Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-124

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Yvonne Tavares** **Ms. Deborah Stewart**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**July 8, 2002**
ISSUE(S):	**1. Entitlement to further therapeutic interventions.** **2. Entitlement to further Income Replacement Indemnity ('IRI') benefits.**
RELEVANT SECTIONS:	**Sections 81(1)(a), 110(1)(a), and 136(1)(a) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act'), Section 8 of Manitoba Regulation 37/94, and Section 5(a) of Manitoba Regulation 40/94.**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant, [text deleted], was involved in a motor vehicle accident ('MVA') on August 18, 1999. Her family physician, [text deleted], examined her on the day following the accident. He diagnosed strain of the neck and back regions, bruise to the left clavicle and a mild ankle sprain. [Appellant's doctor] noted a normal neurologic examination. He recommended ten days off work and prescribed an anti-inflammatory medication along with physiotherapy.

At the time of the motor vehicle accident, the Appellant was participating in a graduated return to work program at [Text deleted], implemented by the Workers Compensation Board of Manitoba ('WCB'). She had been involved in a work-related accident a year prior on August 19, 1998, wherein she sustained the following injuries: left scaphoid fracture; mild left thumb tenosynovitis; right rotator cuff strain; and cervicothoracic strain resulting in chronic regional myofascial pain.

The injuries which the Appellant sustained in the motor vehicle accident of August 18, 1999, prevented her from participating in the graduated return to work program set up by the WCB. As a result, the Appellant became entitled to Income Replacement Indemnity ("IRI") benefits, subsequent to a seven-day waiting period. The IRI benefits were based on five hours of work per day (20 hours per week), that the injuries sustained as a result of the August 18, 1999, motor vehicle accident rendered her incapable of performing.

The Initial Physiotherapy Report completed by [text deleted], physiotherapist, for the visit of September 1, 1999, documents the Appellant's complaints of cervical, lumbar and thoracic pain; multiple zones of pain above and below the waist; sleep disturbance, fatigue, headache and dizziness. Clinical findings were of decreased range of motion of the cervical spine with palpable neck muscle tenderness, limited lumbar spine extension and stiffness and spasm to the right sacral and gluteal regions.

The Appellant also attended upon her chiropractor for treatment of the injuries sustained in the MVA. In an Initial Health Care Report completed by her chiropractor, [text deleted], for the examination of October 6, 1999, he documents complaints of headaches and neck, shoulder and interscapular region pain. [Appellant's chiropractor] diagnosed acute moderate hyperacceleration/deceleration syndrome consistent with a WAD 3a injury (due to C5-C6 dermatomal deficit and C5 myotomal weakness), sacroiliac syndrome and bilateral shoulder sprain/strain. The Appellant was noted to be at less than full function and ongoing chiropractic treatment was recommended.

On or about November 1, 1999, a new graduated return to work program was implemented for the Appellant by the WCB. This program was an eight-week graduated return to work plan, with the hours commencing at two hours per day and increasing by one hour per day each week. The duties associated with this graduated return to work plan consisted of sorting, folding, counting and wrapping towels. The position required a long duration of standing in one spot. The work was very repetitive from a shoulder, arm perspective and was production based. The Appellant discontinued this return to work program after three days, due to her complaints of pain.

The Appellant subsequently underwent several medical examinations and psychological assessments, through the WCB, to evaluate her fitness for a return to work. The WCB's medical and psychological consultants determined that:

1. the Appellant had functional range of motion of her cervical and thoracic spines, as well as both shoulders;

2. the Appellant did not meet the diagnostic criteria for a major depression or other mood disorder; and

3. the Appellant did not meet the diagnostic criteria for a Chronic Pain Syndrome. It was noted that the Appellant's level of disability was not proportional in areas of her daily activities. It was further noted that she did have difficulty coping with aspects of her pain, and it was felt that she would benefit from pain management counselling.

Psychological counselling for pain management was arranged for the Appellant in conjunction with a new graduated return to work program.

In a decision letter from the WCB, dated March 23, 2000, the Appellant was advised that the WCB had concluded that she had recovered from her work-related injuries to the extent that she would be physically able to return to work. Upon completion of the graduated return-to-work program, which had commenced March 13, 2000, the WCB indicated that they would not accept any further responsibility for wage loss after May 11, 2000 (projected end of the graduated return to work plan). MPIC's case manager advised the Appellant that her entitlement to IRI (top-up) payments would end once the graduated return to work plan reached five hours per day, which was what she was working just prior to the motor vehicle accident of August 18, 1999.

In November 2000, the case manager arranged for a complete medical review of all of the medical information on the Appellant's file. This included medical information relating to the August 19, 1998, WCB file, the August 18, 1999, MPIC file, and a previous MPIC claim file relating to a motor vehicle accident of December 14, 1991. In an Inter-departmental

Memorandum dated November 17, 2000, [text deleted], medical consultant to the MPIC Health Care Services Team, concluded upon a review of the entire file that:

> As a result of the 1991 and 1999 motor vehicle collisions and from limited information, likely the January 2000 motor vehicle collision, the claimant on these separate occasions, suffered relatively minor soft tissue injuries involving the neck and back regions. In themselves, it is medically improbable that these injuries would result in permanent impairment. The claimant in the early 1990's was suffering from sleep disturbance and symptoms of depression and later was diagnosed and subsequently is being treated for major depression. In 1993, the claimant's pain complaints and clinical findings evolved into the diagnosis of fibromyalgia syndrome. As stated in my previous comments, not enough is known about this latter diagnosis to indicate that fibromyalgia syndrome is the result of trauma. Temporally, the relationship between the diagnosis of fibromyalgia syndrome made in 1993 and the claimant's 1991 motor vehicle collision is at best, questionable. My other comments on Fibromyalgia Syndrome are found on page 2 of this report. The claimant's chronic myofascial pain complaints, her sleep disturbance and her diagnosis of major depression, on the balance of probabilities, adversely affected her ability to return to baseline status after her work related injuries of 1998 and her motor vehicle collision of 1999. It is noted that, although having symptomatic complaints, at the time of the motor vehicle collision of August 1999, that the claimant was back at work working five hours per day. The relatively minor injuries sustained as a result of the August 18, 1999 motor vehicle collision would not have resulted in permanent impairment on the balance of probabilities and it would be expected that within a relatively short time, the claimant would have been able to resume her work duties as they were noted at the time of her motor vehicle collision. There is no medical documentation on file that explains the claimant's failed ability to return to work for two hours per day as attempted in November 1999 and later in the spring of 2000. On the balance of probabilities, her inability to return to work was not related to the soft tissue injuries associated with her August 18, 1999 motor vehicle collision.

In a letter dated March 14, 2001, the case manager wrote to the Appellant to advise her that:

> There is no objective physical evidence identifying an impairment of physical function which in turn would disable you from your occupational duties. In particular, there is no medical documentation that explains your not being able to participate and complete the graduated return to work program that was set up by the WCB in the spring of 2000.
>
> You are therefore not entitled to receive any further Income Replacement Indemnity (IRI) benefits. This decision is in accordance with Section 110(1)(a) of the Manitoba Public Insurance Corporation Act.

> As commented on earlier, the relatively minor injuries sustained as a result of the August 18, 1999 MVA would not have resulted in permanent impairment on the balance of probabilities. It would be difficult at this point to relate any ongoing symptoms to your MVA of August 18, 1999. There is no documentation on file identifying a therapeutic intervention as being a medical necessity in the further management of your injuries as they relate to your August 18, 1999 accident. You are therefore not entitled to any further therapeutic interventions/medical expenses (i.e. chiropractic treatment, physiotherapy, etc). Your entitlement to further therapeutic interventions/treatment will cease as of April 30, 2001.

The Appellant sought an Internal Review of that decision. In his decision dated July 20, 2001, the Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review with respect to the termination of IRI benefits. In a decision dated August 13, 2001, the Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review with respect to the termination of any further reimbursement for therapeutic interventions.

The Appellant has now appealed from both of those Internal Review decisions to this Commission. The issues which require determination in the Appellant's appeal are as follows:

1. her entitlement to reimbursement of further therapeutic interventions; and
2. her entitlement to further IRI benefits beyond April 12, 2000.

The relevant sections of the MPIC Act and Regulations are as follows:

Section 81(1)(a) of the Act provides that:

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the full-time employment;

Section 110(1)(a) of the Act provides that:

> **Events that end entitlement to I.R.I.**
> **110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident.

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

> **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 8 of Manitoba Regulation 37/94 provides that:

> **Meaning of unable to hold employment**
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident

Section 5(a) of Manitoba Regulation 40/94 provides that:

> **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;

At the hearing of this matter, the Appellant submitted that since the motor vehicle accident of August 18, 1999, she has never been able to regain her pre-MVA status. At the time of the motor vehicle accident, she was working five hours per day, but since the accident she has not been able to regain that capacity.

In support of her position, the Appellant relies on the medical reports from [Appellant's doctor] which, she submits, illustrate an inability to return to her full duties. In [Appellant's doctor's] medical report dated January 21, 2002, he notes the following:

> My feeling it [*sic*] that this lady is suffering from a chronic cervical thoracic and lumbar muscle ligamentous strain complicated by pre-existing fibromyalgia and reactive depression. She has pre-existing rotator cuff impingement syndrome.
>
> In summary this lady had a pre-existing diagnosis of fibromyalgia which likely complicated her work related injury. She had shown some improvement but was continuing with significant difficulties with regards to her work injury at the time of her MVA. She had been able to return to half days at light duties at the time of her MVA but this was still far short of a full functional recovery. Since her motor vehicle accident she has not been able to attain a pre-MVA level of function or symptoms. She was able to get close to half time duties within her work place but with significantly increased pain. This unfortunate lady was using all her coping mechanisms to attempt to return to work when she was involved in her motor vehicle accident and this simply tipped the scales too far for her to make a successful attempt at resuming her occupation. Without a doubt factors other than the MVA have contributed to her present disability, these include her pre-existing fibromyalgia, her relative deconditioning and her work place injury.

With regard to her ongoing need for chiropractic treatments, the Appellant submits that the chiropractic treatments help alleviate her pain and, therefore, she continues to derive a benefit from the ongoing treatments. In support of her position, the Appellant relies on the chiropractic report submitted by her chiropractor, [text deleted]. In his report dated March 20, 2002, [Appellant's chiropractor] noted that:

> There appears to be mounting objective medical evidence that supports the need for this patient to continue to receive care in a supportive nature for injuries sustained in the motor vehicle accident. Many interventions have been attempted but have not been able to resolve the injuries directly. In some instances there have been partial resolution, others have only provided temporary relief, but not effective to the actual injuries. Thus far, only supportive care for chiropractic care provides the safest relief for this patient. Long term use of medicinal therapy will only increase risks of other potential health issues thus complicating her well being in the future.
>
> Because of the patients [*sic*] age, it is understandable to expect some increased discomfort naturally, but incorporating trauma as a result of the motor vehicle accidents, accelerates, aggravates, and complicates the process clearly. This is well documented in all recent scientific literature.

Counsel for MPIC submits that the Appellant's current complaints, which limit her functional capacity, are not related to the injuries she suffered in the motor vehicle accident of August 18, 1999. He refers to the reports of the WCB consultants, which conclude that the Appellant should be capable of returning to her pre-accident work and submits that there has been no objective evidence to rebut those assessments. He notes that the Appellant's own doctors base their opinions on her subjective complaints of pain, rather than any objective evidence. He concludes that whatever injuries the Appellant suffered in the motor vehicle accident of August 18, 1999, have long since healed and no longer prevent her from returning to work. Rather, the injuries she sustained in her workplace injury on August 19, 1998, and her pre-existing depression and fibromyalgia contribute to her functional limitations and prevent her from returning to the workplace.

In regard to the Appellant's claim for ongoing therapeutic treatments, he notes that the Appellant has been attending for chiropractic treatments regularly since 1995. Although those chiropractic treatments may help to ease her pain, supportive care as such is not medically required within the

terms of the MPIC Act and Regulations. Therefore, he submits that there is no further entitlement to reimbursement of any further therapeutic interventions.

After a careful review of all of the evidence, both oral and documentary, we are unable to conclude, on a balance of probabilities, that the injuries sustained by the Appellant in the motor vehicle accident of August 18, 1999, prevented her from holding employment as a laundry worker for five hours per day from April 12, 2000, and thereafter.

There is a lack of objective medical evidence on the file which connects the Appellant's inability to return to her pre-MVA work capacity as of April 12, 2000 and the motor vehicle accident of August 18, 1999. Rather the medical evidence demonstrates that the Appellant had significant pre-existing medical conditions prior to the MVA and these conditions continue to contribute to her ongoing disability. In a report dated May 26, 1996, [text deleted], chiropractor, noted the following:

> She has, as stated, findings on examination which are consistant [*sic*] with ongoing fibromyalgic syndrome. This syndrome consists of: wide-spread chronic pain; decreased pain threshold; disturbed sleep patterns; stiffness; mood changes; irritable bowel syndrome; headache phenomena; and paraesthesia.

Her treating physician, [text deleted] in his letter to the Worker Advisor Office dated July 27, 2000 notes that, "[The Appellant's] *clinical course was exasperated by a motor vehicle accident several months ago but she has never approached her pre-injury level of function. Her present remaining disability I feel is related to her workplace injury of August 19, 1998*." In a report dated January 21, 2002, [Appellant's doctor] commented that, "*Without a doubt factors other*

than the MVA have contributed to her present disability, these include her pre-existing fibromyalgia, her relative deconditioning and her workplace injury".

Based on her extensive pre-existing medical history and the foregoing comments of her caregivers, we conclude that the injuries which the Appellant sustained in the motor vehicle accident of August 18, 1999, no longer prevented her from being able to hold her employment as of April 12, 2000. Accordingly, we find that the Appellant has failed to show, on a balance of probabilities, that her inability to work was as a result of the motor vehicle accident of August 18, 1999.

With regard to the Appellant's appeal respecting her entitlement to reimbursement of further therapeutic interventions, we agree with the reasons set forth in the decision of MPIC's Internal Review Officer bearing date August 13th, 2001 denying any further entitlement to reimbursement for therapeutic interventions such as chiropractic treatment and physiotherapy. The Appellant has failed to show, on a balance of probabilities, that ongoing therapeutic treatments are "medically required" and that any such treatments are required because of the motor vehicle accident of August 18, 1999.

Accordingly, for these reasons, the Commission dismisses the Appellant’s appeal and confirms the decisions of MPIC’s Internal Review Officer, bearing date July 20, 2001 and August 13, 2001.

Dated at Winnipeg this 14th day of August, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

DEBORAH STEWART