

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by J. J.
AICAC File No.: AC-05-181

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, J. J., was represented by Mr. Bob Tyre of the Claimant Adviser Office;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Kathy Kalinowsky.

HEARING DATE: November 16, 2006

ISSUE(S): Entitlement to further chiropractic treatments

RELEVANT SECTIONS: 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, J.J., was injured in a motor vehicle accident on April 21, 2003. The Appellant underwent chiropractic treatment with Dr. Alain Kolt between May 2003 and April 30, 2004. His chiropractor diagnosed a whiplash associated disorder injury and documented risk factors for chronic pain or delayed recovery as:

- A previous motor vehicle accident on December 12, 2000
- Age
- Pre-existing osteoarthritis
- L5-S1 fusion
- Emotional trauma of wife's death
- Failed back surgery (unrelated to motor vehicle accident)

The Appellant suffered a relapse of his condition, and again received chiropractic care from August 2004 to March 2005. On March 10, 2005, Dr. Pethrick, chiropractic consultant for MPIC's Health Care Services Team, provided an opinion to the Appellant's case manager that the Appellant appeared to be at maximum therapeutic benefit and that further care was not likely to significantly alter his symptoms or function. The Appellant's case manager wrote to him on March 14, 2005 indicating that he was at maximum therapeutic benefit with regard to chiropractic care and further treatment was not medically required. In an effort to assist in his transition, MPIC agreed to fund one (1) treatment every three (3) weeks until May 17, 2005, at which time discharge was anticipated.

The Appellant sought Internal Review of the case manager's decision dated March 14, 2005, and, on July 14, 2005, an Internal Review Officer for MPIC concluded that further chiropractic treatment was not medically required. The Internal Review Officer reviewed medical information from the Appellant's chiropractor, general practitioner, and further reports from Dr. Pethrick who had noted that the Appellant had achieved neither significant gain nor deterioration with chiropractic care, with no significant change in range of motion over a prolonged period of time. The Internal Review Officer agreed with Dr. Pethrick's opinion that the Appellant had reached maximum therapeutic benefit in relation to chiropractic treatment and that the medical evidence on his file did not support further advances being made.

The Internal Review Officer stated:

One of the key considerations in determining whether recommended treatment is "medically required" is whether there is any real likelihood that it will lead to a demonstrable improvement in the condition of the patient. You have received approximately 60 chiropractic treatments during the past two years since your motor vehicle accident. Considering the extensive chiropractic care you have undergone, it is highly unlikely that further chiropractic treatment will result in a demonstrable improvement in symptoms or function.

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

Evidence and Submission for the Appellant

The Appellant testified that he had just barely recovered from his first motor vehicle accident of December 2000, when the more recent motor vehicle accident of April 21, 2003 occurred. He started seeing Dr. Kolt, his chiropractor, again, as a result. He took a break from chiropractic treatment in 2004, but due to a relapse, he needed to go back again. These treatments were supported by MPIC until May, 2005.

When MPIC failed to cover him for continued treatments, he continued seeing Dr. Kolt paying for the treatments on his own. He testified that he goes to see the chiropractor approximately every three (3) weeks. Over the course of these three (3) weeks, he loses range of movement in his neck and he gets sore. After treatments, the range of motion in his shoulder and neck improves. He testified that if he does not go for chiropractic treatment he can't function. His driving starts to be a problem because his neck can't turn properly to the right or left.

The Appellant also indicated that although medication can take the pain away, it does nothing for his range of motion and he felt that it was his general practitioner, Dr. Bruneau's opinion that as medication may have side effects, chiropractic care was a healthier approach.

The Appellant indicated that he did not receive physiotherapy or athletic treatment, and indicated that while he has suffered from osteoarthritis in his neck and lower back, these areas became much worse following the motor vehicle accident and that chiropractic treatment helps his neck and shoulder.

Counsel for the Appellant submitted that Dr. Kolt had examined the Appellant many times and provided regular reports and updates to MPIC. He identified mitigating factors affecting the Appellant's recovery early on. He pointed to these factors as explaining the Appellant's slow progress through chiropractic treatment.

In his view, the case manager's decision which initially ended treatment on April 30, 2004, was not well researched, and no real explanation was given for the end date of treatments. Then, when the Appellant again reported problems with his neck and shoulders to MPIC in August 2004, Dr. Pethrick agreed with Dr. Kolt that the Appellant's "*Care appears related to effect of MVA. The additional care should progress this clmt to MTB.*" (See September 7, 2004).

Dr. Kolt continued to submit regular treatment reports and plans, still noting and identifying mitigating factors slowing the Appellant's recovery. A report from November 2004 indicated:

SYMPTOMS

The patient is still experiencing some neck pain and stiffness that was not present prior to the motor vehicle accident.

This is aggravated by work and activity. It is alleviated by chiropractic care.

The patient has found that with the current frequency of treatment, which is 1X every 2-3 weeks, there has been significant improvement in his cervical ranges of motion and significant in his levels of pain.

SIGNS

There is significant intersegmental increase in mobility at multiple levels in the cervical and upper thoracic spine.

This is significantly improved since the start of care on the 10th of Sept 2004. . . .

In February of 2005, Dr. Kolt reported that although the patient's neck had been feeling better, he presented with increased neck pain and stiffness on February 14, 2005. Dr. Kolt stated:

It is the treating doctor's opinion that this patient has not yet reached his maximum chiropractic improvement. He is still experiencing some neck pain and stiffness and soreness and subluxations which are slowly improving. Any increase in the period of

days between appointments would lead to a loss in the therapeutic gain of this patient, with regards to the injuries sustained in the MVA in question.

DIAGNOSIS

The patient is showing moderate to good signs of stabilization of the injuries sustained in the MVA.

Counsel for the Appellant noted that Dr. Pethrick's opinion of March 10, 2005, did not address the Appellant's need for supportive maintenance care or acknowledge the mitigating factors affecting the patient. Yet, on March 14, 2005, the case manager decided to end chiropractic benefits for the Appellant.

Nevertheless, the Appellant's symptoms and problems still had not been resolved and the Appellant still needs maintenance chiropractic care at a frequency of approximately once every three (3) weeks.

Counsel for the Appellant pointed to a letter from the Appellant's general practitioner, Dr. Bruneau, supporting chiropractic care. Dr. Bruneau stated on April 18, 2005:

Patient feels chiropractic treatments help chronic neck pain. Medical therapy may not be as effective or may be associated with side effects.

Counsel for the Appellant also reviewed a report from Dr. Pethrick dated July 2005 and a further report from Dr. Kolt dated July 2006. Dr. Pethrick submitted a further report dated October 4, 2006.

Counsel submitted that the forty-one (41) treatments that the Appellant had between May 2003 and April 2004 were not an excessive amount or aggressive treatment plan.

Counsel argued that the Commission should prefer the evidence of Dr. Kolt, who had been the Appellant's treating chiropractor for five and one-half (5 ½) years, and examined the Appellant many times. Dr. Pethrick, he argued, was restricted by the theory that the clinical guidelines for chiropractic care do not allow room for an individual diagnosis and problems. Nor do they address supportive or maintenance care. Although Dr. Pethrick noted a lack of improvement in the Appellant's measurements on status inventory scores and ranges of motion, these are subjective tests. Counsel submitted that the Commission should prefer Dr. Kolt's observations regarding the changes in the patient's intersegmental mobility, which indicated that the Appellant's improvement, while slow, was continuing. Dr. Pethrick had also failed to give sufficient weight to the mitigating factors slowing the Appellant's recovery, identified by Dr. Kolt, and in relying upon Dr. Pethrick's opinion, the Internal Review Officer had incorrectly concluded that the Appellant had reached maximum therapeutic benefit with chiropractic care.

Evidence and Submissions for MPIC

Counsel for MPIC pointed to the fact that the Appellant had received approximately sixty (60) chiropractic treatments prior to his case manager terminating reimbursement for such treatments on May 17, 2005. Although Dr. Kolt set out a number of mitigating factors for the Appellant's recovery, he had not been able to show any demonstrable improvement in symptoms or function, despite the extensive chiropractic care he had undergone. She pointed to Dr. Kolt's letter of July 23, 2006 where he agreed that there had been little change in the range of motion, which was not significantly different than measurements recorded following the motor vehicle accident.

In counsel's view, Dr. Kolt, in his report dated July 23, 2006, was advocating lifetime chiropractic treatment:

. . . to continue treatment to maintain his therapeutic gain at once every three weeks for the next year. Chiropractic treatments for [J.J.] will be necessary for the remainder of his life to maintain the therapeutic gain that he has achieved.

Dr. Bruneau's letter, she submitted, did not recommend chiropractic treatment, but merely restated the Appellant's views on this issue. Counsel submitted that although Dr. Kolt had noted a trend toward "improved individual motion segment from the Appellant's initial accident date of the year 2000" and "a decrease in the intensity and frequency of the fixation found in individual motion segments", Dr. Pethrick's empirical analysis demonstrated that the Appellant had not improved, notwithstanding the years of chiropractic care received. Dr. Pethrick rejected the findings based on changes in intersegmental mobility, noting that "because of the subjective nature of this type of finding, it is not used as a global outcome measure of progress in the chiropractic profession". Rather, he felt that more weight should be given to markers such as status inventories and ranges of motion, which are widely accepted in the research and therapeutic communities as reliable measures of progress and spinal conditions.

Counsel for MPIC pointed out that Dr. Kolt had failed to provide any data on improvements in the intersegmental movement he noted. According to counsel for MPIC, the criteria used by Dr. Pethrick (status inventories and range of motion), are more reliable. According to these tests, the Appellant showed no demonstrable improvement in his condition and had reached his maximum therapeutic benefit. Accordingly, his condition remained unimproved notwithstanding two (2) years of chiropractic treatment and further chiropractic treatment was not medically required.

Discussion

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

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 5 of Manitoba Regulation 40/94 provides:

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 the further chiropractic treatment he seeks is medically required because of the accident.

While the Commission recognizes and accepts that the mitigating factors listed by Dr. Kolt such as his age, pre-existing osteoarthritis, previous motor vehicle accident of December 2000, emotional trauma of his wife passing away and failed back surgery (unrelated to the motor vehicle accident) have contributed to a slower recovery on the part of the Appellant, the Commission finds that the Appellant is no longer demonstrating improvement in his condition from chiropractic care. According to the empirical measures analyzed by Dr. Pethrick regarding the effect of the claimant's pain on his ability to manage his life, as well as the range of motion of his back and neck, the Appellant is not showing further improvement. Although Dr. Kolt

points to improvements in intersegmental movement as being more significant and relevant, Dr. Pethrick questions the use of these markers, and counsel for MPIC correctly points out that no data has been provided by Dr. Kolt to support this finding.

As Dr. Pethrick stated:

I have reviewed the recent report submitted by Dr. Kolt, dated July 23, 2006, submitted in support of [J.J.'s] range of motion and status inventory scores have not progressed. Notwithstanding his arguments, there has, in fact, been no improvement in these markers, over a prolonged period of treatment, a fact that Dr. Kolt concedes.

Dr. Kolt bases much of his argument on changes in intersegmental mobility. Intersegmental mobility is a physical finding that directs treatment on the occasion of that specific visit. Because of the subjective nature of this type of finding, it is not utilized as a global outcome measure of progress. On the other hand, status inventories and range of motion are widely accepted in the research and therapeutic communities as reliable measures of progress in spinal conditions. Indeed, most spinal research bases outcome assessment on changes in range of motion and status inventories. It is for these reasons that, in my opinion, more weight should be given to these markers than to the changes in intersegmental mobility referenced by Dr. Kolt.

Although recognizing that certain pre-existing and mitigating factors may be important in slowing the Appellant's recovery, Dr. Pethrick finds that the improvements have been "*not slow but not non-existent.*"

. . . It is now over three years from the date of loss, and there is no evidence of improvement despite regular care during this period. It is medically improbable that additional treatment will provide sustained or progressive improvement. Therefore, further chiropractic treatment would not be considered a medical requirement in the management of [J.J.'s] injuries.

While the Commission accepts that the Appellant's recovery may have been slower and required more treatment than norms for chiropractic care in the general population, we find nevertheless that after sixty (60) chiropractic treatments in over two (2) years, the Appellant's condition is no longer improving as a result of this treatment.

The Appellant has failed to show, on a balance of probabilities, that further chiropractic treatment is medically required. The rather extensive amount of chiropractic treatment undertaken by the Appellant, coupled with the lack of improvement in his condition, lead me to the conclusion that the Appellant had likely reached maximum therapeutic benefit from chiropractic care as of May 17, 2005. Accordingly, ongoing chiropractic treatment beyond May 17, 2005 cannot be deemed medically required within the meaning of Section 5(a) of Manitoba Regulation 40/94.

Therefore, the Commission finds that MPIC was justified in terminating payments for further chiropractic treatment for the Appellant on May 17, 2005, as it did. As a result, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date July 14, 2005.

Dated at Winnipeg this 7th day of December, 2006.

LAURA DIAMOND