

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-07**

PANEL: Ms Laura Diamond, Chairperson
Ms Leona Barrett
Dr. Patrick Doyle

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

HEARING DATE: September 23, 2009

ISSUE(S): Entitlement to further physiotherapy treatment benefits beyond May 19, 2005.

RELEVANT SECTIONS: Sections 136 and 138 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 5 and 10(1)(e) 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 was injured in a motor vehicle accident on December 22, 1998. As a result of injuries arising out of the accident, MPIC provided the Appellant with a variety of treatment benefits, including a multi-disciplinary program with [rehab clinic] and physiotherapy. She was also treated by her family physician, a neurologist, a specialist in neuro-ophthomology and neuro-otology, a clinical psychologist and neuropsychologist, and at [Appellant's pain specialist's] [text deleted] clinic. She was also treated by a registered massage therapist.

The Appellant's case manager wrote to her on May 19, 2005 to advise that it was MPIC's view that she had reached maximum medical improvement in regard to her injuries relating to the motor vehicle accident and that ongoing physiotherapy was not a medical necessity in the treatment of her injuries. Accordingly, MPIC would not fund further physiotherapy treatments for the Appellant.

The Appellant sought an Internal Review of this decision. On November 3, 2005, an Internal Review Officer for MPIC reviewed the Appellant's file, including an opinion from [MPIC's doctor] of MPIC's Health Care Services team. The Internal Review Officer concluded that the Appellant had reached maximum medical improvement and that there was no objective evidence of any regression or improvement in her status which may have entitled her to further funding for physiotherapy treatment.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

Counsel for the Appellant submitted that the Appellant required further physiotherapy on a maintenance basis for relief of ongoing, chronic myofascial pain resulting from the motor vehicle accident.

The Appellant testified at the hearing, describing her injuries and the pain and difficulties she has suffered since that time.

The Commission also heard evidence from the Appellant's physiotherapist, [text deleted], describing his practice, as well as history of treating the Appellant. He explained his diagnosis of the Appellant's condition as well as the signs which led to the diagnosis of myofascial pain syndrome.

[Appellant's physiotherapist] described his treatment of the Appellant and her response to such treatment. Although he tried many different treatment approaches with the Appellant, he found most success for her with acupuncture and myofascial release. He also described the ways in which the Appellant's condition would deteriorate when she did not receive treatment. The treatment frequency varied over the years. At times she was treated once a week, other times twice a week and has even gone to see him once every two weeks. Her pain would be reduced or eliminated for a day or several days with the aim that she would have longer periods without pain, but her symptoms would end up coming back. When treatment was consistent and regular, her response was better. He described the physiotherapy treatment as supportive and as a program to prevent her from deteriorating and becoming worse.

The Appellant also provided medical reports from [text deleted], as well as from her general practitioner, [Appellant's doctor] and neurologist, [Appellant's neurologist]. Both [Appellant's doctor] and [Appellant's physiotherapist] set out the deterioration in the Appellant's condition when she went without physiotherapy, massage and acupuncture and the improvement in her function when she received such treatment.

[Appellant's neurologist] specifically recommended massage therapy and acupuncture to manage the Appellant's problems.

Counsel for the Appellant submitted that prior to the motor vehicle accident the Appellant was a busy wife and mother with boundless energy, working part-time [text deleted]. The motor vehicle injuries were serious and persistent and despite various modalities of treatment and visits to specialists, as well as assistance from rehabilitation specialists, the Appellant had never been able to achieve her goal of returning to work. Reports from neurologists and psychologists described her difficulties with pain and the effects of her injuries upon her condition and her life.

The Appellant was suffering from a difficult case of chronic pain and a variety of caregivers had confirmed this. They recommended continuing physiotherapy on a supportive basis to prevent the Appellant from deteriorating and to assist her in maintaining function. Counsel submitted that the Appellant's requirement for physiotherapy met the definition of supportive care and that the Appellant should be reimbursed for physiotherapy treatments she had received from the time her benefits were terminated in May 2005, with continuing entitlement to physiotherapy benefits.

Evidence and Submission for MPIC:

Counsel for MPIC took the position that the Appellant had reached maximum medical improvement in her condition.

MPIC relied on reports provided by [MPIC's doctor]. In a report dated May 5, 2005, [MPIC's doctor] reviewed the Appellant's file and history of treatments with [text deleted] (neurosurgeon), [text deleted] (oral surgeon), [text deleted] (neuropsychologist), [rehab clinic's doctor] at [rehab clinic], [text deleted] (neurologist), [Appellant's pain specialist] and [text deleted] (physiatrist). He also reviewed her history of physiotherapy treatments.

[MPIC's doctor] concluded that it had been 6½ years since the Appellant's motor vehicle accident and that by 2005 she had attended for more than 500 physiotherapy visits. It was his view that further passive treatments were not indicated and that the Appellant could require physical exercise to recover from the effects of her bodily injury. In his view, however, she had reached maximum medical improvement. Further improvement would not occur over time or alter the natural history of her condition.

[MPIC's doctor] reported again on September 28, 2005, after reviewing reports from the Appellant's physician, [Appellant's doctor], as well as her massage therapist and chiropractor. He concluded that the new medical information submitted did not identify objective findings of improvement or regression of the claimant's clinical status. It did not change his previous opinion that the claimant had reached maximum medical improvement.

Counsel submitted that the Appellant had failed to meet the onus of showing, on a balance of probabilities, that further physiotherapy treatment was medically required, even on a supportive basis.

Authorities:

Counsel for the Appellant referred to several earlier decisions of the Commission, at the hearing on September 23, 2009. However, copies of these cases were not provided at the hearing to the panel or to counsel for MPIC. Accordingly, at the Commission's request, counsel for the Appellant provided copies of these cases to the panel and to MPIC on September 24, 2009. The panel was referred to the decisions of:

- [Text deleted] (AC-04-182)
- [Text deleted] (AC-05-11)

- *Menzies v MPIC et al*, 2005 MBCA 97, Manitoba CA.

Counsel for MPIC provided commentary on these authorities in a letter dated October 6, 2009.

The Claimant Adviser Office provided a response to this on October 22, 2009.

Discussion:

The MPIC Act provides:

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.

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 provides:

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.

Counsel for the Appellant submitted that she requires "supportive" physiotherapy care.

Supportive care was described by the Commission in [text deleted] (AC-05-11) as follows:

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*".

One of the considerations which the Commission has looked at when assessing claims for supportive care includes whether there is objective evidence of deterioration in the Appellant's status with the discontinuation of treatment. For example in [text deleted] (AC-05-137) the Commission dismissed the Appellant's appeal regarding supportive chiropractic care, when the Appellant's chiropractor had not provided adequate evidence of deterioration following a discontinuation of chiropractic treatment.

The onus is on the Appellant to establish, on a balance of probabilities, that further care is medically required, even on a supportive basis. Although the Appellant's physiotherapist has provided his opinion that the Appellant requires further supportive physiotherapy care, the Commission may require more than just the opinion of the treating practitioner, in the absence of objective medical evidence, that further care is required.

For example, in the [text deleted] (AC-05-11) decision, the Appellant provided evidence from a psychologist specializing in pain management who also recommended physiotherapy to help the patient deal with her pain complaints.

In the [text deleted] (AC-04-182) decision, the physiotherapist's recommendation for supportive physiotherapy treatments was supported by evidence from [text deleted], a physiatrist, [text deleted], the Appellant's physician and by the Appellant's chiropractor.

In this case, treatment including acupuncture was recommended by [rehab clinic's doctor] in 2001. A further notation regarding the potential for the Appellant's ongoing need for pain control was noted by [Appellant's neuropsychologist] in his report dated May 20, 2002.

Physiotherapy and acupuncture continued until May 19, 2005, with attempts to decrease the frequency of treatment.

On March 3, 2005, the physiotherapist, [text deleted], reported on attempts to decrease the frequency of acupuncture treatments, resulting in an increase in symptoms which occurred over that period.

On July 6, 2005, the Appellant's physician, [text deleted], reported on his examination and assessment of the Appellant, noting that since MPIC had stopped paying for her physio and massage therapy she had regressed, was having continuous pain and grave difficulty in doing her normal daily functions.

This was echoed by the Appellant's massage therapist in an undated report from [text deleted].

She stated:

“[The Appellant's] physiotherapist has training in both myofascial release and cranio-sacral therapy. It is my observation that these two types of treatment benefit [the Appellant] better than any other type of modality. I realize this because I too, have been trained in using these treatments.

It has also been mentioned that receiving acupuncture treatments on a regular basis has helped [the Appellant] a great deal. [The Appellant's] physiotherapist also has extensive experience with using acupuncture to treat his clients. I believe that continuing these treatments would be very beneficial.

In conclusion, I believe that the end of [the Appellant's] physiotherapy treatments would be a mistake...”

[Appellant's doctor] reported on December 9, 2005, again emphasizing the improvement in the Appellant's functioning with treatment and her deterioration without it.

In January of 2006, a neurologist, [text deleted] indicated that it was of the utmost importance for the Appellant to continue massage therapy and recommended acupuncture for managing these kinds of problems.

[Appellant's neurologist] reported again on September 26, 2006 prescribing acupuncture and massage therapy for the Appellant.

Finally, the physiotherapist provided another update, dated July 28, 2008, documenting the deterioration in the Appellant's symptoms and condition without treatment and the changes he observed and recorded following supportive physiotherapy treatments. This concluded in a recommendation that she be seen every two weeks for regular treatment:

“My recommendation would be that [the Appellant] be seen every 2 weeks for regular treatment to help maintain a more consistent level of functioning instead of having her go as long as she can without treatment and then being more significantly limited in mobility and experiencing increased pain.”

Overall, the Commission was provided with sufficient evidence and documentation from the Appellant's treating physiotherapist, as well as her massage therapist, general practitioner and neurologist, all supporting the need for the Appellant to attend for regular, supportive physiotherapy to address her symptoms and condition arising out of the motor vehicle accident.

Therefore the Commission finds that the Appellant has provided sufficient objective or corroborative evidence to satisfy the onus upon her of showing, on a balance of probabilities, that further physiotherapy care is medically required, on a supportive basis beyond May 19, 2005. This includes evidence from a variety of caregivers of deterioration in her condition following discontinuation of care.

We further find that this evidence establishes (similar to the Commission's decision in [text deleted], supra) that supportive and maintenance physiotherapy will serve to lessen the Appellant's disability and prevent further deterioration of her condition. The Appellant has established, on a balance of probabilities, that it was necessary or advisable for her rehabilitation that MPIC fund her physiotherapy treatments every two weeks, pursuant to Section 138 of the MPIC Act and Section 10(1)(e) of Manitoba Regulation 40/94.

The Appellant's appeal is allowed. The Appellant shall be entitled to physiotherapy treatment every two weeks, as long as this continues to be prescribed by her attending physician, and she is assessed by the physician on an ongoing basis at six month intervals, in order to determine whether there is a continuing need for such treatment. MPIC will also be responsible for reimbursing the Appellant for amounts she has already spent on physiotherapy treatments from May 19, 2005, on this basis (every two weeks).

Dated at Winnipeg this 9th day of November, 2009.

LAURA DIAMOND

LEONA BARRETT

DR. PATRICK DOYLE