



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by K.D.
AICAC File No.: AC-04-199

PANEL: Ms Laura Diamond, Chairperson
Ms Mary Lynn Brooks
Mr. Neil Cohen

APPEARANCES: The Appellant, K.D., was represented by Mr. Kris Janovcik;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Tom Strutt.

HEARING DATE: November 23, 2005

ISSUE(S): 1. Whether Section 110(1)(a) was correctly invoked to end
the Appellant's entitlement to Income Replacement
Indemnity effective January 15, 2004;
2. Whether the Appellant is entitled to Personal Injury
Protection Plan funding for physiotherapy or chiropractic
treatments, or medications, beyond February 19, 2004.

RELEVANT SECTIONS: Section 81(1)(a) and Section 136 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, K.D., was injured in a motor vehicle accident on August 7, 2002. As a result of the motor vehicle accident she was in receipt of Personal Injury Protection Plan benefits, including Income Replacement Indemnity ('IRI') benefits and funding for physiotherapy, chiropractic treatment and medications.

At the time of the accident the Appellant was employed as a Patrol Officer at the [text deleted], on a full time basis. The Appellant was unable to continue in this position as a result of symptoms that included problems with “lower back, tailbone, sore neck, stiff neck and numbness in lower back, numbness to right and left hands going down into the three fingers of each hand, occasional numbness to left leg and foot “as well as severe vertigo and headaches with migraines.” As a result, the Appellant was in receipt of IRI benefits.

The Appellant was ultimately diagnosed with the condition of coccydemia, and underwent surgery for this condition.

Following video surveillance of the Appellant and a review of further medical reports and a Functional Capacity Evaluation, the Appellant’s case manager concluded, on February 18, 2004, that the Appellant had regained the ability to return to her employment, effective January 2, 2004. Since her job as a Patrol Officer with the [text deleted] was no longer available, she continued to receive IRI benefits, pursuant to Section 110(2) of the MPIC Act, until July 12, 2004.

The Appellant sought an internal review of this decision. On August 27, 2004, an Internal Review Officer for MPIC reviewed the medical evidence on the Appellant’s file, as well as the results of video surveillance that MPIC had conducted. The Internal Review Officer concluded that the video tape surveillance did not demonstrate any evidence of physical impairment in the Appellant and that the activities shown did not accord with the significant levels of pain and disability she was reporting to various caregivers, to MPIC and to the employer, at the relevant times.

The Internal Review Officer also concluded that the activities and movement demonstrated on the video tapes conflicted with the reports of the Appellant, particularly during the Functional Capacity Evaluation which was conducted dated July 14, 2004. The Appellant had placed herself in the “crippled disability” category, and the athletic therapist conducting the evaluation, Mr. Hutton, concluded that the Appellant displayed a number of strong indicators of a chronic pain condition which was limiting her physical abilities.

The Internal Review Officer concluded that the effects of the motor vehicle accident did not render the Appellant unable to perform her occupation and supported the decision to terminate IRI benefits effective January 15, 2004. He also concluded that there was insufficient evidence on the file to support the notion that further physiotherapy, chiropractic treatment or medications were medically necessary to treat any medical conditions which were causally related to the collision.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence

At the hearing into the Appellant’s appeal, the panel viewed surveillance video tapes conducted of the Appellant in October and November of 2003 and January of 2004. The video tapes depicted the Appellant in a seated position in her yard in front of her home, as well as traveling by motor vehicle to shops and restaurants. The video tapes depicted her getting in and out of the vehicle, walking into stores and restaurants, shopping in stores and bending and squatting to examine items in the stores.

The Commission also heard evidence from the Appellant. She testified as to the difficulties she had following her accident, including pain in her lower back, tailbone and headaches. She testified that she relied on a lot of medication to ease the pain but that she still had difficulty sleeping. She had difficulty with the activities of daily living and her activities were very restricted.

The Appellant described her job as a Patrol Officer for the [text deleted]. Before the accident, she was in very good physical condition and worked twelve (12) hour shifts. These shifts involved a lot of walking, and included climbing stairs. The job required her to wear a very heavy uniform which included a utility belt, radio, cuffs, baton, mandated bullet-proof vest, heavy boots and, particularly in the winter, several layers of clothing (including a police issue coat, wet shirt, vest, tie and sweater).

The Appellant testified that finally, the difficulties with her tailbone (coccyx) pain were diagnosed as involving a severe angulation of her coccyx. Prior to the accident, she had no difficulty with pain in this area. She described the surgery she underwent, a coccygectomy (removal of her tailbone), on March 22, 2005, which was performed in Toronto by Dr. Lithwick. Prior to the surgery she suffered from severe pain in her tailbone, as well as numbness in her left leg. Her lumbar and sacrum were stressed and she suffered from migraine headaches which would last three (3) to five (5) days. She had to be very careful with the way that she sat, in order to protect her coccyx area from contact.

Following the surgery, she suffered from migraines far less frequently and the pain in her tailbone became less intense.

She indicated that she has experienced a huge improvement in her condition and can now walk and drive a bit more.

The Appellant also testified that a careful viewing of the video tape evidence reveals that she walks and moves very carefully, using strategies her caregivers have taught her to reduce her pain and protect her lumbar and sacral area, as well as her tailbone. She was attempting to remain as active as she could on the advice of her doctors who told her that being completely inactive would not be good for her.

Submissions of the Appellant

Counsel for the Appellant took the position that the Appellant was unable to work as a result of a medical condition arising out of the accident. He submitted that the burden was on the insured to establish that the Appellant had a pre-existing condition which would rule out a causal link between her injuries and the accident. As counsel for MPIC had failed to do so, the issue then became whether the Appellant suffered from a disability preventing her from performing her job and requiring further chiropractic, physiotherapy and medication treatment.

Counsel for the Appellant noted that MPIC had relied upon a memorandum from Dr. Craton, Medical Director of MPIC's Health Care Services, dated March 19, 2004. In this memorandum, Dr. Craton strongly disagreed with an independent assessment by Dr. Mayba, who had concluded that the patient's condition pre-existed the motor vehicle accident. Dr. Craton indicated that he could not find support for this opinion in the medical evidence. At that point, Dr. Craton requested that a Functional Capacity Evaluation of the Appellant's abilities be performed. This was ultimately completed a few months later.

However, counsel for the Appellant submitted, MPIC did not respond to Dr. Craton's position regarding the Appellant's lack of a pre-existing condition by going back to the Appellant to review their position. Rather, MPIC then asked Dr. Craton to review the video tape surveillance evidence. Following this review, Dr. Craton concluded, in a memorandum dated July 5, 2004, that:

During the entire videotape surveillance, it is difficult to identify anything that might be construed as a physical impairment despite the pain inventories showing her inner experience of substantial amounts of pain. It would be reasonable to conclude that the pain she is experiencing is not a physical impairment.

CONCLUSION

The videotape evidence does not demonstrate any evidence of physical impairment in this patient that can be perceived through this medium. The patient's pain complaints and self-perception as noted by her pain inventories are in the disabled range yet her physical function appears to be normal in typical activities of daily living. The explanation for this dissonance is not readily apparent.

However, counsel for the Appellant also notes that Dr. Craton relied too heavily on some of the medical evidence on the Appellant's file (for example a report from Dr. Sharif), but did not give sufficient consideration to medical evidence from Dr. Hoy, Dr. Mayba, the Appellant's chiropractors, x-ray or MRI.

As well, he argued Dr. Craton failed to make any recommendations regarding the Appellant returning to a work hardening program or modified duties. Rather, he simply stated that now that he had seen excerpts from the videotapes, the Appellant could go back to work and perform all of her duties as a Patrol Officer. There is no indication that Dr. Craton had any information regarding the demands of the Appellant's job as a Patrol Officer, and counsel for the Appellant queried on what evidence and on what basis Dr. Craton could make the assertion that she could return to that job. He had failed to address the job requirement to work a twelve (12) hour shift,

wear a bullet proof vest, a heavy belt and heavy boots, or to climb stairs and in and out of cars on a regular basis. Nor did Dr. Craton address the fact, evident on the video tapes, that every movement the Appellant makes is a deliberate and cautious move. She moves at her own speed and decides what she can and cannot do within her limits. On the job, she would not be able to make such deliberate and pre-meditated movements; she must move quickly, rapidly, and with physical confidence.

Counsel for the Appellant also discounted counsel for MPIC's questions of the Appellant on cross-examination, regarding her participation in activities of everyday life, such as picking up her children, attending doctor's appointments and grocery shopping. He noted that prior to the accident, the Appellant had worked full time as well as attending to all of these duties, which she could now do on only a limited basis.

There is no evidence that there is any medical information showing that the Appellant had any kind of sacral or coccygeal pain prior to the accident, even following a complete review of her medical history.

Counsel for the Appellant also noted that the Functional Capacity Evaluation concluded that the Appellant was disabled from returning to her previous job. Following that, she was diagnosed and treated, including surgically, by Dr. Lithwick. The evidence now is that the Appellant is getting better and that the nature of her physical pain has changed.

The only explanation for this medical condition, he submitted, is that it is related to the accident. He submitted that the Appellant's physiotherapy treatments should be reinstated with a reasonable plan for treatment, and that any further medication expenses she requires should be

funded. As well, he submitted that the Appellant was disabled from her job as a Patrol Officer as a result of injuries caused by the motor vehicle accident, and that she should be entitled to the IRI benefits which she has been denied.

Submission of MPIC

Counsel for MPIC relied in particular on the very detailed summary of the Appellant's file contained in the Internal Review decision, as well as Dr. Craton's memorandum dated July 5, 2004. He also relied upon the video tape surveillance, and the Investigator's Report dated July 12, 2004.

In addressing the Appellant's complaints of tailbone pain and the suggestion that this was a result of injuries sustained in the motor vehicle accident, counsel for MPIC emphasized that the collision involved very low speeds, with the driver backing up only three and one-half (3 ½) feet towards the Appellant who was not knocked off her feet, but recovered with a lunge step. The evidence indicates that the motor vehicle contacted the Appellant's left thigh or the back of her legs, but that the car did not collide with her sacrum. There is no evidence that a low energy blow of this kind on the thigh would be capable of creating a severe tear or fracture of the coccyx, and there is no evidence that the coccyx was ever actually torn or fractured.

The first medical note of significant tailbone pain was found in Dr. Hoy's report of February 10, 2003, following the claimant's complaints of some tailbone pain in January of 2003. Her earlier descriptions of pain did not list tailbone pain.

As well, a September 17, 2002 x-ray failed to show a tailbone problem, and even a July 18, 2003 specific x-ray study of the coccyx was still "essentially negative."

Counsel for MPIC submitted that a severe trauma of the sort alleged by the Appellant would not take six (6) months to manifest itself, and that the Appellant had failed to establish the onus upon her of showing that her coccygeal pain was related to the motor vehicle accident.

Counsel for MPIC also noted that the Appellant did not suffer a head injury in the accident and that she had a history of migraines when she was young. There is no medical evidence to suggest that she has incapacitating headaches, or that they are a result of the car accident.

It was the submission of counsel for MPIC that if the Appellant suffered any injury it was simply a “flexion-extension” whiplash injury which has long since resolved. Dr. Craton observed that the surveillance video tapes showed greater range of motion than the abilities reported by the Appellant, displaying a lack of consistency between the Appellant’s condition and her reports of pain and disability.

He noted that the Appellant’s responses to standardized questionnaires indicate that she perceives herself to be “crippled”. Mr. Hutton, when conducting the Functional Capacity Evaluation, noted that the Appellant was limited by “pain behaviours”. She also was unwilling to participate in a graduated return to work program.

The surveillance materials make it plain that the Appellant was perfectly able to function at a much higher level than anything she was prepared to admit to and make nonsense of her claims that she could not walk more than “three blocks without being in complete pain” or that she finds “it difficult to crouch or bend or squat without being in excruciating pain.” These tapes, he submitted, also show that Dr. Arneja, in his Disability Certificate dated April 23, 2004, erred when he noted that the claimant was “markedly restricted in walking”.

Counsel for MPIC also noted the Appellant's refusal to return to work on a gradual basis, either for four (4) or two (2) hours a day, in a sedentary job as a dispatcher (a job which she could do either standing or sitting). However, still, in early 2003, she was able to take a trip by plane, to Calgary.

He also noted that the Appellant's refusal to perform a full squat for Mr. Hutton was questionable, as one was obviously able to observe her squatting in the videotapes.

Counsel for MPIC submitted that none of the conditions alleged to be disabling the Appellant from returning to work have any clear connection with the motor vehicle accident. Much of the Appellant's description of her own condition is refuted by the surveillance material. The Commission has not received any information from the Appellant's caregivers commenting upon that video tape material. Accordingly, Dr. Craton's opinion remains unchallenged. This establishes that there is no impairment of function that can be identified in the way she actually functions when she is not with her caregivers, which prohibits the Appellant from returning to work. There is no evidence of any physiological limitation precluding her from doing any job. Accordingly, counsel for MPIC submitted that the Appellant had not met the onus upon her of showing that she suffered from injuries caused by the motor vehicle accident preventing her from continuing her employment.

As well, counsel for MPIC submitted that the Appellant has not provided recent evidence concerning her response to different types of treatment, and submitted that the earlier evidence makes it abundantly clear that no treatment was doing the Appellant any good. Her Oswestry scores of perceived pain remained fixed and did not vary. Therefore, the opinion of the Appellant's case manager that the Appellant would not see a change in her condition no matter

how much care she received, leads to the conclusion that further such care is not medically required under the Act.

Discussion

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;

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.

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;
- (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The onus is on the Appellant to show, on a balance of probabilities, that injuries which prevent her from performing her employment are a result of the motor vehicle accident.

The panel has reviewed the medical evidence on file, as well as the video tape surveillance and the evidence of the Appellant. We are of the view that the Appellant has failed to meet the onus upon her of showing, on a balance of probabilities, that continuing pain and symptoms resulting from the motor vehicle accident are preventing her from returning to work.

The Appellant's subjective reports of pain placed her within the "crippled" category. A review of the medical evidence shows this assessment to be inconsistent with the objective medical evidence before the panel.

The athletic therapist, Mr. Hutton, observed that the Appellant's score on the Oswestry Disability Index was at the seventy-eight (78%) percent disability level and noted that based on these results the Appellant perceives herself to be in the **Crippled** disability category. He noted:

[K.D.'s] perceived level of ability would seem to exceed her demonstrated function during testing. [K.D.] demonstrated the ability to sit, stand, walk and lift on a restricted basis. However, this ability would still exceed the expectations of a person who self reports her ability to be in the "crippled disability" category on a subjective questionnaire. [K.D.] related high pain values when completing the VAS questionnaire with little change in her pain within the four timeframes. In the history portion of the examination, [K.D.] related that her pain complaints had increased following the injection by Dr. Bretecher, yet her pain complaints remain relatively the same.

He also noted:

Despite the use of narcotic analgesia, medical interventions, and a variety of physiotherapy and chiropractic interventions, [K.D.] continues to be limited in her physical ability due to her chronic pain complaints. [K.D.] relates limited function and pain focused behaviours despite demonstrating a level of function greater than expected. .

..

The panel has considered the nature of the collision, which occurred when the driver backed up approximately three and one-half (3 ½) feet. The motor vehicle contacted the Appellant's left thigh or back of her legs, but there is no evidence that it collided with her sacrum or that the

Appellant was knocked off her feet. There is no evidence that a low energy blow of this kind on her thigh would be capable of creating such a severe injury to the Appellant's tailbone.

The panel has also taken particular note of the significant period of time which elapsed following the motor vehicle accident before any complaints of tailbone pain were made by the Appellant. The first medical note of significant tailbone pain was found in Dr. Hoy's report of February 10, 2003, following the claimant's complaints of some tailbone pain in January of 2003. Her earlier descriptions of pain did not list tailbone pain, and there does not appear, from the evidence, to have been any complaints of tailbone pain for five (5) or six (6) months following the accident.

A September 17, 2003 x-ray failed to show a tailbone problem. A Treatment Plan Report from Dr. Sequin dated November 9, 2002 indicated that the Appellant had "Improved lumbar ROM, 80% of normal, squatting better (Ø pain)".

A specific x-ray study of the coccyx from July 18, 2003 was still "essentially negative".

Accordingly, the panel finds that the Appellant's reported symptoms and disability level are inconsistent with the objective medical evidence and the mechanism of injury. We also find that the Appellant's lengthy delay in reporting tailbone symptoms makes it difficult to connect these symptoms to the motor vehicle accident.

Based upon all of the considerations set out above, the panel finds that the Appellant has not met the onus of showing, on a balance of probabilities, that her continuing pain and symptoms were caused by the motor vehicle accident. As a result, the panel finds that she was not entitled to IRI

benefits beyond January 15, 2004 or PIPP funding for physiotherapy, chiropractic and medication treatment beyond February 19, 2004.

For these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer dated August 27, 2004.

Dated at Winnipeg this 8th day of February, 2006.

LAURA DIAMOND

MARY LYNN BROOKS

NEIL COHEN