

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-253**

PANEL: Ms Laura Diamond, Chairperson
Mr. Guy Joubert
Dr. Arnold Kapitz

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Ken Kaltornyk;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Alexandra Miles.

HEARING DATE: March 15 and 16, 2018

ISSUE(S): Whether the Appellant is entitled to additional physiotherapy treatments beyond May 25, 2015.

RELEVANT SECTIONS: Sections 136 and 150 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation 40/94.

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL, IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

Background:

The Appellant was injured in motor vehicle accidents (MVAs) on November 2, 2006 and January 22, 2007. She suffered injuries to her head, knees, and the left side of her body. She experienced headaches, vertigo, and pain in her neck, shoulders, back, hips, chest, arm and wrists.

As a result, the Appellant was in receipt of physiotherapy treatment benefits from MPIC. These benefits were terminated by MPIC in a case management decision, upheld by an Internal Review decision dated September 25, 2009, which found that she was not entitled to treatment related to a bilateral rotator cuff tendinopathy, as the medical information on her file indicated that this condition was not causally related to the motor vehicle accident in question. The Appellant filed a Notice of Appeal in regard to this Internal Review decision.

When an appellant files a Notice of Appeal with the Commission, the appellant may request the option of participating in mediation before proceeding with the appeal at AICAC. Participation in mediation is voluntary. It is an informal and confidential process conducted by a neutral third party mediator who is independent of MPIC and AICAC. Mediation services are offered through the Automobile Injury Mediation Office (AIM).

The Appellant requested mediation for her first appeal and a mediation hearing was held in regard to that appeal on January 30, 2013.

Should an agreement be reached during the mediation process, the mediator prepares a Memorandum of Agreement which sets out the issues that have been resolved or not resolved. Any agreement that is reached at mediation is binding on both parties.

Any issues that are not resolved at mediation may continue on appeal to the Commission. The appeal is then returned to AICAC where a hearing will be scheduled. During the ensuing pre-hearing process, an Appeals Officer for the Commission will assemble documents that relate to the appeal and provide copies of the documents to the appellant and MPIC, so that they may be referred to at the hearing of the appeal. Both parties are asked to review and confirm that all

necessary documents have been included in what is then referred to as the appellant's **Indexed File**. The panel that hears the appeal will also receive a copy of the documents.

The Commission's *Guidelines for Hearing* provide that all new documentary evidence not already in the Indexed File must normally be filed with the Commission at least 30 days prior to the hearing. The Commission has the discretion, on proper grounds, to allow for a shorter period of notice to permit the filing of new documentary evidence or, to adjourn the hearing (pursuant to its procedures) to provide parties with more time to review the late documents.

A (mediation) Memorandum of Agreement signed by the Appellant and MPIC January 30, 2013 resolved the issue in dispute regarding expenses for physiotherapy treatment by rescinding the Internal Review decision dated September 25, 2009. The parties agreed that MPIC would reinstate physiotherapy treatments and reimburse for past treatments. (A copy of this Memorandum of Agreement was included in the Appellant's Indexed File for the current appeal.)

On May 28, 2013, the Appellant's case manager issued another decision denying further funding for physiotherapy treatments, concluding that the Appellant had reached maximum therapeutic benefit. However, on June 27, 2013, a letter was issued to the Appellant from MPIC's Injury Management Coordinator in regard to her concerns regarding entitlements. This letter apologized for the misunderstanding regarding recent decisions and indicated that MPIC was rescinding the decision letter of May 28, 2013 regarding physiotherapy treatment. Physiotherapy treatment would be reinstated to the Appellant at a rate of one to two times per month for treatment. Her file would be reviewed in approximately one year's time to determine if further funding for physiotherapy would be approved.

On October 15, 2013, the Appellant's physiotherapist provided a narrative report summarizing the Appellant's treatment and condition, and recommending a further five vestibular physiotherapy treatments, which MPIC allowed.

Further reports were received from the Appellant's physiotherapist on December 28, 2013, and September 7, 2014. The September 7, 2014 report indicated that at that point the physiotherapist did not expect improvement in the Appellant's neck or shoulder range of motion and strength. After discussing this with the Appellant (who indicated that she wished to continue on a maintenance schedule to help control pain and maintain levels of joint mobility and strength) the physiotherapist concluded that this was a reasonable request in order for the Appellant to maintain her current status. She recommended that the Appellant attend for physiotherapy once every two weeks.

Following a Health Care Services review of the physiotherapy report, the Appellant's case manager, on May 25, 2015 issued a decision denying further funding for physiotherapy treatments, indicating that the medical information on file supported the conclusion that the Appellant had reached maximum therapeutic benefit with respect to physiotherapy treatments and that it was unlikely further treatment would result in significant improvement in her condition. Entitlement to further funding of physiotherapy treatment was terminated effective May 25, 2015.

The Appellant sought an Internal Review of this decision. In an Internal Review Decision (the IRD) dated October 1, 2015, an Internal Review Officer (IRO) for MPIC reviewed the history of physiotherapy treatments and funding on the Appellant's file, including the (mediation) Memorandum of Agreement signed on January 30, 2013.

The IRO opined that the reinstatement of physiotherapy set out in this document related only to the causal connection of the Appellant's injuries to the accident and did not contain information supporting her position that the reinstatement of physiotherapy was to ensure her condition did not deteriorate.

Further, the IRO relied upon the letter from the Injury Management Coordinator dated June 27, 2013 (setting out an entitlement to physiotherapy treatment one to two times per month) which indicated that the file would be reviewed in approximately one year's time to determine if further funding of physiotherapy would be approved.

The IRO concluded that MPIC's physiotherapy consultant had completed a thorough analysis of the medical information available, opining that the Appellant was at maximum medical improvement regarding physiotherapy treatment. He concluded that there was no objective medical information to support further physiotherapy treatment as medically required within the meaning of the PIPP legislation. The case manager's decision was upheld.

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

Preliminary Matters:

An appeal hearing was convened on March 15, 2018. At the outset of the hearing, the parties were asked to clarify and confirm their positions in regard to the Appellant's request for further physiotherapy benefits. Counsel for the Appellant confirmed that the Appellant was seeking supportive physiotherapy treatments and would be taking the position that supportive physiotherapy was medically required pursuant to Section 136(1) of the MPIC Act or, alternatively, under Section 138 of the MPIC Act (regarding rehabilitation).

Counsel for MPIC indicated that it was MPIC's position that the Commission should not award *supportive* physiotherapy treatment benefits to the Appellant, as the issue of supportive physiotherapy had not been considered by the case manager or in the Internal Review Decision. A discussion with counsel ensued and counsel for MPIC indicated that while MPIC recognized that the Commission has considered claims for supportive physiotherapy treatment in the past, in this case, MPIC did not believe that the Appellant met the test or criteria which the Commission had applied in the past regarding supportive physiotherapy care.

Both parties indicated that they would be referring to these criteria and to case law on that point during their final submissions.

The panel proceeded to hear sworn testimony from the Appellant regarding her motor vehicle accident, injuries and treatment. In explaining the procedures and discussions with MPIC, the Appellant commented upon the (mediation) Memorandum of Agreement dated January 30, 2013, a copy of which was located in the Appellant's Indexed File.

It should be noted that it is not common for mediation documents to be included in the Appellant's Indexed File at the Commission, as generally mediation proceedings and the contents of those discussions are dealt with separately by AIM in a confidential manner, such that the Commission is not privy to the information. However, in this matter, the previously negotiated and signed Memorandum of Agreement (which was referred to in the IRD) was included in the Appellant's Indexed File, as agreed by the parties.

In the course of her testimony, the Appellant touched upon an issue which arose after the Appellant's entitlement to physiotherapy was terminated by the case manager on May 28, 2013. The Appellant had been upset that the matter which had been agreed to in mediation was "cancelled by the case manager" four months later. She contacted AIM's project manager to express her concern. As a result, mediation was reconvened with the same mediator and representatives from MPIC (as well as some additional MPIC personnel), and a new agreement was arrived at and signed. The Appellant indicated that she believed this document should also be before the panel.

The Appellant was represented at the hearing by a Claimant Adviser, who is not a lawyer but is an experienced advocate. In response to questioning from the panel, counsel for the Appellant indicated that he was aware of the new agreement and provided a copy of it. It was dated July 10, 2013 and entitled Addendum to Memorandum of Agreement. However, he advised that when, one week before the hearing of the appeal, he discovered that it had been inadvertently omitted from the Appellant's Indexed File, he contacted counsel for MPIC to request that the document be put before the panel, in spite of the fact that the deadline for submitting documents 30 days prior to a hearing (as contained in the Commission's Guidelines for Hearing) had passed. He advised the panel that counsel for MPIC had objected to the introduction of this document on those grounds. Counsel for MPIC confirmed that she had at that time objected to the document being placed into evidence before the panel. Counsel for the Appellant had not pursued the matter any further.

The panel recessed to consider the document and returned to advise that it had concluded that the Addendum to Memorandum of Agreement dated July 10, 2013 (the Addendum) was relevant and important evidence in the matter. The document purported to amend and replace the

Memorandum of Agreement dated January 30, 2013, which was already in the Appellant's Indexed File.

The Memorandum of Agreement dated January 30, 2013 referenced mediation which had been conducted on March 16, 2012 and January 30, 2013 and provided:

Issue 1:

The parties agreed that MPI will reinstate physiotherapy treatment for the claimant and will reimburse the claimant for past treatments.

The Addendum to Memorandum of Agreement dated July 10, 2013 referenced mediation which had been conducted on May 16, 2012, January 30, 2013 and July 10, 2013. It stated:

The issues were resolved as follows:

Issue 1:

The parties agreed that MPI will provide supportive care physiotherapy treatment for the claimant based upon the treatment plan recommended by the physiotherapist. Entitlement to physiotherapy will be reviewed on June 27, 2014.

Counsel for MPIC advised that she was aware of the potential relevance of the document when it was brought to her attention by counsel for the Appellant and so had sought instructions from her supervisor in MPIC's legal department, who had instructed her to object to the inclusion of the document in the evidence before the Commission.

The panel determined that the Addendum should be entered into evidence. The panel also advised the parties that the Commission had some concerns regarding the conduct of MPIC's legal department in objecting to the inclusion of such a relevant document on procedural grounds.

The hearing was then recessed for a few hours, to allow counsel for MPIC, in light of the panel's decision to include the document, to consider the matter and receive instructions. She was asked to return to advise the Commission whether she wished to request a temporary adjournment of the matter, in order to give MPIC some time to prepare a response to the information contained in the document.

The hearing reconvened a few hours later. Counsel for MPIC advised that she had consulted with MPIC's legal department and did not wish to request an adjournment. She was prepared to proceed with the hearing, to hear the rest of the Appellant's evidence and to cross-examine her in this regard. Accordingly, the panel continued to hear evidence. The Addendum dated July 10, 2013, which had been identified by the Appellant, was marked as "Exhibit 1".

The parties were also advised that the panel would like to hear submissions, at the conclusion of the evidence, in regard to the effect of the duties of counsel for MPIC and the legal department towards the Commission, as well as the overall duty of MPIC to the Appellant, pursuant to Section 150 of the MPIC Act.

Evidence and Submission for the Appellant:

The Appellant relied on documents on her Indexed File to establish a history of and continuing need for supportive care physiotherapy treatments. This included past decisions regarding physiotherapy treatment (case management and internal review), a Memorandum of Agreement which concluded a first round of mediation, as well as the Addendum to the Memorandum of Agreement which amended the first and set out an entitlement to supportive physiotherapy treatment. Also included was a decision from MPIC's injury management coordinator. Narrative medical reports from her physiotherapist, [text deleted], were also provided.

The panel heard testimony from the Appellant. She described the MVA, the injuries and pain she suffered as a result, and the treatment which she pursued. This treatment included physiotherapy and athletic therapy as well as chiropractic treatment.

She described her employment, time missed from work due to the MVA, a graduated return to work program and her return to work with accommodation from the employer.

The Appellant also explained difficulties which arose for her with vertigo, in addition to continuing pain in her shoulder, neck, arms, wrists and headaches. She explained that she underwent physiotherapy treatment of a specialized nature for her vertigo and Benign Paroxysmal Positional Vertigo (BPPV) which resulted from the motor vehicle accident. She learned specific home exercises to deal with this. She also underwent physiotherapy treatment for her other symptoms. This included a home exercise program which the Appellant described in detail, indicating that she dedicated a large amount of time, on a daily basis, to performing these home exercises. She also explained that she attends to her doctor for rhizotomies, which help with her symptoms for a period of time but need to be repeated approximately every three months.

The Appellant described her experience with mediation through the AIM office and the situation that led to the execution of the Addendum to Memorandum of Agreement, which extended supportive physiotherapy treatment to her. She explained that since the execution of that agreement, she has been attending for physiotherapy treatments approximately every second week. This is an average, as she finds that she needs more assistance in the winter, during cold weather and can try to go less often in the summer. She also described her experience with a trial withdrawal from physiotherapy care and the positive effect of the resumption of care.

The Appellant explained that her condition caused her to retire from her employment. She also limits her social engagements and is very cautious when it comes to activities of daily living and exercise out of doors, due to difficulties with her vertigo and BPPV and fears of falling.

The panel also heard evidence from the Appellant's physiotherapist who was qualified, by agreement of the parties, as an expert in physiotherapy with training in vertigo. The physiotherapist explained that she had treated the Appellant for four years between April of 2013 and August of 2017. When she reduced her own hours, another physiotherapist at her clinic assumed treatment of the Appellant.

The physiotherapist reviewed the diagnosis of the Appellant's condition. She described the physiotherapy treatment which the Appellant had undergone for vertigo and BPPV.

The physiotherapist had provided reports, on the Appellant's Indexed File, dated September 7, 2014 and June 13, 2016, which addressed the issue of maintenance treatment for the Appellant and tests and scores regarding the criteria for supportive care. These were reviewed in her testimony and included a description of a trial withdrawal of care, with a resulting deterioration of symptoms. She also described an improvement in the Appellant's condition with the resumption of care. She explained and described the home exercise program which the Appellant had been provided with, as well as some of the exercise aids she had prescribed.

The physiotherapist explained that, in her experience, most patients can maintain themselves at home with a home exercise program. However, a small amount of patients need help along that path. She described this as a very small percentage of patients and explained that it often involves patients who are diligent with their home exercise program but still need extra help,

particularly with pain control. She explained that the main purpose of supportive physiotherapy is pain control and the maintenance of function and quality of life. She noted that physiotherapy always involves an active component of healing yourself. Physiotherapists guide patients, but it is up to them to be involved in the active process. Although the goal for a physiotherapist is to have patients leave, and no longer need her, she indicated that she would be surprised if there was a physiotherapist who didn't have a handful of patients who continue to see them for maintenance treatment.

The physiotherapist confirmed that, as noted in her report, after reviewing the Appellant in regard to the criteria for supportive care, as well as considering her own experience with the Appellant's symptoms, exercise program and continuing need for pain control to maintain her level of function, she was of the view that the Appellant did require supportive physiotherapy treatment. She explained that the frequency could vary depending upon the season, but that on average, the Appellant would benefit from attending for treatment a few times per month.

Submission:

Counsel for the Appellant confirmed that she was seeking supportive physiotherapy treatments.

He noted that a Health Care Services review had accepted that the Appellant's vertigo, wrist fracture and shoulder injury from a fall due to vertigo, were causally connected to the motor vehicle accident.

Counsel reviewed the Health Care Services physiotherapy review dated May 19, 2015 which concluded that the Appellant had reached maximum medical improvement, and formed the basis for the case manager denying further treatment benefits. However, counsel submitted that both the physiotherapy consultant and case manager must have been aware of the Addendum which specifically stated that the nature of treatment which the Appellant was receiving was supportive. He added that if they were not so aware, they should have been, or should have been made aware of this. According to MPIC's internal guidelines (which have been applied in previous cases of supportive care), supportive treatments are exempt from the necessity to be "medically required". In fact, he noted, one of the requirements for supportive treatment is that the patient must be at maximum medical improvement, so the physiotherapy consultant should have been asked whether the Appellant still met the criteria for supportive treatments, not the requirement for entitlement to acute care treatment.

Counsel reviewed the reports of [Appellant's physiotherapist], as well as her testimony, which confirmed that by objective measures, and according to her opinion, the Appellant met the criteria which had been set out.

These criteria were described in the previous cases of the Commission which he provided and reviewed. They included decisions of the Commission in *AC-05-11* and *AC-06-07*. These decisions included a consideration of whether an Appellant had established, through objective medical evidence, that further care is required. Evidence of deterioration following a discontinuation of care and evidence of other modes of treatment, including home exercise programs were considered.

The evidence of the Appellant's physiotherapist established objective evidence of deterioration following a period of cessation of treatment, as well as decrease of pain levels and reduction of pain medication on resumption of treatment. Both the Appellant and the physiotherapist had described various other treatments which the Appellant pursued, including the home exercise program. Therefore, the Appellant met all of the criteria used to determine entitlement to supportive care and counsel submitted that ongoing physiotherapy treatments would be beneficial to the Appellant's well-being, serve to lessen a disability resulting from bodily injury and facilitate her return to a normal life or re-integration into society.

In this regard, counsel noted that the Appellant should also be entitled to supportive physiotherapy treatments, pursuant to Section 138 of the MPIC Act, dealing with rehabilitation, and referred to the decision of the Court of Appeal in *Menzies and MPIC et al* 2005 MBCA 97, which considered a decision of the Commission in this regard.

Therefore, counsel submitted that the Appellant should be entitled to supportive physiotherapy care treatments.

Counsel for the Appellant also briefly addressed the duty of MPIC under Section 150 of the MPIC Act. He submitted that the violation of Section 150 in this case goes beyond the absence of the Addendum from the Indexed File that was provided to the Commission. Looking back, even the case manager's referral of the issue to the Health Care Services physiotherapy consultant contained no reference to the Addendum, nor to the fact that MPIC had previously and specifically granted supportive physiotherapy to the Appellant. While it is not clear whether or not the consultant was aware of this, counsel submitted that this does not alter the fact that MPIC should have used the supportive care criteria in assessing the Appellant's entitlement to

further physiotherapy treatments. He submitted that she should be entitled to reimbursement and ongoing supportive physiotherapy treatment on a weekly or bi-weekly basis.

Evidence and Submission for MPIC:

The only evidence submitted by MPIC was set out in a report from the Health Care Services physiotherapy consultant dated May 19, 2015. After reviewing a report dated September 7, 2014 from the Appellant's physiotherapist and the measurements set out therein, he stated:

... The physiotherapist did not anticipate further improvements in the claimant's neck or shoulder range of motion or strength. This was discussed with the claimant and it was reported that the claimant wished to continue on a maintenance schedule in order to help control her pain and maintain current levels of joint mobility and strength.

DISCUSSION

This writer's opinion is unchanged from the previous review of April 30, 2013 and that physiotherapy was not considered medically required.

The April 30, 2013 Health Care Services report he referred to was authored prior to the Addendum and stated:

On balance, the claimant is likely at maximal therapeutic benefit with respect to Physiotherapy treatment. That is, it is unlikely that further treatment will result in a significant improvement in the claimant's condition. Additional physiotherapy would not be considered medically required.

Submission:

In her submission, counsel for MPIC confirmed that MPIC was no longer taking the position that the Commission cannot order supportive physiotherapy in this case because the issue was not dealt with by the case manager or IRO. Rather, MPIC's position was that the Commission should not order supportive therapy after May 25, 2015, based upon the facts before it.

Counsel reviewed the three MVAs which occurred in 2003, 2006 and 2007, as well as the Appellant's pre-MVA history of osteoporosis, herniated disc in her back, bilateral carpal tunnel syndrome and chiropractic treatment for workplace repetitive strain.

Besides suffering from a Whiplash Associated Disorder from the MVAs, the Appellant also suffered from vertigo and BPPV after the 2006 MVA. She received treatment from a number of practitioners. She saw [Appellant's vestibular physiotherapist] for vestibular physiotherapy and received treatment through the public physiotherapy system at [Hospital] for three years.

Counsel then reviewed a number of reports containing assessments and diagnoses, concluding with the physiotherapy report of September 7, 2014. This report indicated that the Appellant's neck range of motion was improved with full flexion, rotation, etc., and that her shoulder range of motion had also increased.

Counsel referred to a previous decision of the Commission in *AC-06-07* which set out the supportive care test as described in the clinical guidelines for chiropractic practice and went on to indicate that one of the considerations which the Commission has looked at when assessing claims for supportive care includes whether there is objective evidence of deterioration in the appellant's status with the discontinuation of treatment. In that appellant's case, the evidence and documentation of the appellant's treating physiotherapist was corroborated by evidence from her massage therapist, general practitioner and neurologist, all supporting the need for continuing treatment. This included evidence from a variety of caregivers of deterioration in her condition following discontinuation of care. Counsel contrasted this with the current appeal where the only evidence available was from the Appellant's physiotherapist.

In another decision of the Commission in *AC-08-132*, the Commission referred to objective findings of deterioration by the physiotherapist, as well as evidence of a seven month withdrawal from care. This evidence was corroborated by the Appellant's athletic therapist.

Counsel also quoted from the Commission's summary of supportive care in that case:

Counsel for MPIC also submitted that the Appellant should not be entitled to supportive care if it does not address the underlying condition and only assists her dysfunction. The Commission notes that the purpose of supportive care is different from treatment directed toward obtaining maximum medical improvement. The tests for these two types of care are quite different. The criteria for supportive care do not require a progress towards maximum medical improvement in the Appellant's underlying condition; that is the test for regular or ongoing care which seeks to achieve maximum medical improvement. Supportive care is meant to address ongoing symptoms where the patient has reached maximum medical improvement but failed to sustain this benefit. It is also intended to facilitate a return to normal life and reintegration into society and/or the labour market.

Finally, counsel referred to the decision of the Commission in *AC-08-053*, in which the appellant had suffered multiple fractures. In addition to her physiotherapy treatment, the appellant did exercises with wobble boards, stretching machines and weights. She progressed from a wheelchair, to crutches, to two canes and then down to one cane, adding a variety of strengthening exercises to her routine which included work on an elliptical machine, walking, weight machines, free weights, stretches, yoga and work with a personal trainer.

The panel in that case indicated that it was struck by the appellant's ongoing efforts to comply with and advance her own rehabilitation program and that several care givers had documented improvement as a result. Further, the panel noted that:

The Appellant's testimony established that physiotherapy treatments continued both before and after September 2009 and continued to the present day. They help her maintain her functionality with daily living, with self-reported ongoing increases in ability to walk, hike, live an active life and increase, or at least maintain, her capacity.

Counsel for MPIC contrasted these cases with the current appeal. The Appellant's testimony showed that in the winter months, she may only derive three or four days of relief from physiotherapy treatments and that her pain levels at that point often tested the same as they had after months of an absence of treatment. There was a lack, she submitted, of objective measurements regarding the Appellant's current functionality. The majority of evidence relied upon for the deterioration of her condition after an absence of care were self-reported levels of pain by the Appellant. No evidence was led or reported in the June 13, 2016 physiotherapy report regarding how her vertigo or BPPV were affected by an absence of care, with no recorded measurements regarding her cervical vertigo.

Given the lack of corroborative caregiver evidence, along with scant evidence of deterioration and reliance on subjective reporting, counsel submitted that the Appellant had failed to advance her claim for supportive physiotherapy. The intention of supportive care was to facilitate a return to normal life in the labour market, and the Appellant had failed to achieve this goal. In fact, despite physiotherapy treatment, she retired due to ongoing pain. This was contrasted with the other decisions of the Commission, where the appellants were able bodied prior to the MVAs and were successful at returning to their previous status. Supportive care has a two-fold purpose of addressing deterioration and supporting reintegration into life, and that has not worked in the Appellant's case. Accordingly, the evidence for the Appellant falls short of meeting the onus upon her to establish her claim.

In regard to MPIC's failure to consider the question of supportive care and the Addendum, counsel admitted that obviously grievous errors had occurred, although she was not sure at what level. She noted that mediation documents do not typically appear on an appellant's Indexed File, but that still she did not know why the claim file was not updated in this case. She had

discussed this with the head of Injury Claims for MPIC but had not received a satisfactory response. She admitted that the Addendum should have been on the Appellant's file and should have been considered in claims management and addressed by Health Care Services (she did not know whether the Health Care Services' physiotherapist had access to the document or not).

Counsel also admitted that the Addendum was a document germane to the appeal before the Commission.

When asked to comment regarding the actions of MPIC's legal department, who were aware of the Addendum at least one week before the hearing and still sought to prevent its introduction before the panel, counsel surmised that her supervisor in the legal department had not been aware that there was already a mediation document on the Indexed File and had instructed her to prevent disclosure of the document both on the grounds of procedural timelines and the confidential nature of the document.

While the events surrounding the mishandling of the document were unfortunate, counsel submitted that the Appellant had still failed in the onus upon her to establish entitlement to supportive physiotherapy care in 2015, and that her appeal should be dismissed.

Discussion:

The MPIC Act provides:

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;
- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

Manitoba Regulation 40/94 provides:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant;
- (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

In order to qualify for entitlement to treatment benefits, the onus is on the Appellant to establish, on a balance of probabilities, that the treatment that she wishes to receive is medically required.

Where it appears that a claimant has reached maximum therapeutic benefit from a modality of treatment, the appellant may take the position that further supportive therapy is medically required.

Entitlement to Supportive Physiotherapy Treatment Benefits:

As Counsel have noted in their submissions, previous decisions of the Commission have considered a definition of supportive care, which was initially described in the Clinical Guidelines for Chiropractic Practice in Canada.

Treatment for patients who have reached maximum therapeutic benefit who have failed to sustain this benefit and progressively deteriorate when there are periodic trials of withdrawal of treatment. Supportive care allows application of active and passive care including rehabilitation and lifestyle modifications. It is appropriate when alternative care options including home based self-care have been considered attempted.

We have reviewed the evidence provided by the Appellant in support of her claim for entitlement to supportive physiotherapy care benefits.

Counsel for MPIC argued that in testing this evidence it is important to note that, unlike in some previous decisions of the Commission on the issue of supportive care, the Appellant had not provided evidence from more than one caregiver or type of caregiver to support her claim, relying only on the evidence of her physiotherapist.

However, the panel, having reviewed all of the evidence, prefers the evidence submitted by the Appellant to the evidence of MPIC's physiotherapy Health Care Services consultant. He provided one report which failed to address or consider the tests and criteria for supportive physiotherapy, simply stating that his opinion remained unchanged from April 30, 2013 and that as further improvements in the Appellant's neck or shoulder range of motion or strength were not anticipated, physiotherapy was not considered medically required.

The Commission has given greater weight to the variety of evidence submitted by the Appellant, which did consider the criteria for supportive physiotherapy care. This includes:

- The Addendum dated July 10, 2013 which provides for supportive care physiotherapy treatments for the Appellant.
- The report from the Appellant's physiotherapist dated September 7, 2014, which concluded:

At this point, I do not expect further improvements in [the Appellant's] neck or shoulder ROM and strength. I have discussed this with [the Appellant] and she wishes to continue on a maintenance schedule in order to help control her pain and maintain her current levels of joint mobility and strength. I feel that this is a reasonable request. I am unsure how often [the Appellant] would need to come to maintain her current status but I believe once every two weeks is a good place to start.

- The report from the Appellant's physiotherapist dated June 13, 2016 which indicated that the Appellant's condition had reached maximum medical improvement and that the primary goal in regard to physiotherapy treatment has been "maintenance of her current levels of pain control, function, joint mobility and strength".

The report goes on to document the Appellant's absence from physiotherapy treatment from March 16, 2016 to April 18, 2016 and provides outcome measures and scores prior to and upon completion of this absence from treatment:

The above scores indicate significant deterioration in [the Appellant's] functional status and pain levels and significant increase in level of disability after a one month absence from physiotherapy treatment.

The report then notes that upon resumption of treatment the Appellant's pain levels decreased and she was able to decrease the amount of pain medication she was taking. The amount of c-spine and shoulder muscle spasm and trigger points reduced and joint play significantly improved. Other treatment approaches (rhizotomy) and the Appellant's home based exercise program were also reviewed.

Counsel for MPIC argued that the evidence of [Appellant's physiotherapist] lacked corroboration from other caregivers. The panel found the reports and testimony of the physiotherapist to be detailed, objective, consistent, reasonable, reliable and credible. This evidence, combined with the Appellant's testimony and documents on the Indexed File, have led the panel to find that the Appellant has met the criteria for supportive care, including deterioration upon trial withdrawal of care, improvement upon reinstatement of care, and attention to other treatment approaches and

home based exercise. The panel therefore concludes that the Appellant has met the onus upon her of showing, on a balance of probabilities, that she is entitled to further physiotherapy treatment benefits on a supportive care basis.

Failure to Consider Supportive Care and the Addendum to Memorandum of Assessment:

As noted, the Commission applies different criteria in assessing the medical requirement for supportive care than it does in an appeal involving standard treatment benefits for an appellant who has not yet reached maximum therapeutic benefit or maximum medical improvement.

Yet the case management and Internal Review decisions which led to this appeal did not consider or address the question of supportive care. MPIC failed to take into account the Addendum dated July 10, 2013 which it had agreed to and which clearly referenced supportive care. This failure, along with the objection of MPIC's legal department to including that document in the evidence before the panel, must be considered by the Commission in reviewing both the IRO's decision and MPIC's duty to assist and advise the Appellant pursuant to Section 150 of the MPIC Act.

The MPIC Act provides:

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

Case Management:

In approaching this issue, Counsel for MPIC admitted that, in spite of inquiries made within the Corporation, it could not be determined how or why this particular document was not in the Appellant's claim file, or if it was (which she did not believe to be the case), why it was ignored. Counsel acknowledged that the Corporations' general duty to assist and advise the Appellant under Section 150 of the MPIC Act was compromised at the point where the Appellant's physiotherapist recommended further maintenance treatment (on September 7, 2014) and MPIC, through reports from its Health Care Services physiotherapy consultant and case manager, failed to take into account the contents of the Addendum.

The panel agrees that the Corporation's failure to consider the Addendum breached its duty to advise and assist the Appellant. The Corporation, in making its decision regarding supportive care, completely ignored the relevant history of the mediation agreements. The Addendum revised and replaced the first agreement. Its language specifically and directly addressed the question of *supportive* care, awarding supportive physiotherapy benefits to the Appellant, to possibly be re-examined by MPIC at a later date. When another request for such care was made the next year, MPIC treated it as a request for standard physiotherapy care and rejected it on the basis that the Appellant had reached maximum therapeutic benefit. The panel finds that the failure to even consider the Addendum and to apply the criteria of analysis for supportive care treatment, violated MPIC's duty to advise and assist the Appellant and endeavour to ensure she received the compensation to which she was entitled.

Internal Review Officer:

The panel finds that the IRO, in making his decision dated October 1, 2015 also failed to consider the Addendum dated July 10, 2013. We have found that this document was germane to the issue before the panel, in that it provides that MPIC will provide *supportive* care physiotherapy treatment for the Appellant. The IRO did not undertake a review of the criteria for supportive care in this case, preferring instead to base his decision upon the following definition of “Maximum Medical Improvement” in assessing whether treatment was “medically required”.

“Maximum medical improvement” means that there is no reasonable expectation of further improvement from any form of therapeutic intervention, or through the natural healing process.

Therefore, the panel finds that the IRD, which completely failed to acknowledge or consider the Addendum providing for supportive care, is flawed and erroneous, and cannot be upheld by the Commission.

MPIC’s Legal Department:

The Commission has considered the duty of counsel for MPIC and MPIC’s legal department towards the tribunal, as well as towards the Appellant under Section 150 of the MPIC Act. While the Commission is not charged with assessing or adjudicating individuals’ conduct pursuant to the Manitoba Law Society’s Code of Conduct, the panel has reviewed counsels’ duty to a tribunal set out therein, for guidance in this matter.

While counsel submitted that it was her belief that the case manager, IRO and others involved in the administration of the Appellant’s claim file were not aware of the existence of the Addendum, the panel finds that the same cannot be said for counsel for MPIC and the legal

department. The parties agreed that counsel for the Appellant discovered that the document was missing from the Appellant's Indexed File one week before the hearing. He approached counsel for MPIC, seeking to have the document submitted to the panel, even though it fell outside the one month cut-off in the Commission's guidelines for production of documents. Counsel for MPIC objected to its production at that time, but after the Appellant testified to its existence, the panel admitted the document into evidence.

Counsel for MPIC explained that the reason the legal department initially objected to providing a copy of the Addendum to the Commission was not only due to the late submission of the document. The legal department also took into account the fact that this was a mediation document, which should be privileged. While counsel candidly acknowledged that she herself was, or should have been, aware that there were already mediation documents on this particular Indexed File, she suspected that her supervisor may not have been so aware.

It is quite clear to the panel that the legal department was aware of the existence of the document, its content and its relevance to the issue before the panel, one week prior to the hearing. Counsel for MPIC admitted to the panel that the document was "germane" and so, had sought advice from her supervisors, who nonetheless instructed her to object to its production. Despite having this document and understanding that it expressly provided for supportive physiotherapy, counsel asserted in her opening statement that supportive care was not the proper issue before the panel.

The Commission has considered counsel's decision in light of a lawyer's duty to act in good faith to the tribunal as well as the duty of the Corporation's legal department to the Appellant under Section 150 of the MPIC Act.

The Commission is of the view that counsel appearing before it has a duty to promote parties' rights to a fair hearing in which justice can be done. This includes a duty, while representing clients resolutely, to treat the tribunal with candour, fairness, courtesy and respect. This also includes a duty not to mislead the tribunal or suppress what ought to be disclosed.

More specifically, the MPIC Act imposes a positive duty upon those acting on behalf of the Corporation to assist and advise claimants. Once she became aware of the document, counsel for MPIC was obliged to address it, and not simply to ignore it. Counsels' actions in regard to this appeal have failed to meet this duty.

Accordingly, we find that the Corporation, and specifically MPIC's legal department, have violated Section 150 of the MPIC Act.

Disposition:

The Commission finds that the Internal Review Decision was flawed and erroneous and that the Appellant has met the onus upon her to show, on a balance of probabilities that she should be entitled to further supportive physiotherapy care.

The Appellant's physiotherapist recommended treatment to be continued once every week or two weeks. In their testimony, both the Appellant and the physiotherapist explained to the panel that the frequency of treatment varies depending upon the season and is impacted by the weather. Based upon this testimony, the panel finds that the Appellant should be entitled to supportive care physiotherapy treatment on a bi-weekly basis, on average. Accordingly, the Appellant

should be reimbursed for any amounts expended in this regard to date with interest, and should be entitled to ongoing supportive physiotherapy treatment on a bi-weekly basis.

The decision of the IRO dated October 1, 2015 is hereby rescinded.

Dated at Winnipeg this 20th day of April, 2018.

LAURA DIAMOND

GUY JOUBERT

DR. ARNOLD KAPITZ