

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-09-057**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Nikki Kagan
Dr. Sheldon Claman

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

HEARING DATES: January 17 and August 20, 2013

ISSUE(S): 1. Entitlement to permanent impairment benefits.
2. Entitlement to reimbursement of treatment expenses.

RELEVANT SECTIONS: Sections 127 and 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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, [text deleted], was involved in a motor vehicle accident on January 6, 2005. At the time of this accident, the Appellant was a backseat passenger of a vehicle which was rear-ended. The Appellant hit her left cheek on the seat in front of her due to the impact from the accident. As a result of this accident, the Appellant reported injuries to her neck, low back and left facial pain to MPIC. She attended a chiropractor for treatment of the injuries to her neck and low back.

In 2003, the Appellant had sustained an injury to the left side of her face. At that time, the Appellant tripped and struck her face on an alarm box, sustaining an injury to the left orbital rim. She had a tremendous amount of local bruising and edema as a result. She had multiple investigations and opinions from several specialists in the neurology, pain clinic and plastic surgery fields regarding that injury. Subsequent to that injury, the Appellant had very prominent pain involving the left malar region, radiating under the left eye and also up to the left temple. The pain was constant and throbbing. It was aggravated by all manner of stimuli, including touching the scalp in a remote area and bending over. She tried a large number of medications, but was generally intolerant to even small doses.

In November of 2006, the Appellant contacted MPIC requesting a review of her file. She advised that she was experiencing severe pain in her jaw and that she had developed a facial deformity as her cheek seemed to be caving in.

MPIC requested a report from [Appellant's Plastic Surgeon] who was treating the Appellant at that time. In a report dated April 12, 2007, [Appellant's Plastic Surgeon] advised that:

[The Appellant's] problems are all localized to the left cheek area. This corresponds to the area of scarring. There has been damage to the underlying nerves in the area, which accounts for her aberrant innervation and facial tics. The scar is hypersensitive, which is also consistent with an underlying nerve injury. The injury caused atrophy of the underlying subcutaneous fat. This would not have been apparent early on due to swelling and bruising. However, as the swelling and bruising resolved, this would have become obvious. If this atrophy were simply due to aging, it would be expected to be present on both sides of the face. There is a very obvious difference when compared to the right cheek. All of the findings are consistent with a localized injury to the left side of the face. Whether the problems arise from the MVA of January 6, 2006 (sic) or the previous injury of April 2003 I am in no position to say, as I have only seen her after events took place. However, at the time of her initial consultation, [the Appellant] indicated that the problems had been present for three years, which would suggest that the April 2003 injury was the causative event.

The file was subsequently reviewed by [MPIC's Doctor], Medical Director of MPIC's Health Care Services team, to determine whether the Appellant's condition was related to the motor vehicle collision of January 2005. In his interdepartmental memorandum of May 14, 2007, [MPIC's Doctor] determined that:

At this point, given a review of the patient's Manitoba Public Insurance bodily injury claim file, the event of January 6, 2005 does not appear to be the probable cause of the patient's current suffering. There is documentation of significant suffering prior to the collision in question, with multiple caregivers, and multiple therapeutic avenues being undertaken. It does not appear as if the incident of January 6, 2005 has substantially changed the patient's clinical condition. No probable new diagnosis has been made in relationship to the collision of 2005.

On May 24, 2007, MPIC's case manager issued a decision letter advising the Appellant that there was no relation between her current signs/symptoms and the motor vehicle accident of January 6, 2005. As a result, MPIC was unable to approve any entitlement for treatment expenses and/or a permanent impairment benefit.

Subsequent to that decision, the Appellant submitted additional information. This new information was again reviewed by MPIC's Health Care Services team and a fresh decision was issued by MPIC's case manager. In a decision dated July 5, 2007, MPIC's case manager confirmed that the new information, including the new report and photographs, did not provide any new information that would change the previous decision of May 24, 2007 and therefore MPIC would not consider additional treatment or a permanent impairment award.

The Appellant sought an Internal Review of the case manager's decision of July 5, 2007. In a decision dated February 23, 2009, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the medical evidence on the Appellant's file did not support the requirement

for plastic surgery or justify a permanent impairment entitlement as a result of the injuries sustained in the motor vehicle accident.

The Appellant has now appealed that decision to this Commission. The issues which require determination on this appeal are:

1. whether the Appellant is entitled to a permanent impairment benefit; and
2. whether the Appellant is entitled to reimbursement of treatment expenses for her left cheek.

Appellant's Submission:

The Claimant Adviser on behalf of the Appellant submits that as a result of the injuries that the Appellant sustained in the motor vehicle accident of January 6, 2005, she developed a deformity to her left cheek, which was a separate injury from the previous injury to her left orbital area. The Claimant Adviser, on behalf of the Appellant, argues that the Appellant's testimony at the hearing establishes that the treatments to her left cheek were a different area of her face with different problems than the injury which she sustained in April of 2003. According to the Appellant, the pain from her April 2003 injury had resolved prior to the motor vehicle accident and she was only treating her skin colour changes resulting from that injury. Following the motor vehicle accident, the Claimant Adviser maintains that the Appellant sustained a separate injury to her left cheek, although not very far apart from the earlier injury sustained in April 2003. The Claimant Adviser argues that the Appellant has required plastic surgery treatments to treat the injury to her left cheek and that she is entitled to a permanent impairment benefit regarding the changes to her left cheek. The Claimant Adviser submits that the evidence supports that the motor vehicle accident caused the Appellant's injury and deformity to her left

cheek which was a new and separate injury from the Appellant's pre-existing injuries sustained in the accident in April 2003.

MPIC's Submission:

Counsel for MPIC submits that the onus is on the Appellant to establish, on a balance of probabilities, that the motor vehicle accident was the cause of the deformity to the Appellant's left cheek. Counsel for MPIC notes that prior to the motor vehicle accident in January 2005, the Appellant had suffered significant trauma to the left cheek area of her face. From 2003 until 2005, the Appellant underwent numerous investigations related to this significant injury to her left cheek. She was examined by numerous caregivers as a result of this accident. Counsel for MPIC argues that the January 6, 2005 motor vehicle accident was in no way comparable to the severity of the April 2003 incident. He maintains that there was no serious injury reported by the Appellant following the motor vehicle accident of January 6, 2005. In fact, counsel for MPIC notes that it was not until 20 months later that the Appellant returned to MPIC and requested benefits for her left cheek.

Counsel for MPIC argues that when the Appellant saw [Appellant's Plastic Surgeon] in March 2006, there was still a focus on the 2003 accident. However, at some point the focus of the investigation changed to the 2005 motor vehicle accident. In support of his position, counsel for MPIC referred to the numerous medical reports on this file documenting a depression of the Appellant's left cheek, a scar formation in the left cheek, left cheek pain and associated swelling, the presence of a scar in the left cheek area and a dent in the left cheek area. Counsel for MPIC submits that prior to the motor vehicle accident of January 6, 2005, the Appellant had sustained a significant injury to her left cheek area which resulted in her attending upon multiple caregivers for treatment of this injury, which injury had not yet resolved prior to the January 6, 2005 motor

vehicle accident. He concludes that the Appellant's ongoing difficulties with her left cheek are most likely connected to her previous trauma and not the January 6, 2005 motor vehicle accident.

Counsel for MPIC notes that while the Appellant probably did hit her head on the front seat due to the rear end collision of January 6, 2005, and she probably did sustain some swelling, that swelling resolved in the normal course. He submits that there were no complaints from the Appellant regarding her left cheek area until her attendance with [Appellant's Plastic Surgeon] in March 2006. Counsel for MPIC notes that [Appellant's Plastic Surgeon's] initial report of April 12, 2007 documented findings consistent with a localized injury to the left side of the face. In that report, [Appellant's Plastic Surgeon] was unable to conclude what caused the injury to the left cheek, but suggested that the April 2003 incident was most likely, based on the Appellant's report.

Counsel for MPIC submits that [MPIC's Doctor] provided the most consistent reports regarding this file and that his opinion should be relied upon. Counsel for MPIC notes that [MPIC's Doctor] opined that the motor vehicle accident was not a causative event of the Appellant's left cheek trauma. Counsel for MPIC argues that neither [Appellant's Doctor #1] nor [Appellant's Plastic Surgeon] saw the Appellant until well after the accident had taken place. He maintains that they are not able to objectively state one way or another whether the Appellant's left cheek problems in 2007 resulted from the motor vehicle accident of January 2005. Counsel for MPIC submits that [MPIC's Doctor] was in the best position to provide a conclusive opinion about what caused the Appellant's left cheek condition.

Counsel for MPIC submits that the evidence is clear cut that causation has not been sufficiently established by the Appellant on a balance of probabilities. He maintains that there is a lapse of

over a year before the Appellant reports problems to MPIC regarding her left cheek and that the early medical reports still reference the 2003 incident as the causative event of the Appellant's condition. As a result, counsel for MPIC submits that the evidence on the file does not establish causation between the Appellant's condition and the motor vehicle accident of January 6, 2005. He submits that the Appellant's appeal should be dismissed and the Internal Review decision dated February 23, 2009 should be confirmed.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant is not entitled to a permanent impairment benefit or to reimbursement of treatment expenses as a result of the injury sustained to her left cheek.

Reasons for Decision:

The Commission finds that the Appellant has not established, on a balance of probabilities, that the motor vehicle accident of January 6, 2005 caused the injury to her left cheek. The Commission notes that there was a significant lapse between the motor vehicle accident and the Appellant's report of the injury to her left cheek to MPIC. As noted by [Appellant's Doctor #2], who saw the Appellant at the [Hospital] [text deleted] in April, June, August and September, 2006, there was no loss of tissue noted to the Appellant's left facial area at that time. Further, the opinions of [Appellant's Plastic Surgeon] and [Appellant's Doctor #1] are not helpful with respect to the issue of whether the motor vehicle accident was the cause of the Appellant's left cheek condition. The Commission finds that the information provided by [Appellant's Plastic

Surgeon] and [Appellant's Doctor #1] does not establish, on a balance of probabilities, that the Appellant's left cheek injury was caused by the motor vehicle accident of January 6, 2005. As a result, based upon a review of all of the evidence before us, the Commission finds that the Appellant has failed to establish that the motor vehicle accident of January 6, 2005 was the cause of her left cheek injury which arose in November of 2006.

Accordingly, the Commission finds that the Appellant is not entitled to reimbursement of expenses for treatment to her left cheek or for a permanent impairment benefit to her left cheek. As a result, the Appellant's appeal is dismissed and the Internal Review decision dated February 23, 2009 is hereby confirmed.

Dated at Winnipeg this 4th day of November, 2013.

YVONNE TAVARES

DR. SHELDON CLAMAN

NIKKI KAGAN