

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by W.A.
AICAC File No.: AC-05-11**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Mr. Paul Johnston

APPEARANCES: The Appellant, W.A., was represented by Ms Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunnha.

HEARING DATE: July 24, 2008

ISSUE(S): Entitlement to further physiotherapy treatment benefits (does the medical evidence support the decision that further physiotherapy treatment is not medically required)

RELEVANT SECTIONS: Sections 136(1)(a) and 138 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 5 and 10(1)(e) 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 20, 2001. She sustained soft tissue injuries to her neck, back, shoulders and chest, along with a bruised and swollen left knee.

The Appellant began attending for chiropractic treatment immediately following the accident and then changed modalities of treatment to physiotherapy. She attended for sixty-nine (69) physiotherapy treatments between her initial visit and March 1, 2004. Her physiotherapist, Carol

Bilinski, recommended ongoing treatment. On July 27, 2004, the Appellant's case manager provided two (2) decision letters which stated that there was insufficient evidence of a connection between the signs and symptoms associated with the Appellant's right elbow and the motor vehicle accident of August 20, 2001 for MPIC to be able to approve funding of the requested treatment. The second decision letter stated that the medical information on file indicated that in clinic treatment would not be of further benefit, nor medically required for the Appellant.

The Appellant sought an internal review of this decision. On October 27, 2004, an Internal Review Officer for MPIC concluded that the medical evidence did not support an ongoing need for further therapy treatments. In order for the Appellant's therapist to review and consolidate her home exercise program (with the goal of self-management), the Internal Review Officer approved funding for three (3) further treatments.

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 her appeal. She described the work that she had been doing prior to the accident, working full time at [Text deleted]. She testified that she had been doing this type of work for several years and had never had any symptoms or problems in doing such work.

She described herself as an independent, athletic single mother who worked hard and was active in sports, camping, gardening and maintaining her home.

Following the motor vehicle accident the Appellant was off work for five (5) days, but felt that she had to go back to work to meet the demands of her job at the time. Although her employer accommodated her need for ergonomic changes and work breaks, she was still suffering symptoms. She found more relief from physiotherapy than the initial chiropractic treatment she received, and followed the exercise program given to her by her physiotherapist, both at work and at home. She saw Dr. Chernish and Dr. Daniels in an attempt to find relief from her pain, but found that this did not help her as much as the physiotherapy treatments she received.

Eventually, the Appellant found that she was not able to meet the requirements of her job and had to leave her full time job at [Text deleted]. She still pursues her home exercise program but still experiences pain from her injuries.

Counsel for the Appellant submitted that the Appellant requires what she called “supportive care”. She noted that Dr. Pethrick, MPIC’s chiropractic consultant, had, in an earlier matter before the Commission, defined supportive care as:

Supportive care is described in the Clinical Guidelines for Chiropractic Practice in Canada (1993) as “Treatment for patients who have reached maximum therapeutic benefit but who have failed to sustain this benefit and progressively deteriorate when there are periodic trials of withdrawal of treatment. Supportive care follows application of active and passive care including rehabilitation and lifestyle modifications. It is appropriate when alternative care options including home based self care have been considered attempted”.

The Appellant’s representative submitted that in the Appellant’s case the evidence established that the criteria for supportive care had been laid out.

It was clear from the Appellant's testimony that she had previously been an active, athletic single mother, working full time, who had not had the need for regular visits to specialists, chiropractors or physiotherapists. The motor vehicle accident had changed all this.

Counsel for the Appellant reviewed several reports from the Appellant's physiotherapist as well as from medical specialists. Throughout, the Appellant cooperated and participated in her treatment program, including her home exercise program, and there was no indication of any pain magnification. However, nothing provided permanent relief. The most effective treatment was manipulation by the physiotherapist on an as needed basis.

The Appellant had even attended at a pain psychologist in an attempt to reduce her pain levels and flare ups, and a report from the psychologist, Dr. Bailly, supported the need for periodic physiotherapy.

Counsel for the Appellant submitted that the proposed treatments were medically required under Section 136(1) of the MPIC Act, and Section 5(a) of Manitoba Regulation 40/94 and that the provisions of Section 138 of the MPIC Act, and Section 10(1)(e) of the Regulation, establish MPIC's ability to provide the Appellant with rehabilitative treatment which has been deemed advisable and supported by her medical providers. She asked that the panel direct MPIC to reimburse the Appellant for out-of-pocket expenses incurred to date in receiving physiotherapy treatment, and to fund supportive physiotherapy treatment on an ongoing basis.

Submission for MPIC

Counsel for MPIC submitted that further physiotherapy treatment for the Appellant could not be considered medically required. She reviewed the opinion of Dr. Shrom, a consultant with MPIC's Health Care Services Team, dated July 21, 2004. Dr. Shrom indicated that:

The claimant can demonstrate her home exercises. Commitment to these is important. The therapist advises that the claimant "benefits" from a few "treatments", then doesn't require/return until increased symptoms occur. "Stretches, cervical stabilization" is listed as the exercises provided, however, there is no other specific treatment documented. Generally speaking, at this point in time, stretches, heat and self massage usually suffice in managing symptomatic periods. It is unlikely that in-clinic treatment will progress the pattern of symptoms – and would not be considered medically required."

Counsel for MPIC submitted that after sixty-nine (69) physiotherapy treatments, along with education and rehabilitative exercises which can be performed at home to improve the Appellant's functional status, any further physiotherapy treatments were providing only short term relief. This was borne out by the Appellant's continuing need for physiotherapy.

Counsel reviewed a further opinion from Dr. Shrom dated February 11, 2008. Dr. Shrom concluded:

Based on review, the additional information submitted is consistent with the opinion previously provided. This is not to say that the claimant does not continue to experience symptoms that temporally relate to the 2001 collision, however, the subsequent information from the treating physiotherapists supports that ongoing in-clinic physiotherapy is not a medically required factor. With specific reference to the home use of a TENS machine, previous Health Care Services' opinion was provided that although not medically required, there can be some benefit with respect to pain management in conjunction with ongoing home attention to stretches, strengthening and heat, along with ergonomic/mini break attention in the workplace.

Counsel submitted that the reports of Dr. Bailly, the pain psychologist, and Ms Bilinski, the physiotherapist, do not say that further physiotherapy treatments for the Appellant is medically required, but rather, that the physiotherapy is intended for pain management. She submitted that, although MPIC was not taking the position that the Appellant's symptoms were not caused by

the motor vehicle accident, it was of the view that physiotherapy had not been determined, on a balance of probabilities, to be medically required. She submitted that the Appellant was not entitled to funding for further physiotherapy treatment and that the decision of the Internal Review Officer and case manager should be confirmed.

Discussion

The relevant Sections of the MPIC Act and Regulations are:

MPIC Act

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;

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

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.

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

...

- (e) funds for occupational, educational or vocational rehabilitation that is consistent with the victim's occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence.

The onus is on the Appellant to show, on a balance of probabilities, that further physiotherapy treatment is medically required and that the Appellant should, therefore, be entitled to further physiotherapy treatment benefits.

The panel has reviewed the documentary evidence on file as well as the testimony of the Appellant and the submissions of counsel. We find that the Appellant has met the onus upon her to establish, on a balance of probabilities, that further funding for reasonable supportive physiotherapy care is medically required as a result of injuries suffered in the motor vehicle accident.

In this regard, the panel has relied upon the opinion of her physiotherapist, Carol Bilinski, as well as of her treating pain psychologist, Dr. Bailly.

On August 30, 2004, Ms Bilinski reported describing the Appellant's efforts at stretching and massage and her continuing pain complaints.

For the most part, she has been able to manage her neck/upper back pain with a home program of stretching and massage. However, over the past two years, she has presented to physiotherapy three or four time (sic) with increasing complaints of pain and stiffness on the right side of her neck and upper back. Although pain initiates in the lower cervical and upper thoracic spine, referred pain as far as her right wrist has been a complaint at the time of these visits. To date, including the treatments in May and June of this year, the arm quickly centralizes and her neck pain and stiffness subsides. (usually in three or four treatments).

Ms Bilinski provided another opinion received by the Commission on November 9, 2007. She described the Appellant's continuing pain complaints and indicated that she

“always tried to control her pain with a home program but the times she presented to physiotherapy, the pain and stiffness in her right cervical and thoracic spine made it increasingly difficult to function at home and work. Following the few treatments, she was again able to control her pain where it did not interfere with her function as much.”

Ms Bilinski stated:

[W.A.] is very diligent with her home program that includes stretches, general and specific strengthening and stabilization exercises. She is also using heat and general as well as acupressure massage. When she begins to experience pain/stiffness at work, she does stretches at work. She is aware of good postural habits and tries to maintain good posture with all activities.

Periodic physiotherapy seems to have assisted [W.A.] to maintain her present level of function. It has only been when she has had difficulty at work doing her job secondary to the pain that she has presented herself to physiotherapy. . . .

[W.A.] has had various and numerous consultations with little change to her pain. Periodic physiotherapy seems to be most effective in maintaining her present status and participate in the activities she enjoys at work and at home.

Dr. Bailly, a psychologist, provided an opinion dated September 25, 2007. He indicated that he had recommended and provided psychological intervention for pain management to improve the Appellant's pain coping skills and reduce emotional distress related to her pain and functional limitations. He began treating the Appellant in February 2006 and had seen her for nineteen (19) sessions at the time of his letter. He supported the Appellant's continuation of physiotherapy stating:

It has been my experience that patients experiencing even modest pain reduction and improved function from periodic physiotherapy are more likely to achieve their rehabilitative goals, including reintegration to a normal life, the labour market, and society (1-3). In [W.A.] case, as with other patients, gains in physiotherapy would likely result in improved quality of life and independence (4). It has been my experience that regular physiotherapy is an important part of a patient's pain management program for reducing the impact of pain flare-ups and promoting and/or maintaining gains in functional ability (5).

In terms of [W.A.'s] ability to continue work with periodic physiotherapy treatment, she has reported significant benefit from physiotherapy in terms of reducing pain and increasing functioning. Continued treatment having these benefits should allow her to increase or maintain these treatment gains, which typically increase the likelihood that a person will remain active, whether at home or in the workplace. Without this treatment, which is reported to have substantial benefit, the probability that she could maintain regular activity in every day life and work would be reduced (6-7).

Although Dr. Shrom provided a comprehensive review of the file on February 11, 2008, she provided no comment regarding Ms Bilinski's report of November 2007, or Dr. Bailly's opinion of September 2007.

The panel finds that the evidence presented, in particular the 2007 reports of her caregiving physiotherapist and psychologist, satisfy the onus upon the Appellant of showing, on a balance of probabilities that further physiotherapy care is medically required.

The panel finds that the Appellant should be reimbursed for the cost of physiotherapy treatments she has received in May of 2004.

The Commission finds that the Appellant has established, on a balance of probabilities, that periodic, reasonable, supportive physiotherapy care provides her with the necessary relief to maintain some productivity and general quality of life. In addition to the medical requirement for such paramedical care identified by her pain specialist and physiotherapist, we find that such treatment is necessary or advisable to contribute to the Appellant's rehabilitation to lessen a disability resulting from bodily injury and to facilitate her return to a normal life or reintegration into society or the labour market.

Therefore, the panel also finds that the Appellant should be entitled to ongoing funding for reasonable periodic physiotherapy treatments (in a manner consistent with the frequency of physiotherapy treatments that the Appellant has received since the termination of these benefits in May 2004), on a supportive care basis.

Accordingly, the decision of the Internal Review Officer dated October 27, 2004 terminating the Appellant's physiotherapy treatment benefits is set aside and the foregoing substituted therefore.

Interest, pursuant to Section 163 of the MPIC Act shall be awarded upon any amounts owed to the Appellant by MPIC.

The Commission will retain jurisdiction in the event that the parties are unable to agree upon the quantum of benefits which are owing to the Appellant.

Dated at Winnipeg this 27th day of August, 2008.

LAURA DIAMOND

NEIL COHEN

PAUL JOHNSTON