

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by B.B
AICAC File No.: AC-07-98

PANEL: Mr. Mel Myers, Chairperson
Mr. Paul Johnston
Ms. Linda Newton

APPEARANCES: The Appellant, B.B., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms. Danielle Robinson.

HEARING DATE: May 12, 2008

ISSUE(S): Entitlement to funding for further chiropractic treatment;
Entitlement to funding for a TENS machine

RELEVANT SECTIONS: Section 136(1)(a) 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 Internal Review Decision, dated July 9, 2007, succinctly sets out the essential facts of this appeal.

1. On March 29, 2006, you were the 58 year old driver of a vehicle that was rear ended by another motorist on [text deleted] in [text deleted], Manitoba. As a result of the accident, you sustained soft tissue injuries affecting your cervical and lumbar spine. You also complained of headaches.

Your pre-existing medical conditions include fibromyalgia and osteoarthritis.

There is no signed Application for Compensation of payment on your Injury Claim file.

2. You began attending for chiropractic care on March 30, 2006 with Dr. Troy Thornton, D.C. The chiropractor has consistently provided your claim file with the status of your neck and lower back injuries. The progression of your rehabilitation has also been closely monitored by Dr. Russell Baron, a Chiropractic Consultant with Health Care Services.
3. In the most recent chiropractic report for an examination date of November 3, 2006, Dr. Thornton advised of your subjective complaints including left low back and neck pain. Your physical findings as it relates to your cervical spine were documented as “non-revealing”. You continued to experience some limitations in motion relating to your lumbar spine.
4. On November 21, 2006, Dr. Baron reviewed the file contents and advised that the most recent information did not describe significant improvement in your symptoms. Continued chiropractic care was not supported by the recent report submitted to your file. Accordingly, the Case Manager issued a decision letter of November 27, 2006 reflecting Dr. Baron’s opinion.
5. The billing summary on your file indicates that you have attended approximately 55 chiropractic treatments from March 30, 2006 to November 10, 2006.
6. Physiotherapist, Jennifer Rybuck, provided an Initial Therapy Report following an examination of November 27, 2006. At that time, your objective findings included (but were not limited to) trigger-points to your back and neck, decreased range of motion affecting your left shoulder, as well as a hypomobile cervical and thoracic spine.
7. On December 20, 2006, the Case Manager received a faxed document from Windsor Park Physiotherapy, advising that you responded well to the use of a TENS machine when treating your neck/shoulder injury. A home TENS unit was suggested as beneficial in speeding your recovery. It was recommended that this unit be considered for a one month trial period.
8. Dr. Baron revisited your file on January 11, 2007. He felt that the request for physiotherapy was “reasonable” to address your residual symptoms, but, in his opinion, the file contents did not provide evidence of the medical necessity for a TENS machine.
9. During the Hearing, you advised that you experienced a slip and fall accident this winter, (the actually (sic) date of your fall is not established) at which time, you injured your left arm/shoulder and your hand “cracked”. You were in a cast for approximately 1 month, followed by an arm sling, as a result of your slip and fall injury.

In support of a temporal relationship between the motor vehicle accident and the slip and fall induced injuries, you argued that, had your motor vehicle accident injuries been completely healed, you would have had the strength and the balance to avoid

slipping on the ice. Instead, in your opinion, the accident injuries vicariously aided to your further left hand/shoulder injury.

10. You have provided an MRI Report for an examination date of March 2, 2007 which confirms that you sustained a left rotator cuff tendon tear as a result of the fall onto your left shoulder.

The Appellant filed an Application for Review on December 23, 2006, in respect of the two (2) decisions of the case manager rejecting the Appellant's request for funding of additional chiropractic treatments, dated November 27, 2006, and rejecting the Appellant's request for funding of the TENS unit for in-home use dated January 18, 2007.

Internal Review Decision

The Internal Review Officer issued a decision on July 9, 2007 rejecting the Appellant's Application for Review and stated:

1. Based on the totality of available information on your file, I must agree with the Case Manager's decision of November 27, 2006. The medical evidence on your file supports that you have reached a plateau in your recovery as it relates to chiropractic treatment. Therefore, continued chiropractic care is not deemed "medically required" as it relates to your accident injuries. Accordingly, I am confirming the Case Manager's decision at this time and dismissing your Application for Review.
2. I am confirming the decision letter of January 18, 2007 as the information on your file fails to provide sufficient evidence to support that treatment administration through the use of a TENS machine is a medical requirement as it relates to your accident injuries.

Even if the medical requirement of this treatment intervention could be established, it is my opinion that Section 136(1)(a) of the Act should be cited in support of the decision under review. The totality of medical information on your file does not provide objective substantiation that your symptoms which prompted the request for funding of a TENS machine is casually related to the motor vehicle accident of March 29, 2006.

In discussing the rationale for this decision the Internal Review Officer stated:

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).

One of the key considerations in determining whether recommended treatment is a necessity or a medical requirement is whether there is any real likelihood that it will lead to a demonstrable improvement in the condition of the patient. Treatment which provides only short term, symptomatic relief does not meet this test.

Based on the medical documentation on your file, I must agree with Dr. Baron’s opinion and conclude that your file has simply failed to establish that further chiropractic treatment or treatment administered through the use of a TENS machine, is a medical requirement in accordance with Section 5 of Manitoba Regulation 40/94.

When determining causality, one must take into account the nature and extent of the claimant’s injuries, the mechanism of the incident, the probability that such injuries could be sustained giving the purported mechanism and, of course, also crucial is the temporal relationship between the onset of a complaints (sic) and the purported incident.

You have provided the Internal Review Office with a speculative argument to explain the relationship of your current left shoulder injury to the accident in question. I cannot accept that a causal relationship exists between your left shoulder condition and the motor vehicle accident of March 29, 2006 and therefore, the expenses that have been incurred for the treatment directed towards that injury cannot be compensated by your PIPP policy.

Accordingly, there is sufficient evidence to support the decisions dated November 27, 2006 and January 18, 2007, and no basis has been shown for interfering with the decisions under review.

Appeal

The Appellant filed a Notice of Appeal dated August 24, 2007.

The relevant provision in respect of this appeal is Sections 136(1)(a) of the 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;

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.

Chiropractic Treatments

MPIC terminated continued funding of the Appellant's chiropractic treatments on the grounds that they were not medically necessary.

The Appellant testified at the hearing that:

1. He disagreed, with MPIC's position, that he had plateaued in his recovery as it relates to the need for further chiropractic treatments.
2. The chiropractic treatments assisted him in maintaining his quality of life.
3. He acknowledged that these chiropractic treatments did not improve his health.

The Commission, however, accepts the chiropractic opinion of Dr. Baron, who determined that the medical evidence on the Appellant's file clearly indicated that he had reached a plateau in his

recovery in respect of chiropractic treatment and, therefore, continued chiropractic treatments were not medically required.

The Commission concludes that, having regard to the chiropractic opinion of Dr. Baron and the testimony of the Appellant, the Appellant has failed to establish, on a balance of probabilities, that continued chiropractic treatments were medically required pursuant to Section 136(1)(a) of the MPIC Act and Section 5 of Manitoba Regulation 40/94.

Decision

For these reasons, the Commission confirms the decision of the Internal Review Officer dated July 9, 2007 and the Appellant's appeal is rejected.

Rental of TENS Unit

MPIC rejected the Appellant's request to reimburse him the cost for the rental of a TENS unit for a period of one (1) month on the following grounds:

1. It was not medically necessary to treat the Appellant's symptoms by means of a TENS unit.
2. There was no objective evidence that the Appellant's symptoms, which prompted the request for the funding of a TENS unit, were causally related to the motor vehicle accident of March 29, 2006.

The Commission disagrees with the decision of the Internal Review Officer, to deny reimbursement of the cost of the rental by the Appellant of the TENS unit for a period of one (1) month. On January 16, 2007, MPIC agreed to fund the costs of physiotherapy, in respect of the

Appellant, to a maximum of 18-26 medically required visits. The physiotherapist, in a report to MPIC, dated December 20, 2006, stated:

This pt responds well to the use of a TENS machine when treating his neck/shldr injury. A home unit would be beneficial in speeding his recovery. Would you consider fund a 1 month trial? Cost \$60-75/month.

The physiotherapist's recommendation was referred by the case manager to Dr. Baron, MPIC's chiropractic consultant, for his assessment. In response, Dr. Baron provided a note to the case manager dated January 11, 2007, in which he stated:

Physio Rationale

This file does not provide evidence of the medical necessity for a TENS machine.

The Appellant testified at the appeal hearing that:

1. The use of the TENS unit, by the physiotherapist during the course of his physiotherapy treatment, did assist in improving his medical condition.
2. The physiotherapist had concluded that the use of the TENS unit would be beneficial in speeding his recovery.
3. It was not unreasonable for MPIC to fund the TENS unit for a trial period of one (1) month at a cost of between \$60.00 and \$75.00.

The Commission notes that the case manager, in rejecting the Appellant's request, relied on the chiropractic opinion of Dr. Baron. Unlike the Physiotherapist, Dr. Baron, in arriving at his decision, conducted a paper review of the Appellant's file and, as a result, he did not personally have the opportunity of assessing the Appellant.

The Appellant attended physiotherapy for treatments between eighteen (18) to twenty-six (26) occasions, all of which were funded by MPIC. As a result, the physiotherapist had the

opportunity of meeting the Appellant, interviewing the Appellant, and assessing the Appellant's progress as a result of receiving physiotherapy treatments. During the course of these physiotherapy treatments, the physiotherapist used a TENS unit in treating the Appellant's neck and shoulder injury and concluded that the Appellant responded well to the use of this treatment. As a result, the physiotherapist recommended that MPIC fund the rental of a TENS unit for a trial period of one (1) month. In these circumstances, the Commission gives greater weight to the opinion of the physiotherapist than it does to Dr. Baron in respect of the need for continued chiropractic treatments.

The Commission finds that the Appellant testified in a very direct and unequivocal fashion and accepts his testimony in respect of the use of a TENS unit that it would have assisted the Appellant in improving his health. The Commission also finds that the Physiotherapist's recommendation in respect of the continued use of a TENS unit, for a period of one (1) month, corroborates the testimony of the Appellant.

The Commission, having regard to the testimony of the Appellant and the Physiotherapist's opinion, concludes that the Appellant has established, on a balance of probabilities, that the rental of the TENS unit for a trial period of one (1) month was a medical necessity within the meaning of Section 136(1)(a) of the MPIC Act and Section 5 of Manitoba Regulation 40/94.

The Commission also rejects MPIC's position that the Appellant's complaints in respect of his left shoulder, which prompted the request for the funding of a TENS unit, was not causally related to the motor vehicle accident of March 29, 2006. The Commission notes that as a result of the motor vehicle accident the Appellant suffered injuries and, as a result thereof, MPIC reimbursed the Appellant for the cost of the physiotherapy treatments. The Commission

therefore notes that MPIC recognized there was a causal relationship between the injuries the Appellant suffered and the motor vehicle accident. The Commission further notes that the physiotherapist, during the course of carrying out the physiotherapy treatments, used a TENS unit in treating the Appellant's neck/shoulder injury. In this circumstance the Commission finds that it was medically necessary that MPIC reimburse the Appellant for the rental of a TENS unit for a period of one (1) month to treat his neck/shoulder injury.

Decision

For these reasons the Commission rescinds the decision of the Internal Review Officer dated July 9, 2007 in respect of the rental of a TENS unit and allows the Appellant's appeal. The Appellant testified that he did not rent a TENS unit, therefore, incurred no expenses in this respect. As a result the Commission makes no order in respect of reimbursement to the Appellant for the cost of the rental of a TENS unit.

Dated at Winnipeg this 29th day of July, 2008.

MEL MYERS

PAUL JOHNSTON

LINDA NEWTON