

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-223**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Paul Johnston
Mr. Neil Margolis

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Bob Tyre and Ms Marcelle Marion of the Claimant Adviser Office;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

HEARING DATE: March 18, 2008

ISSUE(S): Entitlement to further chiropractic treatment benefits beyond June 30, 2005

RELEVANT SECTIONS: Section 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) of Manitoba Regulation 40/94

AICAC 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 a passenger in a motor vehicle which was rear ended on February 6, 2005 and, as a result of which, he sustained a whiplash injury. The Appellant's chiropractor classified, in respect of the cervical spine, as WAD 3A and, in respect of the lumbar spine, as WAD 2 in an Initial Health Care Report to MPIC dated February 16, 2005.

On March 10, 2005 [Appellant's Chiropractor #1], in a Treatment Plan Report to MPIC, classified the Appellant's whiplash to his cervical spine as WAD 3A and to his lumbar spine as a WAD 3A. [Appellant's Chiropractor #1] advised that the Appellant would require 30 – 45 chiropractic sessions and the estimated discharge date would be six (6) months from the date of his report of March 10, 2005.

At the request of the case manager the Appellant completed two (2) questionnaires in respect of his low back pain and disability and in respect of his neck pain and disability index, both dated March 28, 2005. The case manager requested [MPIC's Chiropractor] [text deleted], to review the Appellant's file. [MPIC's Chiropractor] reported to the case manager on April 21, 2005 that there should be no need for treatment to exceed weekly after the end of April 2005. The case manager provided the Appellant with two (2) further questionnaires which the Appellant completed and returned to the case manager on or about May 5, 2005.

On May 13, 2005 [Appellant's Chiropractor #1] provided a further Treatment Plan Report to MPIC wherein it stated:

1. That the Appellant continued to suffer from pain, stiffness and swelling in the neck and lumbar spine, as well as numbness and tingling down the left arm.
2. The Appellant's whiplash to his spine was classified as a WAD 3A and the whiplash to his lumbar spine as a WAD 2.
3. The Appellant would require chiropractic treatments every other day for 10 – 15 weeks and thereafter 2 treatments per week for ten (10) weeks.
4. The duration of care was estimated to be six (6) months.

The Appellant's medical file was referred by the case manager to [MPIC's Chiropractor] for his opinion as to whether or not further chiropractic treatments were justified. In an Inter-departmental Memorandum dated June 3, 2005 [MPIC's Chiropractor] advised the case manager that although there were marginal changes in the range of motion reported, the Appellant's symptoms remained similar and a neurological deficit persisted through this period.

[MPIC's Chiropractor] further stated in his memorandum that:

1. a review of the questionnaires submitted by the Appellant to MPIC indicated that the Appellant reported that there was a worsening to his neck and there were no significant measurable changes in the condition of his low back.
2. the Appellant had not benefited in the measurement interval between March 28, 2005 and May 10, 2005.
3. “. . . *In my opinion, he has maximally benefited with respect to chiropractic care. Further care is unlikely to alter symptoms or improve function. Perhaps alternate care would be more beneficial.*” (underlining added)

On June 10, 2005 [Appellant's Chiropractor #1] provided a further treatment plan report to MPIC and indicated that the Appellant was experiencing a delayed recovery and stated:

Extension requested for 10 sessions due to complications during course of treatment ([text deleted] surgery).

The Appellant testified at the appeal hearing that during the month of May he required [text deleted] surgery and did not receive chiropractic treatments for a period of two (2) weeks.

Case Manager's Decision

On June 14, 2005 the case manager wrote to the Appellant and advised him that:

1. [Appellant's Chiropractor #1's] request for further treatment as outlined in his Treatment Plan Report dated May 13, 2005, as well as the Appellant's entire medical file, was reviewed by MPIC's Health Care Services Team.
2. MPIC's Health Care Services indicated that the Appellant had maximally benefited from chiropractic care which was unlikely to alter his symptoms or improve function further.
3. chiropractic treatments were no longer considered to be medically required.
4. MPIC would not fund further treatment effective June 30, 2005.
5. if the Appellant wished to consider some form of alternate care he should contact him.

The Appellant filed an Application for Review dated August 3, 2005.

Internal Review Officer's Decision

On September 30, 2005 the Internal Review Officer wrote to the Appellant and informed him that she had completed her internal review which she had confirmed the case manager's decision and dismissed the Appellant's Application for Review.

The Internal Review Officer further stated:

DISCUSSION AND RATIONALE FOR 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 treatments must have been directed towards an injury sustained in the accident) in accordance

with Section 136(1)(a) of *The Manitoba Public Insurance Corporation Act* (copy enclosed);

2. The treatments 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 “medically required” is whether there is any real likelihood that it will lead to a demonstrable improvement in the condition of the patient. Considering the extensive therapy, 56 chiropractic treatments you have undergone since the accident, it seems highly unlikely that further chiropractic treatment will result in any such demonstrable improvement. There are no functional deficits noted that would preclude you from proceeding with your exercise program independently.

I am not convinced that further chiropractic treatment is “medically required” within the meaning of the legislation, nor am I convinced that Manitoba Public Insurance has any further obligation to provide funding for those treatments. Treatment which provides only short-term, symptomatic relief does not meet this test.

The medical evidence currently available does not support the ongoing need for further chiropractic care and the decision to not provide further funding for treatment is confirmed. I am, therefore, dismissing your Application for Review. As noted in the Review Decision, should you wish to consider some form of alternate care, you are to contact your case manager to arrange for same. (underlining added)

Notice of Appeal

The Appellant filed a Notice of Appeal dated December 19, 2005 and stated:

1. I did not receive adequate help and cooperation from my original case mgr
2. My first series of chiropractic treatments were terminated unfairly at a time that inevitably led to a relapse
3. Subsequent chiropractic care (at my own expense) has confirmed the above
4. MPIC did not fulfill its obligations to me, as their insured

In support of this appeal [Appellant’s Chiropractor #2], in a letter dated January 29, 2007 to MPIC, stated that:

1. she did not agree with [MPIC’s Chiropractor’s] analysis in his recommendation to terminate the Appellant’s chiropractic treatment.
2. the Appellant had received not only chiropractic treatments from [Appellant’s Chiropractor #2], but also received massage therapy.

3. Presently he experiences sporadic low-grade pain and weakness of his left arm. Lower back occurring occasionally and is low-grade and dull in nature. Pain in the thoracic region has improved. [The Appellant] presently attends treatment on a supportive bases at a frequency of once per month. He also attends massage therapy treatments to alleviate muscle pain.

.....

At the present time, [the Appellant's] progress is satisfactory. The treatment therapies of chiropractic and massage seem to have been helpful in correcting his instability and in alleviating his pain.

[The Appellant's] recovery is approximately 90 percent improved. His age of [text deleted] years causes him to be more susceptible (sic) to injuries and I would expect a slower recovery time. I do not agree with [MPIC's Chiropractor's] analysis in his decision to terminate [the Appellant's] chiropractic treatment. I believe that [the Appellant's] age and lack of preparedness is important in determining the length of treatment. I would expect his recovery time to be slower. (underlining added)

On March 21, 2007 the case manager provided [MPIC's Chiropractor] with a copy of [Appellant's Chiropractor #2's] report for his review and comment. In a (sic) Inter-departmental Memorandum dated March 23, 2007 [MPIC's Chiropractor] stated:

. . . The information supplied by [Appellant's Chiropractor #2] does not change my opinion. The fact that [the Appellant] is reported to be 90% improved is in my opinion not demonstration that the care provided by [Appellant's Chiropractor #2] has been instrumental in bringing about this improvement. In general soft tissue injuries have a favorable natural history. Given the time frames involved during treatment, that is, a period of over one year from October 2005 to December 2006, it is possible that [the Appellant's] condition improved as a result of natural history. Since he did not improve over a period of substantial length of time with chiropractic care earlier in his treatment, in my opinion it is probable that any improvement was the consequence of a favourable natural history rather than attributable to any treatment intervention.

Appeal Hearing

The relevant provisions of the MPIC Act and Regulations 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 at the hearing and stated that:

1. he was a retired [text deleted] and at the time of the motor vehicle accident he was [text deleted] years of age.
2. he had pain and stiffness to his neck and lumbar spine, as well as the numbness and tingling down his left arm.
3. he had found the chiropractic treatment by [Appellant's Chiropractor #1] as unsatisfactory and the whiplash injuries to his neck and his lower back had not improved during the period of time that [Appellant's Chiropractor #1] treated him.
4. on each visit [Appellant's Chiropractor #1] would spend only about five (5) minutes of time treating him, which was insufficient.
5. there had been no improvement to his neck and back as a result of [Appellant's Chiropractor #1's] treatment.
6. during the month of May, for a period of two (2) weeks, he did not attend any chiropractic treatments because he had [text deleted] surgery done during that period of time.

7. at the time MPIC determined he would not receive reimbursement for chiropractic treatments, he was not advised as to any alternative form of treatment he could obtain to improve his medical condition.

The Appellant further testified that:

1. the pain to his neck and back increased over the next several months and his conditioned worsened.
2. he had discussions with his brother-in-law who also suffered from a motor vehicle accident and who had been treated by [Appellant's Chiropractor #2].
3. his brother-in-law had successfully recovered from the motor vehicle accident injuries he sustained due to [Appellant's Chiropractor #2's] treatment.
4. as a result of these discussions the Appellant saw [Appellant's Chiropractor #2] who commenced chiropractic treatments in the month of October 2005.
5. initially [Appellant's Chiropractor #2] was treating him four (4) times a week and that in due course the treatments were reduced to three (3) times a week, twice a week, and commencing the beginning of January 2006, once a week.
6. concurrently with receiving chiropractic treatments the Appellant was also receiving massage therapy treatments.

The Appellant further testified that:

1. as a result of these treatments he made a significant recovery from the injuries he sustained in the motor vehicle accident.
2. as of January 1, 2006 he was receiving chiropractic treatments and massage treatments once a month and that these treatments were for the purpose of maintaining his present condition.

3. in his view his age, his lack of preparedness when he was a passenger in a motor vehicle which had been rear ended, and the major surgery which occurred in the month of May 2005, had prevented him from taking chiropractic treatments for several weeks and significantly delayed his recovery from the motor vehicle accident.

The Appellant also testified that:

1. [Appellant's Chiropractor #2's] treatments had resulted in a significant reduction in his pain and stiffness and the tingling to his neck and back.
2. MPIC was not justified in concluding, at the end of June 2005, that he had reached maximum benefit from chiropractic treatments.
3. [Appellant's Chiropractor #2's] treatments resulted in his making nearly a full recovery from the motor vehicle accident injuries which confirmed that MPIC prematurely terminated his chiropractic treatments.

Discussion

MPIC's legal counsel submitted that:

1. the Appellant did not establish, on a balance of probabilities, that MPIC had erred in terminating his chiropractic treatments effective June 30, 2005.
2. [Appellant's Chiropractor #1] had provided approximately 57 chiropractic treatments to the Appellant between the date of the motor vehicle accident on February 6, 2005 and the termination of the reimbursement of the chiropractic treatments effective June 30, 2005, a period of approximately 21 weeks.
3. the Appellant had received numerous chiropractic treatments over a lengthy period of time and that the Appellant had maximally benefited with respect to these chiropractic treatments.

4. as a result, further chiropractic treatments were not medically required in accordance with Section 5 of Manitoba Regulation 40/94.

MPIC's legal counsel further pointed out that after the Appellant's reimbursement of chiropractic treatments were terminated by MPIC at the end of June 2005, the Appellant did not commence to receive chiropractic treatments from [Appellant's Chiropractor #2] until October 14, 2005 (which was a period of approximately 3 ½ months) and the Appellant had not provided any reasonable explanation for this delay.

In response [text deleted] of the Claimant Adviser Office, filed in evidence a copy of an MPIC document entitled *PIPP Procedures, Case Management > Appendix 5: M.P.I. Chiropractic Management Algorithm*, hereinafter referred to as the "Document", which:

1. sets out MPIC's policy in respect of its procedures and case management relating to chiropractic treatment of soft tissue injuries resulting from motor vehicle accidents.
2. refers to the four (4) different categorizations in respect of a whiplash injury.
3. describes a WAD II category whiplash injury as "Spinal complaints AND physical signs, e.g.: decreased range of motion point tenderness"
4. describes WAD III "Spinal complaints AND physical signs AND neurological signs. E.g.: decreased or absent deep tendon reflexes muscular weakness sensory deficit".
5. sets out the expected time for treating these two classifications as follows:

WAD II: <7 months in duration
<33 total treatments
III and over: Evaluation by Health Care Services Team prior to approval of treatment

This Document further states:

Modifying Factors:
Physical and Human Factors:

Physical and human factors may indicate a more serious injury:

- ...
 4. Age/health
 5. Lack of preparedness

The Claimant Adviser Officer stated that the following factors had a significant impact on delaying the Appellant's recovery:

1. the ineffective chiropractic treatments he received from [Appellant's Chiropractor #1];
2. his advanced age ([text deleted] years);
3. his lack of preparedness in being injured by a rear end collision;
4. the serious WAD III injury he suffered to his neck and lower back;
5. his [text deleted] surgery during the month of May;

The Claimant Adviser Officer further stated that:

1. MPIC's "Document" setting out its procedures relating to chiropractic treatment provided that in respect of a WAD II whiplash injury, it was expected that the treatment period would last for a maximum period of seven (7) months.
2. the Appellant had suffered a WAD III whiplash injury which is more serious than a WAD II whiplash injury.
3. MPIC's case manager, in respect of chiropractic treatments, did not set out a maximum period of time for the duration of these treatments.
4. the case manager did not provide for an evaluation by MPIC's Health Care Services prior to the approval of the treatment in accordance with the provisions as set out in the "Document".

5. MPIC had terminated the Appellant's chiropractic treatments in respect of his WAD III whiplash injury after a period of approximately twenty-one (21) weeks when MPIC's "Document" provided for a maximum of twenty-eight weeks (7 months) in respect of the less severe WAD II whiplash injury.

The Claimant Adviser Officer further submitted that the Appellant's WAD III whiplash injury included not only soft tissue injuries to his neck and lower back, but also neurological deficits in respect of numbness and tingling of the Appellant's left arm. Having regard to the Appellant's age/health, lack of preparedness in respect of the motor vehicle accident and [text deleted] surgery, it would have taken more than seven (7) months of chiropractic treatments for the Appellant to make a full recovery.

The Claimant Adviser Officer, in his submission, referred to [Appellant's Chiropractor #2's] opinion as set out in his report dated January 29, 2007 wherein he stated that:

1. the Appellant's age of [text deleted] years caused him to be more susceptible to injuries and she would have expected a slower recovery time.
2. as a result she rejected [MPIC's Chiropractor's] analysis and his decision to terminate the Appellant's chiropractic treatment.

The Claimant Adviser Officer also referred to [Appellant's Chiropractor #2's] opinion that the Appellant's age and his lack of preparedness were important factors in determining the length of treatments and that she expected his recovery time as determined by [MPIC's Chiropractor] to be slower.

The Claimant Adviser Officer asserted that:

1. [MPIC's Chiropractor] erred in arriving at his decision to recommend termination of reimbursement of the Appellant's chiropractic treatments as of June 30, 2005.
2. [MPIC's Chiropractor] failed to consider the Appellant's age/health, lack of preparedness in respect of the motor vehicle accident, [text deleted] surgery, and the severe nature of the Appellant's WAD III whiplash injury in arriving at his decision that the Appellant had received maximum therapeutic benefit.
3. as a result, [MPIC's Chiropractor] erred in determining that further chiropractic treatments were not medically necessary.

Decision

The Commission notes that [MPIC's Chiropractor's] opinion is based on a paper review of the Appellant's medical file. However, [Appellant's Chiropractor #2], unlike [MPIC's Chiropractor], had the opportunity of personally examining the Appellant and treating him over a lengthy period of time and therefore was in a better position than [MPIC's Chiropractor] to assess the Appellant's medical condition and his credibility. For these reasons the Commission gives greater weight to the chiropractic opinion of [Appellant's Chiropractor #2] than it does to the chiropractic opinion of [MPIC's Chiropractor].

The Commission finds that the Appellant was a credible witness who testified in a clear, direct and convincing manner and that his evidence is corroborated by the chiropractor report of [Appellant's Chiropractor #2]. The Commission accepts the Appellant's testimony that he did not make a recovery from the motor vehicle accident injuries until he received the chiropractic treatments from [Appellant's Chiropractor #2] and the massage treatments.

An examination of [MPIC's Chiropractor's] reports do not indicate that he took into account the

Appellant's age, the Appellant's lack of preparedness when he received the motor vehicle accident injuries, and the effect of the [text deleted] surgery in determining the period of time required for the Appellant to make a recovery from the motor vehicle accident injuries. On the other hand, [Appellant's Chiropractor #2] did take into account the Appellant's age and the Appellant's lack of preparedness when he received the motor vehicle accident injury in determining that the Appellant would require a slower recovery time than that determined by [MPIC's Chiropractor].

For these reasons the Commission finds that the Internal Review Officer erred in determining that it was medically required for MPIC to continue reimbursing the Appellant's chiropractic treatments after June 30, 2005. The Commission finds that, notwithstanding the fact that the Appellant had received approximately fifty-seven (57) chiropractic treatments prior to June 30, 2005, these treatments were not sufficient to permit the Appellant to make a full recovery.

The Commission further finds that the case manager failed to comply with Section 150 of the MPIC Act which requires MPIC to assist the claimant in respect of his claim. [MPIC's Chiropractor], in his Inter-Departmental Memorandum dated June 3, 2005, concluded that the Appellant was not entitled to be reimbursed by MPIC in respect of further chiropractic treatments but did state "perhaps alternate care would be more beneficial".

The case manager, in the decision to terminate reimbursement of the Appellant's chiropractic treatments by MPIC, ignored [MPIC's Chiropractor's] advice that perhaps alternate care would be more beneficial. The case manager should have recognized that, due to the Appellant's age and the Appellant's unsuccessful chiropractic treatments, he should have met with the Appellant and discussed with him alternative forms of care. It would have been appropriate for the case

manager at that time to have suggested the Appellant attend at a pain clinic, or perhaps see a physiotherapist, or obtain acupuncture treatments or massage therapy, and the case manager failed to do so.

It is the Commission's view that had the case manager advised the Appellant to proceed in this fashion it may have expedited the Appellant's recovery from his motor vehicle accident injury. Instead, the case manager, in a letter terminating chiropractic treatments dated June 14, 2004, took no proactive steps but only advised the Appellant to contact him if he wished to consider some form of alternate care.

The Commission further notes that the Internal Review Officer, in the decision dated September 30, 2005, instead of referring the Appellant's claim back to the case manager to carry out [MPIC's Chiropractor's] advice, merely invited the Appellant to contact the case manager if the Appellant wished to consider some form of alternate care. The Commission finds that, having regard to the age of the Appellant and the continuing problems the Appellant was having in respect of his motor vehicle accident, notwithstanding the numerous chiropractic treatments, the Internal Review Officer should have referred the Appellant back to the case manager for further action rather than confirming the case manager's decision and dismissing the Appellant's Application for Review.

For the reasons outlined herein, the Commission finds that MPIC was not justified in terminating the Appellant's reimbursement for chiropractic treatments on June 30, 2005. The Commission determines that the Appellant was entitled to be reimbursed for chiropractic treatments provided by [Appellant's Chiropractor #2] from October 14, 2005 to December 27, 2005.

The Appellant testified that the chiropractic treatments provided by [Appellant's Chiropractor #2] commencing at the beginning of January 2006 and thereafter were for maintenance purposes only and, as a result, the Appellant is not entitled to have MPIC reimburse him for any of these chiropractic treatments.

The Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated September 30, 2005. The Commission directs MPIC to reimburse the Appellant for the chiropractic expenses he incurred when receiving chiropractic treatments from [Appellant's Chiropractor #2] between October 14, 2005 and December 27, 2005.

Dated at Winnipeg this 17th day of April, 2008.

MEL MYERS

PAUL JOHNSTON

NEIL MARGOLIS