Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-95

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Laura Diamond** **Mr. Guy Joubert**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Dianne Pemkowski.**
HEARING DATE:	**December 17, 2003**
ISSUE(S):	**1. Entitlement to chiropractic care benefits beyond January 15, 2002** **2. Entitlement to Income Replacement Indemnity benefits**
RELEVANT SECTIONS:	**Sections 70(1), 81(1)(a) and 136(1)(a) of the Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) 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 July 20, 2001 and, as a result of the accident, sustained injuries to his neck, upper and lower back, right shoulder, elbow and hand.

Entitlement to chiropractic care benefits beyond January 15, 2002

As a result of these injuries the Appellant attended upon and was treated by a chiropractor, [text deleted], and these chiropractic treatments were funded by MPIC. MPIC obtained an Independent Chiropractic Assessment from [independent chiropractor], who provided a report to MPIC dated November 1, 2001. [Independent chiropractor] advised MPIC that the Appellant had obtained maximum therapeutic benefit from his chiropractic treatments. [independent chiropractor] also indicated that in his opinion the Appellant should be pursuing an aggressive physiotherapy program directed towards stretching/conditioning for the cervical thoracic and lumbosacral spine.

Following receipt of [independent chiropractor's] report MPIC requested its chiropractic consultant, [text deleted], to review this matter and in an Inter-Departmental Memorandum dated November 8, 2001 [MPIC's chiropractor] indicated that after reviewing the medical file it appeared that the Appellant had received nearly fifty chiropractic interventions to date and had reached a relatively therapeutic plateau with respect to his care. [MPIC's chiropractor] recommended that the Appellant undergo a supervised exercise program and that further chiropractic care should be extended at the rate of one treatment per week during a four to six week period.

The Appellant applied for a review of the case manager's decision and on May 24, 2002 the Internal Review Officer issued his decision confirming the decision of the case manager and dismissing the Application for Review. As a result the Appellant filed a Notice of Appeal to this Commission in respect of the termination of funding by MPIC of chiropractic treatments.

APPEAL

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

Section 136(1)(a) 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(a) 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;

Upon a careful review of all of the documentary evidence made available to it, and upon hearing the submissions made by the Appellant and by counsel on behalf of MPIC, the Commission finds that the Appellant has not established, on a balance of probabilities, that chiropractic treatments were medically required by him beyond January 15, 2002.

By the authority of Section 184(1) of the MPIC Act, the Commission orders that the decision of the MPIC's Internal Review Officer, bearing date May 24, 2002, be confirmed and that the Appellant's appeal in respect of this issue is, therefore, dismissed.

Entitlement to Income Replacement Indemnity Benefits

As a result of the motor vehicle accident on July 20, 2001, the Appellant applied to MPIC for

Income Replacement Indemnity ('IRI') benefits.

The case manager, in a letter to the Appellant dated June 10, 2002, concluded that there was no direct cause/effect relationship between the Appellant's present symptoms and his inability to maintain employment and the injuries stemming from his motor vehicle accident on July 20, 2001 and, therefore, denied IRI benefits to the Appellant.

The Appellant made an Application for Review of this decision and a hearing was held on August 22, 2002. On August 29, 2002 the Internal Review Officer issued a decision confirming the decision of the case manager and dismissing the Appellant's Application for Review.

The Appellant filed a Notice of Appeal.

At the appeal hearing, which took place on December 17, 2003, the Commission heard the testimony and submissions of the Appellant and submissions of MPIC's legal counsel in respect of the denial of IRI benefits to the Appellant.

The Appellant testified that:

1. subsequent to the motor vehicle accident in which he suffered soft tissue injuries to his neck and back, but was not prevented from returning to work while at the same time receiving chiropractic treatments from [Appellant's chiropractor].

2. he continued to work and receive chiropractic treatments until the middle of February 2002.

3. following a chiropractic treatment by [Appellant's chiropractor] on February 11, 2002 he returned to work on February 13, 2002.

4. while at work he began to experience severe neck and back pain, proceeded to [Appellant's chiropractor's] office for an examination and was subsequently taken to the [hospital] by [Appellant's chiropractor].

While at the hospital he was examined by [text deleted], a neurologist, who in a report dated March 5, 2002 strongly advised that the Appellant should not receive any type of manipulation to his neck for any condition whatsoever and [Appellant's neurologist] confirmed the diagnosis of an injury to the Appellant's vertebral artery secondary to chiropractic manipulation.

[Appellant's vascular surgeon], [text deleted], in a report dated March 26, 2002, confirmed the Appellant had a vertebral artery dissection most probably following chiropractic manipulation of his neck.

MPIC requested [text deleted], Medical Consultant, MPIC's Health Care Services Team, to form a medical opinion on the relationship of the "medical event" of February 11, 2002 with the motor vehicle accident of July 20, 2001.

[MPIC's doctor] reviewed the entire medical file of the Appellant and in an Inter-Departmental Memorandum dated June 3, 2002 stated:

> The medical information reviewed indicates that [the Appellant] sustained a dissection of the left vertebral artery. The opinions from the treating practitioners were that this dissection was the result of chiropractic manipulation of the cervical spine on February 11, 2002. The documented material indicates that [the Appellant] developed increased neck pain and visual disturbances on that day. Based on the attending neurologist's report, there were no neurological deficits. Further investigations, including an MRI were pending. (underlining added)
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> In my opinion, I would agree with the treating medical opinions on file that there is a medically probable cause and effect relationship between the vertebral artery dissection and chiropractic manipulations performed on February 11, 2002. These opinions are based on the mechanism of injury involved and the temporal relationship. In my opinion, it is medically improbable that the motor vehicle collision of July 20, 2001 is causally related to the vertebral artery dissection of February 2002. The mechanism of injury associated with the motor vehicle collision reported and the temporal relationship do not support a cause and effect association. (underlining added)

The Internal Review Officer, in arriving at his decision dated August 29, 2002, stated:

> A causal connection between the injuries from the accident and your vertebral dissection has not been established in my view. In arriving at that decision, I have taken into account the following facts:
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> 1. That your vertebral dissection was caused by the chiropractic manipulation of February 11, 2002.
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> 2. That as of November 14, 2001, MPI, based upon the opinions of [independent chiropractor] and [MPIC's chiropractor], was of the view that further chiropractic coverage was not medically required for injuries arising out of your accident of November 8, 2001 (*sic – July 20, 2001).*
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> 3. That the Corporation's decision to fund a supportive chiropractic of once a week while you were attending physiotherapy was a benevolent decision made in response to your request that chiropractic coverage be continued.
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> 4. That the decision to extend physiotherapy coverage did not address the chiropractic supportive treatments.
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> 5. That notwithstanding the effect of the Corporation's decision of November 14, 2001, you continued to attend for chiropractic treatments on a three times per week basis.
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> 6. That the treatment resulting in the torn artery was administered by your treating chiropractor.
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> 7. That issues relating to possible negligence of [Appellant's chiropractor] have not been disclosed by you.
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> 8. That your vertebral dissection is a medical event unrelated to the motor vehicle collision of July 20, 2001.
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> Therefore, I am upholding [text deleted's] decision of June 10, 2002 and dismissing your appeal.

At the appeal hearing the Appellant, in his testimony and in his submission, did not challenge the factual findings of the Internal Review Officer but argued that, but for the accident, he would not have required the chiropractic treatments to treat his motor vehicle accident injuries and as a result would not have sustained a vertebral dissection. The Appellant further submitted that the

motor vehicle accident directly caused the injury to his neck arteries. The Appellant, however, did acknowledge to the Commission that the chiropractic treatment which occurred on February 11, 2002 was not authorized and/or funded by MPIC.

MPIC's legal counsel submitted:

1. the Appellant's injury to his left vertebral artery was determined by [Appellant's neurologist], [Appellant's vascular surgeon] and [MPIC's doctor] to have been caused by chiropractic manipulation on February 11, 2002 and was not the result of the motor vehicle accident which occurred on July 20, 2001 which was approximately six months and two weeks after the motor vehicle accident.

2. the Appellant did not provide any medical evidence to challenge the medical opinions of [Appellant's neurologist], [Appellant's vascular surgeon] and [MPIC's doctor].

3. the Appellant has not established, on a balance of probabilities, that the injury to his left vertebral artery was caused by the motor vehicle accident and, as a result, the Appellant was not entitled to receive IRI benefits from MPIC.

DECISION

At the conclusion of the submissions in respect of the Internal Review Officer's decision denying the Appellant IRI benefits, the Commission adjourned the proceedings. During the recess the Commission reviewed the medical reports on file, the decisions of the case manager and the Internal Review Officer, the testimony of the Appellant and the submissions made by both parties at the appeal hearing. The Commission concluded as a result of its review that on the balance of probabilities the Appellant has not established his entitlement to IRI benefits and the Commission decided to inform the Appellant of this decision when it reconvened the hearing.

The Commission reconvened the hearing and advised the Appellant that, having regard to the evidence and arguments submitted by both parties, the Commission has determined, on a balance of probabilities, the vertebral artery dissection was not caused by the motor vehicle accident in

question and, accordingly, he was not entitled to IRI benefits. The Commission further advised the Appellant that it intended to issue a written decision setting out the Commission's reasons in respect of this appeal. The Commission also suggested that the Appellant should consider, as quickly as possible, obtaining legal advice as to whether or not a legal remedy was available to him in another forum.

The relevant sections of the MPIC Act and Regulations relating to this appeal are as follows:

1. Section 70(1) of the MPIC Act which is a definition section and the following definitions are relevant to the issue in this appeal:

> **Definitions**
> 70(1) In this Part,
> **"accident"** means any event in which bodily injury is caused by an automobile;
> **"bodily injury"** means any physical or mental injury, including permanent physical or mental impairment and death;
> **"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;

2. Section 81(1)(a) of the MPIC Act states:

> **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;

The Courts in Manitoba interpreted Sections 70(1) and Section 81(1)(a) of the MPIC Act in the following cases:

1. *McMillan v. Thompson (Rural Municipality),* (1997) 115 Man. R. (2d) (Man. C.A.)

2. *Mitchell v. Rahman et al,* 2000 CarswellMan 465, 2000 MBQB 143, [2000] 11 W.W.R. 759, 149 Man. R. (2d) 254 (Man. Q.B.)

3. *Mitchell v. Rahman et al* decided February 14, 2002, docket A100-30-04816 (Man. C.A.)

4. *Guiboche v. Ford Motor Co. of Canada Ltd..*, docket AI 98-30-03676 (Man. C.A.)

The Courts in Manitoba in respect of Sections 70(1) and 81(1)(a) of the MPIC Act, have adopted a two-fold test as set out in the Supreme Court decision of *Amos v. Insurance Corp. of British Columbia* [1995] 9 W.W.R. 305. In this decision Major J. stated the two part test as follows:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?

2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?

MPIC asserted that the Appellant did not establish, on a balance of probabilities, a nexus or causal relationship between the motor vehicle accident and the injuries the Appellant was alleging prevented him from working. As a result, MPIC argued that the Appellant was not entitled to receive IRI benefits under Section 81(1)(a) of the MPIC Act.

The Appellant, on the other hand, asserted that as a direct result of the motor vehicle accident he sustained injuries to his neck which required him to be treated by [Appellant's chiropractor]. The Appellant further asserted but for the motor vehicle accident injuries he would not have required chiropractic manipulation of his neck which caused the vertebral artery dissection.

In *Mitchell v. Rahman (supra)* the Defendants in the Court of Queen's Bench action raised a defense of novus actus interveniens. In that case the Plaintiff sued four doctors and a hospital

alleging negligent treatment to a shoulder injury sustained in a motor vehicle accident. The Defendants denied the negligence and asserted that the MPIC Act set out a plan of coverage for automobile accidents and precluded any action with respect to injuries covered by the MPIC Act.

The Defendants brought an action to dismiss the claim on the grounds that it was barred by the MPIC Act. The Plaintiff asserted that the injuries were caused not by the motor vehicle accident but by the negligence of some of the Defendants and, therefore, the action is not barred by the MPIC Act. The court was required to determine whether the injuries in respect to the claim of bodily injuries was caused by the motor vehicle accident as defined by the MPIC Act or was the result of medical treatment provided by the Defendant doctors and hospital.

Mr. Justice Kaufmann concluded that the injuries sustained by the Plaintiff were caused by the motor vehicle accident and not by the medical treatment provided by the Defendants. He therefore determined that the injuries with respect to the claim were bodily injuries caused by the motor vehicle accident as defined by the MPIC Act and, as a result, Section 72 of the Act provided that no legal action could be entertained by the Court of Queen's Bench.

On appeal the Manitoba Court of Appeal reversed the Queen's Bench decision and permitted the Plaintiffs to proceed with their legal action.

The Court of Appeal determined that the defense of novus actus interveniens has no application to the legal proceedings in question. The Court of Appeal stated:

> Determining the liability of successive tortfeasors and assigning responsibility between or among them are not issues that arise on this appeal. The fundamental question to be answered is whether the injuries that the plaintiff alleges resulted from the negligence of the defendants were "caused by … the use of an automobile" so as to trigger the application of Part 2 of the Act.

The Court further stated:

> However, Major J. points out in Amos v. Insurance Corp. of British Columbia that "it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle" (at para. 21). Issues such as "effective cause," "cause-in-fact," and "proximate cause or remoteness" do not have to be considered. The question in this case is whether the relationship between the plaintiff's use of an automobile and the later aggravation of his injuries that resulted from the medical treatment was more than merely incidental or fortuitous. Did the injuries have a "consequential connection" [See Note 12 below] to the use of an automobile? Did the "requisite nexus or causal link" [See Note 13 below] exist between the injuries resulting from the alleged medical negligence and the use of an automobile? Does it matter at all whether the need for medical treatment arose out of the use of an automobile, a vigorous tennis match, a bicycle mishap, or digging in the garden?
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> Note 12: The words of Kroft J.A. in McMillan v. Thompson (Rural Municipality), at para. 137
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> Note 13: The words of Major J. in Amos v. Insurance Corp of British Columbia, at para. 21
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The Court also stated:

> The allegations of negligence against the defendants – misdiagnosis of the plaintiff's shoulder injury and failure to prescribe appropriate treatment – flow from an intervening act independent of the plaintiff's use of an automobile. They constitute a distinct and separate cause of action against them for the additional damage the plaintiff suffered. The plaintiff's position is perhaps best explained by the comment of Lord Normand in the often-cited decision of Hogan v. Bentinck West Hartley Collieries (Owners), Ltd. [See Note 17 below] (at p. 596):
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> Note 17: [1949] 1 All E.R. 588 (H.L.)
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> I start from the proposition, which seems to me to be axiomatic, that if a surgeon, by lack of skill or failure in reasonable care, causes additional injury or aggravates an existing injury and so renders himself liable in damages, the reasonable conclusion must be that his intervention is a new cause and that the additional injury or the aggravation of the existing injury should be attributed to it and not to the original accident. On the other hand, an operation prudently advised and skilfully and carefully carried out should not be

> treated as a new cause, whatever its consequences may be.

The Court concluded that the Plaintiff's claim against the Defendants for injuries resulting from alleged medical mistreatment were not caused by the use of an automobile so as to be barred from suit by Part 2 of the Act.

In the present appeal the medical evidence of [Appellant's vascular surgeon], [Appellant's neurologist] and [MPIC's doctor] clearly established, on the balance of probabilities, that the Appellant's vertebral artery dissection was not caused by the motor vehicle accident but by the chiropractic manipulation of the Appellant's neck on February 11, 2002. The Commission notes that this chiropractic manipulation occurred approximately six months and two weeks following the motor vehicle accident of July 20, 2001.

The Appellant's testimony clearly indicates that shortly after the motor vehicle accident he was able to return to work at the same time that he was receiving chiropractic treatments. The Appellant testified that following a chiropractic treatment by [Appellant's chiropractor] on February 11, 2002 he was unable to continue to work on February 13, 2002 because he was experiencing severe neck and back pain. Subsequent medical examinations revealed that the Appellant suffered a vertebral artery dissection.

The Appellant did not offer any medical evidence which challenged the medical opinions of [Appellant's neurologist], [Appellant's vascular surgeon] and [MPIC's doctor] relating to the connection between the chiropractic manipulation of his neck and the vertebral artery dissection.

MPIC has established, on a balance of probabilities, that the chiropractic manipulation resulted in a vertebral artery dissection to the Appellant's neck and that this injury was not caused by the use of an automobile.

The Commission therefore determines that for these reasons the Appellant has not established, on the balance of probabilities, that the vertebral artery dissection which prevented him from working was caused by the motor vehicle accident and, as a result, he is not entitled to receive IRI benefits pursuant to Section 81(1)(a) of the MPIC Act.

By the authority of Section 184(1) of the MPIC Act the Commission orders that the decision of MPIC's Internal Review Officer bearing date August 29, 2002 be, therefore, confirmed and the Appellant's appeal in respect of this issue is therefore dismissed.

Dated at Winnipeg this 23rd day of January, 2004.

MEL MYERS, Q.C.

LAURA DIAMOND

GUY JOUBERT