Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-70

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Mr. Colon C. Settle, Q.C.** **Mr. [independent chiropractor #2] MacLennan**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf, assisted by [Appellant's assistant];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**February 8, 2002**
ISSUE (S):	**1. Entitlement to ongoing chiropractic and acupuncture benefits; and** **2. Entitlement to Income Replacement Indemnity ('IRI') benefits beyond February 4, 2000.**
RELEVANT SECTIONS:	**Sections 81(1), 110(1)(a) and 136(1)(a) of The Manitoba Public Insurance Corporation Act (the '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, [text deleted], was involved in a motor vehicle accident ("MVA") on January 25, 1997. At the time of the collision, [the Appellant's] vehicle was slowing down, and he was hit in the rear by an oncoming vehicle. The Appellant injured his neck and aggravated pre-existing cervicothoracic and lumbosacral injuries. As a result of the injuries he sustained in the MVA, the Appellant was unable to return to his position as sewer maintenance worker with the [text

deleted] and he became entitled to receive Income Replacement Indemnity ('IRI') benefits in accordance with subsection 81(1) of the MPIC Act and reimbursement for medical and paramedical care for treatment of his injuries in accordance with subsection 136(1) of the MPIC Act.

[The Appellant] has a significant history of motor vehicle and work related injuries to his cervicothoracic and lumbosacral areas. In a November 26, 1996, work related injury, he was jack hammering, when he received injuries to his thoracolumbar and lumbosacral spinal areas. This was a Workers Compensation injury, and at the time of this injury he had just returned to work for only two days from a previous accident. As a result of this injury and at the time of the January 25, 1997, motor vehicle accident, he was off work. He was scheduled to return to work on modified duties on January 27, 1997.

On August 16, 1996, [the Appellant] was involved in a rear end collision in which he was the front seat passenger. As a result of this injury he sustained cervical and lumbosacral spinal injuries which was also claimed through Workers Compensation. He was off work for approximately two months. On July 30, 1996, [the Appellant] was in a Workers Compensation related injury, when he was trying to lift a manhole cover, and he injured his right superior trapezius, and cervical spine. There was no time loss as a result of this injury.

On June 6, 1996, he was lifting a manhole cover and sustained injury to his neck, which was claimed on Workers Compensation. There was no time lost. In November 1995, [the Appellant] slipped on ice while at work and sustained injuries to his cervical, thoracic and lumbosacral spine, for which he claimed Workers Compensation, and remained off work for three weeks.

As part of his rehabilitation from the January 25, 1997 accident, [the Appellant] underwent a rehabilitative assessment on March 17, 1997, to determine his suitability for a reconditioning program. Based on the outcome of the examination, [the Appellant] was determined to be a suitable candidate for a reconditioning program. [The Appellant] subsequently began a reconditioning program at the [text deleted] Clinic under the supervision of [Appellant's chiropractor #1].

The Appellant also attended for chiropractic treatments with [Appellant's chiropractor #2] after the accident for treatment of the injuries sustained in the motor vehicle accident.

On March 17 and 24, 1998, the Appellant attended the [Rehab Clinic] for a physical/functional assessment and possible plan for work hardening. [Text deleted], occupational therapist, conducted the assessment. She found that [the Appellant's] main difficulties were with back extension and weak abdominals for heavy work. She concluded that [the Appellant] was functioning consistently at a medium level of work and suggested a work-hardening program to improve his level of functioning. She suggested a return to his job, following a review of his actual duties, to begin work hardening while on the job, likely at a form of modified duties.

[Appellant's occupational therapist] also conducted a job demands analysis of [the Appellant's] position as a sewer maintenance worker with the [text deleted]. Based on her analysis of that position and her assessment of [the Appellant], she found that the opportunity existed within this job for him to function within the medium level of work by working with his partner for any strength tasks and accordingly recommended that he return to work with this condition. She did not identify any activities which would be restricted due to his difficulties with back extension, provided he had a cooperative work partner. His general level of conditioning suggested that he

could likely return to work full time immediately, provided the tasks were kept to a medium level, although she suggested that it would be desirable to consider graduating his hours of work as one of his main difficulties was with muscular pain, which would likely be aggravated by the work. By graduating his hours, she felt that he would have the opportunity to again become accustomed to the nature of the work.

On July 13, 1998, the Appellant returned to his employment with the [text deleted] on a gradual return-to-work plan. As of September 20, 1998, he was capable of 90% to 95% of his job duties and was working on a full-time basis. As of September 20, 1998, his IRI benefits were terminated by MPIC, and he returned to the payroll with the [text deleted]. At this time, the Appellant was still not capable of jack hammering or drilling of steps, and it was agreed that the employer would accommodate him in his return to work with the hope that he would be able to return to 100% of job duties at some time down the road.

In a report dated April 22, 2000, [Appellant's chiropractor #2], chiropractor, commented on [the Appellant's] continuing treatment for ongoing injuries that were related to the motor vehicle accident of January 25, 1997. In that report, [Appellant's chiropractor #2]'s diagnosis was ongoing residual cervical, thoracic, and lumbo-pelvic strain/sprain symptomatology including articular hypomobility, cephalgia, and suspected myofascial inflammation. [Appellant's chiropractor #2] commented that [the Appellant] had received chiropractic care at his office comprised of spinal mobilization, spinal manipulation, trigger point massage, interferential therapy, low volt muscle stimulation, and ultrasound therapy. He noted that [the Appellant] had also received an extensive rehabilitation program, including acupuncture and physiotherapy from the [text deleted] Clinic, and that [the Appellant] continued to receive acupuncture treatments at that time.

On May 19 and May 26, 2000, the Appellant underwent an independent chiropractic examination with [text deleted]. In his report dated May 29, 2000, [independent chiropractor #1] stated that:

> [The Appellant] has a long history of neck and back soft tissue related injuries. On the balance of probabilities, it is difficult to relate the necessity for ongoing care and any future disability on his motor vehicle accident. To qualify, it was noted that he did return to work from the period of July 1998 until February 2000. His frequency of care although determined by him, is now less than what he was receiving prior to the motor vehicle accident in question. As well, the areas of involvement relative to his W.C.B. injury and motor vehicle accident are very similar.

[independent chiropractor #1] recommended that:

> Regarding treatment, I believe that he has reached maximum therapeutic benefit and maximum medical improvement. While [the Appellant] appears to have a strong reliance on care and as noted, has had some 242 chiropractic treatments and 176 physiotherapy/acupuncture treatments, I am of the opinion that a continuance of more of the same, will not alter his residual symptom expressions. Subsequently, I see no reason to continue with more of the same. He has had both extensive passive and active interventions and has to my understanding, been under treatment in the years preceding his last motor vehicle accident. Because of his long history of soft tissue injuries, I do feel that he could benefit from chronic pain management to assist him in establishing better self-managing/coping methods.

[The Appellant's] file was then referred to MPIC's Healthcare Services Team for a review. [MPIC's chiropractor] conducted the review. In his Inter-departmental Memorandum dated June 21, 2000, he concluded that:

> The Claimant was receiving two chiropractic treatments per week just prior to this motor vehicle accident. The treatment was directed to the neck, mid and lower back. Prior to the motor vehicle accident he was restricted from regular and/or modified work duties. He was however expected to resume modified light duties two days after the motor vehicle accident took place.
>
> Currently, the claimant is receiving treatment at a frequency of approximately once per week. The care appears to take place on an "as needed" directed by the claimant. The claimant although is currently not working, did initially return to work June 1998 in a modified capacity and continued to work for 20 months but had been taken off work in February 2000 (for reasons that are clear). This period

> of sustained work seems to be the longest stretch that he has worked since prior to 1995.
>
> If one is to expect that rehabilitative care as it relates to the motor vehicle accident is expected to place this claimant in relatively the same physical state that he was just prior to this accident. I would suggest that this claimant has likely recovered to his pre-accident status and had likely recovered at some time during the period when he returned to work.

Based on [MPIC's chiropractor's] opinion, MPIC's case manager wrote to the Appellant on July 4, 2000, to advise him that MPIC would no longer cover his treatment expenses. This decision was based on the review conducted by the Healthcare Services Team, which determined that the Appellant's current complaints/symptoms related to his pre-existing condition.

The Appellant sought an internal review from that decision. As part of his Application for Review, the Appellant also requested a reinstatement of Income Replacement Indemnity benefits. This matter was referred back to the case manager for a determination. In a letter dated September 6, 2000, the case manager advised the Appellant that the decision dated October 7, 1998, regarding his Income Replacement Indemnity entitlement with respect to this motor vehicle accident would stand and that the Appellant did not qualify for any further Income Replacement Indemnity benefits with regard to the motor vehicle accident of January 25, 1997.

At the internal review hearing, the Internal Review Officer received additional information from the Appellant with respect to his retirement from the [text deleted]. The Internal Review Officer forwarded the matter back to the case manager for a reconsideration of whether the Appellant was entitled to Income Replacement Indemnity benefits after February 4, 2000.

In his decision dated October 4, 2000, the case manager advised that:

> A member of our Medical Services Team reviewed all available medical information and that in all probability, you had fully recovered from the effects of the motor vehicle accident prior to February 4, 2000.
>
> In light of and based on the above, as such, there is no entitlement to any further Income Replacement Indemnity.

The Appellant also sought a review of this decision.

[MPIC's chiropractor], chiropractic consultant to MPIC's health care services department, was again asked to review the Appellant's file to determine whether or not his ongoing complaints were related to the motor vehicle accident of January 25, 1997. In his Inter-departmental Memorandum dated March 5, 2001, [MPIC's chiropractor] advised that:

> I feel that based on the above information, there is no medical information to support that the claimant continues to suffer from injuries of the motor vehicle accident in question. The residual aches and pains that the claimant may continue to be bothered by are, in my view, related to his prior pre-existing injuries and not from the accident in question.
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> With all of the above in mind, I do not feel that any further care that the claimant may want or require is related to the motor vehicle accident in question.

In a decision dated March 30, 2001, the Internal Review Officer confirmed the case manager's decision of July 4, 2000, that MPIC would not fund further chiropractic or acupuncture treatments. In her decision, the Internal Review Officer advised the Appellant that:

> Looking back at the totality of the medical information on your file, I agree with [Appellant's doctor #1], [independent chiropractor #1] and [MPIC's chiropractor] that you have recovered from the injuries you sustained in your motor vehicle accident of January 25, 1997. It is also my decision that the necessity for further treatment is not as a result of that accident. As a result, I can see no reason to disagree with your Case Manager's decision of July 4, 2000 and I am therefore confirming it.

In a decision dated April 2, 2001, the Internal Review Officer confirmed the case manager's decision of October 4, 2000 and advised the Appellant that MPIC would not extend any additional Income Replacement Indemnity benefits beyond February 4, 2000. In her decision, the Internal Review Officer stated that:

> In a letter to you dated January 22, 1997 from the Workers Compensation Board you highlighted a paragraph for my consideration. I have reproduced it below:
>
> > "As such, by way of a copy of this letter to your employer, we are asking them to accommodate you immediately in modified/light duties for a period of three weeks, after which it is board's opinion you should be fully fit for your pre-accident job duties".
>
> You had only just returned to work at modified/light duties when your accident occurred. Therefore, if you were working light duties at the time of your motor vehicle accident it is the responsibility of MPIC to return you to that position. As of November 10, 1999 it was [Appellant's doctor #1's] opinion that you were capable of working in your position with some restrictions. He did not say that you had to work light duties. Therefore, as of the end of 1999 you were capable of working at a level above light duties. This ended the responsibility of MPIC.
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> [Appellant's doctor #1] and [independent chiropractor #1] both advised that you have recovered from the injuries you sustained in your motor vehicle accident dated January 25, 1997. [Text deleted], a Chiropractic Consultant working with MPIC has reviewed your file and his opinion and the above reports were attached to your decision letter on file [text deleted]. It is [MPIC's chiropractor's] opinion that any disabilities that you have are as a result of your pre-existing factors and not as a result of you motor vehicle accident. I agree with these doctors and as a result, I am confirming your Case Manager's decision of October 4, 2000.

After rendering her decision, additional information was provided by the Appellant to the Internal Review Officer. The Internal Review Officer forwarded this new information, together with the relevant file documentation, to [text deleted], chiropractor, for his opinion as to whether [the Appellant]'s present condition stemmed from a motor vehicle accident of January 25, 1997, and if there was a requirement for further treatment. In his report dated June 15, 2001, [independent chiropractor #2] commented as follows:

> On review of the medical information, it would not appear that [the Appellant] continues to suffer from any disabilities that are related to his motor vehicle

> accident of January 25, 1997. In comparing the medical reports of numerous assessments [the Appellant] has undergone following his motor vehicle accident, I find the information to be notably consistent between examiners. In general, these findings include functionally full ranges of motion, intact neurological integrity, soft tissue tenderness, and an absence of hard orthopaedic findings. The subjective complaints and physical examination results reported by [independent chiropractor #2], [Appellant's doctor #1], [independent chiropractor #1], [Appellant's chiropractor #1], [Appellant's doctor #2], and [Appellant's occupational therapist] at various points in time post-accident are in fact quite similar to the findings on pre motor vehicle accident assessment by [Appellant's doctor #3] on January 7, 1997 relative to a November 1996 workplace injury. I specifically refer to [Appellant's doctor #1's] assessment of November 1999 and [independent chiropractor's] in May 2000, both of whom report on soft tissue tenderness to palpation and little else in the way of significant findings. Both examiners indicate that [the Appellant's] work difficulties stem from a subjective response to certain tasks but not to any physical impairment found at the time. It is on this basis that [Appellant's doctor #1] advised the Employee Benefits Board of [the Appellant's] ability to initiate modified duties, but there was no inference of any permanent partial disability. There is no information on file provided by any caregiver or examiner that identifies any permanent functional disability based on an objectively reproducible physical impairment. [Appellant's chiropractor #2], who is [the Appellant's] attending chiropractor, does raise the possibility of future permanent impairment in an April 22, 2000 correspondence. The findings [Appellant's chiropractor #2] reports are similar to all the other medical information accumulated at various points post accident, and do not contain any objective evidence of functional deficit, merely subjectively biased responses to testing.
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> …
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> Overall, there is no compelling objective evidence contained in the file to indicate that [the Appellant]'s February 4, 2000 work loss or present symptomatic status is causally related to any of his accidental incidents and the association between events and consequences seems to be based on maladapted attitudes. [the Appellant]'s present status appears similar to what it was pre-accident and as such, I would not think that there is a requirement for any further care stemming from the collision of January 25, 1997.

On June 21, 2001, the Internal Review Officer again wrote to the Appellant and advised him as follows:

> After reading [independent chiropractor #2's] review, I find no further information that would change my two previous opinions on your file. Therefore it is still my opinion that your symptoms are not related to your motor vehicle accident and you do not require any further treatment as a result of the injuries sustained in your motor vehicle accident of January 25th, 1997.

The Appellant is now appealing the decisions of the Internal Review Officer dated March 30, 2001, and April 2, 2001, to the Commission. The issues which require determination in [the Appellant's] appeal are:

1. Entitlement to ongoing chiropractic and acupuncture benefits; and

2. Entitlement to Income Replacement Indemnity benefits beyond February 4, 2000.

The relevant sections of the MPIC Act and Regulations are as follows:

Section 81(1) of the MPIC Act:

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the full-time employment;

Section 110(1)(a) of the MPIC Act:

> **Events that end entitlement to I.R.I.**
> **110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident;

Section 136(1) of the MPIC Act:

> **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 of Manitoba Regulation 40/94:

Medical or paramedical care

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

(a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician.

1. Entitlement to Chiropractic and Acupuncture Benefits

At the hearing of the appeal, the Appellant advised that he has continued to attend for chiropractic treatments with [Appellant's chiropractor #2] even though MPIC is no longer covering the cost of chiropractic care. He has not continued with the acupuncture treatments since MPIC stopped reimbursing the cost of those treatments. The Appellant submitted that chiropractic treatment does provide him with some relief from the pain caused by the injuries, which he sustained in the motor vehicle accident of January 25, 1997. Although he testified that he does not obtain any lasting improvement with the chiropractic treatments, the relief from pain lasts approximately one to two days, depending on his level of activity. He also advised that although he visited his chiropractor regularly prior to the motor vehicle accident, his visits to the chiropractor have increased since, as he has greater mid and lower back problems post-motor vehicle accident.

Counsel for MPIC referred the Commission to [MPIC's chiropractor's] Inter-departmental Memorandum of March 5, 2001, wherein he noted that, "*The Claimant did not have a prior impairment and in my opinion, still does not have a current functional impairment. The report by [Appellant's doctor #1] (November 10, 1999, examination) and Dr. Brian [independent chiropractor #1] (May 26, 2000, examination) did not find any permanent impairment or functional disability from either of their examinations.*" Counsel for MPIC submits that the

Appellant's current complaints are a culmination of his numerous past injuries. He submits that the Appellant has not shown that the ongoing need for chiropractic treatment and acupuncture is related to the motor vehicle accident of January 25, 1997.

In order to qualify for funding under the Personal Injury Protection Plan contained in the MPIC Act and Regulations, expenses must be incurred by a victim because of the accident and must be medically required. In the case at hand, the Appellant has received over 240 chiropractic treatments since the date of the motor vehicle accident, yet there has been little indication of a reduction in symptomalogy as treatment has continued. Indeed, [Appellant's chiropractor #2] noted in his report dated January 25, 2002, that "*Over the past several months I have noted a deterioration of [the Appellant's] condition.*" This despite the fact that [the Appellant] continues to attend for chiropractic care at a frequency of twice weekly.

The Clinical Guidelines for Chiropractic Practice in Canada contain some recommended time-frames within which maximum chiropractic benefit may usually be anticipated, both for 'normal' and for more difficult cases. The Guidelines indicate that continued failure to show additional improvement over any period of six weeks of treatment, should result in patient discharge or appropriate referral, or the patient will be deemed as having achieved maximum therapeutic benefit.

The facts of the case at hand, including the rather extensive amount of chiropractic treatments undertaken by the Appellant coupled with the lack of improvement in his condition, lead us to the conclusion that the Appellant has likely reached maximum therapeutic benefit and, essentially, maximum medical improvement from chiropractic care. We are of the opinion that

MPIC was justified in terminating payments for further chiropractic care for [the Appellant] on July 4, 2000, as it did.

With regards to an entitlement for ongoing reimbursement of acupuncture treatments, we find that the Appellant has not established on a balance of probabilities that the continuation of acupuncture treatments is medically required.

2. Entitlement to Income Replacement Indemnity Benefits Beyond February 4, 2000

The Appellant submits that as a result of the motor vehicle accident of January 25, 1997, he continues to suffer from ongoing injuries to his cervical region, mid and lower back. These ongoing injuries prevent him from returning to his prior occupation without restrictions. As a result of the restrictions that were placed on his work capacity, he has never been able to return to his full employment duties. Consequently, on February 4, 2000, when his employer was no longer able to accommodate him on modified duties, he was forced to resign from his position with the [text deleted]. The Appellant submits that since the ongoing disability is related to the injuries sustained in the motor vehicle accident of January 25, 1997, he should be entitled to reinstatement of Income Replacement Indemnity benefits from February 4, 2000.

Counsel for MPIC submits that the Corporation has returned the Appellant to the same position he was in at the time of the motor vehicle accident. He advises that the Appellant was not free of work activity limitations prior to the motor vehicle accident. He notes that the Appellant was on light and modified duties at the time of the motor vehicle accident. He was able to return to those same duties in October 1998 and indeed worked for some 20 months prior to being forced to resign his position. Accordingly, counsel for MPIC submits that MPIC has fulfilled its

obligation pursuant to the MPIC Act as it has returned the Appellant to the same position he was in before the motor vehicle accident and, therefore, no further IRI entitlement exists.

Subsection 110(1)(a) of the MPIC Act provides that entitlement to an income replacement indemnity ends when a victim is able to hold the employment that he held at the time of the accident. At the time of his motor vehicle accident, [the Appellant] was scheduled to return to his position with the [text deleted] on modified/light duties. In July 1998, the Appellant returned to his employment with the [text deleted] with the restriction that his tasks be kept to a medium level. As of September 20, 1998, the Appellant was capable of 90% to 95% of his job duties and was working on a full-time basis. At this point in time the only restrictions were that the Appellant not do any jack hammering or drilling of steps. The Appellant was able to continue his employment with the [text deleted] until February 4, 2000.

We find that as of September 20, 1998, the Appellant was able to hold the employment that he held at the time of the accident. Accordingly, the Appellant's entitlement to Income Replacement Indemnity benefits was properly terminated by MPIC pursuant to subsection 110(1)(a) of the MPIC Act. In addition, the Appellant has not established on a balance of probabilities that an entitlement to Income Replacement Indemnity benefits beyond February 4, 2000 was related to the motor vehicle accident of January 25, 1997.

Accordingly, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decisions of MPIC's Internal Review Officer bearing dates March 30, 2001 and April 2, 2001.

Dated at Winnipeg this 24th day of April, 2002.

YVONNE TAVARES

COLON C. SETTLE, Q.C.

[INDEPENDENT CHIROPRACTOR #2]

MacLENNAN