

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-029**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Ms Jean Moor

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.

HEARING DATE: August 17, 2011

ISSUE(S): Entitlement to reimbursement of out-of-province medical expenses.

RELEVANT SECTIONS: Section 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(b) of Manitoba Regulation 40/94.

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION

Reasons For Decision

The Appellant, [text deleted], is appealing the Internal Review Decision dated April 6, 2009 with respect to his entitlement to reimbursement of expenses for out-of-province medical care.

The facts giving rise to this appeal may be briefly summarized as follows:

1. The Appellant was involved in a motor vehicle accident on October 5, 2005. The Appellant was the restrained driver of a vehicle, which lost control at highway speed, causing the vehicle to flip onto its roof. The Appellant advised that in the course of removing his seat belt following the collision, he did not realize that he was upside down,

and as a result, fell onto his head. Following the accident, the Appellant was able to climb out of the passenger side of the vehicle.

2. Following the collision, the Appellant was assessed at [text deleted], Manitoba. At that time, he was complaining of a neck strain, laceration on his left wrist, knee pain, right-sided neck and shoulder pain and he felt very stiff. In view of the right sided neck and shoulder pain, an x-ray of the cervical spine was obtained, which revealed no abnormalities. The diagnosis was documented as neck/back strain. The Appellant was advised to seek medical attention as necessary.
3. The Appellant initiated physiotherapy treatment on October 12, 2005. At that time, the Appellant presented with pain relating to the neck, bilateral shoulders, interscapular area, chest, thoracic area, low back and right hip. Headache was also reported. Objectively, range of motion relating to the neck, shoulders and lumbar spine was reduced, with associated tenderness. The diagnoses were documented as neck and back strain.
4. On November 16, 2005, the Appellant attended [text deleted], with increasing back pain. Analgesics were provided. The Appellant again attended a physician the next day, as the lower back pain was precluding physiotherapy. Neck pain, headache, interscapular pain, low back pain and right hip pain persisted through November 2005.
5. Physiotherapy continued to early February 2006, at which time an orthopaedic assessment with [Appellant's Orthopaedic Specialist] was undertaken. Neck and back pain continued, with no pre-accident history of same. The Appellant advised that although his neck had improved, back pain remained unchanged, sharp in nature and aggravated by activity. The Appellant had been off work since November 17, 2005. Medications at that time included anti-inflammatories, Gabapentin, Oxycontin and Tylenol #3. [Appellant's Orthopaedic Specialist] documented the examination findings as well as reviewing the imaging studies. Neurologic examination revealed intact

dermatomal and myotomal testing. It was [Appellant's Orthopaedic Specialist's] impression that the Appellant likely had some degree of a disc injury (likely L4-5 annular tear), without herniation. An MRI of the lumbar spine was to be pursued.

6. An MRI scan of March 9, 2006 noted minimal disc bulging without protrusion at the L4/5 level. Bilateral mild narrowing of the neural foramina was noted at that level. At the L5/S1 level, a small broad based right paracentral disc protrusion was identified. A transitional lumbosacral vertebra was also identified.
7. On March 23, 2006, the Appellant underwent a third party medical examination with [Independent Doctor]. Based on review of history, submitted imaging studies and clinical examination, [Independent Doctor] felt that the Appellant had a probable right S1 radiculopathy, with evidence to support a cause and effect relationship to the October 2005 motor vehicle collision. Treatment considerations included epidural injection which could be done in conjunction with core strengthening. It was hoped that with these interventions, narcotic analgesia use could be decreased.
8. [Appellant's Doctor #1] assessed the Appellant in June and July 2006, noting the working diagnosis to be soft tissue injury relating to the neck and low back. [Appellant's Doctor #1] reviewed CT scan and MRI findings, noting slight degenerative changes. The absence of pre-accident symptoms was also noted. The recommended treatment plan was to consist of conservative therapy in the form of exercise, heat, massage and, in time, a gradual return to work.
9. A third party reassessment was undertaken by [Independent Doctor] on December 11, 2006. Based on his evaluation, [Independent Doctor's] diagnoses included mechanical neck pain and mechanical low back pain. He noted that compared to his prior examination in March 2006, there was less probability concerning a right S1 radiculopathy with the current presentation being more consistent with mechanical type

back pain. He noted the pain was complicated by relative deconditioning as well as pain focus. [Independent Doctor] suggested discontinuation of back support/corset and cane use, which was felt to be leading to deconditioning and deconditioning pain. A multi-disciplinary reconditioning program was recommended along with an assessment of psychological factors.

10. A reconditioning/work hardening program was initiated in late March 2007. Four weeks of reconditioning were followed by six weeks of work hardening, with the program being completed on June 1, 2007. Assessment at the conclusion of this program noted the Appellant having improved from a sub-sedentary to sedentary strength level. A home program was provided to the Appellant at the conclusion of the program in order to assist in maintaining and facilitating gains. Based on assessment, the opinion was provided that the Appellant would be capable of returning to his workplace at full hours, however, with initial accommodation for light duties.
11. In or about October 2007, the Appellant was referred to [Appellant's Doctor #2]. A spinal injection was performed in January 2008 which provided some pain relief for a few hours. Another injection was performed in March 2008 where the Appellant reported that his symptoms worsened.
12. On October 1, 2008, the Appellant met with his case manager to advise that he would like to attend for back surgery in Germany. He had investigated a treatment that involved disc replacement with a titanium intervertebral disc, a procedure that was offered in [text deleted], Germany. He attended a clinic in [United States] and when seen by the German surgeons, he was deemed a good candidate for the procedure.
13. On October 22, 2008, MPIC's case manager wrote to the Appellant to advise him that MPIC would not provide reimbursement of his expenses for attending for back surgery in Germany.

14. On December 9, 2008, the Appellant left Manitoba and travelled to Germany. On December 12, 2008, the Appellant underwent surgery which involved the implantation of an artificial disc at L5/S1. The Appellant returned home from Germany on December 23, 2008.
15. The Appellant testified that he had a significant reduction of his pre-operative pain syndrome following the disc replacement surgery. He also testified that he had not taken any narcotic drugs or prescription drugs since the surgery. The Appellant was able to return to work in March 2009 on a part-time basis. He went back to work full-time duties in August 2009.
16. The Appellant sought an Internal Review of the case manager's October 22, 2008 decision. In a decision dated April 6, 2009, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that there were no provisions in the MPIC Act to cover the cost of the out-of-province surgery or related expenses under the Personal Injury Protection Plan ("PIPP"). As a result, she found that the Appellant was not entitled to reimbursement of his expenses for back surgery in Germany.
17. The Appellant also sought reimbursement from Manitoba Health for his expenses. His request was denied by Manitoba Health as the information provided failed to demonstrate that the service could not be adequately provided in Manitoba or elsewhere in Canada. As a result, Manitoba Health determined that the criteria for funding had not been met and it was unable to provide benefits for care obtained outside the country.
18. The procedure that was performed in Germany (Disc replacement with a titanium intervertebral disc) is an insured service in Manitoba. A form of this surgery is performed in [text deleted], Manitoba.

The Appellant has now appealed the Internal Review Decision of April 6, 2009 to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to reimbursement of his out-of-province medical expenses.

Relevant Legislation:

Section 136(1)(a) of the MPIC Act provides 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;

Section 5(b) of Manitoba Regulation 40/94 provides as follows:

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:

(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.

Appellant's Submission:

Counsel for the Appellant submits that, pursuant to Section 5(b) of Manitoba Regulation 40/94, the Appellant is entitled to reimbursement of his out-of-province medical expenses. He argues that a literal reading of the Regulation provides that a claimant is entitled to reimbursement of out-of-province medical expenses if he is not entitled to be reimbursed for the expense under *The*

Health Services Insurance Act (or any other Act), so long as this service is an insured service in Manitoba.

Counsel for the Appellant maintains that Section 5(b) of Manitoba Regulation 40/94 expressly provides for reimbursement of medical expenses where a claimant is not entitled to reimbursement from Manitoba Health, regardless of the reasons for the denial of reimbursement from Manitoba Health. He submits that Section 5(b) of Manitoba Regulation 40/94 does not require a claimant to qualify for coverage under *The Health Services Insurance Act*, in order to also qualify for coverage under PIPP. Counsel for the Appellant argues that this provision expressly provides for payment of expenses in those cases where Manitoba Health does not provide coverage, so long as the type of care is an insured service in Manitoba. He contends that a claimant is not compelled to seek medical care in Manitoba, but rather can choose to obtain medical care anywhere, and, if the care is an insured service in Manitoba, MPIC is required to cover the expenses of that care pursuant to Section 5(b) of Manitoba Regulation 40/94.

As a result, counsel for the Appellant submits that the care obtained by the Appellant in Germany is an insured service in Manitoba and therefore, since the Appellant is not entitled to reimbursement under *The Health Services Insurance Act*, MPIC is obligated to cover his expenses under PIPP.

MPIC's Submission:

Counsel for MPIC submits that since Manitobans injured in motor vehicle accident are eligible for benefits provided under *The Health Services Insurance Act*, Manitoba Health is the first payer of insured services. As a result, the coverage provided under the MPIC Act is secondary

to that provided under *The Health Services Insurance Act*, in regards to payment of expenses which are insured under *The Health Services Insurance Act*.

Counsel for MPIC argues that the procedure which the Appellant had performed in Germany is an insured service in Manitoba. As a result, the Appellant is eligible for coverage under *The Health Services Insurance Act*, and, had the surgery been performed in Manitoba, he would not have incurred any expenses. Counsel for MPIC maintains that the Appellant knowingly assumed the risk when he undertook the surgery in Germany. He had been advised by the case manager that the expenses would not be covered under the MPIC Act. Counsel for MPIC contends that it was the Appellant's responsibility to approach Manitoba Health prior to leaving for the surgery in Germany. The surgery undertaken by the Appellant could have been performed in Manitoba, where it would have been fully covered under *The Health Services Insurance Act* and in the normal course, there would have been no expenses incurred by the Appellant for the surgical procedure.

Counsel for MPIC submits that MPIC does not become obligated to reimburse the Appellant's expenses in a situation where the Appellant has chosen to seek care outside Manitoba and thereby, incur expenses for care which would normally be covered under *The Health Services Insurance Act*. She maintains that the Appellant would have been entitled to coverage under *The Health Services Insurance Act* for the disc replacement surgery. He chose to avail himself of the option to have the surgery performed out-of-province. He is not entitled to reimbursement from MPIC simply because Manitoba Health has denied benefits in his case for care obtained outside the country. Counsel for MPIC argues that the coverage provided by MPIC is secondary to that provided by Manitoba Health. MPIC's responsibility in such a situation extends only to any costs associated with the treatment that would have been over and above what Manitoba Health

would have funded if it had accepted the Appellant's claim. Counsel for MPIC submits that since Manitoba Health did not accept the Appellant's claim, MPIC is not obligated to fund any expenses incurred by the Appellant in this situation.

Accordingly, counsel for MPIC submits that the Internal Review Decision of April 6, 2009 should be confirmed and the Appellant's appeal should be dismissed.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant is not entitled to reimbursement of expenses for his out-of-province medical care.

Reasons for Decision:

The Commission finds that the literal interpretation suggested by counsel for the Appellant ignores the purpose and the intent of the MPIC Act and *The Health Services Insurance Act*. Clearly, the Legislature intended a correlation between the two Acts to provide a broad range of coverage for Manitoba residents. In coming to this conclusion, the Commission has looked at the entire context of Section 5(b) of Manitoba Regulation 40/94, including the purpose and scheme of the MPIC Act. We find that *The Health Services Insurance Act* provides health care benefits on behalf of Manitobans. That is not the purpose of the MPIC Act.

The Commission finds that *The Health Services Insurance Act* and the *Canada Health Act* provide an exclusive scheme for the provision of insured health care benefits. To the extent that

coverage is provided under those Acts, those benefits are primary. Manitoba Health provides primary health care coverage on behalf of Manitoba residents and is the primary funding body for insured medical services. MPIC is the provincial auto insurer that administers the PIPP. PIPP provides benefits to Manitobans who are injured in a motor vehicle collision and extends coverage for expenses which are not covered by any government health care program. The primary obligation for funding insured medical services through Manitoba Health is not displaced in the event of a bodily injury caused by a motor vehicle. That obligation remains exclusively with Manitoba Health.

Additionally, the Commission finds that the position advanced by counsel for the Appellant is incompatible with MPIC's objective to ensure that insurance premiums remain stable, predictable and affordable. To suggest that a claimant is not compelled to seek medical care in Manitoba, but rather can choose to obtain medical care anywhere, and, if the care is an insured service in Manitoba, MPIC is required to cover the expenses of that care pursuant to Section 5(b) of Manitoba Regulation 40/94, is unreasonable. Such a scheme would lack the necessary controls and oversight to ensure financially responsible management of bodily injury claims and in effect create a two-tiered system for medical care within Manitoba. Accordingly, given our purposive analysis, the Commission rejects the literal interpretation of Section 5(b) of Manitoba Regulation 40/94 suggested by counsel for the Appellant.

As a result, we find that Manitoba Health is the primary funding body for insured medical services for Manitobans and that obligation does not transfer to MPIC when the injuries are caused by a motor vehicle accident. In this case, the Appellant does not become entitled to reimbursement of his out-of-province medical expenses, simply because Manitoba Health has denied reimbursement. The Appellant is bound by the provisions of *The Health Services*

Insurance Act and MPIC does not become obligated to reimburse the Appellant's expenses in a situation where the Appellant has chosen to seek care outside of Manitoba for care which would normally be covered under *The Health Services Insurance Act*. Lastly, given our decision in this matter, the Commission finds that it was not required to make any further findings with regards to the arguments advanced by both counsel regarding causation and the medical requirement of the care sought by the Appellant in Germany.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated April 6, 2009 is confirmed

Dated at Winnipeg this 15th day of November, 2011.

YVONNE TAVARES

NEIL COHEN

JEAN MOOR