tail bone and pelvic injuries. As a result of these injuries, he became entitled to Personal Injury Protection Plan benefits, including Income Replacement Indemnity ('IRI') and chiropractic treatment benefits.

At the time of the accident, the Appellant was working at [text deleted] doing back up baking and prep work. He was in receipt of IRI benefits from August 31, 2001. He returned to work doing light duties in November 2001 and participated in a gradual return to work program until he was at work full time. His IRI benefits ended in June of 2002.

The Appellant received ongoing chiropractic treatment from his own chiropractor, Dr. Hawkins, until the end of July, 2002.

In December 2002 the Appellant suffered what he believed was a flare-up of his symptoms and continuation of back pain from the motor vehicle accident. He was unable to work and sought chiropractic treatment. A CT scan report of February 2003 showed that the Appellant had a disc bulge.

The Appellant sought a continuation of chiropractic treatment benefits and IRI benefits as a result of the symptoms he experienced in December 2002 and following. A decision of his case manager dated December 23, 2002 denied both the chiropractic treatment benefits and IRI benefits.

On December 30, 2003, the Appellant was awarded a permanent impairment benefit for post-traumatic alteration of an intervertebral disc herniation and post-traumatic alteration of coccyx, as a result of the accident of August 23, 2001.

Internal Review Decision

On January 12, 2004, an Internal Review Officer for MPIC considered the case manager's decision of December 23, 2002 regarding the chiropractic treatment and IRI benefits claimed.

The Internal Review Officer concluded that the evidence did not support a medical necessity for chiropractic treatment, as no substantial gains or improvement beyond temporary relief of one or two days had been shown and as such, treatment could not be said to be a medical necessity.

On the issue of the Appellant's inability to work, the Internal Review Officer concluded that there was no evidence of a causal connection between the Appellant's back pain or his disc bulge, and the motor vehicle accident. According to the Internal Review Officer, the Appellant had recovered from his accident, regained full function, and was back at work full-time. As such, he was not entitled to any further IRI benefits.

It is from this Internal Review decision that the Appellant now appeals.

Evidence

In addition to the documentary evidence on file, the Commission heard evidence from the Appellant's treating chiropractor, Dr. Hawkins, as well as from Dr. Pethrick, Chiropractic Consultant to MPIC's Health Care Services Team, and from the Appellant.

Dr. Hawkins was of the view that the Appellant had never fully recovered from the effects of the motor vehicle accident. He had not suffered from abnormal low back pain prior to the motor vehicle accident, and had in fact been healthy and very physically active. Dr. Hawkins had been reluctant to see the Appellant return to work full time at his job when he did, and had also disagreed with MPIC's decision to discontinue chiropractic treatment benefits.

Having treated and examined the Appellant both prior to and after the accident, and having reviewed the medical reports and CT scan, it was Dr. Hawkins' view that the Appellant was not

able to work full time at his previous employment and that he required further chiropractic treatment, from December 2002. In his view, both of these situations were causally connected to the motor vehicle accident.

Dr. Pethrick testified that he had reviewed the reports of Dr. Hawkins and of Dr. Rothman, a chiropractor who performed an independent third party examination. Dr. Pethrick was of the view that the Appellant was capable of performing his pre-accident employment in June of 2002. He had reviewed the CT report which indicated the Appellant suffered from a disc bulge, but noted that this is fairly common in the general population, and that disc bulges do not necessarily result in back pain. In fact, the Appellant's disc bulge did not seem to approach any neurological elements and was at the low end of findings regarding pressure exerted on nerve roots.

Dr. Pethrick also reviewed an assessment by Dr. Craton, Medical Consultant to MPIC's Health Care Services Team. Dr. Craton's assessment of November 24, 2003 led to the Appellant's permanent impairment award of December 2003. Dr. Craton believed the association between the motor vehicle accident and the Appellant's disc bulge was probable. Dr. Pethrick disagreed with Dr. Craton's assessment. In Dr. Pethrick's view, the facts did not suggest that the bulge was caused by the motor vehicle accident.

Dr. Pethrick was also of the view that continued chiropractic care was not a medical necessity for the Appellant. He was of the view that a shift from passive to active care should occur and that chiropractic care was not helping the Appellant get better faster than the natural course of events. He also felt such care would not fall into the realm of supportive care which would prevent the Appellant from deteriorating significantly.

The Appellant testified that prior to the motor vehicle accident he had been a very healthy and fit individual. He described the impact of the motor vehicle accident, where his whole buttocks region impacted with the cement, while traveling about 27 km per hour. He suffered a cracked tail bone and was in extreme pain.

He described his job at [text deleted] as very physically demanding. During his gradual return to work, he was still in a great deal of pain and did not feel that he was ready to go back to work. In his view, the assessments conducted by the occupational therapist who examined the functional requirements of his job were inadequate, and did not present a true picture of the demands of the job.

He described his return to work and his continued use of anti-inflammatories and pain medication, as well as his home physio exercises, which he continued. The pain was variable, worse some days than others, and often worse towards the end of a day or a shift.

He continued to work, however, until December of 2002. He had been performing his daily physio stretches as usual. According to the Appellant's description, on December 2, 2002 "something just went". The pain was in the same region as it had been all along, but had gotten very much worse. He continued to see Dr. Hawkins for treatment, but described himself as being "worse off overall after that big flare up". He was not able to return to work at [text deleted] after that.

He testified that the only thing that really gives him relief is the chiropractic treatment he receives from Dr. Hawkins, although that relief only lasts for one or two days at a time. He has

also continued to take Celebrex and Tylenol 3, and when he tries to go off the pain killers, the pain gradually gets worse.

Submissions

Counsel for the Appellant submitted that although the Appellant had tried to return to work at his employment at [text deleted], he was not able to do that job and to work full duties and full hours to the standards expected by his employer. He never fully recovered from the effects of the accident and then experienced a major flare up in December of 2002. He had suffered no low back pain his entire life, prior to the motor vehicle accident. He has now suffered a permanent injury, which can be seen on the CT scan, and the flare up which he experienced in December of 2002 was a continuation of this injury sustained in the motor vehicle accident. The position of MPIC and Dr. Pethrick that the Appellant had returned to full function by the spring of 2002, was a gross oversimplification of what was going on at that time. The Appellant, formerly an athletic individual, had a clinically significant and disabling condition and, as Dr. Craton has recognized, the association between that condition and the motor vehicle accident was probable.

Counsel for the Appellant also submitted that without the chiropractic treatment which had sustained him, it is possible that the Appellant deteriorated, resulting in the December 2002 flare up. She submitted that the Appellant pursued a variety of methods to deal with the pain of his condition, including exercise, ice, medication and taking breaks from activities. All of these only provided temporary benefit. Thus, if the chiropractic treatment also provided temporary benefit then he should be entitled to the benefit of this treatment, funded by MPIC.

Counsel for MPIC submitted that Dr. Hawkins' reports and evidence were not reliable. He submitted that while the CT scan results showed a disc bulge, such bulges were common in the general population, and could often be asymptomatic.

There was no evidence, he submitted, that the bulge was caused by the motor vehicle accident or that it was causing the Appellant's pain. As such, there was no causal connection between the accident and the difficulties encountered by the Appellant in December 2002.

Further, there was no clear evidence that the Appellant was unable to perform the work of his former employment; rather, the evidence of Dr. Pethrick, Dr. Rothman and the other health care professionals and practitioners involved did not identify any essential duties which the Appellant was unable to do.

The Appellant had recovered from the accident and should not be entitled to further IRI benefits.

Counsel for MPIC also submitted that further chiropractic treatment for the Appellant had not been shown to be a medical necessity. Such passive therapy has been shown only to provide short term symptomatic relief for the Appellant, and, this did not meet the test of "medical necessity" set out in the legislation.

Discussion

In order to qualify for funding under the Personal Injury Protection Plan contained in the MPIC Act and Regulations, expenses must be incurred by a victim because of the accident and must be medically required. The relevant sections of the MPIC Act and Regulations are as follows:

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;

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;

Section 81(1) of the MPIC Act provides:

Full-Time Earners

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

(b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;

(c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

The onus is on the Appellant to show that he is unable to continue his full-time employment as a result of the accident.

The onus is also upon the Appellant to show that treatment is medically required as a result of the accident.

1. Entitlement to further Income Replacement Indemnity benefits

Does the evidence support the decision of the Internal Review Officer that the Appellant's back problems of December 2002 were not caused by the accident and thus he was not entitled to further IRI benefits from December of 2002?

As noted by Dr. Craton in his Inter-Departmental Memorandum dated November 24, 2003, the Appellant did not have a documented pre-accident history of spinal complaints of a significant nature. He was a healthy and fit individual.

Dr. Craton also found that evidence of a disc bulge of mild to moderate severity at the L4-5 region (the segment that was identified by Dr. Hawkins in close temporal proximity to the collision in question), as well as the severity of the accident, leads to the conclusion that the association between the Appellant's condition and the motor vehicle accident is probable.

The evidence of the Appellant was that he never completely returned to his pre-accident status. This was confirmed by Dr. Hawkins, who had the opportunity of observing him and assessing him, both prior to and following the accident and the alleged recurrence.

Although the Appellant did return to work and was not in receipt of IRI benefits from July to December 2002, he was, according to his evidence, working with pain and with difficulties.

The flare-up he reported in December 2002 involved the same symptoms which he initially reported after the accident. A review of Dr. Hawkins' earlier reports following the accident and his reports following the flare-up, leads the Commission to conclude that the symptoms that the Appellant complained of in December 2002 and following were not substantially different from those reported by the Appellant and his caregivers immediately after the accident and following. The Commission has not heard any evidence to indicate other causes for the Appellant's pain and symptoms. The Commission is of the view that these are part of the same ongoing complaints and difficulties that the Appellant had been having since the accident, and that this prevented him from working in December of 2002.

As Dr. Craton concludes in his report of November 24, 2003, while disc changes are common in the general population and it is difficult to determine whether an identified change on a CT scan is secondary to any particular episode of trauma

. . . Given the magnitude of the trauma, and the findings described as L5 reflex and myotome changes as well as the L5 difficulties based on segmental examination, I believe the association is probable.

Accordingly, the Commission is of the view that the accident of August 23, 2001 materially contributed to the recurrence of symptoms which the Appellant experienced in December of 2002. It is the view of the Commission that injuries sustained in the motor vehicle accident prevented the Appellant from continuing his full time employment and as a result he is entitled to IRI benefits from December 2, 2002.

2. Entitlement to further chiropractic treatment benefits

Does the evidence support the decision not to fund further chiropractic treatments?

As noted above, there are two conditions which must be met before MPIC becomes obligated to reimburse the claimant for expenses incurred for medical or paramedical care. The expenses must have been incurred because of the accident and the treatment must have been “medically required”.

Dr. Pethrick and Dr. Rothman have both stated that no substantial gains or improvements from chiropractic treatment have been shown in this case. Rather, the treatments are palliative and not curative, and are of such temporary benefit that they cannot be justified.

The Commission finds that while the Appellant may derive subjective temporary relief of his symptoms from chiropractic treatments, there is not sufficient objective evidence of improvement in his condition to establish that continued treatments are medically required.

Decision

Accordingly, the panel finds that the decision not to fund chiropractic treatment is supported by the medical evidence. The decision of MPIC's Internal Review Officer, dated January 12, 2004, denying the Appellant's entitlement to further chiropractic treatment benefits is upheld in regard to this issue.

The decision of MPIC's Internal Review Officer dated January 12, 2004 relating to the denial of IRI benefits from December 2, 2002 is rescinded. The Appellant shall be entitled to IRI benefits, in accordance with Section 81(1), for the periods he was unable to work as a result of the accident after December 2, 2002. Interest in accordance with Section 167 of the MPIC Act shall be added to that amount.

Dated at Winnipeg this 24th day of February, 2005.

LAURA DIAMOND

PAUL JOHNSTON

HONOURABLE WILFRED DE GRAVES