Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-04

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Mr. Robert Malazdrewich**
APPEARANCES:	**The Appellant,[text deleted], appeared on his own behalf via teleconference;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.**
HEARING DATE:	**August 2, 2005 and October 30, 2006**
ISSUE(S):	**Entitlement to funding for prescription Androgel Testosterone**
RELEVANT SECTIONS:	**Section 136 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, [text deleted], was injured in a motor vehicle accident on September 28, 1997. He suffered multiple injuries, including nerve damage on the left shoulder, neck stiffness creating headaches, broken cheek and jaw on the left side of his face, very clear scars on his face, frequent headaches, hip problems with trouble walking and aching pelvis muscles. He received medical care and physiotherapy and was referred for psychological services as well.

In the spring of 2003, the Appellant's general practitioner, [text deleted], prescribed treatment with a prescription for testosterone. [Appellant's doctor #1] was of the view that the effects of the motor vehicle accident had led to a decrease in the Appellant's testosterone levels, which resulted in the Appellant suffering from weight loss, fatigue, low energy levels and mood alteration.

The Appellant's case manager wrote to him on June 27, 2003 denying reimbursement for the testosterone medication as there was "insufficient medical evidence to indicate the medication Andriol Testosterone is medically required in the management of the condition that developed as a result of this accident."

The Appellant sought Internal Review of this decision. On October 17, 2003 an Internal Review Officer for MPIC determined that medical evidence on the Appellant's file indicated that testosterone was not a medical requirement in the management of a condition arising from the Appellant's motor vehicle accident of September 28, 1997, and confirmed the case manager's decision. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

The Appellant submitted that many of the difficulties which he has encountered since the motor vehicle accident are the result of a decrease in testosterone levels caused by the accident.

He testified that prior to the accident he was strong, healthy and fit. He was a weightlifter who weighed approximately 215 lbs. Although he worked night shift for many years prior to the

accident he had not suffered from sleep disturbances or found that it had any ill effect upon his health.

However, following the accident he experienced weight loss, at one point dropping to 165 lbs. He had problems with fatigue, low energy and a loss of motivation. His sleep was disturbed due to pain, he suffered from decreased sex drive and a lack of interest in sex, as well as mood alteration.

Along with the physical treatments and therapies the Appellant received, he also was seen by [Appellant's psychiatrist]. He was prescribed anti-depressants, and testified that he tried at least five (5) different kinds and different combinations, without any success. Finally, in the spring of 2003, [Appellant's doctor #1], concluded that the sleep deprivation caused by the effects of the accident had affected the Appellant's testosterone levels and prescribed testosterone. When it was found that the Appellant did not do well on oral testosterone, he was prescribed a topical gel which is applied daily, called Androgel Testosterone.

The Appellant testified that while on the Androgel Testosterone his symptoms improved. He began to feel "more like himself". He gained some weight, began to think about sex, had more energy and no longer experienced the same negative moods.

However, although MPIC had paid for some early prescriptions of testosterone, once the corporation declined to pay for the prescription, the Appellant found that he could not afford to pay for the Androgel himself, as it was very expensive. He obtained some free samples from his physician but because of the irregularity of his supply, was not taking the full, proper dosage.

He also saw [the Appellant's doctor #2], who practices medicine with an interest in men's health issues. Under [the Appellant's doctor #2's] care, he was able to receive some injections of testosterone, which were administered approximately every two (2) weeks, instead of daily, like the gel. According to the Appellant, the injections were not as effective as the gel, although the injections were much more inexpensive. Because the injections had to last approximately two (2) weeks, this treatment did not provide the same stable levels of testosterone that the Appellant experienced with the gel.

The Appellant submitted medical reports from [Appellant's doctor #1] and [Appellant's doctor #2] which, he argued, established that his symptoms were caused by the motor vehicle accident and improved as a result of the administration of testosterone. He also submitted lab test results showing his testosterone levels both before and after his injections. However, because the injections provided less stable levels of testosterone, the readings on the test results varied widely, sometimes showing elevated or high testosterone levels following an injection, and sometimes showing levels in the low/normal range.

Evidence and Submission for MPIC

Counsel for MPIC cross examined the Appellant and also relied upon medical reports from [MPIC's doctor], medical consultant with MPIC's Health Care Services. Counsel for MPIC took the position that the particular symptoms complained of by the Appellant were not caused by the motor vehicle accident, and also took the position that Androgel Testosterone was not medically required as a treatment for the Appellant's condition.

In a Memorandum dated August 19, 2003, [MPIC's doctor] was of the opinion that testosterone was not a recommended treatment for the Appellant's ongoing "chronic fatigue". It was his view

that the Appellant's fatigue was multi-factorial and not solely the result of the incident in question. He also noted that the file did not contain documentation outlining the results of tests identifying a disturbance in the Appellant's testosterone secretion.

Counsel for MPIC also noted that an endocrinologist, [text deleted], had analyzed blood tests of the Appellant and concluded, on March 10, 2004, that the Appellant's testosterone levels were normal and that he did not need any androgen replacement.

In a more recent Memorandum dated December 9, 2005, [MPIC's doctor] reviewed a medical report from [Appellant's doctor #2], as well as [Appellant's endocrinologist's] assessment. It was his view that the Appellant's testosterone levels were within normal limits and he noted that a review of the file showed the Appellant had not reported his symptoms (muscle wasting, fatigue, loss of motivation, depressed mood and loss of sex drive) following the incident in question. Counsel for MPIC pointed out that in fact, [Appellant's doctor #1's] prescription for testosterone was not issued until approximately five (5) years after the motor vehicle accident in question. Accordingly, the lack of symptoms or reporting of them in the period following the motor vehicle accident raised doubt regarding a causal connection between the motor vehicle accident and the Appellant's symptomology.

Counsel for MPIC also submitted that the evidence was far from clear as to what might have caused any decrease in the Appellant's testosterone levels, if there was any. She noted that although [Appellant's doctor #1's] reports consistently attributed the Appellant's reduced testosterone levels to disturbed sleep patterns resulting from the pain of his accident injuries, [Appellant's doctor #2], in his report identified a few different possible causes such as a possible injury to the Appellant's pituitary gland (for which there was no medical support), the prescribed

use of antidepressants and narcotics by the Appellant following the accident or possibly poor sleep resulting from depression. She noted [Appellant's doctor #2's] observation that the relationship, for example, between testosterone and sleep "is not clear".

Counsel for MPIC also noted that [Appellant's doctor #2] had not seen the Appellant before the motor vehicle accident or even shortly after the accident in 1997.

In reviewing the test results for testosterone levels submitted by the Appellant, counsel for MPIC submitted that these test scores did not show an individual with low testosterone levels in need of testosterone supplements. In some cases, following treatment, the Appellant showed elevated or high levels of testosterone. In another instance, test results prior to the injection showed a low normal level of 15.9, which were then tested at another low level of 18.3, following the injection. Accordingly, counsel for MPIC questioned the efficacy of these treatments and whether they were really medically required by the Appellant. She suggested that the testosterone treatments might be having something like a placebo effect upon the Appellant, who was experiencing symptoms and desperate to find a means of reducing them.

In response to these points, the Appellant discounted the theory that the testosterone treatments were having a placebo or similar effect upon him. He noted that he had tried several different antidepressant pills, as well as testosterone pills. Although he had not previously had any difficulty in the past with absorbing oral medication, the testosterone pills did not help nor did the antidepressants assist him. He had limited success with the injections, but was able to clearly identify a benefit from the Androgel. He submitted that if this was simply a case of his desperately looking for some treatment help, it was unlikely that he would have differentiated between the pills, injections and gel.

On the issue of the delay in reporting his symptoms, the Appellant noted that during the early days following his accident, he and his caregivers were more concerned with the fairly major physical issues confronting him. He was in a good deal of pain and attempting to deal with injuries to his face, upper limp and head. It was only after some of these things started to heal, and he received unsuccessful treatment for depression, that he began to give more focus to some of the other issues such as mood alteration, sexual dysfunction and fatigue.

The Appellant discounted [Appellant's endocrinologist's] opinion, noting that the physician had spent very little time with him, and had not, in his view, taken his complaints seriously. He also submitted that he had very little faith in [MPIC's doctor's] opinion, as [MPIC's doctor] had never examined him. He noted that his own caregivers, [Appellant's doctor #1] (who he saw every two (2) weeks), and [Appellant's doctor #2] (who has special knowledge in this area), had examined and treated him, and were both of the opinion that the Androgel treatment relieved his symptoms, which were caused by the motor vehicle accident.

Discussion

Section 136 of the MPIC Act states:

> **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;
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> (b) the purchase of prostheses or orthopedic devices;
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> (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;

(d) such other expenses as may be prescribed by regulation.

Section 5 of Manitoba Regulation 40/94 states:

> **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 onus is on the Appellant to show, on a balance of probabilities, that the treatment in question is medically required for his condition, and that the condition is a result of injuries arising out of the motor vehicle accident. The panel finds that, on a balance of probabilities, the Appellant has met the onus upon him of showing that his condition was caused by the motor vehicle accident and that his symptomology is relieved by the testosterone treatment.

Causation

The panel has carefully considered the arguments put forward by counsel for MPIC to support its view that the Appellant's symptoms were not caused by the motor vehicle accident and that testosterone treatment is not medically required to relieve the symptoms. We have reviewed the evidence submitted by MPIC in support of these arguments and weighed it against the evidence submitted by the Appellant and his caregivers.

MPIC's submission that the Appellant did not report these symptoms until almost five (5) years

after the motor vehicle accident is not supported by a careful review of the evidence on file. A review of the file indicates that the Appellant did complain of many of these symptoms following the accident, although at that time they were not identified as having a connection to testosterone levels.

For example, [Appellant's psychiatrist's] report dated July 13, 1999 set out the many physical injuries which the Appellant suffered. He also noted the Appellant's concern over his increased frustration, nervousness and irritability, as well as difficulty sleeping and a moderate level of depression which included:

> . . sadness, pessimism, past failure, loss of pleasure, guilty feelings, punishment feelings, self-dislikeness and criticalness, agitation, loss of interest, worthlessness, loss of energy, changing in sleep pattern, irritability, tired/fatigue, and loss of interest in sex. . .

At that time, [Appellant's psychiatrist] diagnosed an adjustment disorder with mixed emotional feature of anxiety and depression.

Many of these symptoms were again reported by [Appellant's psychiatrist] on January 6, 2003 including:

> . . . poor appetite, lack of sleep, weight loss, lack of desire to work and sometimes to live. . .

We also accept the Appellant's comments that during the early period following the accident he and his caregivers were more focused on his serious physical ailments and attributed many of these other symptoms to depression. Only when the physical symptoms were alleviated and treatment for depression proved to be unsuccessful, was the possibility of low testosterone syndrome as an explanation for his symptomology then considered.

Counsel for MPIC's suggestion of possible other causes of the Appellant's symptomology, such as his night shift work or a pre-existing condition, were not borne out by the evidence. The Appellant testified that he had worked shift work for five (5) to ten (10) years prior to the accident, without any difficulties with sleeping or the symptoms he described. He also testified, and medical reports on file confirm, that he reported having no such symptoms prior to the accident. In fact, his weight was significantly higher prior to the accident and he was a young and fit weightlifter. The panel does not accept the argument of counsel for MPIC that the Appellant's work schedule or a pre-existing condition caused the symptoms he complains of.

The panel found that the Appellant gave credible evidence regarding his condition prior to and following the accident. His position was supported by his caregivers. [Appellant's doctor #1] provided several reports setting out his opinion that the symptoms described by the Appellant were a result of reduced testosterone due to disturbed sleep patterns. In a letter to the Commission dated August 27, 2005, [Appellant's doctor #1] stated:

> [The Appellant] experienced pain from his accident injuries that disturbed his sleep pattern, and subsequently resulted in a reduced testosterone level. Testosterone is released in a pulsatile diurnal pattern, at - 2-3am, during sleep. If sleep is disturbed in a persistent manner, the release of testosterone is interfered with. [The Appellant] has not slept well since his accident due to pain and his permanent disability in his shoulder that does not allow him to comfortably sleep on his affected side.
>
> [The Appellant] had improved energy, increased work tolerance, improved cognition, and improved mood when taking Andriol Testosterone.
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> [The Appellant] demonstrated the positive benefits of receiving testosterone replacement therapy (which is not universally the case), and should be continued on therapy.
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> [The Appellant] suffered a serious closed head injury, an (sic) permanent disfigurement to his face in his fractured (untreated) zygoma, and neck with a large prominent scar, and to his neck with concomitant permanent loss of his long thoracic nerve and resultant weakness and pain, resulting in permanent sleep deficit which led to testosterone

deficiency.

In a letter dated October 5, 2005, [the Appellant's doctor #2] provided the Commission with his opinion. He reviewed testosterone blood tests for the Appellant noting that the Appellant:

> . . . would appear to have been low although his total testosterone was strictly speaking within the normal range. . .
>
> . . . These levels are either low or at the low end of the normal range. This is somewhat unusual for a [text deleted] year-old. Unfortunately I have no information about [the Appellant's] levels prior to his accident.
>
> . . .
>
> . . . I don't have accurate testosterone levels from [the Appellant] prior to his accident to compare to. Very shortly after his accident he developed symptoms consistent with low testosterone including muscle wasting, fatigue, loss of motivation, depressed mood and loss of sex drive. These symptoms are also consistent with a possible depression. For a [text deleted]-year-old his free testosterone levels are surprisingly low in that they are barely into the normal range and some cases below the normal range. On testosterone replacement he has a resolution of his symptoms that is significantly superior to the benefits obtained from the use of two antidepressants used simultaneously.
>
> The oral medication Andriol did not result in a clinical improvement in [the Appellant] when given to him by another physician. Andriol is sometimes ineffective in people who don't absorb it well from the GI tract. [The Appellant] appears to respond much better to the use of Androgel.

In reviewing the possible causal connection, [the Appellant's doctor #2] stated:

> [The Appellant's] MVA involved significant facial and head injuries. It is conceivable that during the MVA [the Appellant] suffered an injury to the pituitary gland. This is far from clear. If there was an injury it is not a complete injury and there is no evidence to directly support this. There is some suggestion in the literature that the use of anti-depressants and narcotics which were used in [the Appellant] after his MVA can lower testosterone. In addition, as suggested in your question, there are some small studies suggesting that poor sleep can be associated with low testosterone. Unfortunately low testosterone can be associated with depression which may affect sleep. In short the relationship between testosterone and sleep is not clear.
>
> Overall and in summary it would appear that [the Appellant] has low testosterone levels, chronologically the symptoms associated with this are associated with his MVA replacing his testosterone with Androgel 1% 5 ccs per day ameliorates these symptoms.

Counsel for MPIC argued that there is no positive or scientific proof that the Appellant's motor vehicle accident caused a decrease in his testosterone or his symptomology.

The Supreme Court of Canada, in *Athey v Leonati*, (1996) 140 DLR 4th 235 has stated that:

> The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision . . . it is essentially a practical question of fact which can best be answered by ordinary common sense. (see page 239)

The panel is of the view that, on a balance of probabilities, the evidence presented by the Appellant, [the Appellant's doctor #1] and [the Appellant's doctor #2] supports his position that it was the motor vehicle accident which caused the Appellant's symptoms. We have weighed this evidence against the opinion of [the Appellant's endocrinologist] and [MPIC's doctor] and find that we prefer the evidence of the Appellant's caregivers, who had the opportunity to examine and treat him over time, as well as the evidence of the Appellant, who we find to be credible.

[The Appellant's doctor #2's] report of October 5, 2005 did consider a few different ways that the accident may have caused the Appellant's reduced testosterone syndrome. He identified a possible injury to the Appellant's pituitary gland, the use of anti-depressants and narcotics following the accident, as well as possible depression and/or sleep disturbance, all as possible causes of the problem. [The Appellant's doctor #1's] view was that sleep disturbance caused by the motor vehicle accident was the cause.

While a variety of possible causes have been identified by these caregivers, all of them relate to, and are a result of, the motor vehicle accident. Accordingly, we find that the symptomology complained of by the Appellant, including fatigue and low energy, weight loss, mood

disturbance and loss of sex drive, were caused by the motor vehicle accident.

Medically Required

Counsel for MPIC also submitted that Androgel Testosterone was not a medically required treatment for the symptoms experienced by the Appellant. Although counsel for MPIC commented upon the wide range of testosterone level results in the blood tests submitted by the Appellant, arguing that this showed that testosterone was not an appropriate treatment for the Appellant, the panel finds that these tests results are not particularly helpful or reliable. Some of the tests were conducted at different times of day, and the evidence from the Appellant's caregivers was that testosterone levels can vary throughout the day, making testing times relevant. As well, many of these test results were based upon treatment with testosterone injections, as opposed to the testosterone gel, which the Appellant has testified and [the Appellant's doctor #2] has noted, was more successful in ameliorating his symptoms.

Counsel for MPIC's submission that the Appellant's subjective interpretation of the treatments' effects may be based on some type of placebo syndrome was rebutted by the Appellant's evidence that such an effect would have presented itself earlier, with the many antidepressant medications he tried, or with the oral testosterone. The Appellant was quite firm in his impression that it was only the Androgel Testosterone which was successful in ameliorating his symptoms and we find him credible in this regard. Accordingly, the panel has relied upon the opinions of [the Appellant's doctor #1] and [the Appellant's doctor #2].

[The Appellant's doctor #1] found that testosterone gave the Appellant "improved energy, increased work tolerance, improved cognition, and improved mood". He added that the Appellant "demonstrated the positive benefits of receiving testosterone replacement therapy

(which is not universally the case), and should be continued on therapy"

[The Appellant's doctor #2] stated:

> Overall and in summary it would appear that [the Appellant] has low testosterone levels, chronologically the symptoms associated with this are associated with his MVA replacing his testosterone with Androgel 1% 5 ccs per day ameliorates these symptoms.

And:

> . . . On testosterone replacement he has a resolution of his symptoms that is significantly superior to the benefits obtained from the use of two antidepressants used simultaneously.
>
> The oral medication Andriol did not result in a clinical improvement in [the Appellant] when given to him by another physician. Andriol is sometimes ineffective in people who don't absorb it well from the GI tract. [The Appellant] appears to respond much better to the use of Androgel.

Accordingly, the panel finds that the Appellant has shown, on a balance of probabilities, that treatment with Androgel Testosterone is medically required to treat a condition arising out of his motor vehicle accident of September 29, 1997.

The decision of MPIC's Internal Review Officer dated October 17, 2003 is therefore rescinded. The Appellant shall be entitled to reimbursement from the Manitoba Public Insurance Corporation for Androgel Testosterone Medication. Interest in accordance with Section 167 of the MPIC Act shall be added to amounts which have been previously expended by the Appellant to pay for testosterone medication.

Dated at Winnipeg this 21st day of November, 2006.

LAURA DIAMOND

MARY LYNN BROOKS

ROBERT MALAZDREWICH