

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by R. J.
AICAC File No.: AC-05-107

PANEL: Ms Laura Diamond, Chairperson

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

HEARING DATE: May 16, 2007

ISSUE(S): Entitlement to funding for orthotics

RELEVANT SECTIONS: Section 136(1) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Section 11 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 was injured in a motor vehicle accident on August 8, 1999. As a result, he became entitled to Personal Injury Protection Plan benefits under the MPIC Act. As a result of fractured bones in his left foot, the Appellant's physician, Dr. Pacin, prescribed "semi rigid orthotics for biomechanical foot problems", on April 18, 2000.

At that time, MPIC provided the Appellant with funding for orthotics for his daily footwear and safety work shoes.

In February of 2005, the Appellant sought funding for new orthotics. The Appellant's case manager indicated that MPIC would not authorize funding for the orthotic intervention as there was no evidence of any biomechanical abnormality that had developed as a result of the accident.

The Appellant sought Internal Review of the case manager's decision and indicated that his caregivers believed he continued to have metatarsal pain related to the motor vehicle accident, which would benefit from orthotics.

The Internal Review Officer, in a decision dated May 18, 2005, relied upon the opinion of Dr. MacKay, of MPIC's Health Care Services Team, who noted that the material on the Appellant's file did not indicate any biomechanical abnormality that would explain his complaints and that he had not developed a specific condition secondary to the incident that would require custom orthotics to address the condition. The Internal Review Officer held that the Appellant was not entitled to funding for new orthotics. 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 at the hearing into his appeal. He described the injuries he had suffered in the motor vehicle accident, including a broken toe, ankle and tibia.

The Appellant submitted reports from his physician, Dr. Pacin, as well as his physiotherapist, Julaine Scarlett. Both of these caregivers recommended that the Appellant obtain new orthotics as a result of his injuries from the motor vehicle accident.

The Appellant described the difficulties he has with his feet and when walking. He indicated that his gait is wrong and that his hips are not aligned. He has difficulty finding shoes that fit properly and his left foot is often sore and swollen. He requires safety shoes for work and needs orthotics for his safety shoes. After the accident, MPIC had paid for two (2) sets of orthotics (one for his safety shoes and one for his other shoes). Both had been prescribed by Dr. Pacin to help him overcome his injuries from the motor vehicle accident.

Counsel for the Appellant reviewed a long list of medical reports touching upon the Appellant's initial injuries in the motor vehicle accident and attendance at the hospital, care and recommendations from Dr. Barnes and Dr. Pacin, as well as physiotherapy reports. All of these reports were based upon examinations of the Appellant. The reports indicate that the use of custom orthotics over the past five (5) year period has prevented a worsening of the Appellant's ankle and foot problems. The evidence established, it was submitted, that the Appellant requires these orthotics to ameliorate the injuries he suffered in the motor vehicle accident, and it is the opinion of his caregivers that he is now in need of replacements.

Counsel for the Appellant submitted that Dr. MacKay had not examined the Appellant and had limited his focus to issues with the Appellant's feet, ignoring the problems with his knees and gait, that the motor vehicle accident had caused. All of these injuries require assistance from orthotics. The evidence on the file shows a long history of injury to the area and shows that the Appellant required orthotics in 2000, for work and recreation. Counsel submitted that he still requires these orthotics and that he should be entitled to funding for replacement orthotics.

Evidence and Submission for MPIC

Counsel for MPIC relied on reports submitted by Dr. MacKay. She submitted that the Appellant had failed to establish that there was a medical requirement for orthotics arising out of the motor vehicle accident.

As Dr. MacKay indicated, the Appellant had suffered a comminuted fracture and tip fracture in the accident. These would not lead to biomechanical changes involving the foot and there was no documentation indicating that he reported significant difficulties with his left foot after the motor vehicle accident.

Counsel for MPIC submitted that the orthotics were not helping with the Appellant's pain, as he continued to have pain, and that MPIC should never have paid for the orthotics in the first place. She took the position that the initial orthotics had been approved by a previous case manager who had not consulted with Health Care Services before deciding to pay for them. She noted that the Appellant had not shown how the orthotics were helping him, in any event.

Discussion

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:**Prosthesis and orthosis**

11 Subject to sections 12 to 18, the corporation shall pay any expense that the corporation considers reasonable and proper and that the victim incurs for the purchase, rental, repair, replacement, fitting or adjustment of a prosthesis or orthosis if the prosthesis or orthosis is medically required and prescribed by a physician, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist.

The onus is on the Appellant to show, on a balance of probabilities, that new orthotics are medically required as a result of the motor vehicle accident. A review of the evidence on the file shows that the Appellant has met the onus upon him.

A report from Dr. Barnes, dated January 18, 2000, indicates that the Appellant was seen by Dr. Ahsan and diagnosed with a fractured left first and fifth metatarsal and treated with a cast.

The Emergency and Hospital Reports from Concordia Hospital also described his injuries, including injuries to his left foot.

A prescription from Dr. Pacin, dated April 18, 2000 indicates that the Appellant required semi-rigid orthotics for biomechanical foot problems.

Following Dr. Pacin's prescription, MPIC approved orthotics for the Appellant's shoes and for his safety work boots.

The Appellant returned to work, but continued to encounter difficulties with pain in his foot, knee, lower extremities and with his gait. He was awarded an eight (8%) percent permanent

impairment award for his left foot and left shin.

In spite of this, when the Appellant requested new orthotics, his case manager wrote to him, on January 26, 2005, stating:

I have also reviewed the medical information regarding your foot, but can find no reference to long standing problems with your foot . . .

Following this, the Appellant's physiotherapist, Ms Scarlett, wrote to the case manager on February 16, 2005, to address the question of orthotics. She stated:

After reviewing the chart for further reference to his foot pain and potential long standing problems, I do believe casting for a new set of orthotics is recommendable. . . . X-ray reports on January 11, 2000 on his left foot read, "separate ossicle adjacent to the tuberosity of the calcaneus. There is osteoporosis. This is slight degenerative changes is the 1st MTP. Small erosions are present in the heads of all the metatarsals." This may have been part in due to his fractures of the 4th and 5th metatarsals. . . .

Throughout the chart, foot and ankle pain was reported both in doctors notes and Physiotherapy notes. Semi rigid othotics were prescribed and recommended by both Dr. Pacin and Dr. G. Chernish. The effects of these were quite dramatic in helping his foot and knee pain in the past and upon assessment of his biomechanics and foot mobility on February 3rd, I feel this would be indicated for him in the future. He is a large man and wears through his shoes quickly, and this would include his orthotics. It has been nearly 5 years since he has been casted and it would seem legitimate to need an upgrade at this time. Further degenerative changes may have occurred with his dilapidated footwear and orthotics as well as him being on his feet a good majority of his day at work. His foot pain, lack of mobility, and poor biomechanics could undeniable be in part due to his original injury almost 6 years ago.

From this review, I feel it would benefit [R.J.] to be fit with new orthotics for daily footwear and his work boots at this time. . . .

Ms Scarlett's report was reviewed by Dr. MacKay, and, on March 4, 2005, the Appellant's case manager indicated:

I've had an opportunity to have your report of February 16, 2005 reviewed by our Health Services Department. Based upon that review we will not be able to authorize funding for your proposed orthotic intervention.

It is Dr. Michael MacKay's opinion that there was no evidence of any biomechanical abnormality that had developed as a result of the accident. The undisplaced fracture of the first metatarsal and the possible (not confirmed) fracture of the fifth metatarsal would not have led to any structure/biomechanical abnormality in the future in all probability. As such, Dr. MacKay is unable to relate the need for an orthotic intervention as a result of the accident.

Dr. Pacin provided a further note on March 25, 2005. He stated:

Above patient had MVA Aug /99 with multiple injuries. Including apparently # 4,5 metatarsals left foot. He continues to have left foot metatarsal pain (metatarsalgia). I believe this is still related to the MVA. I believe he would benefit from new orthotics for this.

Dr. MacKay reviewed both Ms Scarlett's and Dr. Pacin's opinions and came to the conclusion, in an Inter-Departmental Memorandum dated May 9, 2005, that the file did not contain much in the way of information pertaining to a problem the Appellant might have been experiencing with his left foot.

The file does not contain information indicating [R.J.] was identified as developing biomechanical abnormalities involving his left foot.

Another physiotherapist, D'Arcy Bain, addressed the Appellant's need for orthotics and the status of his present orthotic, in a letter dated May 17, 2005. He reviewed the diagnosis of osteoarthritis of the first toe and the orthotics which had been prescribed by Dr. Chernish and Dr. Pacin to help the Appellant's ankle, foot and apparently knee problems.

The treatment program 5 years ago appears to have been very successful in controlling [R.J.'s] knee, ankle and foot symptoms. It appears though, now that the life of his orthotics (5 years) has elapsed, he is getting symptoms.

There appears to be a logical sequence of injury, treatment and symptoms resolution that would have [R.J.'s] orthotic review and financially supported for re-casting. This is supplied by x-ray (Dr. Ahsan), Dr. Chernish, Dr. Pacin and physiotherapist J. Scarlett.

In the letter of March 4, 2005, Dr. MacKay's opinion did not find "any biomechanical abnormality" that had developed as a result of the accident. The fracture of the 5th metatarsal was questioned, but the x-ray report confirmed that there was a fracture.

He was granted orthotics once due to his accident. He requires them, renewed after 5 years. I am unsure of how Dr. Mackay evaluated [R.J.] for a biomechanical abnormality but there were (sic) my findings from my exam of May 2, 2005.

Mr. Bain described the Appellant's difficulties in getting shoes to fit without orthotics, describing problems caused by discrepancies in the width and length of his feet, as well as calluses on the anterior surface of the distal interphalangeal joint of the great toe.

In summary, I concur with the other health professionals that [R.J.] would benefit from orthotics as they had benefited his foot and knee pain in the past.

In a note dated November 30, 2005, Dr. Pacin reiterated his view that the

Above patient requires custom orthotics for left foot dx metatarsalgia with previous #4,5 metatarsals

A further review by Dr. MacKay, dated March 6, 2006, concluded:

Metatarsalgia is a term used to describe pain around the mid foot region particularly the metatarsal heads. The term itself does not signify a specific type of pathological condition that in turn would result in pain. The term does not denote a biomechanical abnormality involving the foot that in turn might benefit from custom orthotics.

The Commission has considered the opinions of several of the Appellant's caregivers, who were all of the view that the Appellant suffered from gait and foot abnormalities as a result of the motor vehicle accident and that his foot and knee pain has benefited from the use of orthotics. These caregivers, who had many opportunities to examine, assess and treat the Appellant, were all of the view that he requires new custom orthotics as a result of the injuries he suffered in the

motor vehicle accident.

Although counsel for MPIC has taken the position that the Appellant should never have been entitled to funding for orthotics, it is clear that the Appellant's caregivers are of a different opinion, and continue to believe that the Appellant requires custom orthotics as a result of the accident. In spite of Dr. MacKay's opinion that the Appellant did not suffer from "any biomechanical abnormality" as a result of the motor vehicle accident, the Commission finds that the Appellant's caregivers did document and continue to document injuries resulting from the motor vehicle accident which require custom orthotics.

The Commission finds that, for the reasons cited above, the Internal Review Officer erred in her decision. The appeal is allowed and the Internal Review Officer's decision dated May 18, 2005 is rescinded.

The Commission finds that the Appellant shall be entitled to funding for new sets of custom orthotics for both his daily footwear and work boots.

Dated at Winnipeg this 5th day of July, 2007.

LAURA DIAMOND