

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-082**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Dr. Neil Margolis

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Cynthia Lau.

HEARING DATE: November 23, 2011

ISSUE(S):

1. Entitlement to further treatment reimbursement and other expenses;
2. Entitlement to Income Replacement Indemnity benefits;

RELEVANT SECTIONS: Sections 70(1), 81(1), 83(1) and 136(a) of The Manitoba
Public Insurance Corporation Act ('MPIC Act') and Section
5 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 motor vehicle accidents on March 10, 2006 and June 24, 2007.

The Appellant also had a history of several earlier motor vehicle accidents, some dating back to 1992 and 1993, and some between 1994 and 2001. She also had a pre-existing diagnosis of cerebellar ataxia.

As a result of injuries sustained in the 2006 and 2007 motor vehicle accidents, the Appellant received physiotherapy treatment which was funded by MPIC. She also sought Income Replacement Indemnity benefits (“IRI”) for periods when she was unable to work, or could only work part-time, as a result of the motor vehicle accidents.

The Appellant’s case manager wrote to her on March 18, 2009. She reviewed a report from a third party medical examination completed by [independent physiatrist] and concluded that although the motor vehicle accident may have temporarily aggravated some of the Appellant’s complaints, her current complaints, signs and symptoms were a result of pre-existing conditions, and no longer a result of the motor vehicle accidents.

As well, the case manager concluded that there was no evidence to support the Appellant’s claim that she was unable to work past December 2007 and noted that a review of the financial information submitted showed there was little discernable difference in the Appellant’s earnings for the years 2005, 2006 and 2007. Accordingly, she concluded that there was no IRI benefit entitlement following either of the motor vehicle accidents, as it did not appear that there was lost income.

The Appellant sought an Internal Review of this decision.

On June 11, 2009, an Internal Review Officer for MPIC upheld the case manager’s decision of March 18, 2009. The Internal Review Officer reviewed [independent physiatrist’s] independent medical examination of May 10, 2008, as well as information from her physician, [Appellant’s doctor #1] and physiotherapist, [Appellant’s physiotherapist].

The Internal Review Officer concluded that there were no restrictions or inability to work relating to the Appellant's motor vehicle accidents. She confirmed the case manager's decision that the current signs and symptoms were all pre-existing the motor vehicle accidents of 2006 and 2007, and as a result, the Appellant was not entitled to reimbursement for further treatment expenses or IRI benefits.

She also agreed with the review the IRI calculator made with respect to the Appellants IRI entitlement which noted that there was little discernable difference in business activity prior to and after the March 10, 2006 date of loss.

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

Evidence and Submission for the Appellant:

The Appellant provided oral testimony at the hearing into her appeal. She described the motor vehicle accidents and the chiropractic treatment and massage therapy which followed. She maintained that [Appellant's doctor #1], her family physician, supported the position that the motor vehicle accident injury pain she suffered was different and separate from the symptoms of her ataxia. She submitted that ataxia does not cause pain, muscle tension, irritable bowel, lower back pain, leg pain and TMJ. These are the symptoms she has to live with because of the motor vehicle accidents and they have nothing to do with her other condition. She maintained that ataxia does not cause whiplash in one's neck and does not cause that kind of pain. She added that because of the accidents she has to go for chiropractic and physiotherapy treatment and pay for it herself.

The Appellant submitted that ataxia does not cause pain in her lower back and leg, and that this was a result of the motor vehicle accident. She also submitted that MPIC was causing her to have too much stress, which affected her health.

On cross examination, the Appellant acknowledged that [Appellant's doctor #1] was not treating her for her ataxia, but she maintained that prior to the motor vehicle accident she had never had whiplash or pain.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that there was no causal link between the motor vehicle accidents and the Appellant's current signs and symptoms. Accordingly, the Appellant was not entitled to further treatment, reimbursement and other expenses. As well, there was no objective medical evidence that she could not return to work as [text deleted]. As a result, the Appellant was not entitled to further IRI benefits.

Counsel for MPIC reviewed the evidence on the Appellant's indexed file regarding the 2006 and 2007 motor vehicle accidents, beginning with documentation from the ambulance, emergency and triage reports.

She reviewed reports from the Appellant's family doctor, [Appellant's doctor #1], which revealed that the Appellant was not an individual who was symptom free prior to the motor vehicle accidents and explained the symptoms that she had experienced prior to that. These included gait disturbance, in-toeing, myofascial pain, neck pain, mechanical back pain and ankle injuries after a fall. All of this, she submitted, depicted an individual who was not completely healthy prior to the motor vehicle accidents.

Her condition of congenital ataxia pre-dated the motor vehicle accident. Although [Appellant's doctor #1] had concluded that the motor vehicle accident complicated her pre-existing condition and created more instability, to the point where had the motor vehicle accident not happened she would not have required the use of a walker, counsel submitted that it was difficult to measure such subjective complaints of weakness, pain and instability.

Even [Appellant's doctor #1] noted, in a report dated January 30, 2008, that the cerebellar ataxia will only get worse as she gets older and gets weaker overall.

There was no empirical evidence provided regarding measurements of her pain and counsel submitted that it was difficult to attribute the loss of her functional capacity to her motor vehicle accidents and not to the ataxia. [Appellant's doctor #1] was not a psychiatrist and could not provide a measurement of incremental deterioration in her performance levels following the motor vehicle accidents. Moreover, counsel submitted that the Appellant was back working at [text deleted] and could not show that her functional status was worse than it was before the motor vehicle accidents.

Further, although [Appellant's doctor #1] had been attending to the Appellant for over twenty years, since he had not been treating her for her ataxia, he was not in the best position to provide an opinion on the distinction between the ataxia and the effects of the motor vehicle accidents.

Counsel submitted that for this type of condition the opinion of a psychiatrist such as [independent psychiatrist] should be given greater weight.

Counsel also noted the report of [Appellant's doctor #2] dated June 1, 2007, which noted that the Appellant had been seen for her ankle by an orthopaedic surgeon who did not recommend surgical intervention. Her pain was not a result of a bony deformity. [Appellant's doctor #2] noted:

“The patient's right ankle pain was probably caused by right anterior talofibular and calcaneofibular ligament sprain and myofascial pain involving the patient's right calf muscles. Her ligamentous injury is likely healed by now. On examination, I did not find instability or signs of acute inflammation but tenderness on palpation. Active trigger points in above mentioned muscles could cause referred pain to the ankle area. At this point, the patient does not require wearing an ankle/foot orthosis. I referred her for physiotherapy for trial of physiotherapeutic modalities (ultrasound, TENS) to relieve her pain and improve strength of right ankle evertor muscles in addition to calf stretching exercises. She will be reassessed in 2-3 months and trigger point injection into right calf muscles will be considered.”

As a result, [Appellant's doctor #2's] examination did not find any real issues or problems with functional capacity.

Counsel then reviewed in detail the report provided by [independent physiatrist], a physiatrist who provided a third party medical examination report dated May 10, 2008.

She took the panel through [independent physiatrist's] twenty-one (21) page report which included a review of the Appellant's history, a physical exam, a review of her current function and a forensic review. He concluded with a list of diagnoses and symptoms as well as an examination of their relationship to both her pre-existing conditions and the motor vehicle accidents. He concluded that the objective findings on examination were related to conditions pre-existing the motor vehicle accident with some impairment related to the underlying cerebellar ataxia and gait mobility disturbance. Although some areas of symptoms included areas that may have had some aggravation as a result of the motor vehicle accident, these symptoms seem to have improved and were most likely at base line level of symptoms.

[Independent physiatrist] opined that there was no evidence on the assessment or interview that any additional chiropractic therapy was necessary due to the two most recent motor vehicle accidents and there was no motor vehicle accident related permanent impairment found.

Counsel also reviewed reports provided by the physiotherapist, [MPIC's doctor #1] and [MPIC's doctor #2] of MPIC's Health Care Services Team.

She submitted that all these reports supported the position of MPIC, that MPIC had provided the Appellant with ample treatment and expense coverage and that the current signs and symptoms of which she complained were not consistent with her motor vehicle accident injuries. There was no objective evidence to support that any additional treatment or expenses are medically required as a result of the motor vehicle accidents.

Counsel for MPIC also reviewed the Appellant's work history and the findings of the IRI Calculator regarding the Appellant's employment and self employment as a [text deleted].

Counsel submitted that the Appellant had not demonstrated any loss of functional capacities post motor vehicle accident which would have entitled her to IRI. There were no restrictions imposed by her family doctor and her physiotherapist and there were no restrictions on her return to work as of November 28, 2007. This is consistent, she submitted with [independent physiatrist's] report which did not find any physical or structural contraindications to the Appellant returning to work and activity. He noted that she did not require the use of the walker or cane at that time, although she was slightly ataxic.

This was consistent with a report from [Appellant's doctor #1] noting she was able to work, and that by February 15, 2011 she was able to work as a [text deleted] up to thirty-two hours per week, and at eight hour shifts as a greeter at [text deleted].

Further, a review of the Appellant's income tax summaries from 2003, 2005, 2006 and 2007 supported the view of the IRI Calculator that there was little discernable difference between the business activity of the Appellant prior to and after the motor vehicle accidents. Her income levels remained at much the same level, so counsel submitted that it was unclear there was really any decrease in how much she worked after the motor vehicle accidents.

Therefore, counsel concluded, it was MPIC's position that the evidence of [independent physiatrist] should be preferred in terms of weight, as he is in the best position to provide an assessment on the issues of the Appellant's ability to work and her need for further treatment, as a result of the motor vehicle accidents. It was MPIC's position that no causation had been established between the motor vehicle accident and the Appellant's current signs and symptoms and so, she should not be entitled to further treatment, reimbursement and expenses or IRI benefits. Counsel submitted that the Appellant had received ample treatment and reimbursement for expenses from MPIC and there was no objective medical evidence on file that she could not return to work as a [text deleted]. The Appellant suffered from pre-existing conditions which predisposed her to the symptoms she was experiencing and these were not the result of the motor vehicle accident. As a result, counsel submitted that the Appellant's appeal should be dismissed on both issues.

Discussion:

The MPIC Act provides:

[70\(1\)](#) In this Part,

"bodily injury" means any physical or mental injury, including permanent physical or mental impairment and death; (« dommage corporel »)

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile; (« dommage corporel causé par une automobile »)

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;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Temporary Earners and Part-Time Earners

Entitlement to I.R.I. for first 180 days

[83\(1\)](#) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

- (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;
- (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

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 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.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in concluding that she was not entitled to further treatment benefit, expenses or IRI benefits as a result of a condition arising out of the motor vehicle accidents.

The Panel has carefully reviewed the evidence on the Appellant's indexed file, including the medical reports on file. We have also reviewed the evidence of the Appellant at the appeal hearing and the submissions of the Appellant and counsel for MPIC.

A review of this evidence, including reports from [Appellant's doctor #1], and his report of September 4, 2007 showed that the instability which arose in the Appellant's ankle and gait was not really noted until approximately six months following the motor vehicle accident.

Although [Appellant's doctor #1] had followed the Appellant as her general practitioner and caregiver for twenty years, the panel acknowledges that he was not a specialist in the areas of ataxic conditions, physiatry or motor vehicle accident injuries. He was, as a result, required to place a good deal of reliance upon the Appellant's subjective reporting. Although he had followed her for a chronic condition for many years and did have a good deal of knowledge and familiarity with her condition both prior to and following the motor vehicle accidents, it is difficult to differentiate between the pre-existing problems the Appellant had, and problems which were attributed to both of the motor vehicle accidents. [Appellant's doctor #1's] reports do not provide sufficient objective medical evidence to support a finding of causation, on the balance of probabilities which is required for the Appellant to meet the onus of showing that she is unable to work due to the motor vehicle accident or that she requires additional treatment as a result.

[Independent physiatrist]'s independent assessment is thorough and detailed, yet he was not able to find any persistent conditions related to the motor vehicle accident which would require further treatment or prevent the Appellant from working. [Independent physiatrist] recognized that there had been temporary soft tissue symptoms arising after the motor vehicle accident, but these had been treated thoroughly by MPIC through chiropractic and physiotherapy treatments, as well as provision of a walker, skis and wobble board. The panel finds that by 2008 the effects of the motor vehicle accident had resolved. The Appellant was left with lingering effects from

her pre-existing chronic condition which was not related to the motor vehicle accident. The panel agrees with the comments of [independent physiatrist] who concluded:

“As per the IME report, the current complaints, signs and symptoms were as per the IME report and include ataxia, difficulty with balance, speech difficulties related to the cerebellar ataxia, and the secondary right ankle instability, some hip articular symptoms, some foot symptoms and some soft tissue symptoms. The soft tissue involvement to the lower body is most likely related to preexisting issues rather than as a residual to either of the two most recent MVAs. As discussed in the IME, the ankle instability appears related to the prior injuries and not to the current MVAs in question. The list of current areas of symptoms as above include some areas that may have had some aggravation, however these appear to have improved and are most likely at baseline level of symptoms as prior to the two most recent MVAs in question. The most recent MVA appeared to have included, in addition some contusions, and some sprains and joint irritations and these appear to have resolved. The current subjective soft tissue symptoms in the neck and right shoulder girdle area, which are documented as being present prior to the MVAs in question and that likely had some aggravation also on a balance of probabilities are at baseline. These however would be expected to be improve (sic) further with reactivation and remobilization that the claimant can do on her own. As discussed on the IME report some formal therapeutic assistance but limited may be beneficial....

...There is no evidence on the assessment or interview that any additional chiropractic therapy is necessary related to any of the two most recent MVA components.....”

The Panel finds that the Appellant has received ample treatment and expense reimbursement from MPIC in regard to the injuries which arose from the motor vehicle accidents. The Commission finds that the Appellant has failed to establish, on a balance of probabilities, that there is a causal link between the motor vehicle accident and the Appellant’s current signs and symptoms which would entitle her to further treatment, expense reimbursement or income replacement indemnity benefits, or that the Appellant could not return to work as a result of her motor vehicle injuries.

As a result, the decision of the Internal Review Officer dated June 11, 2009 is upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 16th day of January, 2012.

LAURA DIAMOND

NEIL COHEN

NEIL MARGOLIS