

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by D.L.  
AICAC File No.: AC-04-144**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson

**APPEARANCES:** The Appellant, D.L., appeared on his own behalf via teleconference;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

**HEARING DATE:** October 31, 2006

**ISSUE(S):** Entitlement to funding for physiotherapy and acupuncture

**RELEVANT SECTIONS:** Section 136(1) of *The Manitoba Public Insurance Corporation Act* ('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**

The appeal hearing commenced on October 31, 2006 at 9:30 a.m. at the Commission Office in the City of Winnipeg, in the Province of Manitoba. At the commencement of the hearing Mr. T. Kumka, MPIC's legal counsel, was present but the Appellant, D.L., had not attended the hearing. As a result the Appellant was contacted by telephone and he advised that he was in the [text deleted] area operating his motor vehicle. The Appellant acknowledged to the Commission that he wished to proceed with the appeal hearing by teleconference. He further acknowledged that

he had received a Notice of Hearing and was aware that the appeal hearing was taking place at the Commission Office on October 31, 2006.

The Appellant was involved in a motor vehicle accident on June 15, 2002 and sustained a low back injury which resulted in his commencing chiropractic treatment two (2) days after the motor vehicle accident. The Appellant was in receipt of chiropractic treatments from Dr. Troy Thornton.

On October 9, 2002 the case manager wrote to D.L. and advised him that MPIC had approved a treatment plan provided by Dr. Thornton which provided for several treatments in the month of October and November 2002, and that these treatments would taper off in December to either one to two (1-2) treatments. MPIC informed the Appellant that they would not fund further chiropractic treatment beyond December 31, 2002 without prior authorization.

In addition to chiropractic treatments the Appellant was receiving physiotherapy treatments from Andrea Vinci, a physiotherapist. On December 4, 2002 MPIC received a Discharge Report from Ms Vinci indicating that the Appellant had improved with treatment and was participating in a home program.

#### **Case Manager's Decision**

On December 13, 2002 the case manager wrote to the Appellant advising him that his file would be closed within fourteen (14) days. This letter was followed by a telephone discussion with the Appellant on December 18, 2002 in which he indicated, as a result of the symptoms, he would like the file to remain open.

On November 27, 2003, eleven (11) months after the Appellant was discharged from physiotherapy, an Initial Health Care Report was received by MPIC from Dr. Greg Chernish. Dr. Chernish reported that he had examined the Appellant for low back pain and sleep difficulties and recommended further physiotherapy and acupuncture treatment.

Upon receipt of Dr. Chernish's report, MPIC referred the Appellant's file to its MPIC medical consultant, Dr. Fougere, who requested further information from MPIC as to whether the Appellant had any attendances for treatment in the 2003 year prior to his attendance with Dr. Chernish. Dr. Fougere was advised that the Appellant had not attended for treatment in 2003 prior to his attendance at Dr. Chernish. Upon receipt of this information Dr. Fougere provided an Inter-departmental Memorandum to MPIC which indicated:

... The cl's Nov 24/03 presentation suggests an acute or recent onset – given suggested dysfunction & inability to sleep.

There is no documentation that supports a temporal relationship between his presentation on Nov 24/03 & the MVC (motor vehicle collision), as such, tx is not supported.

Mr. Wayne Singer, physiotherapist, provided an Initial Health Care Report dated January 8, 2004 to MPIC, which was reviewed by Dr. Fougere on January 28, 2004. Dr. Fougere noted that this report failed to establish any causality between the Appellant's symptoms and the motor vehicle accident. Dr. Fougere further noted the Appellant had previously attended for physiotherapy treatments and was deemed ready for discharge from physiotherapy on December 4, 2002.

On January 29, 2004 the case manager wrote to the Appellant and advised him that both Dr. Chernish's and Mr. Wayne Singer's reports, as well as his entire file, had been reviewed by MPIC's Health Care Services Team. The medical information indicated there was insufficient evidence to support a causal relationship between the Appellant's current signs/symptoms and

the motor vehicle accident on June 15, 2002. As a result, the case manager informed the Appellant that they were unable to approve funding for the requested acupuncture and physiotherapy treatments.

The Appellant filed an Application for Review dated April 7, 2004.

On May 7, 2004 the Internal Review Officer wrote to Dr. Fougere and provided her with the following information that the Internal Review Officer received from the Appellant:

- Although [D.L.] did not formally have any medical intervention during the one year lapse in time, he maintains he continued to experience the following symptoms and dysfunction:
  1. Sore and stiff back when rising from bed each morning.
  2. Inability to sit for extended periods of time due to lower back pain.
  3. Unable to lean forward for tasks including shaving, washing dishes.
  4. States lumbar ROM is getting progressively worse. Acute back pain is dissipated.
- [D.L.] indicates he has routine blood work (cholesterol check) and also attends the Mayo Clinic on an annual basis for a physical examination. He indicates the Mayo appointments are related to his business (insurance purposes).
- [D.L.] continues to exercise regularly and although he finds this helpful, no long term benefit is recognized.
- [D.L.] has replaced office furniture to ensure his surroundings are more ergonomically friendly. He has also replaced furniture in his home and purchased a hot tub. He does not take any analgesics for pain.
- [D.L.] was referred to Dr Chernish for acupuncture by a family friend, Dr. Moorhouse. Dr. Chernish has promised [D.L.] that his “treatment will work”.
- Sleep disturbance began immediately following the accident, due to pain and discomfort. Although [D.L.] indicates he has never complained about this in the past, Dr. Chernish verified this as a dysfunction and suggested a sleeping aid prior to the onset of acupuncture treatment.
- [D.L.] is a business owner with a very high-paced lifestyle. His work requires that he travel on/off throughout the year. He states he has been living in pain and there is no question as to whether this is MVA-related. Two letters of reference

have been sent to file by colleagues who support that [D.L.'s] symptoms have been consistent since the MVA of June 15, 2002.

- [D.L.] recognizes no further need for physiotherapy or chiropractic treatment. He would like to try acupuncture and see whether Dr. Chernish can help him.
- Between dates June 17, 2002 – November 27, 2002, [D.L.] attended 11 Chiropractic tx, 13 Physiotherapy treatments, 14 Massage Therapy and 3 Acupuncture tx.

In response, Dr. Fougere, in an Inter-departmental Memorandum to the Internal Review Officer, dated May 12, 2004, concluded that the medical documentation on file did not support a causality between the Appellant's symptoms as of the fall of 2003, and the motor vehicle accident. Dr. Fougere further stated that the acupuncture treatment would not be a medical necessity but would represent elective care. Dr. Fougere further stated:

. . . It is medically probable that the claimant's current life stressors (psychosocial, job-related), level of conditioning, postural habits, awareness of pain-coping strategies, understanding of and implementation of pain-coping strategies contribute more to his current perceived symptoms than, the soft tissue injuries attributed to the motor vehicle collision.

### **Internal Review Officer's Decision**

On May 25, 2004 the Internal Review Officer wrote to the Appellant and advised him that she was confirming the case manager's decision and dismissing the Appellant's Application for Review on the following grounds:

#### **REASONS FOR REVIEW DECISION**

There are two conditions which must be met before Manitoba Public Insurance becomes obligated to reimburse a claimant for expenses incurred for medical or paramedical care:

1. The expenses must have been incurred because of the accident (i.e. the treatment must have been directed towards an injury sustained in the accident) in accordance with Section 136(1)(a) of the Act (copy enclosed);

2. The treatment must have been “medically required” in accordance with Section 5 of Manitoba Regulation 40/94 (copy enclosed).

Given the lengthy time period which has elapsed since the accident, I have some difficulty accepting that your current low back symptoms have a significant enough causal relationship with the accident to oblige MPI to fund further passive therapy such as physiotherapy and acupuncture.

Even if I assume that the requisite causal connection exists, I must also consider that the concept of “medical requirement” (or medical necessity, as it is sometimes referred to) connotes an expectation that the proposed treatment will ultimately lead to a resolution of the condition being treated.

Your current symptoms cannot be objectively quantified and compared to previous status as no medical status exists for the time period of December 5, 2002 to November 26, 2003. The medical information on your file simply does not support a causal relationship between your need for physiotherapy or acupuncture and the motor vehicle accident in question. Accordingly, there is ample evidence to support the decision of January 29, 2004 and I am affirming your case manager’s decision.

The Appellant filed a Notice of Appeal dated August 16, 2004.

### Appeal

The relevant provisions of the MPIC Act and Regulation are:

#### **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;

The Appellant testified during the course of the hearing and was cross-examined by MPIC's legal counsel. In his testimony the Appellant essentially confirmed the information he provided to the Internal Review Officer, and which is set out in the Internal Review Officer's Memorandum dated May 7, 2004. In his testimony the Appellant stressed that he has been in constant pain since the motor vehicle accident, has difficulty standing or sitting for any length of time, and cannot sleep throughout the night. He further testified that he did not have this pain prior to the motor vehicle accident and, therefore, asserts that this pain was caused by the motor vehicle accident. He therefore desired to have MPIC fund physiotherapy and acupuncture treatments when they are required due to his back pain. The Appellant acknowledged that the physiotherapy and acupuncture treatments did not improve his health, but was for the purpose of pain maintenance.

Dr. Fougere testified on behalf of MPIC and indicated that she had reviewed medical information in respect of the Appellant's claim on four (4) separate occasions and determined there was no causal connection between the Appellant's symptoms, which he reported in the later part of November 2003 to Dr. Chernish, and the motor vehicle accident in question. Dr. Fougere further testified that the Appellant's complaints in respect of constant pain were not reported to Dr. Chernish until approximately eleven (11) months after his discharge from physiotherapy and, as a result, there was no connection, in Dr. Fougere's view, between the motor vehicle accident and the Appellant's complaints.

The Commission notes that during the course of Dr. Fougere's testimony the Commission lost telephone contact with the Appellant. After several minutes the Commission was able to contact the Appellant by telephone and Dr. Fougere continued to testify for a very short period of time and, at that time, the Appellant informed the Commission that he was voluntarily withdrawing

from the hearing and unilaterally terminated his telephone contact with the Commission. The Commission, continued the hearing and requested MPIC's legal counsel to complete his cross-examination of Dr. Fougere and make his final submission, which he proceeded to do. The Commission informed MPIC's legal counsel that the Appellant would be given an opportunity to make any further submissions he wished. The hearing was then adjourned pending receipt of any further submission from the Appellant.

On November 20, 2006 the Commission wrote to the Appellant and stated in part:

Please be advised that this writer requested MPIC's legal counsel to complete his cross-examination of Dr. Fougere and to make his final submission, which he proceeded to do. At the conclusion of his submission this writer requested MPIC's legal counsel to provide this writer with a written copy of a summary of his verbal submission to the Commission, together with his own notes (if any) of his cross-examination of Dr. Fougere after your voluntary withdrawal from the hearing. I indicated to MPIC's legal counsel that I intended to give you an opportunity of making a written submission if you wished in support of your appeal.

Please be advised that I am enclosing herewith the following documents:

1. My notes of Dr. Fougere's testimony after you voluntarily withdrew from the Commission hearing;
2. a written summary of MPIC's legal counsel's verbal submission that he gave at the conclusion of Dr. Fougere's testimony.

The purpose of providing you with the enclosed documents is to give you an opportunity, if you wish, to make a written submission to this Commission in support of your appeal. If you wish to provide a written submission I would request that you do so within the next two weeks.

I will consider any submission you make, together with the evidence it heard at the hearing and the written material contained in the Index of material which was filed at the hearing and in due course issue a decision in respect of your appeal. If you do not wish to make such a submission please advise within the next two (2) weeks. At the conclusion of the two (2) week period I will proceed to consider all of the evidence I have heard, as well as your written submission (if any), and in due course render a decision in respect of your appeal.

I have been informed by an officer of the Commission that this letter was personally served on

the Appellant on November 22, 2006. The Commission notes that the Appellant did not provide any written submission to the Commission by December 20, 2006, being a period of four (4) weeks after personal service was effected on November 22, 2006.

### **Decision**

The Commission accepts the Appellant's testimony that he has constant pain to his lower back which has caused him difficulty in sitting and standing and from carrying out daily activities such as shaving and washing dishes. The Commission also accepts the Appellant's testimony that the Appellant did not suffer any of this pain prior to the motor vehicle accident and therefore honestly believes that this pain was caused by the motor vehicle accident injuries he sustained on June 15, 2002. However, the Appellant was not able to clearly explain that, notwithstanding the debilitating effects that this constant pain has caused in his quality of life, why he was able to cope with this pain for a period of eleven (11) months before seeing Dr. Chernish.

Dr. Fougere testified that in her view, as a result of the eleven (11) month lapse between the Appellant's discharge from physiotherapy and his meeting with Dr. Chernish, there was no medical documentation to support a causal connection between the Appellant's present complaints and the motor vehicle accident injuries he sustained. It should be noted that Dr. Fougere was a qualified medical doctor who testified that in addition to her medical degree she also obtained a Fellowship in Musculoskeletal Medicine and has been certified by the Acupuncture Foundation of Canada Institute. She further testified that in addition to acting as an MPIC medical consultant fifty (50%) percent of the time, she carries on a clinical practice.

The Commission notes there is a conflict between the Appellant's testimony and Dr. Fougere's testimony on the issue of causation. The Commission further notes that the Appellant did not

produce any medical evidence to contradict Dr. Fougere.

For these reasons the Commission gives greater weight to the medical reports and testimony of Dr. Fougere than it does to the testimony of the Appellant and, as a result, accepts the medical opinion and testimony of Dr. Fougere in preference to that of the Appellant on the issue of causation. The Commission therefore finds that the Appellant has not established, on a balance of probabilities, that there was a causal connection between his complaints of constant back pain and the motor vehicle accident which occurred on June 15, 2002.

Dr. Fougere testified that the acupuncture treatment that the Appellant was receiving was not medically necessary to improve the Appellant's health and represented elective care. The Appellant acknowledged that the physiotherapy and acupuncture treatments did not improve his health but was for the purpose of pain maintenance. The Commission therefore finds that the Appellant has failed to establish, on a balance of probabilities, that the acupuncture and physiotherapy treatments were medically required pursuant to Section 5 of Manitoba Regulation 40/94.

The Commission therefore determines that the Internal Review Officer was correct in rejecting the Appellant's request for reimbursement in respect of acupuncture treatments and physiotherapy treatments and, as a result, confirms the Internal Review Officer's decision dated May 25, 2004 and dismisses the Appellant's appeal.

Dated at Winnipeg this 22<sup>nd</sup> day of December, 2006.

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**MEL MYERS, Q.C.**