

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File Nos.: AC-14-112, AC-14-113, AC-14-114 and AC-15-226**

PANEL: Ms. Karin Linnebach, Chairperson
Ms. Linda Newton
Mr. Brian Hunt

APPEARANCES: The Appellant, [text deleted], was represented by
Mr. Ken Kaltornyk of the Claimant Adviser Office;

Manitoba Public Insurance Corporation (MPIC) was
represented by Mr. Steve Scarfone.

HEARING DATES: April 19, 20 and June 11, 2018

ISSUES:

1. Whether the Appellant is entitled to further chiropractic treatments;
2. Whether the Appellant is entitled to a permanent impairment award for her low back, right hip and left knee conditions;
3. Whether the Appellant is entitled to Personal Care Assistance (PCA) benefits; and
4. Whether the Appellant is entitled to funding for various medical equipment (wheeled walker, comfort lift chair, low back support brace, walk-in bathtub with safety equipment, shoes with orthotics and a walking cane).

RELEVANT SECTIONS: Sections 70(1), 126, 127(1), 136(1) of The Manitoba Public Insurance Corporation Act (the Act) and sections 5(a), 10(1)(d), 10(2) and 11 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

Background

The Appellant, [text deleted], was injured in a motor vehicle accident (MVA) on November 25, 2002. Following the MVA, she received Personal Injury Protection Plan (PIPP) benefits, including chiropractic treatments.

In three separate decision letters dating March 11, 2014, the Appellant's case manager addressed entitlement to further chiropractic care, a permanent impairment award and personal care assistance (PCA) benefits. While noting that the Appellant had signed an Appeal Resolution Agreement regarding chiropractic care, the case manager found that additional chiropractic treatment was not medically required. In response to the Appellant's request for a permanent impairment award for her right hip, left knee and lower back, the case manager found that the Appellant did not sustain a left knee injury in the MVA and that the injury to the Appellant's low back and right hip did not qualify her for an impairment payment. Regarding PCA benefits, the case manager found that the Appellant's PCA assessment did not meet the minimum score to entitle her to PCA benefits.

In three separate decisions dated June 19, 2014, the Internal Review Office upheld all three case manager decisions. The Appellant filed Notices of Appeal with the Commission on August 8, 2014.

The Appellant made a request for funding for various medical equipment, including a wheeled walker, comfort lift chair, low back support brace, walk-in bathtub with safety equipment, shoes with proper fitted orthotics and a walking cane. On October 19, 2015, the case manager held that the medical equipment was not medically required for the injuries associated with the MVA. This decision was upheld by the Internal Review Office on November 10, 2015. The Appellant filed a Notice of Appeal with the Commission on December 2, 2015.

The parties agreed that the appeals of the three Internal Review Decisions dated June 19, 2014 were to be heard together with the appeal of the Internal Review Decision dated November 10, 2015. However, at the commencement of the hearing, counsel for the Appellant advised that the Appellant was not pursuing her appeals with respect to entitlement for a permanent impairment for her left knee and entitlement to PCA benefits. Accordingly the issues on appeal are whether the Appellant is entitled to further chiropractic treatments; a permanent impairment award for her low back and right hip conditions; and funding for a wheeled walker, comfort lift chair, low back support brace, walk-in bathtub with safety equipment, shoes with orthotics and a walking cane.

Procedural Matters

During cross examination, the Appellant was questioned about an Appeal Resolution Agreement (the Agreement) that she had signed with MPIC regarding chiropractic treatment. While it is referenced in the Internal Review Decision addressing chiropractic care, this document had not previously been included in the agreed-upon documentary evidence. Counsel for MPIC ultimately agreed to tender this document and its associated background documents as an exhibit

at the hearing with no objection from counsel for the Appellant. The parties made submissions as to the impact of this Agreement.

Decision

For the reasons set out below, the panel finds the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further chiropractic treatments; a permanent impairment award for her low back and right hip conditions; and funding for a wheeled walker, comfort lift chair, low back support brace, shoes with orthotics and a walking cane. The issue of funding for a walk-in bathtub with safety equipment is remitted back to case management for further assessment and implementation of the assessment as addressed below. The Commission remains seized on this issue should it remain unresolved between the parties.

Evidence for the Appellant

The Commission heard evidence from the Appellant and her chiropractor, [text deleted].

The Appellant

The Appellant described the MVA, the injuries she sustained in the MVA and how the MVA has affected her. Before the MVA, the Appellant was working full time and participated in lots of different activities including motorcycling throughout Canada and the U.S., gardening, camping, fishing and playing ball with her grandkids. This all changed after the MVA. She hasn't been able to do the things she used to do. She hasn't been on a boat or driven a motorcycle and her ability to walk has gotten progressively worse. However, she was able to keep working after the MVA. The Appellant was [text deleted] years of age at the time of the MVA and continued

working until she was [text deleted]. The Appellant confirmed that she is now [text deleted] years old.

Since her accident she has been attending to [Appellant's chiropractor] for chiropractic treatment once or twice per month. She described him as her "family chiropractor" and stated that she attended to him right after the MVA. She reported that seeing her chiropractor has made her life a lot easier by taking the pain and swelling down and making her more mobile and flexible so she can get around easier. Her chiropractor not only treats her injuries, but works on all areas of her body and has been treating her in that manner since the time of the MVA. When she doesn't attend to her chiropractor her back starts giving out, she doesn't have any endurance, her walking ability and flexibility is reduced, and her pain gets progressively worse. The Appellant acknowledged on cross examination that she started seeing her chiropractor before the MVA and possibly back in the 1990s.

As a result of the MVA, her right knee gets stiff and she can't straighten it out. She walks with a limp and reports that her right knee has no flexion. She stated that she has had problems across her whole back since the time of the accident and described the problem areas as up and down her spine and her side. Her hip gradually got worse such that she had to have a right hip replacement in 2016 due to arthritis in her hip. She believes her hip arthritis was caused by the injuries in the MVA. However, she acknowledged on cross examination that her hip pain started in 2011. She continues to have a lot of pain in her lower back, spine and right hip. She has required ongoing chiropractic treatment because she is "off kilter" and requires her chiropractor to "realign" her.

In response to questions regarding her request for medical equipment, the Appellant stated that she needs a wheeled walker because of her back. Even though her chiropractic treatment helps her back, she still needs a walker to walk any distance due to her poor balance. She requires a comfort lift chair because it is hard for her to get in and out of a chair. She purchased one 4 years ago for approximately \$1200.00. She requires an obusforme for her low back as her chiropractor has told her it is beneficial for her. She has used an obusforme since the accident. She requires a walk-in bathtub because she finds it hard to get in and out of a bathtub as her knee does not bend. She is able to sit on a chair in the bathtub and use the shower but has difficulty lifting her leg to get into the bathtub to sit on the chair. She requires orthotic shoes because she walks with a limp and needs to keep herself balanced. She is currently using insoles which she described as “better than nothing”.

The Appellant was questioned about the Agreement that she had signed in March of 2013. In signing the Agreement, the Appellant agreed to withdraw a number of appeals, including an appeal regarding chiropractic care beyond March 31, 2004. The Appellant testified that when signing the Agreement she understood that she was signing off on the past and not the present and future entitlement to chiropractic treatment. She confirmed that she had received regular chiropractic treatment between the termination date of the funding for chiropractic and the date of signing the Agreement.

The Appellant was cross examined as to her understanding of the effect of the Agreement. She stated she didn't recall that the Agreement meant she wouldn't be asking for further chiropractic care benefits from MPIC. She acknowledged that the Internal Review Decision concluded that she wasn't entitled to funding for active or supportive chiropractic care beyond March 31, 2004 and that she withdrew her appeal of that decision. She acknowledged that, in exchange for

withdrawing the appeals, she received \$548.00 as reimbursement for foot orthotics and a 5% permanent impairment award for her right shoulder. She acknowledged that MPIC was not prepared to pay her for further chiropractic treatments but did not agree that she was paid for the orthotics and right shoulder permanent impairment in exchange for agreeing that MPIC will not fund future chiropractic treatment. She stated that as far as she was concerned she could still receive funding for chiropractic treatments in the future. She agreed that she continued to see [Appellant's chiropractor] after the Agreement was signed and paid for the treatments herself. She didn't again approach MPIC to have her chiropractic treatments covered until approximately 8 months after signing.

The Appellant did purchase a foot orthotic as a result of the Agreement, but felt it was constructed wrong and "never worked". She returned it to the store where she purchased it and kept the money to buy insoles.

[Appellant's chiropractor]

[Appellant's chiropractor] has been a practicing chiropractor for 44 years and was qualified as an expert in chiropractic medicine. [Appellant's chiropractor] began treating the Appellant's MVA related injuries approximately 2 weeks after the MVA. While he could not remember when he first started treating the Appellant, he had been treating the Appellant before the MVA approximately once or twice a month. Although the reason she was attending for treatment at that time was due to a neck problem, he always treats the whole body and works on both sides of the spine on every visit for every patient.

The Appellant reported injuries to her low back and hip, upper back, neck area, right knee, right shoulder, right eye, left thumb and hand, right arm, thighs on both legs, and right ankle from the MVA. [Appellant's chiropractor] compared the Appellant's physical and functional status before and after the MVA. He reported that there was considerable change as the Appellant was "in pretty bad condition" when he saw her after the MVA. The Appellant couldn't move her right shoulder and had trouble bending backwards and forwards to the side, especially in her lower extremities. She had radicular pain from her hip to her right foot and couldn't straighten her right leg out. She had cuts and bruises on both of her legs, a cut over her forehead and her right eye was swollen and bruised.

The Appellant has never fully recovered to her pre-MVA status, especially in her arm and right shoulder. As time goes on, her injured areas are more susceptible to arthritic changes as compared to those areas of the body that were not injured. [Appellant's chiropractor] confirmed that he provided a report dated August 15, 2010 outlining why the Appellant requires supportive chiropractic care and confirmed that the Appellant still requires supportive chiropractic care at a frequency of twice per month.

[Appellant's chiropractor] acknowledged that the Appellant's right hip surgery resulted in reduced pain and stiffness in the right hip area and lumbar spine area, but indicated that the Appellant continues to have some radicular pain down her leg to her foot. He indicated that there has been very little change in the Appellant's right knee. The Appellant has been unable to fully extend her right leg since the MVA.

[Appellant's chiropractor] described the interconnectedness between the parts of the body and the resultant impact of injuries on different parts of the body. In [Appellant's chiropractor]'s

view, the Appellant's MVA injuries created an imbalance in the Appellant's spine such that the Appellant's problems in her lower back and hip contribute to the problems down her leg to her foot while the right knee exacerbated her problems in her lower back.

[Appellant's chiropractor] indicated that the Appellant needs a wheeled walker to assist her with balance to prevent a fall. She is unable to stand without some kind of support. [Appellant's chiropractor] opined that it is her right knee, lower back and foot problems that require her to use a walker. The Appellant requires a comfort lift chair as a result of problems to her lower back, knee and ankle as she requires assistance to stand erect from a sitting position. She requires a low back support brace as it holds her hips in place, stabilizes her lower spinal column and takes the pressures off her nerves. This takes the weight off the lower spine and reduces pain and stiffness in her lower back area. The Appellant has great difficulty getting into a bathtub which, in [Appellant's chiropractor]'s view, is disturbing for a person of her age. A walk-in bathtub would allow her to step into the tub to properly bathe. He noted that walk-in tubs are used widely in older people. He attributed her difficulties with getting into a bathtub as being due to her lower back, right knee and right foot. [Appellant's chiropractor] recommended foot orthotics to support the Appellant's medial arch, help heal the right ankle, stabilize the knee and help with the positioning of the right hip bone.

[Appellant's chiropractor] opined that the Appellant can move better and walk better when she is receiving chiropractic treatment. He observed that she gets off the table easier after treatment and can walk out of the office quicker. He explained that it is his main objective to help his patients get better, feel better and move better. He stated that he cannot always do a test and measure an angle. His approach is to communicate with his patient to determine the patient's treatment needs.

[Appellant's chiropractor] acknowledged that the Appellant has reached maximum therapeutic benefit from chiropractic treatment and therefore that the request for further funding is for supportive chiropractic care. With respect to the guidelines for supportive chiropractic care, [Appellant's chiropractor] acknowledged that he did not conduct a planned withdrawal of treatment to see how the Appellant did without chiropractic care. He acknowledged that he didn't undertake objective testing of the Appellant before and after breaks in treatment.

[Appellant's chiropractor] acknowledged a decline in the Appellant's general condition after 2014 due to arthritis in her body. However, [Appellant's chiropractor] indicated that the Appellant's arthritis caused her more difficulties on her right side than on her left and her right side was injured in the MVA.

[Appellant's chiropractor] acknowledged that aging is a factor in the development of arthritis.

[Appellant's chiropractor] acknowledged that, while he has been attributing her physical difficulties after 2002 to the MVA, the Appellant had at least one fall on ice since the MVA. He was unsure whether she had had a second fall on ice. He would treat the Appellant for whatever problem she had when she attended to him and that he "had her on a maintenance schedule". He is currently treating her for non-MVA related problems along with her MVA-related injuries.

Submission for the Appellant

Counsel for the Appellant reviewed the circumstances of the MVA and injuries that were being treated. The Ambulance Patient Care Report of November 25, 2002 shows that the Appellant suffered injuries to her right neck, left shoulder, right knee and scalp. [Appellant's chiropractor]'s initial health care report of December 11, 2002 lists low back, upper back and

neck as being very sore as well as the right shoulder, thigh, knee and ankle. [Appellant's chiropractor]'s report of January 3, 2003 states that he was treating the right hip, right shoulder, neck and lower back.

Counsel noted that MPIC's Health Care Services (HCS) review dated December 20, 2013 states that it would be reasonable to conclude that the MVA had an influence on both the Appellant's ongoing back pain and right hip pain. Counsel submitted that while this review states the lower back and right hip conditions have likely reached maximum medical improvement, nowhere in the report does the consultant conclude that those injuries have resolved or that the Appellant has achieved her pre-accident status.

[Appellant's chiropractor]'s April 15, 2015 report notes that the Appellant was still experiencing pain in her right hip and lower back and that she had deteriorated from using a cane to requiring a walker. The Appellant testified that her lower back and right hip were getting increasingly painful to the point that she required a hip replacement in 2016. There was a significant deterioration in the Appellant's lower back and right hip condition during the period following the signing of the Agreement. [Appellant's chiropractor] testified that an injury to a joint often results in the development or acceleration of arthritis. The Appellant's right side, lower back and right hip injuries were painful from the time of the MVA until present. The reasonable conclusion is that the injury to the Appellant's lower back and right hip, on a balance of probabilities, played a significant role in the development of severe arthritis in her right hip, leading to the right hip replacement.

Counsel submitted that as MPIC has accepted that the Appellant's lower back, right hip and right knee injuries are MVA-related, the Appellant has therefore demonstrated the need for the

medical equipment she is requesting as a result of the MVA. [Appellant's general practitioner] prescribed a wheeled walker and comfort lift chair and [Appellant's chiropractor] recommended a wheeled walker, comfort lift chair, low back support brace, a walk-in bathtub with substantial safety equipment and shoes with properly fitted orthotics. The Appellant has described the problems she is having and why the various equipment is needed to assist her in functioning. The Appellant testified that the need for all of this medical equipment was related to the problems she still has with her lower back and right knee.

Counsel noted that the HCS review dated October 6, 2015 states that the consultant was unable to locate medical documentation demonstrating bony or soft tissue pathology. However, this opinion ignores [Appellant's chiropractor]'s numerous reports demonstrating objective evidence in terms of tenderness and reduced range of motion, particularly in the lower back, right hip and right knee, corresponding to the subjective complaints of pain. In addition, [Appellant's chiropractor] provided a report dated December 16, 2015 which states that the Appellant was scheduled for a right hip replacement in February/March 2016. Counsel submitted that is clear evidence of a bony pathology, but it does not appear that MPIC's HCS consultant was ever presented with that evidence. Nor is there any evidence that MPIC's HCS consultant was provided with a copy of the computed tomography (CT) report dated October 10, 2014.

The Appellant received a right hip replacement in 2016. As there is no evidence on the file of a left hip problem and MPIC has accepted that the MVA resulted in an injury to the right hip which contributed to the ongoing pain symptoms, it is the Appellant's position, on a balance of probabilities, that the right hip replacement would not have been required but for the injuries suffered in the MVA. Therefore, the Appellant is entitled to a permanent impairment award under Regulation 41/94, Division 1, Subdivision 2, Section 2.2. While that section deals with

consequences of a fracture, it is the Appellant's position that section 129(2) of the MPIC Act would allow this section of the regulation to be used as a guideline for a hip replacement. Counsel indicated that Appellant is seeking a 10-15% permanent impairment award for her right hip.

In his April 15, 2015 report, [Appellant's chiropractor] refers to a loss of range of motion in the Appellant's lower back, especially forward and right lateral flexion and bilateral right rotation. As MPIC has accepted that the injury to the Appellant's lower back in the MVA has contributed to her problems, it is the Appellant's position that she is entitled to a permanent impairment award for loss of range of motion of the lower back.

With respect to the issue of supportive chiropractic treatments, [Appellant's chiropractor] addressed MPIC's criteria for supportive care in his report of August 15, 2010. This demonstrates that, at that time, the Appellant met all of the criteria for entitlement to supportive care. In a report dated November 3, 2011, [Appellant's chiropractor] provided subjective and objective evidence pre and post treatment which demonstrated the considerable benefits that the Appellant received from chiropractic treatments. In his April 15, 2015 report, [Appellant's chiropractor] stated that the Appellant deteriorated between 2012 and 2015 from getting around with a cane to requiring a walker. He recommended two chiropractic treatments per month in order to relieve pain and promote greater mobility. Since the Appellant met the criteria for supportive chiropractic treatments in 2010 and has deteriorated further since that time, it is the Appellant's position that she still meets the criteria for supportive treatments today.

[Appellant's chiropractor] testified verbally that, in his medical opinion, the Appellant meets all of the criteria for supportive chiropractic treatments. He testified to the benefits of the treatment

that he has observed between the Appellant's pre and post treatment levels of function. The Appellant also testified about the considerable benefits that she receives from the chiropractic treatments, stating that she improves about 60% following a treatment, then gradually deteriorates over the next couple of weeks. She testified that without the chiropractic treatments, she would be unable to perform even the limited activities that she can still do. The Appellant testified that before the MVA, she regularly motorcycled, fished and had a very active social life. She can no longer perform many of those activities, but stated that the chiropractic treatments allow her to do some cooking, which she enjoys and to interact with her grandchildren. This purpose of supportive chiropractic treatments is to maximize the claimant's function and ability to participate in society. Therefore, the Appellant requests that the Commission overturn the Internal Review Decision and accept that the Appellant is entitled to ongoing, supportive chiropractic treatments.

Regarding the impact of the Agreement, counsel disagreed with MPIC's suggestion that where an Appeal Resolution Agreement exists and a specific issue before the Commission has been withdrawn, the claimant is precluded from all future entitlement to the specific benefits covered by the Appeal Resolution Agreement. Counsel submitted that this would result in situations where it would be impossible for the Claimant Adviser Officer to recommend that a claimant sign such an agreement.

Counsel also noted that s. 171(1) of the MPIC addresses new information and that it is not unusual for MPIC to terminate a benefit which has been previously accepted in a decision of the Commission when new information becomes available. However, s. 171(1) does not only apply to the termination of benefits, as MPIC also relies on s. 171(1) to accept benefits when new evidence becomes available.

The Appellant signed the Agreement on March 25, 2013. In exchange for acceptance of a permanent impairment award and payment for orthotics, the Appellant gave up her entitlement to reimbursement for chiropractic treatments from the period of 2004 to 2013, a period of approximately 9 years. Counsel conceded that the Appellant is not entitled to reimbursement for chiropractic treatments for any period prior to March 25, 2013, the date she signed the Agreement.

In November 2013, the Appellant asked her case manager to reinstate her entitlement for chiropractic treatments. The case manager contacted [Appellant's chiropractor] and obtained updated medical information. At no time did the case manager claim that the information she received from [Appellant's chiropractor] did not constitute "new information" pursuant to s. 171(1) of the Act.

The Internal Review Officer reviewed the case manager's decision and also raised no objection in regard to whether or not the medical update from [Appellant's chiropractor] constituted "new information". Counsel submitted that it would be difficult to envision a situation in which an update of medical for a period subsequent to an Appeal Resolution Agreement would not constitute "new information". If such updates did not constitute "new information" then MPIC would never be able to terminate benefits when the issue is framed as an entitlement to benefits beyond a particular date and the appeal is upheld by the Commission. The only question here is whether the new information is sufficient to support entitlement to supportive chiropractic care.

MPIC has suggested the Commission should interpret the intent of the Agreement. Counsel submitted that determining the intent of the document in any way other than what is written is an

impossible task. The Appellant testified that her intent on signing the document was to receive certain benefits in exchange for withdrawing a claim for reimbursement of past chiropractic treatments. Counsel for MPIC has suggested that the intent was to extinguish all future entitlement to chiropractic treatments. If there is no agreement on intent, then the only option open to the Commission is to look at what the Agreement actually says, namely that the Appellant agrees to withdraw four specific appeals and MPIC agrees to pay her certain sums of money. Nowhere in the Agreement does it state that the Appellant waives her right to request MPIC to pay for chiropractic treatments at some later date. Therefore, it is the Appellant's position that she did not, in any way, waive her right to apply for ongoing, supportive chiropractic treatments and the Commission is free to decide this issue on the merits.

Submission for MPIC

Counsel for MPIC submitted the threshold issue on the issue of ongoing chiropractic care is whether the Appellant is precluded from seeking this benefit from the Commission because of the Agreement.

The Appellant suffered soft tissue injuries in the November 2002 MVA. She started attending for chiropractic care almost immediately following the MVA. However, she had been attending to her chiropractor for many years prior to the MVA. In 2005, the Appellant's case manager determined that chiropractic treatment was no longer medically required. This decision was upheld by the Internal Review Office and the Appellant appealed to the Commission. However, that appeal was not heard.

The Appellant's representative obtained a new report from [Appellant's chiropractor] and this report was reviewed by an HCS chiropractic consultant. The consultant was of the view that further chiropractic treatment was not medically required. The case manager issued another decision denying coverage for further chiropractic treatment. The Appellant filed an Application for Review of the case manager's decision. While at the Internal Review Office, an HCS chiropractic consultant review was sought on the issue of supportive chiropractic care. The Internal Review Office denied the Appellant's Application for Review in December 2011 and the Appellant appealed to the Commission. Again, the appeal was not heard as the Appellant and MPIC executed the Agreement.

After signing the Agreement, the Appellant returned to her case manager and again sought coverage of chiropractic treatment. In a decision dated March 11, 2014, the case manager considered the new information that was provided notwithstanding that the Appellant had just signed the Agreement. However, the case manager referred to and relied on the Agreement in her decision. The fact that the case manager considered the new information does not discount or minimize the effect of the Agreement.

Counsel submitted there is an overriding public interest in honouring settlement agreements and the Commission should find that the Appellant is precluded from seeking further chiropractic benefits on the basis of having entered into the Agreement. Counsel submitted that the Agreement is clear; the Appellant was compensated for foot orthotics and a permanent impairment award for her right shoulder was provided in exchange giving up her right to chiropractic benefits beyond March 31, 2004. The Appellant signed off on a benefit for good consideration. She carefully reviewed the case manager and Internal Review Office decisions and entered into the Agreement. It is contrary to the overriding public interest for the

Commission to allow her to come back later and seek the benefits she already agreed not to pursue.

In response to the question from the panel regarding new information and the application of s. 171(1) of the Act, counsel submitted that the Agreement overrides any new information that was provided as an Appellant can contract out of s. 171(1) of the Act as it pertains to specific benefits.

With respect to the merits of the Appellant's request for ongoing chiropractic care, counsel submitted that the Appellant has clearly not met the requirement for supportive chiropractic care. The criteria to be entitled to supportive chiropractic care requires a withdrawal of treatment followed by objective evidence of deterioration. Counsel submitted that there was no real withdrawal from treatment in the Appellant's case and [Appellant's chiropractor] did not dispute that he didn't conduct any testing in order to document deterioration in the Appellant's condition.

With respect to Appellant's claim for a permanent impairment award for her lower back and right hip, counsel noted that the Appellant was [text deleted] years old at the time of the MVA and already had arthritis throughout her body and severe arthritis in parts of her body. Counsel submitted that the initial post-MVA medical documents show that the Appellant's lower back and right hip MVA injuries were soft tissue injuries and all the x-rays taken at that time showed normal results.

Counsel referred to a physiotherapist's December 10, 2012 assessment report that documents the range of motion in the Appellant's right hip to be fully functional. The Appellant's orthopaedic

surgeon provided an opinion dated September 24, 2014 addressing the Appellant's osteoarthritis of her right hip and the MVA. This opinion clearly states that the Appellant's right hip osteoarthritis is not related to the MVA.

Counsel referred to an HCS review dated December 20, 2013 which addresses the Appellant's lower back and right hip. The consultant stated that these injuries were relatively minor soft tissue injuries consistent with musculoligamentous strain/sprain injuries which have had ample time to heal. Counsel submitted that to be entitled to permanent impairment awards, there needs to be more than subjective complaints from the victim 16 years after the MVA. There is no evidence that the Appellant's ongoing lower back and right hip complaints are related to the MVA.

With respect to the Appellant's request for medical equipment, this issue was not brought to MPIC's attention until 2015, 13 years after the MVA. Counsel reiterated that the injuries were soft tissue and submitted that too much time has passed for this equipment to be medically required for her MVA-related injuries. Counsel submitted that it is not surprising that the Appellant needs a walker and assistance getting into a bathtub given that she is [text deleted] years old.

The Appellant's Reply

In response to MPIC's suggestion that there was no "new information" provided by the Appellant, counsel submitted that medical documentation provided after the signing of the Agreement shows a rapid deterioration between 2012 and 2016 when the Appellant required a hip replacement. Counsel reiterated that there is nothing in the Agreement that states she is

precluded from seeking chiropractic benefits in the future. In response to MPIC's submission that a claimant can contract out of s. 171(1) of the Act, counsel submitted that several Commission decisions have ruled otherwise.

In response to MPIC's reliance on an orthopaedic surgeon's comments addressing causation of the Appellant's hip osteoarthritis, it is clear that the surgeon did not have documentation of the nature of the Appellant's injury and that the opinion is based on generalities. The surgeon had not seen any of the documentation and counsel submitted that this is not a reliable medical opinion in this case.

With respect to MPIC's reliance on the passage of time before medical equipment was requested, counsel submitted that [Appellant's chiropractor] did not agree that no request was made until 2015. In any event, the MVA injuries accelerated the aging process.

Discussion

The onus is on the Appellant to show that, on a balance of probabilities, she is entitled to a permanent impairment award for her low back and right hip, further chiropractic treatments, and funding for the medical equipment that she is seeking.

The Appellant's Right Hip and Low Back Complaints

The Appellant has arthritis and ongoing pain in her lower back and required surgery to her right hip in 2016 due to arthritis. The Appellant attributes her ongoing low back and right hip difficulties to the MVA and is seeking a permanent impairment award for her low back and right hip problems.

The relevant provisions of the MPIC Act are as follows:

Definitions

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

"accident" means any event in which bodily injury is caused by an automobile;

"bodily injury" means any physical or mental injury, including permanent physical or mental impairment and death;

"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...

Meaning of "permanent impairment"

[126](#) In this Division, **"permanent impairment"** includes a permanent anatomicophysiological deficit and a permanent disfigurement.

Lump sum indemnity for permanent impairment

[127\(1\)](#) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500 and not more than \$100,000 for the permanent impairment.

The panel finds that the Appellant has not met her onus to prove, on a balance of probabilities, that she is entitled to a permanent impairment award for her low back and right hip. The medical documentation in the years immediately after the MVA contains very little reference to any complaints of right hip pain. The majority of the Appellant's right hip pain complaints commence in December 2011, 9 years post-MVA. The medical documentation in the years immediately after the MVA do reference low back pain. On cross examination, [Appellant's chiropractor] suggested that the references to low back pain are meant to include the right hip area. Ultimately, MPIC's HCS consultant accepted that the Appellant's low back and right hip were injured in the MVA. However, the consultant also concluded that the low back and right hip injuries in the MVA were soft tissue, had ample time to heal and therefore would not result in permanent impairments. The panel agrees with this conclusion.

The Appellant's lumbar spine injury was described as a sprain/strain and no imaging studies were conducted in the years immediately after the MVA. Based on the Appellant's complaints at the time of the MVA, imaging was done of the Appellant's c-spine only. In a report of June 9, 2009, [Appellant's chiropractor] outlined the permanent impairments to which, in his view, the Appellant was entitled. There is no mention of low back or right hip in his report.

A CT of the Appellant's lumbar spine was ultimately conducted in October 2014, 12 years after the MVA and noted a "superior endplate fracture of the L1 vertebral body which appears remote". However, there is no documentation from the time of the MVA that the Appellant suffered a fracture in her lumbar spine in the MVA. There is no documentation that the Appellant had any direct or structural injury to her right hip joint.

[Appellant's chiropractor]'s report of November 12, 2004 states that the Appellant was attending for chiropractic treatments for her low back prior to the MVA. [Appellant's chiropractor] indicated that "these problems were further aggravated by the accident especially her right hip and right gluteal areas". It is also noted that the Appellant was referred for imaging on her right hip by her family physician 7 months prior to the MVA. The panel therefore concludes that the Appellant had pre-existing lower back and right hip complaints at the time of the MVA. In addition to the pre-existing low back condition, the Appellant had injured her back in a fall on ice in 2004, 2 years after the MVA.

[Appellant's chiropractor] attributed the Appellant's "early onset" of arthritis to the MVA. He referred to a pamphlet that addresses the causes of arthritis and states "injuries that don't completely heal can become arthritic later in life". The panel notes that the pamphlet also

references excess weight and advancing age as causes, both of which are factors for the Appellant.

An orthopaedic surgeon was asked to comment on whether the MVA caused the Appellant's osteoarthritis in her right hip. In a report dated September 24, 2014, the surgeon stated that generally osteoarthritis is a chronic degenerative condition and not usually related to an injury. In the surgeon's view, the Appellant's condition was unrelated to the MVA in the absence of documentation of a hip fracture, dislocation pelvic injury or some relevant injury. As indicated, there is no documentation supporting that the Appellant had any direct or structural injury to her right hip joint in the MVA.

Given that the Appellant's low back and right hip injuries in the MVA were relatively minor soft tissue injuries, that the bulk of the Appellant's complaints concerning her low back and right hip did not occur until many years after the MVA, that the Appellant is impacted by other factors in the development of arthritis, and that the Appellant had pre-existing low back and right hip problems at the time of the MVA, the panel finds that the Appellant has not established, on a balance of probabilities, that her ongoing lower back and right hip complaints are casually related to the MVA and therefore that she is entitled to a permanent impairment award for her low back and right hip complaints.

Further Chiropractic Treatments

The Appellant is seeking ongoing chiropractic treatment on a supportive basis for the treatment of her low back and right hip injuries. The onus is on the Appellant to show, on a balance of probabilities, that supportive chiropractic treatment is medically required.

The relevant provisions of the MPIC Act are as follows:

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:
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.

Counsel for MPIC strenuously argued that the Agreement between the Appellant and MPIC prevents her from seeking further chiropractic treatments and that the Commission should deny the appeal on this basis. However, it is not necessary for the panel to determine the impact of the Agreement as the panel finds that the Appellant has not shown, on a balance of probabilities, that she is entitled to further chiropractic treatments.

The panel has concluded that the Appellant's ongoing low back and right hip pain are not causally related to the MVA such that she would require ongoing medical treatment. The panel also concludes that the Appellant has not met the requirements for supportive care as outlined in

prior Commission cases¹. An accepted test for determining supportive care sufficient to establish “a medical requirement” of chiropractic treatment includes the following elements:

1. The initial treatment must provide a benefit and the claimant must be at a maximal medical benefit;
2. the condition deteriorates in the absence of a therapeutically relevant time frame (typically over a six week period);
3. the condition improves with the resumption of treatment (demonstrated by objective measures such as status inventory and numeric pain rating scores);
4. alternative approaches have been attempted without success;
5. an appropriate home-based program is in place; and
6. risks (especially reliance upon a passive treatment) are out-weighed by the benefits.

In order for an Appellant to meet the criteria for supportive care, it must be demonstrated in an objective manner that without the prescribed treatment, the Appellant’s condition deteriorates both in terms of the subjective symptoms as well as their objective findings.

The panel agrees with counsel for MPIC that there was no real withdrawal from treatment in the Appellant’s case and that [Appellant’s chiropractor] did not conduct the appropriate testing in order to document deterioration in the Appellant’s condition following breaks in treatment. The panel also finds that an appropriate home-based program has not been in place for the Appellant.

¹ For example, see AC-13-102, AC-14-093, AC-14-036, AC-08-115, and AC-12-002.

Medical Equipment

The Appellant is seeking funding for a wheeled walker, walking cane, comfort lift chair, low back support brace, a walk-in bathtub with safety equipment and shoes with orthotics. The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to funding for this equipment.

The relevant provisions of the MPIC Act are as follows:

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:

- (b) the purchase of prostheses or orthopedic devices;
- (d) such other expenses as may be prescribed by regulation.

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (d) reimbursement of the victim at the sole discretion of the corporation for:
 - (i) wheelchairs and accessories,
 - (ii) mobility aides and accessories,
 - (iii) medically required beds, equipment and accessories,
 - (iv) specialized medical supplies,
 - (v) communication and learning aides,
 - (vi) specialized bath and hygiene equipment,
 - (vii) specialized kitchen and homemaking aides, and
 - (viii) cognitive therapy devices;

Consent of corporation required

10(2) Unless the victim first obtains the consent of the corporation prior to incurring a cost under subsection (1), the corporation is not liable for paying it.

Prosthesis and orthosis

11 Subject to sections 12 to 18, the corporation shall pay any expense that the corporation considers reasonable and proper and that the victim incurs for the purchase, rental, repair, replacement, fitting or adjustment of a prosthesis or orthosis if the prosthesis or orthosis is medically required and prescribed by a physician, dentist, optometrist, chiropractor, physiotherapist, registered psychologist, athletic therapist, nurse practitioner, clinical assistant, physician assistant or occupational therapist.

Wheeled Walker, Walking Cane, and Low Back Support Brace

In her testimony, the Appellant indicated that she requires a wheeled walker and walking cane due to her back and difficulties with balance. In his correspondence of April 15, 2015, [Appellant's chiropractor] discussed the Appellant's need for a walking cane and wheeled walker in connection with her low back and right hip difficulties. In his testimony, [Appellant's chiropractor] opined that it is the Appellant's right knee, lower back and foot problems that require her to use a walker.

Based on the evidence presented, the panel finds that the Appellant's main reason for requesting funding for a wheeled walker and walking cane is due to her ongoing low back and hip problems. For the reasons outlined above, the panel finds that the Appellant's ongoing low back and hip problems are not casually related to the MVA such that she is entitled to funding for a wheeled walker, walking cane, and low back support brace.

Comfort Lift Chair

The Appellant indicated that she requires a comfort lift chair because it is hard for her to get in and out of a chair. [Appellant's chiropractor] opined that the Appellant requires a comfort lift chair as a result of problems to her lower back, knee and ankle as she requires assistance to stand erect from a sitting position.

MPIC had previously provided the Appellant with a permanent impairment award for loss of range of motion in the Appellant's right knee and right ankle. While the panel accepts that the Appellant has had permanent problems with her right knee and ankle as a result of the MVA, the panel does not accept that these permanent injuries would necessitate the purchase of a comfort lift chair.

The panel is mindful that lower back difficulties were identified as one reason for the purchase of the chair. The panel also notes that s. 10(2) of Regulation 40/94 states unless the victim first obtains the consent of MPIC prior to incurring a cost, MPIC is not liable for paying it. The Appellant purchased the comfort lift chair and submitted the receipt to MPIC for reimbursement. The Appellant did not have MPIC's consent prior to incurring the cost.

We find that the Appellant has failed to show, on a balance of probabilities, that the comfort lift chair is medically required within the meaning of the MPIC Act and Regulations.

Walk-in Bathtub with Substantial Safety Equipment

The Appellant indicated that she requires a walk-in bathtub because she finds it hard to get in and out of a bathtub as her knee does not bend. [Appellant's chiropractor] attributed her difficulties with getting into a bathtub as being due to her lower back, right knee and right foot. He indicated that the Appellant has been unable to fully extend her right leg since the MVA.

The Appellant has received a permanent impairment award of 10% for loss of range of motion in her right knee. Based on the Appellant's description of her difficulties with bathing and her inability to fully extend her right leg due to her permanent right knee problems, the panel accepts that specialized medical supplies and/or specialized bath equipment are medically required due

to MVA related injuries that make it difficult for the Appellant to safely bathe. However, the panel is not prepared to order that a walk-in bathtub is provided in the absence of a review by a health care practitioner who specializes in the identification of appropriate aides. We therefore refers this issue back to case management so that an appropriate professional such as an occupational or physical therapist can provide assessment of what equipment and/or modifications to the Appellant's bathtub are necessary to enable the Appellant to safely bathe.

Shoes with Orthotics

In correspondence dated April 15, 2015, [Appellant's chiropractor] indicated that the Appellant requires "custom fitted orthotics for her shoes to keep her spine in line due to fallen arches, knee and hip problems." In his testimony, [Appellant's chiropractor] recommended foot orthotics to support the Appellant's medical arch, help heal the right ankle, stabilize the knee and help with the positioning of the right hip bone.

The panel agrees with MPIC that given the nature of the MVA injuries and the passage of time, the Appellant is not entitled to funding for orthotics. The panel also notes that the Appellant is seeking orthotics due to some conditions that have not been determined to be casually related to the MVA.

Disposition

Based on the foregoing, the June 19, 2014 Internal Review Decisions that address entitlement to personal care assistance, further permanent impairment awards and further chiropractic care are confirmed. The Internal Review Decision dated November 10, 2015 is varied. The request for a

wheeled walker, walking cane, low back support brace, comfort lift chair and shoe orthotics is denied. The issue of bathing/bathroom equipment and/or bathtub modifications is referred back to case management for assessment and implementation as outlined above. The Commission shall remain seized on the issue of bathing/bathroom equipment and/or bathtub modifications should a resolution of this issue not be reached between the parties.

Dated at Winnipeg this 28th day of August, 2018.

KARIN LINNEBACH

LINDA NEWTON

BRIAN HUNT