

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-147**

PANEL: Ms Laura Diamond, Chairperson
Ms Janet Frohlich
Mr. Neil Margolis

APPEARANCES: The Appellant, [the Appellant], appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Steve Scarfone.

HEARING DATE: November 23 and 24, 2015

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits for
bilateral knee arthritis and the need for knee replacement
surgery.

RELEVANT SECTIONS: Section 71(1) and 171(1) of The Manitoba Public Insurance
Corporation Act ('MPIC Act')

**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 October 30, 2007. As a result of the accident, she sustained a fractured right calcaneus, a bony defect to the right talus, multiple contusions and soft tissue injuries to various regions of the body, and a laceration to the left temple.

In spite of being assessed and treated by various caregivers, including a sports medicine physician, the Appellant's fractured calcaneus was not diagnosed until 2008. [Appellant's orthopedic surgeon #1], an orthopaedic surgeon, reported (on November 7, 2008) that when he saw her on January 18, 2008, her main concern was pain in her right foot and ankle. There was swelling of the right leg, ankle and foot and the Appellant was quite tender in her right foot, particularly over the calcaneus, which was noted to have healed in a slightly deformed manner. The Appellant was treated at the [text deleted] and was also provided with a walking air cast, as she was unable to weight bear due to pain in the right foot.

In October of 2009, MPIC's Health Care Services medical consultant noted that the Appellant continued to have ongoing difficulties with her right ankle and foot as a result of the incident in question and that surgery was being considered to minimize the pain and increase her level of function. Surgery was performed on January 25, 2012.

In 2013, a total left knee arthroplasty was conducted. Due to severe osteoarthritic narrowing involving the right patellofemoral articulation, plans were made for a total right knee replacement as well.

The Appellant was of the opinion that the motor vehicle accident and subsequent prolonged altered gait and non-weight bearing status played a role in the development and/or worsening of her bilateral knee degeneration. As such, it was her position that the need for bilateral knee replacements was causally related to the motor vehicle accident.

After reviewing the reports from the surgeon who performed the knee arthroplasties, MPIC's medical consultant concluded that the osteoarthritis and the need for knee replacements was not causally related to the motor vehicle accident.

The Appellant's case manager wrote to her on May 31, 2013 indicating that it was MPIC's position that the bilateral knee arthritis and need for knee replacement surgery were not related to injuries sustained following the motor vehicle accident. On November 4, 2013, the Appellant's case manager wrote to her, following consideration of a narrative report provided by her family physician, [Appellant's doctor #1], which advised that in her opinion, wearing a boot on her right foot and ankle resulted in deterioration of her knees and hips due to unbalanced gait, which in turn resulted in the need for knee replacement surgery. However, the case manager concluded that following review by MPIC's Health Care Services department, this report did not change MPIC's opinion.

The Appellant sought an Internal Review of the decision letter dated November 4, 2013. Following a review of the material in the Appellant's medical file, an Internal Review Officer for MPIC concluded that:

“In the absence of objective collateral information to support your position, I must agree with the case manager's decision letter of November 4, 2013. The new information provided by your doctor does not change the decision rendered on May 31, 2013.”

It is from this decision of the Internal Review Officer that the Appellant has now appealed. The issue before the Commission was whether the Appellant is entitled to PIPP benefits because her bilateral knee arthritis and her knee replacement surgeries were caused by the motor vehicle accident. The panel has concluded that the Appellant has failed to show, on a balance of

probabilities, that the need for her knee replacement surgery was caused by the motor vehicle accident.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She described the motor vehicle accident and the treatment which she received for her injuries, at [text deleted] Hospital and the [text deleted] Clinic. She had first been diagnosed with a sprained ankle and advised to try and walk it out. Following discovery of the fracture, she was still advised to put weight on her foot but to be fitted for an air cast.

The Appellant described trying to walk with the air cast and the pain and difficulty in functioning which she experienced. She also saw an orthopaedic surgeon. She testified that during this period her knees and hips were fine and she was not experiencing any problems with them.

Her family practitioner, [Appellant's doctor], then sent her to have some bone scans because she was still suffering from pain and swelling in her heel. The bone scan results confirmed that her heel bone had been fractured and was showing signs of being crushed. As a result, her orthopaedic surgeon recommended physiotherapy and the Appellant also attended for acupuncture treatment. The Appellant considered attending at the Mayo Clinic for surgery, but finally, in 2012, [Appellant's orthopedic surgeon #2] performed the surgery in Manitoba. The Appellant explained that she wore a walking cast boot for five years until [Appellant's orthopedic surgeon #2] finally operated on her heel. By that time, the Appellant testified, she had been impacted by the height difference between her legs, as one was raised due to the walking boot. She said that she was feeling the effects of this, through pain in her hip, knees and lower back.

The Appellant was of the view that as she had been walking on a badly healed fractured ankle and crushed heel bone for at least five years, the resulting difference in height caused by the cast put stress on her knees. Her gait was not correct and this caused problems further up the line, in her hips and knees.

The Appellant was treated by [Appellant's orthopedic surgeon #3], who operated on her knees, performing bilateral knee replacement. Reports were provided by her caregivers, including operative and narrative reports from [Appellant's orthopedic surgeon #2], who performed the ankle surgery and [Appellant's orthopedic surgeon #3] who performed the knee surgeries. She also provided reports from [Appellant's doctor #1].

[Appellant's orthopedic surgeon #3] provided a report dated April 18, 2013 describing the surgery and the Appellant's recovery. He reported again on May 6, 2013, indicating that the diagnosis of the Appellant's bilateral knee condition was osteoarthritic wear and tear and degenerative arthritis. He indicated that the arthritic degeneration of her knees was not related to the motor vehicle accident in 2007. He indicated that it was:

“...highly unlikely that the motor vehicle accident caused the degeneration of the knees and that was a pre-existent condition whose symptoms were only started or exacerbated by her accident in 2007. ...

Again, the role of the motor vehicle accident may have either been the point of the onset or an exacerbation of the symptoms in her knees, but the motor vehicle accident did not cause the arthritic degeneration in her knees. ...

[The Appellant] may have been asymptomatic prior to the accident with her symptoms being attributed at the time of onset related to the accident. She certainly has significant degenerative arthritis of the knees and it is difficult to say at what point the symptoms would have come on or if they may have been exacerbated at the time of the accident. However, to be clear, the arthritic degeneration in her knees cannot be attributed to having been involved in the motor vehicle accident unless there was some significant damage to the knee at that time that I am completely unaware of.”

The Appellant agreed with [Appellant's orthopedic surgeon #3] that the motor vehicle accident itself did not directly injure her knees. However, it was her position that her knee condition was a direct result of her right foot injury (which was caused by the motor vehicle accident), and the misdiagnosis and delay in treating this injury. She maintained that if she had not suffered the foot injury in the motor vehicle accident and this had not been misdiagnosed and ignored, causing her to spend five years in a boot cast, she would not have required a knee replacement. There was nothing wrong with her knees prior to the motor vehicle accident. In fact, she noted that prior to the accident she had been very involved in various sports and had never experienced ankle or foot problems. She believed that it was her altered gait resulting from her motor vehicle accident injuries which caused the arthritis in her knees.

[Appellant's doctor #1] provided a narrative report dated May 27, 2008 which traced the history of the Appellant's orthopaedic difficulties following the motor vehicle accident, described her difficult recovery and recommended that MPIC provide the Appellant with assistance as well as support for surgical or therapeutic intervention. She reported again on December 1, 2008, indicating that the Appellant remained significantly disabled. Following the surgery, [Appellant's doctor #1] reported again. On October 4, 2013, she indicated:

“[The Appellant] has been my patient for approximately 19 years. Prior to her motor vehicle accident of October 30, 2007 [the Appellant] never complained of knee or hip pain. Over the years following the accident, and wearing the boot on her injured right foot and ankle, she complained of new and worsening knee and hip pain. This resulted in the deterioration in her knees and hips progressing quickly due to her unbalanced gait. The deterioration was followed by x-ray and once her left knee became “bone on bone” she had a total knee arthroplasty by [Appellant's orthopedic surgeon #3]. I believe the rapid progressive deterioration of her knees and hips was caused by her unbalanced gait caused by wearing the boot on her right foot from the injuries sustained in the motor vehicle accident of October, 2007.”

The Appellant submitted that prior to the motor vehicle accident she was active and did not have any difficulty with her hips and knees. However, since October 20, 2007 she had suffered from numerous orthopaedic problems and continued to do so. She did not agree that the osteoarthritis in her knees was simply present and asymptomatic prior to the motor vehicle accident. Rather, she submitted that her case was not a textbook case because of the misdiagnosis of her foot injury and the errors and damage done to her through these events. She felt victimized by the doctors who had not done their jobs properly and by MPIC for not believing and relying upon the letters submitted by her family doctor. [Appellant's doctor #1] had been treating her for many years, even prior to the motor vehicle accident and was of the view that the gait problems which resulted from the motor vehicle accident led to her arthritis and need for knee replacements. The Appellant submitted that the Commission should accept this opinion of her family doctor and uphold her appeal to find that the need for the bilateral knee surgery was a result of her motor vehicle accident injuries.

Evidence and Submission for MPIC:

MPIC's medical Health Care Services consultant, [MPIC's doctor], testified at the appeal hearing. The parties agreed that he was qualified as an expert in musculoskeletal medicine and as a consultant for MPIC in providing forensic paper reviews. [MPIC's doctor] confirmed that he had been involved in reviews of the Appellant's file and approved various forms of therapy for her injuries in the past.

Following the Appellant's knee surgeries, he reviewed [Appellant's orthopedic surgeon #3's] report of May 6, 2013. [Appellant's orthopedic surgeon's] report indicated that he believed that it was highly unlikely that the motor vehicle accident caused the degeneration of the Appellant's knees. It was a pre-existing condition, although the symptoms may have only started or been

exacerbated by the motor vehicle accident. [Appellant's orthopedic surgeon] indicated that the Appellant had significant degenerative arthritis of the knees and that the arthritic degeneration could not be attributed to having been involved in the motor vehicle accident "unless there was some significant damage to the knee at that time that I am completely unaware of".

[MPIC's doctor] testified that after reading [Appellant's orthopedic surgeon #3's] report, he went back to review the Appellant's claim file to see if he could find any evidence of an injury to the knee. He could find no such evidence and this factor, along with the fact that there was no indication that the Appellant's knee problems became apparent shortly after the motor vehicle accident, caused him to agree with [Appellant's orthopedic surgeon #3's] opinion. There was no temporal or evidentiary connection between the need for knee surgery and the motor vehicle accident. It was [MPIC's doctor's] view that the Appellant's knee arthritis was the result of the normal course of wear and tear over the Appellant's lifetime. Other possible risk factors which could lead to arthritis, such as gender and body weight, were also present and had possibly contributed to the condition.

[MPIC's doctor] reviewed the x-ray reports on the Appellant's file as well as reports from [Appellant's doctor #2] and [Appellant's orthopedic surgeon #1]. He reviewed and considered the history of the Appellant's difficulties with her ankle and heel fracture and treatment, including the walking boot and cast which had followed the accident. However, he indicated that he has not seen a case where knee arthritis developed due to an unbalanced gait and had never diagnosed a patient with arthritis due to an altered gait.

[MPIC's doctor] also reviewed [Appellant's doctor #1's] report of October 4, 2013 wherein she opined that the deterioration of the Appellant's knees (or its rapid progression) was caused by the

unbalanced gait which resulted from wearing a boot on her right foot. [MPIC's doctor] disagreed with this position. He noted that [Appellant's doctor #1] had not provided evidence to support this theory, either in terms of physical findings or medical studies to support the theory. He indicated that he had done an extensive search and had not been successful in finding any studies which show that altered gait is a risk factor in the development of osteoarthritis. He noted that he would have expected to see some notations in [Appellant's doctor #1's] clinical notes regarding the history of the knee and the development of the knee problems requiring treatment, as well as some supporting evidence which showed that something that occurred in or following the motor vehicle accident had caused a change. However, beyond her opinion of October 4, 2013, which was brief, no such chronology, information or evidence had been provided. Thus, [MPIC's doctor] concluded that the Appellant's osteoarthritis, through the natural progression of time, led to increased pain and to the surgical referral.

[MPIC's doctor] confirmed the opinion which he had provided on October 31, 2013 which concluded that the Appellant's bilateral knee arthritis was not caused by the motor vehicle accident or by her altered gait or non-weight bearing status following the accident. That report noted:

"I was not able to locate medical evidence indicating [the Appellant's] knees and hips "rapidly deteriorated" after the incident in question. It should be noted that osteoarthritic changes can occur in knees and hips to the extent joint arthroplasty is performed on individuals, in their [text deleted] decade of life that do not have altered gait or previous history in joint trauma. In other words degenerative changes would have developed in [the Appellant's] knees even if the incident had not taken place, in all probability.

If one takes the position that altered gait results in a more rapid onset or progression of osteoarthritic changes affecting the knees and hips then one would expect to see a higher incidence of knee and hip OA in the population that have neuromuscular disorders (resulting in ataxia) or congenital anomalies affecting the lower extremities (but not hip or knee) that would lead to altered gait. Based on my search of the medical literature (i.e. PubMed search) I was not able to identify any pertinent studies that support this position."

Counsel for MPIC submitted that based upon the medical reports from [Appellant's orthopedic surgeon #3] and [MPIC's doctor], as well as [MPIC's doctor's] oral testimony, the evidence suggests the Appellant already had some arthritis in her knees when the motor vehicle accident occurred. He pointed out that radiological investigations dated January 4, 2008 and February 15, 2008 already showed, just three or four months after the motor vehicle accident, that there were osteoarthritic changes in the Appellant's right knee.

Further, [MPIC's doctor] had confirmed that the medical literature does not attribute an unbalanced gait as a cause of osteoarthritis. Rather, the most common causes of osteoarthritis are related to age, weight and gender. All three of those factors were working against the Appellant in 2007. She was [text deleted] years old, a female, and was noted by [Appellant's doctor #3] on December 18, 2007, to be slightly overweight at [text deleted] pounds. In March, 2008 he noted obesity as one of her pre-existing conditions.

[MPIC's doctor] confirmed that his review showed that the Appellant's knees weren't injured in the motor vehicle accident, and the Appellant confirmed this both on cross-examination and in her submission before the panel.

Thus, it was submitted, the Commission must closely examine whether the cause of the Appellant's arthritis was normal wear and tear over the course of her life or the unbalanced gait theory put forward by [Appellant's doctor #1]. This unbalanced gait theory cannot explain the fact that the radiology reports from 2007 and early 2008 already showed osteoarthritis in the Appellant's knees, during a time when she had admittedly been almost completely immobile, in the months following the motor vehicle accident.

Appellant's orthopedic surgeon #3], the surgeon who performed the knee replacements, was also clearly of the view that the Appellant's arthritic degenerative changes in her knees were not related to the motor vehicle accident.

Counsel noted that the Appellant has the onus to show, on a balance of probabilities, that the conclusions of the Internal Review Officer were in error. Her testimony at the hearing, was supported only by [Appellant's doctor #1's] brief report, which was not supported by any medical evidence, clinical notes, tests, physical exams or research. Counsel submitted that the appeal should be dismissed and the decision of the Internal Review Officer upheld.

Discussion:

The MPIC Act provides:

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.

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The onus is on the Appellant to show, on a balance of probabilities, that the decision of MPIC's Internal Review Officer was in error and that the osteoarthritis in her knees and the need for knee replacement surgery was caused by the motor vehicle accident. The panel has reviewed the documents on the Appellant's indexed file as well as the evidence of the Appellant and [MPIC's doctor] at the hearing, and the submissions of the Appellant and counsel for MPIC.

The panel has concluded that the Appellant has failed to show, on a balance of probabilities, that the need for her knee replacement surgery was caused by the motor vehicle accident.

The panel does accept the Appellant's submission that she suffered from an unbalanced gait. Regardless of [MPIC's doctor's] evidence regarding the likely insignificance of the height differential she endured before she received treatment for her heel fracture, [Appellant orthopedic surgeon #1], in a report dated September 7, 2008, did note that the Appellant had an antalgic gait.

However, the panel was not provided with sufficient evidence to establish that this antalgic gait led to the development of osteoarthritis in the Appellant's knees.

We have taken careful note of the Appellant's evidence regarding her difficulties walking and [Appellant's doctor #1's] opinion, as set out in her letter dated October 4, 2013, that these problems led to the rapid progressive deterioration of the Appellant's knees:

“... Over the years following the accident, and wearing the boot on her injured right foot and ankle, she complained of new and worsening knee and hip pain. This resulted in the deterioration in her knees and hips progressing quickly due to her unbalanced gait.
...”

As counsel for MPIC pointed out, although [Appellant's doctor #1] was asked to provide the Appellant's clinical notes on February 15, 2011, she had failed to provide supporting evidence or information to substantiate her opinion. The consult report which [Appellant's doctor #1] wrote to [Appellant's orthopedic surgeon #3] on November 14, 2011 did not note any motor vehicle accident related factors in her relevant history, which noted her age of [text deleted] and her

increased BMI. Nor did her brief subsequent opinion substantiate the notion that the rapid deterioration of the knees was caused by the Appellant's gait.

X-rays taken in late 2007 and early 2008 showed that just a few months following the motor vehicle accident, the Appellant was already showing signs of osteoarthritis of the knee:

“RIGHT KNEE Feb. 15/08

Osteoarthritic changes are noted. There is a well corticated bony density noted adjacent to the tibial spine on the AP view which could represent a loose body. No further abnormality is identified.

...

Jan. 18/08...

RIGHT KNEE

Mild medial compartment joint space narrowing is noted. The patellofemoral articulation demonstrates a moderate degree of degenerative change and joint space loss, however. ...”

MPIC submits that, as [MPIC's doctor] testified, such early radiological findings of osteoarthritis, during a period when the Appellant was fairly immobile due to the motor vehicle accident, means that these changes must have been present prior to the motor vehicle accident. [Appellant's orthopedic surgeon #3's] note of March 22, 2013 that the Appellant “had longstanding osteoarthritic degeneration of both knees” supports this conclusion. The panel agrees that the radiological evidence supports the finding that these osteoarthritic changes were likely already present in the Appellant's knees prior to the motor vehicle accident.

The panel has also given weight to [Appellant's orthopedic surgeon #3's] opinion of May 6, 2013 that it was “highly unlikely that the motor vehicle accident caused the degeneration of the knees”. He believed that the arthritic degeneration in the Appellant's knees could not be attributed to the motor vehicle accident unless there was some significant damage to the knee at that time that he was unaware of. [MPIC's doctor] then, in both his report of May 29, 2013 and his testimony before the Commission, confirmed that he had looked for evidence of such an

injury and found none. [MPIC's doctor] then considered [Appellant's doctor #1's] opinion that it was the Appellant's altered gait which had led to the degeneration of the knees, and opined, in his report dated October 31, 2013, that he did not agree with this theory. He provided greater detail in his testimony regarding the problems this theory presented.

Having considered all of the above, the panel finds that, although the delays which occurred in treating the Appellant's foot injury unfortunately caused her pain and difficulty, the Appellant has failed to provide sufficient evidence to establish, on a balance of probabilities, that this caused a rapid acceleration of osteoarthritic changes in her knees leading to the need for knee surgery. Rather, the x-ray evidence showed pre-existing degenerative changes and there was insufficient evidence to show, beyond [Appellant's doctor #1's] unsubstantiated opinion, that the level of deterioration was a result of the effects of the motor vehicle accident. Therefore, having regard to our review of all of the evidence on the indexed file, as well as the testimony of the Appellant and [MPIC's doctor], we find that the Appellant has failed to advance sufficient evidence to establish, on a balance of probabilities, that her claim that the effects of the motor vehicle accident and delayed treatment resulted in the need for knee surgery.

Accordingly, the Internal Review decision of July 28, 2014 is hereby upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 17th day of December, 2015.

LAURA DIAMOND

JANET FROHLICH

NEIL MARGOLIS