Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-165

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Ms Wendy Sol**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Marcelle Marion and Ms Laurie Gordon of the Claimant Adviser Officer;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATE:	**May 6, 2008, December 2, 2008 and April 2, 2009**
ISSUE(S):	**Entitlement to further funding for diabetic medication.**
RELEVANT SECTIONS:	**Sections 136(1), 136(2), 171(1), 171(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act'**

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 injured in a motor vehicle accident on August 25, 1995. He sustained multiple injuries including a head injury, a fractured pelvis and a broken leg.

The Appellant had been diagnosed with Type II diabetes in March 1994. While in the hospital following the motor vehicle accident, he developed an increase in hyperglycemia levels and required insulin. By the time of discharge he required a diabetic diet to control blood sugars rather than insulin.

Sometime in 1998, the Appellant began requiring diabetes medication. These expenses were paid for by MPIC following a letter from his family doctor, [Appellant's doctor #1], to the case manager on December 21, 1998 to the effect that his diabetes was totally out of control post-accident and may have impacted on his ability to control his blood sugars through diet alone.

> "[The Appellant] has asked me to write to you in regards to the use of his other medications. I would support the fact his diabetes was totally out of control post-accident and this may well have impacted on his ability to control his blood sugars through diet alone, therefore, his need for DiaBeta may be directly related to the accident."

For several years, the Appellant received payment from MPIC for his diabetes medication. Then, in 2005, a new case manager for MPIC asked [MPIC's doctor], a Medical Consultant with MPIC's Health Care Services, to look at whether the diabetes medication was causally related to the motor vehicle accident. On November 17, 2005 [MPIC's doctor] provided a memorandum which noted that the natural history of the Appellant's type of diabetes was one of progression over time and that he would have required some type of medication even without the accident. He also noted that his review of the file showed that the Appellant may not have been compliant with the required diabetes diet and that this could have caused him to need medication. He concluded that the diabetes medication was not related to a condition arising from the motor vehicle accident.

The Appellant's case manager issued a decision letter on January 26, 2006 ending reimbursement for the diabetes medication.

The Appellant sought an Internal Review of this decision. An Internal Review hearing was held and the Internal Review Officer wrote to the Appellant's family doctor, [Appellant's doctor #1]

to seek her opinion on how long the Appellant would have been able to control his diabetes without medication.

[Appellant's doctor #1] provided a letter dated May 17, 2006. That letter indicated that prior to the motor vehicle accident, the Appellant's diabetes was only sub-optimally controlled by diet and lifestyle and that he had not necessarily been following the diabetic diet. She indicated that he would have required medication at an earlier stage, even without the motor vehicle accident, and also noted that current diabetic guidelines recommended earlier and more aggressive medical intervention.

> "In summary [the Appellant] had Type II diabetes for many years which was sub-optimally controlled through his intermittent attempts at lifestyle alteration. The natural progression for Type II diabetes is gradual progression. The current diabetes guidelines recommend earlier and more aggressive intervention with medication than they did in the 1990's. He certainly would have been considered a candidate for intervention at an earlier stage. Therefore the likelihood that he would have required medication intervention even without having experienced the hyperosmolar state at the time of the accident is extremely high.
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> I do not have the expertise to confirm that having experienced a hyperosmolar state would have caused more rapid progression than would have occurred otherwise. However, I do believe that he would have required intervention with medication at some point regardless. Perhaps [Appellant's doctor #2] would be able to shed more light on this question."

The Internal Review Officer, after reviewing [Appellant's doctor #1]'s letter and [MPIC's doctor]'s report, concluded that the Appellant's ongoing need for diabetes medication had little relation to his 1995 accident and confirmed the case manager's decision ending reimbursement for diabetes medication.

It is from this decision of the Internal Review Officer, dated August 16, 2006, that the Appellant has now appealed.

Hearings were held on May 6, 2008 and December 2, 2008. Both of these hearings were adjourned to allow the parties to exchange their positions and to review the material and authority upon which the other side was relying.

Written submissions were then provided to the panel and the hearing reconvened, to hear oral submissions, on April 2, 2009. MPIC takes the position that the decision to terminate funding for the diabetes medication falls under Section 171(2) of the Act, where the Corporation may reconsider a decision if a substantial or procedural error was made in respect of the decision. The Appellant has taken the position that the decision to terminate was made, improperly, under Section 171(1) of the Act, which allows the Corporation to make a fresh decision where it is satisfied that new information is available in respect of the claim.

Submission for the Appellant:

Counsel for the Appellant took issue with MPIC's characterization of the decision to discontinue payment of the Appellant's diabetes medication as a review or reconsideration of a decision pursuant to Section 171(2) of the MPIC Act. Rather, Counsel for the Appellant took the position that MPIC's decision had been based upon "new information" obtained pursuant to Section 171(1) of the Act.

Section 171 of the MPIC Act provides:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

Claims corporation may reconsider before application for review or appeal

171(2) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if

(a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or

(b) the decision contains an error in writing or calculation, or any other clerical error.

Counsel for the Appellant took the position that the letters provided by [MPIC's doctor] and [Appellant's doctor #1] constituted new evidence obtained years after the initial decision. This prompts an analysis as to whether MPIC is entitled to look at new evidence under Section 171(1). As a result, the requirements set out by the Manitoba Court of Appeal in *Shier vs. Manitoba Public Insurance Corp. [2008] M.J. 305* must be applied:

> **"For information to be "new information", under Section 171(1), it must be relevant and decisive to the issue and that the Claimant must not be prejudiced by a lack of due diligence on the part of MPIC in bringing this information forward."** [paragraph 57]

Counsel submitted that this was the appropriate test to apply in this case. She acknowledged that MPIC was taking the position that the new case management decision had been made pursuant to Section 171(2) of the Act to allow the Corporation to reconsider a decision where a substantive or procedural error had been made. However, Counsel for the Appellant took the position that this was really a "cloak" for a consideration of new evidence under Section 171(1). MPIC had improperly based its arguments under Section 171(2). The case manager's decision relied on Section 136(1)(a) of the Act and did not mention Section 171(2). Counsel submitted that for nearly three years after the January 26, 2006 case manager's decision, MPIC did not provide written notice that its decision had been made in accordance with Section 171(2) of the Act, until December 12, 2008 when Counsel for MPIC provided a written submission to the Commission.

MPIC should not be allowed to select, at the appeal hearing, a section of the Act that was not initially relied upon by the case manager or Internal Review Officer.

Further, she submitted that Section 171(2) of the Act was inapplicable in the case. When determining whether a decision contains a substantive error, she submitted, it is only logical to analyze the evidence that was available to and relied upon by the case manager at the time the decision was made and determine whether the decision contained a substantive error based upon the available and relied upon evidence. Instead MPIC focused on information obtained years after this decision. Such evidence, obtained subsequent to the decision, prompts an analysis of whether the evidence meets the criteria to be considered "new information" as contemplated by Section 171(1) of the Act.

Counsel submitted that a significant consideration in this case was the length of time which had elapsed. She submitted that it was unreasonable to wait seven years before questioning the ongoing need for medication and that this substantial delay greatly prejudiced the Appellant. She submitted that the Appellant had and was entitled to have a reasonable expectation that MPIC would act in accordance with the Act. Due diligence should have been performed at a much earlier date.

She submitted that [MPIC's doctor]'s report was not relevant, as it was based upon assumptions and not upon a balance of probabilities. Further, due to the unusual and complex nature of the Appellant's case (he went into a coma, experienced a hyperosmolar state and subsequently required medication to control his diabetes) it was difficult for [MPIC's doctor], or even [Appellant's doctor #1] to understand the issues as an endocrinologist would be required to shed more light on the issue.

She further noted that all of the relevant evidence was available at the time the initial decision was made to reimburse the medication, except for the new guidelines on diabetes management referred to by the Internal Review Officer from [Appellant's doctor #1]'s report. However, insufficient information regarding the guidelines and whether the Appellant would have been a candidate in 1998 was provided to support this position.

Accordingly, Counsel for the Appellant submitted that the information relied upon by the case manager and Internal Review Officer failed to meet the tests set out by the Court of Appeal in the *Shier*, supra, decision for information to be "new information" considered in making a fresh decision under Section 171(1).

Counsel also submitted that dealing as this case does, with the termination of the Appellant's benefits, this should not be taken lightly. The Appellant had met the onus of proof in establishing that his benefits were improperly terminated and MPIC had failed to even meet any burden of proof at its level to entitle them to change position on the reimbursement of diabetes medication.

Submission for MPIC:

MPIC's primary position was that the initial case management decision allowing reimbursement for diabetes medication was in error and that the decision under review was made pursuant to Section 171(2) of the Act which provides that the Corporation may on its own motion reconsider a decision if, in the opinion of the corporation, a substantive or procedural error was made.

The initial case management decision to reimburse the Appellant for his medication was made January 5, 1999. A subsequent case manager's decision pointed out that the medication was

found to not be causally related to the motor vehicle accident. Therefore, there was clearly a substantive error made in the January 5, 1999 decision that needed to be corrected.

New information came to light when a new case manager took over and investigation revealed the substantive error. Then, the decision was corrected and the entitlement was terminated.

Counsel for MPIC submitted that the Appellant had failed to provide any medical evidence or information contrary to the current medical information on the file which indicated that the requirement for medication was not causally connected to the motor vehicle accident.

Counsel also submitted that, in the alternative, the case manager and Internal Review Officer decisions are supportable pursuant to Section 171(1) of the Manitoba Public Insurance Act. She reviewed the principles set out by the Court of Appeal and the Commission in the *Shier* case and summarized the principles for the consideration of new information as follows:

> "1. The evidence should generally not be admitted if, by due diligence it could have been adduced at trial;
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> 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue on the trial;
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> 3. The evidence must be credible in the sense that it is reasonably capable of belief; and
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> 4. The evidence must be such that if believed, it could reasonably, when taken with other evidence at trial be expected to have affected the result."

MPIC took the position that [MPIC's doctor]'s report of November 17, 2005 could then have constituted new information under Section 171(1) and that this report would form a sufficient basis for the case manager to render a new decision letter. [MPIC's doctor]'s report was clearly information that had not previously appeared on the file. It was reasonable for the case manager

to accept [Appellant's doctor #1]'s initial opinion and there had been no reason at that time to send the matter for opinion to Health Care Services. However, as time went on, it was logical and proper for the case manager to question whether the ongoing need for diabetes medication was still causally related to the motor vehicle accident. This inquiry generated [MPIC's doctor]'s report.

Counsel submitted that [MPIC's doctor]'s report was clearly relevant and that, as a licensed health care practitioner in the Province of Manitoba he would have knowledge of the causes and effects of diabetes. Further, the information contained in his report clearly affects any decision regarding the Appellant's entitlement to funding for diabetes medication.

In dealing with the Appellant's position that MPIC had not previously mentioned Section 171(2) when setting out its decision, Counsel submitted that when determining entitlement to benefits, MPIC looks at Part II of the MPIC Act as a whole. Any termination of benefits would be pursuant to Section 171, even if not expressly noted. This would be involved in most decisions determining medical benefits. The Appellant has not suffered any prejudice. In fact, he has been given an opportunity to respond and address the arguments of the Corporation regarding both Section 171(1) and (2).

Counsel submitted that the only issue before the panel is whether the Appellant is entitled to this benefit. The onus remains on the Appellant to prove that the benefit requested is connected to the injuries sustained in the motor vehicle accident. The information on file indicates that in this case it is not, and the onus to bring forward contrary information and evidence still rests with the Appellant. Accordingly, the Appellant has not proven that this medication is required due to injuries suffered in the motor vehicle accident. Rather, the Appellant is asking the Commission

to perpetuate an error that was made and find that he is entitled to reimbursement when, on the evidence, he is not. Counsel submitted that this is completely contrary to the Personal Injury Protection Plan and the legislation that supports it. Accordingly, Counsel submitted that the decision of the Internal Review Officer should be upheld.

Discussion:

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;

(b) the purchase of prostheses or orthopedic devices;

(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.

Reimbursement of expense paid by other person

136(2) A person who pays an expense referred to in subsection (1) on behalf of a victim is entitled to reimbursement of the expense.

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

Claims corporation may reconsider before application for review or appeal

171(2) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if

(a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or

(b) the decision contains an error in writing or calculation, or any other clerical error.

Counsel for the Appellant submitted that MPIC's actions in terminating the Appellant's benefits in this case were taken, not under Section 171(2), but rather under Section 171(1) of the Act and that the test set out in the Court of Appeal decision in *Shier*, supra, should be applied. According to Counsel for the Appellant, once new information is obtained, Section 171(1) is the only Section that applies.

The Commission has considered this submission, but does not agree. We find that Section 171(2)(a) does apply in this case. The panel finds that a substantive error occurred in the initial case management decision allowing reimbursement for diabetes medication.

We find that a new case manager was then appointed who questioned the original determination and proceeded to research and investigate the issue. The new case manager obtained a medical report from [MPIC's doctor]. That report showed that an error had occurred and the case manager issued a new decision. The Internal Review Officer then obtained a report from [Appellant's doctor #1] which supported [MPIC's doctor]'s opinion.

The panel finds that MPIC discovered a substantive error in the Appellant's case management and that the new case manager acted responsibly in investigating this issue and obtaining a proper medical foundation for a new decision. We find that Section 171(1) of the Act is not relevant in this case, based upon our finding that the Corporation proceeded properly pursuant to Section 171(2) of the Act, when it discovered a substantive error.

Counsel for the Appellant argued that MPIC's failure to cite Section 171(2) in its case management and Internal Review Decisions, citing only the application of Section 136 to the Appellant's entitlements, prejudiced the Appellant. According to Counsel for the Appellant, the Appellant relied on MPIC to reimburse him for medication for seven years and did not understand MPIC's new position.

However, the panel is not persuaded that the Appellant has suffered prejudice from MPIC's failure to specifically cite Section 171(2), which would prevent MPIC from applying Section 171(2) (and, as a result, Section 136(a)) to determine his entitlement to benefits. The Commission recognizes that Appellants are not always well versed or familiar with the Personal Injury Protection Plan scheme and the MPIC Act or the way in which it operates, and that it might be helpful to them for MPIC to specifically delineate all relevant Sections in its decisions. However, we do not find that this matter is restricted or limited to only the Sections set out and described in the case manager's decision letters. Rather, the Commission has the obligation to look at the real issues between the parties and the real issues affecting entitlement. Section 184(1) of the MPIC Act provides:

Powers of commission on appeal

184(1) After conducting a hearing, the commission may

(a) confirm, vary or rescind the review decision of the corporation; or

(b) make any decision that the corporation could have made.

In the lengthy period leading up to the final hearing of this appeal, both parties participated in an exchange of positions and arguments, providing both the Appellant and MPIC with full notice of the issues and provisions of the Act in dispute, with the opportunity to make full submissions regarding the issues both in writing and at the hearing.

In the alternative, the panel has also reviewed the parties' submissions regarding the application of Section 171(1) of the Act, and whether MPIC received new information which it could properly consider in issuing a fresh decision.

We find that the reports of [MPIC's doctor] and [Appellant's doctor #1] are relevant, credible and decisive in this regard. We also agree with Counsel for MPIC that the case manager initially relied upon [Appellant's doctor #1]'s 1998 assessment to allow reimbursement for medication as a result of the motor vehicle accident, but that the new case manager and Internal Review Officer acted reasonably and responsibly in obtaining new and updated opinions from [MPIC's doctor] and [Appellant's doctor #1] in 2005 and 2006.

The Commission finds that the Appellant has failed to establish on a balance of probabilities that the Appellant's need for diabetes medication was as a result of the motor vehicle accident. We find that the Internal Review Officer was correct in finding that the evidence supported the decision to deny further funding for diabetes medication. The decision of the Internal Review Officer dated August 16, 2006 is hereby confirmed and the Appellant's appeal is dismissed.

Dated at Winnipeg this 28th day of May, 2009.

LAURA DIAMOND

MARY LYNN BROOKS

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