



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-25

PANEL: Mr. Mel Myers, Q.C., Chairperson
Dr. Patrick Doyle
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Danielle Robinson.

HEARING DATE: December 14, 2005

ISSUE(S): Entitlement to funding for athletic therapy treatment

RELEVANT SECTIONS: Sections 136(1)(a) 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

[The Appellant] was involved in a motor vehicle accident on February 4, 2004 in which he sustained a whiplash associated disorder. MPIC approved a treatment plan of eighteen (18) physiotherapy treatments, dated March 3, 2004, which the Appellant received over the next few months. The Appellant was not satisfied with the physiotherapy treatments and, as a result, obtain an assessment from [Appellant's athletic therapist], who recommended athletic therapy treatments two (2) times a week for six (6) weeks. As well, MPIC received a request by the Appellant for chiropractic treatments three (3) times a week for four (4) weeks and then two (2)

times a week for eight (8) weeks. These requests for treatment were referred by the case manager to [text deleted], MPIC's Chiropractic Consultant, to determine whether these treatments were medically required.

[MPIC's chiropractor], by an Inter-Departmental Memorandum to the case manager dated March 31, 2004, advised that in his opinion the file contents of the reports from the athletic therapist, physiotherapist and chiropractor do not support the necessity for concomitant care.

The Appellant continued to receive physiotherapy treatments funded by MPIC. After twenty-two (22) physiotherapy treatments the case manager requested a progress report from the physiotherapist and, as a result thereof, approved funding for an additional six (6) sessions beyond the eighteen (18) approved originally.

The Appellant testified at the hearing that he was not happy with the results he was receiving from the physiotherapy treatments and was still suffering some pain from the motor vehicle accident whiplash injury and, as a result, saw [Appellant's sports medicine doctor] at the [text deleted]. On June 3, 2004 [Appellant's sports medicine doctor] provided a note to the Appellant suggesting eight (8) to ten (10) sessions of athletic therapy for postural cervical scapular myofascial pain.

The Appellant further testified at the appeal hearing that he was referred by his caregiver, [Appellant's sports medicine doctor], to [Appellant's athletic therapist], and the Appellant attended at the office of [Appellant's athletic therapist] for an assessment. On July 12, 2004 [Appellant's athletic therapist] provided a report to MPIC recommending two (2) visits per week for six (6) weeks to receive athletic therapy treatments. [Appellant's sports medicine doctor] as

well provided an Initial Health Care Report to MPIC in respect of the Appellant, dated July 15, 2004 which indicated a diagnosis of cervical myofascial pain. The Internal Review Officer, in her decision dated November 25, 2004, stated in respect of [Appellant's sports medicine doctor's] report that although that report had not indicated any treatment, [Appellant's sports medicine doctor] in fact had prescribed a treatment regime of between eight (8) to ten (10) sessions with an athletic therapist.

The case manager, in a written request dated July 29, 2004, requested a medical opinion from MPIC's Health Care Services as to whether the Appellant's request for treatment from an athletic therapist was medically required and to determine whether in the opinion of the consultant the Appellant's current signs and symptoms relate to the motor vehicle accident of February 4, 2004. [text deleted], the Chiropractic Consultant for MPIC's Health Care Services, provided an Inter-Departmental Memorandum to the case manager dated July 29, 2004 setting out the following medical opinion:

After reviewing the information on file, there does not appear to be sufficient evidence to suggest that the Standards of Excellence Program would not apply to this claimant as he has already exceeded those guidelines in terms of physiotherapy care. There does not appear to be sufficient evidence on file to suggest that ongoing supervised exercises are a therapeutic necessity.

The case manager wrote to the Appellant on August 27, 2004 and advised the Appellant that his entire medical file had been reviewed by MPIC's Health Care Services Team and stated:

. . . The medical information on file indicates that sufficient physiotherapy sessions have occurred and ongoing supervised exercises are not a "medical necessity".

Internal Review Officer's Decision

The Appellant, in an Application for Review dated October 17, 2004, made application to have the case manager's decision reviewed. An Internal Review Hearing was held on November 16,

2004 and the Appellant attended this hearing. On November 25, 2004 the Internal Review Officer issued her decision and stated:

In making my decision, I am aware there are two conditions which must be met before MPI becomes obligated to reimburse a claimant for expenses incurred for medical or paramedical care:

1. The expenses must have been incurred because of the accident (ie. Treatments must have been directed towards an injury sustained in the accident) in accordance with section 136(1)(a) of the *Manitoba Public Insurance Act* (copy enclosed); and
2. The treatment must have been “medically required” in accordance with section 5 of Manitoba Regulation MR P215-40/94 (copy enclosed).

The totality of the available medical evidence does not support the second branch of the above test. I am not convinced that the athletic therapy treatments being recommended are medically required within the meaning of the PIPP legislation or that MPI has any obligation to pay for those treatments.

The Appellant filed a Notice of Appeal dated February 14, 2004 (sic).

Appeal Hearing

The appeal hearing took place on December 14, 2005. The Appellant appeared on his own behalf and MPIC was represented by Ms Danielle Robinson.

The relevant sections of the MPIC Act and Regulations are:

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;

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.

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;
- (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.

The Appellant testified at the hearing and stated that:

1. as a result of the motor vehicle accident he suffered a whiplash injury and that MPIC agreed to fund a series of physiotherapy treatments to assist the Appellant in recovering from these injuries.
2. these treatments, although helpful, did not specifically treat the pain which he suffered from the whiplash injury.
3. as a result, he went to see [Appellant's sports medicine doctor], at the [text deleted], who physically examined the Appellant and recommended that he receive athletic therapy treatment for his pain.
4. he attended at the office of [Appellant's athletic therapist], who confirmed [Appellant's sports medicine doctor's] diagnosis and recommended that the Appellant receive two (2) athletic therapy treatments each week for a period of six (6) weeks.
5. he disagreed with MPIC's decision not to fund the athletic therapy treatments because he was of the view that the physiotherapy treatments were not resolving the pain arising from the motor vehicle accident injuries.

6. he has been personally assessed by both [Appellant's sports medicine doctor], and [Appellant's athletic therapist], and both confirmed he required athletic therapy treatments in order to resolve his motor vehicle accident injuries.

He further testified on cross-examination that:

1. he had not received the athletic therapy treatments because MPIC refused to fund these treatments and he could not afford to pay for these treatments.
2. his purpose in appearing at the appeal hearing was to seek a declaration that his rights had been violated by MPIC's refusal to fund the athletic therapy treatments.
3. he wasn't seeking any reimbursement of expenses for these treatments because he had not been able to afford to receive these treatments.
4. his shoulders still hurt and that he wished to see an athletic therapist for the purpose of treating his motor vehicle accident injuries.

Submissions

The Appellant, in his submission, reviewed his testimony and submitted that having regard to the medical opinion of [Appellant's sports medicine doctor] and [Appellant's athletic therapist], MPIC erred in failing to fund athletic therapy treatments.

MPIC's legal counsel argued, relying on [MPIC's chiropractor's] chiropractic opinion, that there was little evidence on the Appellant's file to suggest that the physiotherapy treatments were medically necessary for the Appellant to receive athletic therapy treatments. MPIC's legal counsel further submitted that the athletic therapy treatments would only be of a maintenance nature and would not in any way improve the health of the Appellant and as a result were not medically required pursuant to Section 5 of Manitoba Regulation P215-40/94.

Discussion

The relevant provision of the MPIC Act in respect of this appeal is Section 5(a) of Manitoba Regulation P215-40/94 which reads:

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:

- (c) 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;

The Commission noted the Appellant was personally examined by [Appellant's sports medicine doctor] who recommended athletic therapy treatment to deal with the Appellant's shoulder pain. [Appellant's sports medicine doctor's] medical opinion was confirmed by the [Appellant's athletic therapist], who recommended a series of athletic therapy treatments.

MPIC provided its medical consultant with the reports of [Appellant's sports medicine doctor] and [Appellant's athletic therapist] and requested [MPIC's chiropractor's] opinion as to whether the treatment recommended by the athletic therapist was medically required. [MPIC's chiropractor], after reviewing the medical information on file, concluded that there did not appear to be sufficient evidence to suggest that the standards of excellence program did not apply to the Appellant as he had already exceeded those guidelines in terms of physiotherapy care and that the athletic therapy treatments were not of a therapeutic necessity.

The Commission notes the case manager relied on [MPIC's chiropractor's] chiropractic opinion and rejected the medical opinion of [Appellant's sports medicine doctor], and the opinion of an athletic therapist in rejecting the Appellant's request for reimbursement for athletic therapy

treatments. The Commission further notes that MPIC did not give [Appellant's sports medicine doctor] an opportunity to review [MPIC's chiropractor's] chiropractic opinion before they rejected the Appellant's application to fund the athletic therapy treatments.

Section 150 of the MPIC Act states:

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.

In this case, [text deleted] (*AC-01-75*), the Commission stated:

The Dictionary of Canadian Law, Second Edition, defines the word claimant in part as:

1. One who makes a claim. . . .
4. A person who applies or has applied for benefit or compensation.

The Commission finds that the Appellant, in this appeal, was a claimant and that MPIC had a statutory duty to assist the Appellant pursuant to Section 150 of the Act.

In [text deleted] (*AC-01-75*), the Commission stated:

In carrying out its investigation, MPIC is required to comply with the principals set out in Section 150 of the MPIC Act. During the investigative process the relationship between MPIC and the Appellant is not adversarial in nature but is subject to Section 150 of the MPIC Act. As a result when MPIC is carrying out its investigation it is required to act fairly, reasonably and in good faith in order to determine the Appellant's entitlement to benefits under the MPIC Act and it failed to do so in this case. (page 12)

It is the Commission's view that prior to rejecting the Appellant's request for funding for athletic therapy treatments, MPIC should have requested from [Appellant's sports medicine doctor] the same information they requested from [MPIC's chiropractor]. The case manager, in a written request dated July 29, 2004, provided [MPIC's chiropractor] with the reports of [Appellant's

athletic therapist], dated July 12, 2004 and the report of [Appellant's sports medicine doctor] dated July 15, 2004 and requested:

. . . Please provide your opinion as to how his current signs and symptoms relate to the incident on Feb. 4, 2004. Is this request for treatment medically required?

The Commission notes that both [Appellant's sports medicine doctor] and [Appellant's athletic therapist], had physically examined the Appellant prior to determining that the Appellant required athletic therapy treatment while [MPIC's chiropractor] never physically examined the Appellant and only conducted a paper review. Notwithstanding the personal contact that [Appellant's sports medicine doctor] and [Appellant's athletic therapist] had with the Appellant, MPIC did not give [Appellant's sports medicine doctor] or [Appellant's athletic therapist] the same opportunity it gave to [MPIC's chiropractor] in determining whether or not the athletic therapy treatments were medically required. The Commission notes that MPIC, without first obtaining the medical opinion of [Appellant's sports medicine doctor] and the comments of the [Appellant's athletic therapist], accepted [MPIC's chiropractor]'s chiropractic opinion and rejected the Appellant's request for funding of athletic therapy treatments.

During its investigation, and prior to rendering a decision as to the entitlement of the Appellant to athletic therapy benefits, MPIC should have:

1. obtained a narrative report from [Appellant's sports medicine doctor] in respect of his medical examination and requested [Appellant's sports medicine doctor] to provide his opinion as to whether or not the recommended athletic therapy treatments were medically required;
2. obtained a narrative report from the athletic therapist indicating why he was recommending athletic therapy treatment;

3. given both [Appellant's sports medicine doctor] and [Appellant's athletic therapist] an opportunity of commenting on the opinion of [MPIC's chiropractor].

Section 150 of the Act requires MPIC to conduct a full and complete investigation of the Appellant's claim before rejecting it and they failed to do so. Had MPIC received reports from [Appellant's sports medicine doctor] and [Appellant's athletic therapist], it may have been persuaded to fund the Appellant's athletic therapy treatments. The Commission therefore concludes that in failing to carry out an appropriate investigation, contrary to Section 150 of the Act, MPIC did not treat the Appellant fairly and reasonably.

The Commission further notes that MPIC has the sole jurisdiction under the Act to determine a person's entitlement to benefits in respect of bodily injury arising out of a motor vehicle accident after March 1, 1994. As a result MPIC has a great responsibility to ensure that it complies with Section 150 of the Act prior to making a determination of a claimant's entitlement to benefits.

The Commission notes there was a conflict in the opinions between [MPIC's chiropractor] on one hand and [Appellant's sports medicine doctor] and [Appellant's athletic therapist] on the other hand as to whether or not the athletic therapy treatments were medically required pursuant to Section 5 of Manitoba Regulation 40/94. The Commission notes that under Section 5 of the regulation, there is no statutory distinction between MPIC's obligation to fund athletic therapy treatments and physiotherapy treatments.

The Commission further notes that MPIC, when rejecting the Appellant's funding for athletic therapy treatments, accepted the opinion of [MPIC's chiropractor], and rejected the opinion of both a medical doctor who specializes in sports medicine and an athletic therapist whose specific

training is providing athletic therapy treatments. The Commission has no evidence before it that [MPIC's chiropractor], who is qualified as a chiropractor, was in a better position to express a medical opinion in respect of the medical requirement for athletic therapy treatment than was a duly qualified medical practitioner specializing in sports medicine or an athletic therapist specializing in providing athletic therapy treatments. MPIC has not set out any reasons why, in respect to the Appellant's request for athletic therapy treatments, it preferred the opinion of [MPIC's chiropractor] over the opinions of [Appellant's sports medicine doctor] and [Appellant's athletic therapist].

[MPIC's chiropractor], in rejecting the Appellant's claim for funding, concluded the Appellant had already exceeded the guidelines in terms of physiotherapy treatments but could not provide any specific reasons why the Appellant could not benefit from athletic therapy treatments, which is a treatment distinct and separate from physiotherapy treatments.

The Commission further notes that [MPIC's chiropractor] did not personally examine the Appellant but conducted a paper review in arriving at his opinion. On the other hand, [Appellant's sports medicine doctor] and [Appellant's athletic therapist] personally examined the Appellant before rendering an opinion as to the need for athletic therapy treatments. Both [Appellant's sports medicine doctor] and [Appellant's athletic therapist] were therefore in a position to assess the Appellant's credibility prior to arriving at their opinion while [MPIC's chiropractor] was not able to do so.

It is for these reasons the Commission prefers the medical opinion of [Appellant's sports medicine doctor] and the opinion of [Appellant's athletic therapist], to the chiropractic opinion of [MPIC's chiropractor] in respect of the Appellant's need for athletic therapy treatments.

The Appellant testified in a clear and unequivocal fashion and the Commission finds that he was a credible person. The Commission accepts the Appellant's testimony that the physiotherapy treatments did not resolve the injuries he sustained to his shoulder as a result of the motor vehicle accident and accepts his testimony that he needed further athletic therapy treatment to resolve these injuries. The Commission finds that the medical opinion of [Appellant's sports medicine doctor] and the comments of [Appellant's athletic therapist] corroborate the testimony of the Appellant.

The Commission therefore finds, for these reasons, that the Appellant has established, on a balance of probabilities, that the athletic therapy treatments were medically required pursuant to Section 5(a) of Manitoba Regulation P215-40/94. The Commission therefore rescinds the decision of the Internal Review Officer dated November 25, 2004.

Dated at Winnipeg this 9th day of February, 2006.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

NEIL COHEN