

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-50**

PANEL: Ms Laura Diamond, Chairperson
Ms Mary Lynn Brooks
Dr. Sheldon Claman

APPEARANCES: The Appellant, [text deleted], was represented by
Ms Virginia Hnytka;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: October 8, 2009

ISSUE(S): Entitlement to Personal Care Assistance Benefits (whether
injury to right rotator cuff has a cause and effect relationship
to the motor vehicle accident).

RELEVANT SECTIONS: Section 70(1) of The Manitoba Public Insurance Corporation
Act ('MPIC Act')

Reasons For Decision

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.

The Appellant was injured in a motor vehicle accident on January 15, 2000. She complained of injuries to the back of her head, shoulders and left arm and was diagnosed as having "mild myalgia (muscle pain) of the left shoulder muscles". The Appellant attended for various forms of treatment, primarily physiotherapy and acupuncture.

MPIC also arranged for a Personal Care and Home Assistance Grid to be completed in October of 2000. The Appellant was found to not be entitled to personal care assistance expense reimbursement. The Appellant sought Internal Review and appealed that decision to the Commission which found, on October 8, 2003, that although the Appellant was unable to prepare her own meals, there was no medical evidence before the Commission to connect her current medical conditions (including arthritis, depression, stomach ulcer and blood clots) to the motor vehicle accident of January 15, 2000.

The Appellant was then diagnosed with a rotator cuff tear of her right shoulder, which was treated surgically on August 26, 2005.

Following her surgery for the rotator cuff tear the Appellant sought personal care assistance benefits from MPIC.

The Appellant's case manager wrote to her on November 8, 2005, after reviewing medical information on her file from [Appellant's surgeon], the surgeon who performed the rotator cuff tear repair surgery.

The case manager advised that as MPIC was unable to relate the Appellant's right shoulder symptoms to the motor vehicle accident of January 15, 2000 there was no entitlement to benefits under the Personal Injury Protection Plan ("PIPP"), including personal care assistance.

The Appellant sought an Internal Review of this decision. On February 17, 2006, an Internal Review Officer for MPIC reviewed and summarized the medical evidence on the Appellant's file. He noted the Appellant's lack of complaints regarding problems with her right shoulder in the period following the motor vehicle accident. Her initial consultation note from [Appellant's surgeon] traced the beginning of ongoing problems with her right shoulder at approximately one year before the report, January 10, 2005.

The Internal Review Officer upheld the decision of the case manager that there was lack of a causal relationship between the accident and the right shoulder condition.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She described the motor vehicle accident and her injuries suffered on that day. The Appellant testified that she was sore in both shoulders, but that her left shoulder hurt more at that time, along with her neck and the back of her head. She complained of pain to her family physician, [Appellant's doctor #1], who told her it might be due to arthritis and referred her for therapy. She attended for physiotherapy at [text deleted], but only had temporary relief of her pain. The Appellant testified that when her physiotherapy treatment finished, she still had pain in her shoulders, back and neck. She took pain killers and used ointments and rubs. She also did the exercises that the physiotherapist had taught her. She testified that the pain was not constant, but that she had good days and bad days.

The Appellant then described the treatment that she sought for her right shoulder in approximately April of 2002. At that time, she realized that the pain in her shoulder, which had been there off and on, was getting worse. She went to take a drink of coffee and lost control of that arm.

[Appellant's doctor #1] referred her from more therapy, but she felt that it was not helping her. The pain was getting worse.

She returned to see her doctor in 2004, because her arm was not cooperating with the rest of her body. She saw [Appellant's doctor #2] about her shoulder and was referred to [Appellant's surgeon], who ordered x-rays and an MRI, discovering that she had a torn rotator cuff. The surgery to repair the rotator cuff injury took place in 2005, and she required personal care assistance during the period of her recovery. This assistance was provided by her daughter [text deleted], for about six to seven weeks.

The Appellant was cross-examined by counsel for MPIC in regard to her pain complaints through the period from the motor vehicle accident in January of 2000 until her surgery in August of 2005. The Appellant had difficulty recalling specific events and at what various times she had had problems with and complained of pain in her left or right shoulders.

The Appellant also submitted a letter from her daughter describing the care she required after her rotator cuff surgery, as well as a medical report from [Appellant's surgeon] dated May 30, 2008. This included a review of some of her medical records, and indicated that the first report noting concern regarding her right shoulder was dated May 10, 2002, from a physiotherapist at [text deleted].

“...Following this there are multiple notes made [text deleted] of ongoing problems with the shoulder which subsequently lead to a referral from [Appellant’s doctor #2] which brought her to see me in consultation and then the subsequent diagnosis of rotator cuff tear.”

[Appellant’s surgeon] concluded that the patient was experiencing significant problems with the right shoulder prior to 2004. The doctor acknowledged that it was likely patients with rotator cuff problems would have periods of time when the shoulder was more and less symptomatic, but that it would be unlikely for the pain to go away completely. His surgical operative notes indicated that the tear was likely present for some time prior to the surgery, but it was impossible to place an actual time frame on that period.

Counsel for the Appellant submitted that the Appellant’s rotator cuff injury to her right shoulder was caused at the time of the motor vehicle accident. The lack of documentation regarding pain on this side in the period following the accident was due to the fact that the pain on her left side was initially so much worse. This pain claimed her attention and the attention of her caregivers. The patient followed treatment recommendations and managed her pain with physiotherapy, pain medication and a home exercise program. However, increased weakness and right shoulder discomfort finally caused her to seek further care, and when the pain became unbearable and the weakness in her arm returned, she was finally referred to a specialist who diagnosed the rotator cuff tear.

It was submitted that the multitude of injuries which she suffered during the motor vehicle accident could certainly have masked a rotator cuff tear which occurred at this time, and that this was supported by [Appellant’s surgeon’s] report of May 30, 2008. The Appellant’s symptoms became less symptomatic at certain times and were not always constant, but over this long drawn

out process, the Appellant eventually found out what was wrong and had the condition repaired surgically.

Counsel submitted that nothing else had happened to the Appellant and that no other trauma had occurred which could account for this rotator cuff injury. Accordingly, she submitted that the Commission should find that the Appellant's rotator cuff injury to her right shoulder was causally related to the motor vehicle accident and that MPIC should fund the personal care assistance that she received while recovering from her injuries.

Evidence and Submission for MPIC:

Counsel for MPIC took the position that the Appellant had failed to establish a causal connection between her right shoulder surgery and the motor vehicle accident five years earlier. MPIC provided a report from [MPIC's doctor], a medical consultant with MPIC's Health Care Services team, dated June 22, 2009. [MPIC's doctor] testified at the hearing into the Appellant's appeal.

[MPIC's doctor] explained his familiarity with rotator cuff injuries through his training as a sports medicine and musculoskeletal specialist as well as in his medical practice. He indicated that he had had opportunity to examine the Appellant's file on two occasions. The medical assessments conducted following the motor vehicle accident did not identify anything which would raise suspicion regarding a right shoulder or rotator cuff injury. In his view, the Appellant had not reported any symptoms or shown any signs that would have caused her caregivers to suspect such an injury and to order specific tests and investigations in that regard.

[MPIC's doctor] testified that in general, if a traumatic event had injured an individual's rotator cuff, they would most often present with symptoms that day or within a few days after the event.

He was of the view that it was unlikely that the tear had occurred in the Appellant's shoulder at the time of the motor vehicle accident and gone unnoticed for such a long period of time. The lack of complaint during the two year period post motor vehicle accident was significant. He testified that a lot of things could happen to a rotator cuff on a day to day basis to make it symptomatic and lead to the development of a tear, including degenerative changes often occurring in the older population. He could not find any evidence that any right shoulder discomfort appeared before January 2002, almost two years after the motor vehicle accident in question.

He noted that [Appellant's surgeon] had not even initially been made aware that she was involved in a motor vehicle accident, which of course, made it hard for him to comment on the cause of the tear and its connection to the motor vehicle accident.

Even considering the other injuries that the Appellant had suffered in the motor vehicle accident, [MPIC's doctor] was of the view that the long delay in the appearance of right shoulder symptoms meant that the injury was not caused by the motor vehicle injury.

Counsel for MPIC therefore submitted that the medical reports on file did not support the Appellant's position that the rotator cuff tear occurred as a result of the motor vehicle accident. [Appellant's surgeon] was not made aware of the motor vehicle accident until a later date, and was not able to form an opinion regarding causation. Counsel submitted that there was not evidence to support, on a balance of probabilities, a causal connection between the motor vehicle accident and the need for rotator cuff surgery in 2005. The Appellant's appeal should be dismissed.

Discussion:

The MPIC Act provides:

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

"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, but not including bodily injury caused

(a) by the autonomous act of an animal that is part of the load, or

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile.

The onus is on the Appellant to show, on a balance of probabilities, that the injury to her right rotator cuff (and the need for personal care assistance benefits which that entailed) were causally connected to the motor vehicle accident of January 15, 2000.

The panel has reviewed the evidence of the Appellant and of [MPIC's doctor], as well as the medical and other reports on file and the submissions of counsel.

In reviewing the evidence of the Appellant, along with the documentation on file, the panel finds that the Appellant is a poor historian. There were numerous inconsistencies in the reporting of symptoms by the Appellant. A great deal of time has passed since the motor vehicle accident, and we find the Appellant's recall of details and events less reliable than the medical documentation on file.

Many of the medical reports on file, for example, [Appellant's doctor #1's] report of November 7, 2000, contain substantial documentation of complaints, without any mention of right shoulder problems.

All of the Appellant's caregivers, if they mention anything specific about her shoulder in the two years following the motor vehicle accident, refer to her left shoulder complaints.

Even the Appellant's documentation, such as her letters to and conversations with MPIC case workers, refer only to left shoulder complaints. It is only in her narrative report, dated September 22, 2005 when the Appellant refers to her motor vehicle accident related injuries as including pain in both arms and more to her right arm than left.

The first time the right arm was the focus of the Appellant's documented complaints then, was three weeks after her surgery.

Documentation from [text deleted] shows no mention of right shoulder injury complaints until April 30, 2002, which reports back on the onset of symptoms in this region on January 3, 2002.

Accordingly, the panel finds that there is no evidence of specific right shoulder complaints or injuries until January 3, 2002.

The evidence of [MPIC's doctor], both in his written reports and his testimony, emphasizes the lack of documentation in the two years post accident, regarding any injury or symptoms in the right shoulder. On June 22, 2009, [MPIC's doctor] wrote:

“Documentation indicating the first documentation of problems involving her right shoulder was noted in April 2002. It should be noted that a clinical note relating to an assessment performed on April 23, 2002 indicates [the Appellant] indicated her right shoulder symptoms began in January 2002. It should also be noted that it is documented that [the Appellant] stated she attended physiotherapy, which helped her arm “*very much*”. If [the Appellant] had sustained a traumatic rotator cuff tear as a result of the incident in question that went undetected for many years, it is not medically probable that she would develop symptoms two years after the incident only to improve with physiotherapy treatment over a short period of time and then later decompensate for unknown reasons”.

The Appellant has relied upon the opinion of [Appellant’s surgeon], in support of her claim.

The panel notes that in the first two reports provided by [Appellant’s surgeon], he was unaware of the motor vehicle accident. At that time, he was unclear that her symptoms had begun before 2004.

His later report of May 30, 2008 then clarified that the symptoms had begun at least in 2002, three years prior to his treatment of the Appellant.

However, the last paragraph of this report addresses the question of causation. [Appellant’s surgeon] noted:

“In summary, I do believe that evidence of rotator cuff pathology was present at quite a bit of time prior to my initial report. The multitude of injuries suffered at the time of the MVA in 2000 may certainly have masked the rotator cuff pathology if the tear did occur at that time. Certainly, the mechanism of injury is consistent with a reason for the tear. Unfortunately, I cannot based on the evidence supplied give a definite cause and effect relationship. I have discussed this with [text deleted] since I have received a letter and she does insist that the pain began at the time of this injury and prior to it she was asymptomatic.”

Although [Appellant’s surgeon] opines that it was possible that other injuries masked the rotator cuff pain and that the motor vehicle accident could be a mechanism of injury for the rotator cuff

tear, he was not able “based on the evidence supplied” to give a “definite cause and effect relationship”.

Accordingly, the panel finds that based on all of the evidence before us, including the documentary evidence on file and the testimony of the Appellant at the appeal hearing, the Appellant has failed to establish, on a balance of probabilities, that the injury to her right rotator cuff and the surgery of August 26, 2005 were a result of the motor vehicle accident.

As a result, the Appellant’s appeal is dismissed and the decision of the Internal Review Officer dated February 17, 2006 is hereby confirmed.

Dated at Winnipeg this 4th day of November, 2009.

LAURA DIAMOND

MARY LYNN BROOKS

DR. SHELDON CLAMAN