

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-018**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Dr. Sheldon Claman
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted] was represented by
Mr. Ken Kaltornyk, Claimant Adviser Office;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Matthew Maslanka.

HEARING DATE: April 19, 2012

ISSUE(S): Entitlement to physiotherapy and Temporomandibular
Joint Dysfunction ("TMD") treatments.

RELEVANT SECTIONS: Sections 71(1), 71(2)(a) and 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 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 involved in a motor vehicle accident on January 12, 2005. She was a passenger in a car that was rear-ended by another vehicle, causing the car the Appellant was in to be pushed into a third vehicle.

The Appellant was seen by [Appellant's physiotherapist #1], physiotherapist, who provided a Primary Health Care Report to MPIC on January 20, 2005. He stated that the Appellant was suffering from a Whiplash Classification WAD2.

The Appellant also saw [Appellant's doctor] who provided a Primary Health Care Report to MPIC on January 21, 2005. In this report, [Appellant's doctor] stated that the Appellant's clinical diagnosis was a lateral strain injury and soft tissue injury of the neck. He confirmed the earlier diagnosis from [Appellant's physiotherapist #1] of a Whiplash Classification WAD2.

In a January 21, 2005 note to file MPIC's case manager reported a discussion with the Appellant who was complaining that her jaw did not seem to be sitting right and that the muscles around her jaw were stiff.

An examination of [Appellant's doctor's] chart notes indicated that on:

1. January 17, 2005 he noted problems with the Appellant's neck and jaw.
2. February 24, 2005 he noted the Appellant's neck was improving but was not 100%.
3. April 26, 2005 he noted there was tension in the Appellant's neck/shoulder which was constant.

The Appellant saw her dentist, [Appellant's dentist #1], who provided a dental report to MPIC dated April 8, 2005. In this report he indicated that:

1. An X-ray and visual examination did not show any lasting signs although there was trauma waste to the Appellant's left side of her face and jaw.
2. He was not planning any further treatment at that time.

On November 24, 2010 [Appellant's dentist #1] wrote a letter to the Claimant Adviser Officer and stated:

“In 1995 [the Appellant] complained of TMJ soreness and clenching was considered as the possible cause. An occlusal equilibration was done and a niteguard fabricated.”

[Appellant's dentist #1] did not see this as an ongoing problem. However, he further stated:

“On April 8/05 [the Appellant] was again complaining of pain in the TMJ area and at that time I took a panoramic xray. She was seen for a regular recall appointments in June/05 and then again in July/07. At the July 10/07 appointment it was decided that a new perio appliance might relieve some of the jaw pain she was experiencing and this appliance was delivered in Sept/07.”

In a Standard Dental Treatment Form dated August 1, 2007 [Appellant's dentist #1] stated:

“[The Appellant]has been having sensitivity due to bruxism following her accident in Jan. 2005”

In an interdepartmental memorandum of August 27, 2007, MPIC's case manager wrote to Dr.

[MPIC's dentist #1], MPIC's Dental Consultant, and stated:

“ORIGIN: Claimant was a passenger in vehicle that turned (sic) was rear ended and pushed into another vehicle

INJURIES: neck and sore tooth/jaw

PROBLEMS: Plse review dental report as attached and confirm if txs and rates correct / causally related to MVA.” (underlining added)

In reply [MPIC's dentist #1] stated “OK to provide appliance” on September 10, 2007.

In a note to file dated December 8, 2008, the case manager noted that the Appellant had switched dentists from [Appellant's dentist #1] to [Appellant's dentist #2]. [Appellant's dentist #2] saw the Appellant on December 9, 2008 and referred her to [Appellant's dentist #3] for his diagnosis and treatment of Temporomandibular Joint Dysfunction (“TMD”).

[Appellant's dentist #3] provided a report dated January 7, 2009 indicating that he had seen the Appellant for an evaluation on January 6, 2009. He reported that she presented with a chief complaint of neck pain and noted:

“She presented with chief complaint of neck pain (chronic), also reporting: jaw pain (chronic), ear pain (chronic), eye pain (chronic), pain when chewing (chronic), vision problems (chronic), shoulder pain (chronic), jaw joint noises (chronic), jaw joint locking (chronic), limited ability to open mouth (chronic), ear congestion (chronic), headache pain (chronic), facial pain (recent), tooth grinding (chronic), frequent heavy snoring (chronic), night-time choking spells (chronic), gasping when waking (chronic) and affects sleep of others (chronic). Our clinical examination included motor reflex testing, muscle palpations and sleep and airway evaluation. Additional testing and/or imaging provided included: laryngeal evaluation, AP tomograms and sagittal tomograms...

I believe [the Appellant] has a TM primary disorder with an intracapsular and extracapsular component. I believe the primary cause of TM symptoms to be a structural dysfunction and associated inflammatory conditions. Additionally, I believe the patient has a Sleep Disordered Breathing condition and would benefit from Oral Appliance Therapy (airway issues reported and improvement in airway with mandibular advancement).”

[Appellant's dentist #3] set out a treatment program to deal with the TMJ (“Temporomandibular Joint”) problem.

In December 2008 the Appellant contacted her case manager and sought funding for further physiotherapy treatments as she was still sore and having problems with her teeth. The Appellant was seen by [Appellant's physiotherapist #2] on December 16, 2008.

MPIC's Dental Consultant, [text deleted], provided an interdepartmental memorandum on February 3, 2009 and indicated that there appeared to be a four year period between the Appellant's most recent submission to MPIC and the previous submissions.

In a further memorandum dated February 19, 2009, [MPIC's dentist #2] acknowledged that [MPIC's dentist #1] had approved an oral appliance and questioned whether the appliance had ever been picked up and why a new one was needed.

In a note to file dated March 12, 2009 the case manager indicated that the Appellant did pick up the oral appliance in September 2007 and noted that the appliance had been used for approximately one year before becoming problematic.

In a further memorandum dated March 24, 2009 to the case manager [MPIC's dentist #2] indicated that after reviewing the file, he acknowledged that MPIC paid for a bruxism guard about a year and a half after the motor vehicle accident and stated that no one guard is better than another guard at treating TMD. He further stated:

“...unless the existing guard is broken or no longer fits, any new guard would not be required as a result of the MVA.”

On April 22, 2009 [Appellant's dentist #3] provided a detailed submission to MPIC indicating why [MPIC's dentist #2's] opinion was incorrect and he set out his reasons in support of this position. He pointed out that the Appellant was being treated for TMD and not a periodontal problem and that MPIC's dental consultant was ignoring this matter. [Appellant's dentist #3] further noted that there was a significant distinction between periodontal appliances, TMD appliances and myofascial pain dysfunction appliances. He further submitted that an appliance prescribed by another dentist and approved by MPIC had not provided any positive relief to the Appellant.

[MPIC's doctor], MPIC's Medical Consultant, provided an interdepartmental memorandum to the case manager on May 12, 2009. [MPIC's doctor] indicated that on review of the Appellant's

file it was his opinion that the symptoms she reported were not a byproduct of a medical condition arising from the motor vehicle accident, based on the balance of probabilities. In arriving at this conclusion [MPIC's doctor] stated:

1. "Documentation indicating [the Appellant] developed symptoms following the incident in question in keeping with a Whiplash Associated Disorder Type 2 (the natural history of this condition is one of full resolution in the majority of cases);
2. The absence of documentation indicating assessments performed on [the Appellant] shortly after the incident in question identified any structural abnormalities that might in turn contribute to problems in the future;
3. Documentation obtained from [the Appellant's] primary health care physician ([Appellant's doctor]) indicating [the Appellant] was assessed on numerous occasions between January 17th, 2005 and February 12th, 2009 during which time she did not report any problems with her cervical spine and was not noted to have any objective physical findings of an abnormality involving her cervical spine. It was noted in the clinical notes that as of September 18, 2007, [the Appellant] reported having a wonderful summer and feeling well. It is documented that a complete physical examination performed on April 15, 2008 did not identify any musculoskeletal abnormalities;
4. Documentation indicating [the Appellant] was assessed in December 2008 and February 2009 by [Appellant's physiotherapist #2] and [Appellant's doctor] respectively at which time she reported problems with jaw pain and neck symptoms for which a probable medical diagnosis was not established.

It is my opinion it is not medically probable that any symptoms [the Appellant] might be experiencing involving her jaw and her neck at this time are a byproduct of a Whiplash Associated Disorder that occurred in January 200 (sic), which had resolved by the fall of 2005, in all probability.

Based on this review, it is my opinion any treatments [the Appellant] might receive to address her present symptomatology is not the responsibility of Manitoba Public Insurance since the symptoms did not develop as a direct result of the incident in question."

Case Manager's Decision – May 29, 2009:

The case manager wrote to the Appellant on May 29, 2009 rejecting further funding for physiotherapy treatment as outlined in [Appellant's physiotherapist #2]'s request of December 16, 2008. The case manager stated:

“That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. They stated that it is not medically probable that any symptoms you might be experiencing involving your jaw and your neck at this time are a byproduct of a Whiplash Associated Disorder that occurred in January 2005, which had resolved by the fall of 2005, in all probability. Therefore, additional treatment is not “medically required”. Based on the information provided, there is no entitlement to further funding of physiotherapy treatment.”

The Appellant filed an Application for Review of the case manager’s decision to reject further physiotherapy treatments.

Case Manager’s Decision – June 22, 2009:

On June 22, 2009 the case manager wrote to the Appellant rejecting [Appellant’s dentist #3’s] request for dental treatment as outlined in his narrative report of January 7, 2009. The case manager stated:

“That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. The medical information on file indicates that a bruxism guard was provided to you which we funded approximately one year after the motor vehicle accident. Our consultant stated that the provided guard is used as a conservative treatment for TMD conditions. He also indicated that no one guard is better than another guard at treating TMD conditions. Therefore, unless the existing guard is broken or no longer fits, any new guard would not be required as a result of the motor vehicle accident resulting in no entitlements for a new oral appliance.”

On August 18, 2009 the Appellant filed a further Application for Review of the case manager’s decision to reject the dental treatment outlined by [Appellant’s dentist #3].

The Appellant was receiving physiotherapy treatments from [Appellant’s physiotherapist #3] and on September 8, 2009 he wrote to MPIC:

1. Outlining his assessment of the Appellant’s complaints of left jaw pain, left side facial pain, constant headaches and left upper shoulder girdle pain.

2. Indicating that since his initial assessment on February 23, 2009, he had treated the Appellant for a total of ten treatment sessions.
3. Indicating there was a good reduction in shoulder girdle myofascial tightness and suboccipital tightness and a marked increase in TMD opening as well as lateral translation.
4. Stating the treatment consisted of heat, active release techniques to the above noted musculature as well as a home stretching program.
5. “Due to the chronic nature of [the Appellant’s] myofascial tightness in the past and the intimate relationship between the upper cervical spine and the TMJ region I do feel it is possible and likely that the problems that [the Appellant] has been having with her TMJ are a direct result of myofascial tightness caused by the accident of January 2005. This is due to the fact that she has ongoing cervical pain, ongoing cervical myofascial tightness and left shoulder girdle tightness that has not fully resolved since the time of her motor vehicle accident.” (underlining added)

The Internal Review Officer wrote to [MPIC’s dentist #3], MPIC’s Dental Consultant, on September 23, 2009 and stated:

“Your predecessor was involved in several reviews of this file concerning [Appellant’s dentist #3’s] request for day and night time appliances and associated expenses relating to a TMD condition. [The Appellant] has applied for a Review flowing from the case manager’s decision based on your predecessor’s opinion the bruxism guard that was approved previously is sufficient to treat her TMD condition (MPI would consider replacement if worn out or no longer fits).

A review hearing was held on September 17, 2009, in which [the Appellant] states she proceeded with treatment with [Appellant’s dentist #3] and has been fitted with both the daytime appliance and the TMD night appliance. She reports a significant improvement in symptoms including increased jaw opening and decreased pain. She has submitted a report from [Appellant’s dentist #3] dated April 22, 2009 in support of her Application which does not appear to have been reviewed previously.”

[MPIC’s dentist #3] replied on November 4, 2009 and indicated that she agreed with [MPIC’s dentist #2]’s previous opinion and rejected the need for MPIC to reimburse the Appellant for a daytime appliance and a TMD night appliance.

The Internal Review Officer wrote to [MPIC’s doctor] on September 23, 2009 and:

1. Asked him to comment on [Appellant's dentist #2's] opinion of the cause and effect relationship of the TMD condition and her cervical pain, and the need for treatment.
2. Provided [MPIC's doctor] with [MPIC's dentist #3's] review regarding her opinion on the relationship of the Appellant's TMD condition to the motor vehicle accident and the treatment plan requested by [Appellant's dentist #3].
3. Wanted to know whether the new information would change [MPIC's doctor's] opinion on the cause and effect relationship of the Appellant's cervical and TMD related pain to the motor vehicle accident and the therapist's request for further physiotherapy treatment.

In reply, [MPIC's doctor] provided the Internal Review Officer with an interdepartmental memorandum dated November 10, 2009 wherein he stated that:

1. He reviewed [Appellant's physiotherapist #3's] September 8, 2009 report and disagreed with his opinion that there was a causal relationship between the Appellant's TMD problems and the motor vehicle accident.
2. "It is noted that [the Appellant] was assessed on February 23, 2009 at which time she had findings in keeping with myofascial tightness. It is noted that it was possible and likely that the problems [the Appellant] was having with her temporomandibular joint were a direct result of myofascial tightness caused by the January 12, 2005 motor vehicle incident. It is noted that [the Appellant] reported ongoing cervical pain and myofascial tightness as well as left shoulder girdle tightness that had not fully resolved since the time of the motor vehicle accident."
3. "Based on my previous review, it was determine (sic) that [the Appellant's] symptoms arising from the incident in question had resolved. The file does not contain documentation indicating [the Appellant] reported persistent symptoms involving the

cervical spine and/or temporomandibular joint from the date of the motor vehicle incident to 2009. The file does not contain documentation indicating [the Appellant] developed a condition as a result of the incident in question that in turn would result in chronic symptomatology.” (underlining added)

4. “If one reviews the clinic notes obtained from [the Appellant’s] family physician, it is apparent that [the Appellant] did not report any symptoms involving her cervical spine to her family physician after April 26, 2005. It is documented that a general physical examination performed on December 1, 2005 did not identify any abnormalities involving her cervical spine.” (underlining added)
5. “Information obtained from CARS as it relates to the damages that occurred to [the Appellant’s] vehicle as a result of the incident in question leads me to conclude that exchange of force transferred to [the Appellant] was not significant. It is not medically probable that this type of incident would result in a significant musculoskeletal injury that in turn would result in long term symptomatology.” (underlining added)

[MPIC’s doctor] concluded his review by stating that the Appellant had recovered from the medical conditions arising from the motor vehicle accident and that any musculoskeletal symptoms she might be experiencing at this time were not a result of the motor vehicle accident.

Internal Review Officer’s Decision:

On November 18, 2009 the Internal Review Officer issued his decision rejecting the Appellant’s request for reimbursement of physiotherapy expenses provided by [Appellant’s physiotherapist #3] and the cost of the treatment provided by [Appellant’s dentist #3].

The Internal Review Officer stated:

“Regarding physiotherapy, you stated that you have been seeing [Appellant’s physiotherapist #3] at [text deleted] and have attended for approximately 12 physiotherapy sessions since the beginning of 2009. You report that you are only seeing him now on an as needed basis. You state there is no question that by proceeding with [Appellant’s dentist #3’s] treatment as recommended along with physiotherapy your TMD symptoms have improved significantly.”

The Internal Review Officer further stated:

“Regarding physiotherapy, [MPIC’s doctor] again refers to the chart notes in which there is an absence of documented cervical pain since April 26, 2005. I reviewed the chart notes and it was not until 2009 when there was a further mention of TMJ issues and reported pain in your shoulders and back. Thus, there is an almost 4 year absence of symptoms when reading through the available medical records. Further, it is his opinion the amount of vehicle damage in this accident would not in turn result in long term symptomatology, in all probability.

I have no doubt that you had symptoms that required treatment to alleviate. However, based on my review of the file, I agree with both the Consultants, that your current complaints are not related to the motor vehicle collision on the balance of probability. Therefore, I am upholding the case manager’s decision of June 22, 2009.” (underlining added)

The Appellant filed a Notice of Appeal dated January 19, 2010.

Relevant Provisions:

The relevant provisions of the MPIC Act are:

70(1) In this Part,

"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

(a) by the autonomous act of an animal that is part of the load, or

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile;

Application of Part 2

[71\(1\)](#) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

Bodily injury to which Part 2 does not apply

[71\(2\)](#) Notwithstanding subsection (1), this Part does not apply to bodily injury that is

- (a) caused, while the automobile is not in motion on a highway, by, or by the use of, a device that can be operated independently and that is mounted on or attached to the automobile;

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;

Appeal Hearing:

The Appellant testified at the hearing and indicated that:

1. As a result of the motor vehicle accident the left side of her face came into contact with the interior of the automobile and she sustained a soft tissue injury to her neck.

2. Shortly thereafter she reported to MPIC's case manager that she was having problems with the crown in the front of her jaw and she was going for X-rays.
3. She saw a physiotherapist, [Appellant's physiotherapist #1], and complained about neck and shoulder pain and sleep disturbance.
4. She saw [Appellant's doctor] in January 2005 about her symptoms.

She further stated that:

1. In April 2005 the Appellant saw [Appellant's dentist #1], a dentist, with complaints of pain into the left side of her face.
2. She continued to complain about a sore jaw.
3. [Appellant's dentist #1] provided her with a night guard.
4. She saw him on several occasions to receive new appliances which did not provide any relief to her jaw pain.
5. She changed dentists and saw [Appellant's dentist #2] in December 2008.
6. [Appellant's dentist #2] referred her to [Appellant's dentist #3] for TMD treatment.
7. She continued to suffer jaw pain as well as soreness to her neck for which she was receiving physiotherapy treatments from [Appellant's physiotherapist #3].
8. [Appellant's dentist #3] provided her with new appliances.
9. His treatments resulted in a substantial improvement to the jaw pain she had been suffering.
10. Physiotherapy treatments assisted her in reducing her neck pain and she currently only attended physiotherapy on as needed basis.

[Appellant's dentist #3] testified on behalf of the Appellant. He provided the Commission with his C.V. which noted that:

1. He graduated in dentistry [text deleted].
2. Over the last 25 years he has completed extensive training in Functional Jaw Orthopedics, Orthodontics, Myofunctional Therapy, Tempromadibular Joint Disorders and Sleep Disordered Breathing.
3. Over the past 12 years he has completed Mini-Residencies and Advanced Residencies for TMD and Sleep Disordered Breathing and has completed over 1000 hours of continuing education in these disciplines.
4. He had been treating patients in respect of TMD, snoring problems and sleep apnea for 10 years.
5. He had been attending mini-residency programs from [text deleted], who is an Adjunct Professor at the [text deleted].
6. In 2011 he studied the relationship between TMD and sleep apnea.

[Appellant's dentist #3] further testified that:

1. The appliances that had been supplied prior to his examination of the Appellant were inappropriate for the treatment of TMD.
2. He supplied the Appellant with appliances to deal with her TMD and sleeping disorder.
3. As a result of this treatment there was a significant reduction in her jaw pain.

MPIC did not call any witnesses.

Submissions:

Counsel for MPIC submitted that:

1. MPIC was correct in rejecting the Appellant's request for reimbursement of expenses for TMD and physiotherapy treatment.

2. In arriving at this decision, the Internal Review Officer had correctly relied on the medical opinions of [MPIC's doctor] provided in his memorandums of May 12, 2009 and November 10, 2009.
3. [MPIC's doctor] had correctly determined that the Appellant did suffer a Whiplash Associated Disorder Type 2 injury as a result of the motor vehicle accident.
4. However, [MPIC's doctor] concluded that any symptoms the Appellant was experiencing in respect of her jaw and neck at that time were a by-product of the Whiplash Associated Disorder which had resolved in the fall of 2005.

MPIC's legal counsel submitted that the basis of [MPIC's doctor's] opinion on causality was that:

1. There was an absence of medical documentation between January 17, 2005 and February 12, 2009 which would indicate that the Appellant was not reporting persistent symptoms involving her cervical spine and/or TMD as a result of the motor vehicle accident.
2. The medical evidence did not establish a chronic pain syndrome.
3. The Appellant had been seen by several medical practitioners in the four year period after the motor vehicle accident and there was no report of the Appellant complaining of chronic neck or jaw pain.
4. The damages that occurred to the Appellant's vehicle as a result of the motor vehicle accident led him to conclude that the exchange of force transferred to the Appellant was not significant and it was not medically probable that this type of incident would result in a significant musculoskeletal injury which would result in long term symptomatology.

MPIC's counsel submitted that based on [MPIC's doctor's] medical opinion, the Internal Review Officer was correct in concluding that there was no causal relationship between the motor vehicle accident and the Appellant's complaints about chronic neck and jaw pain.

MPIC's counsel further submitted that:

1. The Internal Review Officer was correct in terminating the Appellant's request for further physiotherapy treatment as they were not medically required in accordance with the MPIC Act and Regulations.
2. The Appellant had received 12 physiotherapy treatments since the beginning of 2009, the Appellant was only seeing the physiotherapist on an as needed basis and therefore there was no medical requirement for these treatments.

MPIC's legal counsel therefore submitted that the appeal should be dismissed and the Internal Review Officer's Decision dated November 18, 2009 be affirmed.

The Claimant Adviser reviewed a written submission filed with the Commission wherein he stated that on a balance of probabilities there was a causal connection between the motor vehicle accident and the Appellant's chronic jaw and neck pain. He therefore requested that the appeal be allowed and the Internal Review Officer's Decision dated November 18, 2009 be rescinded.

Discussion:

The Commission rejects the submission from MPIC's legal counsel and finds that the Appellant has established on a balance of probabilities that the motor vehicle accident of January 12, 2005 caused her to suffer from TMD resulting in chronic neck and jaw pain. The Commission agrees with the submission of the Claimant Adviser that the Internal Review Officer erred in relying on

[MPIC's doctor's] medical reports to reject the Appellant's request for reimbursement of [Appellant's dentist #3's] fees for treating the Appellant's TMD and for rejecting her request for reimbursement of physiotherapy fees.

The Commission agrees with the Claimant Adviser's submission that:

1. [MPIC's doctor] erred in determining that there was no documentation in the four year period subsequent to the motor vehicle accident in support of the Appellant's complaints of chronic pain to her neck and jaw.
2. In arriving at his position [MPIC's doctor] determined that [Appellant's doctor's] chart notes did not indicate any report of problems to the Appellant's cervical spine between January 17, 2005 and February 20, 2009.
3. [Appellant's doctor's] chart notes indicated:
 - 1) "...for January 17, 2005 documenting problems with the neck and jaw."
 - 2) "On February 24, 2005 there is a note that ROM neck is improving but not 100%."
 - 3) "On April 26, 2005 there is a note that tension in the neck/shoulder is constant."
- 4) [Appellant's doctor's] April 15, 2008 physical examination did identify musculoskeletal abnormalities. This report had three references to neck and jaw problems and a reference to a malocclusion problem which is clearly related to the TMD.

The Claimant Adviser further noted in his submission that:

1. [MPIC's doctor] in response to the Internal Review Officer in his interdepartmental memorandum of November 10, 2009, shifted his position and acknowledged that there were references in [Appellant's doctor's] medical chart to indicate that the Appellant did have problems between January 17, 2005 and February 12, 2009 which he did not note on his first review of [Appellant's doctor's] chart notes.

2. Notwithstanding acknowledgement of this significant error in his initial review of [Appellant's doctor's] chart notes, [MPIC's doctor] maintained his position that there was no causal connection between the Appellant's chronic complaints of neck and jaw pain and the motor vehicle accident.

The Commission notes that [Appellant's doctor's] diagnosis is confirmed by the Appellant's dentist, [Appellant's dentist #1], who saw the Appellant shortly after the motor vehicle accident. In a letter dated November 24, 2010, subsequent to [MPIC's doctor's] review of all of the medical reports on the Appellant's file, [Appellant's dentist #1] stated that the Appellant did demonstrate some TMD soreness in 1995 and an occlusal equilibration was done and a night guard fabricated for the Appellant. He further noted that on April 8, 2005 the Appellant was complaining of pain in the TMD area and in 2007 it was decided that a new appliance would be required.

The Commission notes that [MPIC's doctor] did not have knowledge of [Appellant's dentist #1's] November 24, 2010 letter where he reported medical opinions to the Claimant Adviser Office. However, when [MPIC's doctor] was requested by the case manager to provide a medical opinion, he did receive all relevant medical reports including [Appellant's dentist #1's] report dated August 1, 2007 which stated:

“[The Appellant] has been having sensitivity due to bruxism following her accident in Jan. 2005.”

The Commission finds that this note from [Appellant's dentist #1] does contradict [MPIC's doctor's] position that there was no documentation in the four year period subsequent to the motor vehicle accident in support of the Appellant's complaints of chronic neck and jaw pain.

The Commission further noted that MPIC's case manager wrote to [MPIC's dentist #1], MPIC's dental consultant, on August 27, 2007 and provided him with a copy of [Appellant's dentist #1's] August 1, 2007 report. [MPIC's dentist #1] replied in a noted dated September 10, 2007 and stated that it was OK for MPIC to reimburse the Appellant for a night guard appliance.

The Commission agrees with the Claimant Adviser that Dr. [MPIC's dentist #1's] approval for the night guard appliance indicated that he had agreed that the Appellant's TMD complaints were related to the motor vehicle accident. The Commission therefore finds that [MPIC's dentist #1's] direction to MPIC to reimburse the Appellant for the cost of a night guard appliance corroborated the Appellant's position that her TMD problems were connected to the motor vehicle accident.

The Commission notes that [MPIC's dentist #1], who unlike [MPIC's doctor], is a dentist and is a professor of dentistry at [text deleted] and who serves as a consultant to MPIC, contradicted [MPIC's doctor]'s opinion on the causal relationship between the Appellant's chronic neck and jaw pain and the motor vehicle accident.

The Commission further notes that MPIC's case manager did not seek to obtain a report on the issue of causality from [MPIC's dentist #1], who is one of MPIC's dental consultants, and who had been consulted only by the case manager in respect of an oral appliance for the Appellant. The Commission further notes that MPIC did not seek to obtain reports from the dental consultants, [MPIC's dentist #2] and [MPIC's dentist #3], on the issue of causality, but only requested information regarding whether or not the Appellant was using the appropriate oral appliance.

The Commission finds that rather than consult with dentists who would have the knowledge and experience of TMD, MPIC sought the advice of [MPIC's doctor] who is a general practitioner specializing in sports medicine. The Commission was not presented with any evidence which indicated that Dr. McKay had the experience or qualifications to render a dental opinion on the causal relationship between the motor vehicle accident and the Appellant's TMD.

In a file note of December 8, 2008, the case manager noted that the Appellant had switched dentists and was now seeing [Appellant's dentist #2]. [Appellant's dentist #2] wrote to the Appellant on September 4, 2009 and stated:

"I saw L.G. for the first time in December 2008. She had mentioned she had been in a MVA in the past and treated with a splint by another dentist. The splint wasn't helping and she was still experiencing pain and problems. As I do not treat or diagnose TMD I sent her to see Dr Steve Lawson. He can be contacted about his findings."

The Commission notes that the Appellant testified that [Appellant's dentist #2] noted on examination that she was suffering from TMD and referred her to [Appellant's dentist #3].

[MPIC's doctor] conducted a paper review in providing his opinions to MPIC and did not testify at the hearing. [Appellant's dentist #3], on the other hand, personally examined the Appellant and testified at the hearing. [Appellant's dentist #3] provided a C.V. which clearly indicated that he is qualified to express an opinion about the causal relationship between the Appellant's TMD and the motor vehicle accident. [Appellant's dentist #3] determined there was a direct connection between the Appellant's complaints of TMD and the motor vehicle accident. The Commission notes that [MPIC's dentist #1], who is MPIC's Dental Consultant and who teaches at the [text deleted], also found a direct causal connection between the motor vehicle accident and the Appellant's TMD problems.

[Appellant's dentist #3] having personally examined the Appellant was able to obtain a history from her and therefore was in a position to assess her credibility. In his testimony before the Commission [Appellant's dentist #3] testified that the Appellant, in his view, was a credible witness. Unfortunately [MPIC's doctor] did not examine the Appellant and therefore was not in a position to express any opinion as to her credibility.

In a report to MPIC dated September 8, 2009, the physiotherapist, [Appellant's physiotherapist #3] indicated that he saw the Appellant on February 23, 2008 and that the Appellant had been complaining of left jaw pain, left side facial pain, and constant headaches since the motor vehicle accident in January 2005. He also indicated that the Appellant's jaw was aggravated by chewing, talking and clenching her teeth. [Appellant's physiotherapist #3] indicated that due to the chronic nature of the Appellant's myofascial tightness he felt that it was possible that the Appellant was having TMD problems as a direct result of the myofascial tightness caused by the motor vehicle accident.

The Appellant testified that prior to the motor vehicle accident she did not have any chronic pain to her neck and jaw and that this pain commenced as a result of the motor vehicle accident. The Appellant testified in a clear and direct fashion and the Commission accepts her testimony that her chronic neck and jaw pain were a result of the motor vehicle accident.

The Appellant's testimony is corroborated by the testimony and reports of [Appellant's dentist #3] and the reports of [MPIC's dentist #1], [Appellant's dentist #1], [Appellant's doctor], [Appellant's dentist #2] and [Appellant's physiotherapist #3] (the physiotherapist). In these circumstances the Commission gives greater weight to the opinions of [Appellant's dentist #3],

[Appellant's dentist #1] and [MPIC's dentist #1] on the issue of causality than it does to [MPIC's doctor's] opinion.

[MPIC's doctor] concluded that in regard to the nature of the damages to her car after the motor vehicle accident the Appellant could not have suffered from significant musculoskeletal injuries which would in turn result in long-term symptomatology. An examination of [MPIC's doctor's] report does not indicate the factual basis upon which he rendered this opinion.

The Commission notes that MPIC provided no evidence that it conducted an investigation in respect of the damage to the Appellant's motor vehicle in relation to the Appellant's injuries. The Commission was not provided with any evidence of photographs of the damage to the Appellant's automobile or reports or opinions from MPIC's mechanics in respect of the relationship between the automobile damages and Appellant's motor vehicle injuries which would support [MPIC's doctor's] opinion that there was no correlation between the damages to the Appellant's automobile and her chronic pain.

The Commission further notes that [MPIC's doctor] is a medical practitioner with a specialty in sports medicine. There was no evidence provided to the Commission that demonstrated [MPIC's doctor] had any expertise to express an opinion on the relationship between the damage to the Appellant's vehicle and her chronic pain.

For these reasons the Appellant has established on a balance of probabilities that as a result of the motor vehicle accident the Appellant's chronic neck and jaw pain was a result of TMD.

Reimbursement for Physiotherapy Treatment:

In respect of the Appellant's claim for reimbursement of physiotherapy treatments, the Commission notes that the Internal Review Officer relied on [MPIC's doctor's] opinion that there was an absence of documented cervical pain between the time of the motor vehicle accident and 2009, a period of approximately four years. The Commission notes that for the reasons outlined herein [MPIC's doctor] erred in concluding there was no documentation of the Appellant's complaints between the time of the motor vehicle accident and a period of years later. For these reasons the Commission finds that MPIC erred in relying on [MPIC's doctor's] opinion to reject the Appellant's request for reimbursement of physiotherapy treatments.

The Appellant testified that physiotherapy treatments on an as needed basis from time to time were essential for her to maintain her daily activities. She further testified that these physiotherapy treatments reduced the severity of her chronic neck and jaw pain and enhanced the quality of her life.

The Commission finds that the Appellant testified in a direct and unequivocal fashion and the receipt of physiotherapy treatments from time to time would enable her to avoid a renewal of her neck and jaw pain. The Commission found that the Appellant was a credible witness and accepts her testimony in this regard.

In an appeal hearing in November 2011 the Commission received a two page document from MPIC's legal counsel entitled Clinical Guidelines for Chiropractic Practice in Canada. In this document the term "Supportive Care" is defined as follows:

"Supportive Care: Treatment for patients who have reached maximum therapeutic benefit, but who fail to sustain this benefit and progressively deteriorate when there are periodic trials of withdrawal of treatment. Supportive care follows appropriate

application of active and passive care including rehabilitation and life style modifications. It is appropriate when alternative care options, including home-based self-care, have been considered and attempted. Supportive care may be inappropriate when it interferes with other appropriate primary care, or when the risk of supportive care outweighs its benefits, i.e. physician dependence, somatisation, illness behaviour, or secondary gain.”

The Commission finds that this definition of supportive care applies to both physiotherapy treatment and chiropractic treatment. The Commission has considered the documentary evidence on file and the testimony of the Appellant and finds that she meets the criteria for supportive care as set out in the above definition.

The Commission finds that the Appellant has established on a balance of probabilities that periodic, occasional, physiotherapy treatments provide relief to the Appellant’s chronic neck and jaw pain and improve her ability to function and enable her to carry on the ordinary activities of her daily life. The Commission accepts the Appellant’s testimony that the absence of physiotherapy treatment causes a significant increase of chronic pain to her neck and jaw.

Accordingly the Commission finds that physiotherapy treatment on a periodic and occasional basis meets the criteria for supportive care and the Appellant is entitled to be reimbursed for expenses occurred in obtaining this treatment. The Commission finds that the Appellant is entitled to ongoing funding for periodic physiotherapy treatments in the same manner as which she received in the past.

For these reasons the Commission rejects the November 18, 2009 Internal Review Officer’s Decision, which relied on [MPIC’s doctor’s] medical opinion, to reject the Appellant’s request for reimbursement of physiotherapy treatments. The Commission therefore determines that the

Appellant has established on a balance of probabilities that physiotherapy treatment was medically required in accordance with Section 5(a) of Manitoba Regulation 40/94.

The Commission therefore allows the Appellant's appeal and rescinds the Internal Review Officer's Decision dated November 18, 2009. The Commission directs that MPIC reimburse the Appellant for the cost of [Appellant's dentist #3's] TMD treatments and the cost of her physiotherapy treatments.

Dated at Winnipeg this 28th day of May, 2012.

MEL MYERS, Q.C.

DR. SHELDON CLAMAN

NEIL COHEN