

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-18**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Leona Barrett
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Mike Triggs.

HEARING DATE: November 12, 2009

ISSUE(S): Entitlement to funding for further physiotherapy treatment

RELEVANT SECTIONS: Section 136(1)(a) 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 involved in a motor vehicle accident on October 5, 2001 and as a result, he sustained a "whiplash" type injury to his neck and shoulder.

By April 2002 the Appellant had attended approximately 26 physiotherapy sessions and was reported to be at full function with little improvement in reported symptoms. The Appellant was referred by his personal physician to [Appellant's pain specialist] [text deleted]. On June 17, 2002 [Appellant's pain specialist] wrote to the Appellant's personal physician and reported that

the Appellant complained of a severe neuropathic groin pain, resulting from a Workers Compensation hernia injury from 1997. As well, [Appellant's pain specialist] noted:

“One other condition that he suffers from is persisting right neck pain after a motor vehicle accident with flexion and extension injury. He states that neck pain impedes his mobility and while the pain is different than that in his right groin, he still finds it uncomfortable and limiting.”

In March of 2004 the Appellant attended at his family doctor, [Appellant's doctor #1]. In a narrative report [Appellant's doctor #1] stated:

“Difficulty with neck pain. Likely relates back to his previous whiplash injury. Still a lot of pain with any movement of the neck. No radiation down the arms. Trying different modalities at the [text deleted] Clinic with little success.”

[MPIC's doctor], a medical consultant with MPIC's Health Care Services, reviewed the Appellant's file in April 2002 and advised no further physiotherapy was warranted at that time.

[Appellant's pain specialist] provided a report to MPIC's case manager on December 10, 2004.

In this report he stated:

“I had the pleasure of reassessing this patient for his persisting right-sided neck pain.

On his bone scan of June 27, 2002 it is identified that he has increased uptake and inflammatory change at the C2 vertebra as well as osteoarthritic changes in the facet joint at C4-C5, C5-C6 in addition to some mild central disc bulging.”

[Appellant's pain specialist] described the treatment provided to the Appellant at the pain clinic and indicated there was no improvement in the Appellant's complaint of neck pain. In his letter to MPIC, [Appellant's pain specialist] recommended further treatments.

MPIC requested a report from [MPIC's doctor] regarding the requirement for further physiotherapy treatment. In an interdepartmental memorandum dated December 15, 2004, [MPIC's doctor] concluded that physiotherapy treatment was not required. [MPIC's doctor]

recommended a program of postural stabilization exercises to be performed by the Appellant at home to educate him of the importance of proper static and dynamic posturing on a daily basis and to instruct the Appellant in pain-coping strategies that he could utilize as required in his daily routine.

In a report to MPI on May 11, 2005, [Appellant's pain specialist] reported that another treatment option for the Appellant to pursue was that of acupuncture. He further recommended the Appellant to be seen by [Appellant's doctor #2] for assessment and management in accordance with [Appellant's doctor #2's] impressions.

On May 27, 2005 [Appellant's doctor #2] wrote to the case manager and stated:

"I received a referral for this patient from [Appellant's pain specialist] at [text deleted].

From the referral that I received, it appears that there may be some medical management issues as well as rehabilitation issues. Furthermore, it appears that the patient may require some attention to their current antidepressant regimen.

The patient would benefit from a Multidisciplinary, Comprehensive Rehabilitation Assessment, including baseline psychometric testing. (underlining added)

Our fee for the assessment and report would be \$1000-1500, depending on the complexity of the file review and report.

Looking forward to your reply."

Case Manager's Decision:

On May 31, 2005 the case manager's decision stated:

"I have attempted to contact you but so far have been unsuccessful. This confirms our decision regarding additional information requested from [Appellant's pain specialist] for further treatments and medications as outlined in his report of May 11, 2005.

That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. The medical information reviewed indicates that there is insufficient evidence to support a causal relationship between your current signs/symptoms and the

motor vehicle accident of October 5, 2001. Therefore, we are unable to approve funding of the requested treatment.

We base our decision on Section 136(1)(a) of The Manitoba Public Insurance Act which reads as follows:

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care.”

[Appellant’s doctor #2] wrote again to the case manager on June 5, 2005 and stated:

“I received a referral for this patient from [Appellant’s pain specialist].

I see from the referral, that there might be some complexity to this case and that it might involve a comprehensive rehabilitation assessment at our clinic.

Please confirm that funding would be available for such a referral.”

The case manager wrote to [Appellant’s doctor #2] on June 8, 2005 and stated:

This is to inform you that your referral from [Appellant’s pain specialist] (May 27, 2005) and your recommendation (June 5, 2005), for a Multidisciplinary assessment for [the Appellant] is currently under review with our health care services team. We will inform you if any further funding is approved.”

In a memo to MPIC dated June 15, 2005, [MPIC’s doctor] reviewed [Appellant’s doctor #2’s] latest report. In her review [MPIC’s doctor] stated that in her opinion causality was not supported by the Appellant’s neck complaints and the motor vehicle accident and that “further treatment is not warranted”.

On June 27, 2005, the case manager wrote to the Appellant and advised him that [Appellant’s doctor #2’s] report dated May 27, 2005 had been reviewed by MPIC’s Health Care Services Team. The case manager stated that this report did not provide any new information which

would allow a fresh decision by MPIC and as a result, MPIC would not consider the cost of additional treatments.

Application for Review:

On August 15, 2005 the Appellant made an Application for Review of the Internal Review Officer's decision and stated:

"I ask the Manitoba Public Insurance Corporation to review the decision of May 31/05 because:

- chronic neck pain has cost me a promising career in the drafting (arch.) field
- It also has caused me undo (sic) pain and suffering and has lead me to consult a mental health therapist/psychiatric (sic) nurse and taking anti-depressants."

On September 12, 2005 the Internal Review Officer wrote to [Appellant's doctor #2] and stated:

"I am reviewing [the Appellant's] claim for benefits. I understand he will be seeing you shortly.

Would you please provide a brief report outlining your objective findings and diagnosis, any tests performed, as well as any required treatment you recommended? Can you comment on the relationship of his 2001 motor vehicle accident and his current symptoms?"

On September 27, 2005 [Appellant's doctor #2] wrote to the Internal Review Officer and indicated that he had seen the Appellant on two occasions, on January 13, 2005 and again on September 13, 2005. [Appellant's doctor #2] noted that his request for funding for treatment of the Appellant was rejected by MPIC. [Appellant's doctor #2] noted that the Appellant's pain had not changed and his sleep was disturbed several times per night. He further stated:

"On examination, there was decreased lateral rotation of the neck to the right, limited extension and flexion and lateral flexion of the neck. This was associated with shortening of the posterior cervical musculature and right trapezius.

I suggested that he increase his Venlafaxine to 150 mgs. per day, and that he could benefit from a comprehensive rehabilitation assessment at our clinic.

He has a chronic neck pain syndrome, with superimposed mood and sleep disturbance, was on maintenance narcotics, and has poor range of motion of the neck at present.

He requires a combination of medication adjustments, cognitive pain therapy, and an active therapy program. All facets of his program have to be delivered in concert, and although he has had physiotherapy programs in the past, a comprehensive approach as discussed above has not to my knowledge been attempted. (underlining added)

The Internal Review Officer requested [MPIC's doctor] to review the Appellant's medical file to determine whether any of her previous opinions had been altered. In her report dated November 8, 2005, [MPIC's doctor] indicated that the Appellant had reached a plateau in response of physiotherapy treatments and therefore as a result, there is no basis to provide further funding for physiotherapy treatment. [MPIC's doctor] also indicated in her report that there were several potential factors contributing to the Appellant's perceived symptoms relating to function and stated:

“...[Appellant's doctor #2] reiterated that he had approached the Manitoba Public Insurance to consider funding a multidisciplinary treatment program for the claimant that included psychological intervention. The claimant was described as currently taking anti-depressant medication. [Appellant's doctor #2] reported his pain to be unchanged and stated that the claimant suffered from sleep disturbance several times per night. Objective findings were noted to be diminished range of neck motion in multiple planes and posterior neck and upper back muscle shortening. The physician advised an increase in the claimant's anti-depressant medication dose and stated that the claimant could benefit from a comprehensive rehabilitation assessment at the physician's clinic. The physician diagnosed chronic neck pain syndrome and superimposed mood and sleep disturbance and objective findings of poor neck range of motion. The physician proposed a multidisciplinary approach including medication adjustments, cognitive pain therapy and an active therapy program. The physician's comments suggested that a comprehensive approach was required as opposed to a program of physiotherapy treatment.”

[MPIC's doctor] recognized that the Appellant is suffering from the symptoms described by [Appellant's doctor #2] but rejected [Appellant's doctor #2's] opinion that these symptoms are caused by the motor vehicle accident:

“...[Appellant's doctor #2's] opinion is shared by this consultant that being, that the claimant potentially would benefit from a multidisciplinary approach to addressing his current complaints, in particular his mental/psychological status. In my opinion, residual pain complaints that the claimant associates with the motor vehicle collision do not play a significant role in his current presentation and as such, support with a

multidisciplinary approach by the Manitoba Public Insurance is not warranted. The medical documentation reviewed suggests that unrelated issues, in particular, mental health issues formed the basis of the claimant's current perceived symptoms. It is not uncommon for mental health issues to manifest themselves by somatic complaints. Addressing mental health issues can be instrumental in resolving somatic complaints such a soft tissue irritation." (underlining added)

Internal Review Officer's Decision:

The Internal Review Officer wrote to the Appellant on November 25, 2005 rejecting the Appellant's application for Internal Review and confirming the case manager's decision of May 31, 2005.

In his decision, the Internal Review Officer stated:

"The evidence supports the denial of further funding for therapy and treatment as requested by [Appellant's pain specialist]. [MPIC's doctor] has noted in her reviews you have had ample physiotherapy treatment and training in conditioning and pain coping strategies. There is no basis to suggest further treatment would result in any long-term benefit to you.

If anything, you would benefit from some psychological treatment. The case manager should consider whether such treatment is related to the accident and medically required. (underlining added)

With respect to the issue at hand, the case manager's decision of May 31, 2005 denying further funding for treatment must be confirmed."

Notice of Appeal:

The Appellant filed a Notice of Appeal on January 23, 2006. In this appeal the Appellant stated:

"The reason why I am appealing this decision is because I believe not all treatment have been tried such as accupuncture or massage. I also believe my injuries have prevented me in pursuing a carreer (sic) in my chosen field due to the ongoing pain and suffering I go through every day."

Appeal:

The relevant provision in the MPIC Act in respect of this appeal is:

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;

In his testimony, the Appellant testified that:

1. Prior to the motor vehicle accident he never had a problem with any pain to his right neck and that this pain did not commence until after the motor vehicle accident.
2. This pain to his neck was continuous and intense and adversely affected his career opportunities and his quality of life.
3. The chiropractic and physiotherapy treatments he received did not resolve the pain to his right neck.

The Appellant was not cross-examined by MPIC's counsel.

In his submission, MPIC's legal counsel reviewed the Internal Review Officer's Decision and the reports of [MPIC's doctor] and submitted that:

1. the Appellant had failed to establish on a balance of probabilities that there was a causal connection between the motor vehicle accident and his complaints in respect of his neck complaint.
2. [MPIC's doctor] was correct in concluding that the Appellant had received ample physiotherapy, and training in conditioning and pain-coping strategies.
3. As a result there was no basis for the Appellant to complain that he was entitled to funding by MPIC for any additional treatments.

Discussion:

The two issues under appeal are:

- 1) Was there a causal connection between the motor vehicle accident and the chronic neck pain syndrome with super-imposed mood and sleep disturbance and poor neck range of motion suffered by the Appellant?
- 2) If there is such a causal connection, is MPIC obligated to fund a multidisciplinary treatment program which includes psychological intervention.

The Appellant testified before the Commission in a very direct and sincere manner and his testimony was not challenged. He asserted that he never had a neck problem prior to the motor vehicle accident and as a result of the motor vehicle accident, he commenced to suffer from chronic neck pain which adversely affected his quality of life and his ability to obtain employment. He further testified that subsequent to the motor vehicle accident he became depressed and suffered from lack of sleep and had difficulty rotating his neck.

[MPIC's doctor] recognized that the Appellant's complaints were legitimate but concluded they were not connected to the motor vehicle accident. [MPIC's doctor] conducted a paper review and did not have the opportunity of personally meeting with the Appellant, obtaining a history of his medical condition before and after the motor vehicle accident and/or assessing the credibility of the Appellant. On the other hand, [Appellant's doctor #2] had the opportunity of personally examining the Appellant on two occasions, and therefore had the opportunity of assessing the credibility of the Appellant and obtaining a history of the Appellant's condition before and after the motor vehicle accident. As a result of his examinations [Appellant's doctor #2] concluded that the Appellant's chronic pain, depression, sleep disturbance and poor neck range of motion were causally connected to the accident. In these circumstances the Commission gives greater weight to the medical opinion of [Appellant's doctor #2] than it does to [MPIC's doctor] on the

issue of causality.

It is not necessary for the Appellant to establish that the motor vehicle accident was the sole cause of the injuries he sustained in the motor vehicle. It is only necessary that the Appellant establish on a balance of probabilities that the motor vehicle accident materially contributed to the injuries the Appellant sustained in this accident.

In [text deleted] (AC-01-42), the Commission stated:

The Review Officer correctly set out the two legal tests to deal with causation in these matters. In *Athey v. Leonati et al* (1996), 140 D.L.R. (4th) 235, the Supreme Court dealt extensively with this issue. In a unanimous decision, Mr. Justice Major states:

A. General Principles

(13) Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

(14) The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

(15) The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, supra. A contributing factor is material if it falls outside the de minimis range: *Bonnington Castings, Ltd. v. Wardlaw*, supra; see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

In *Liebrecht v. Egesz et al*, 135 Man.R. (2d) 206 Justice De Graves, in arriving at his decision, cites *Athey v. Leonati et al* (supra) and states:

(64) Causation must be proved on a balance of probabilities. But it is only necessary by that civil standard of proof to prove that the defendants' negligence materially contributed to the injury.

(65) On the question of causation Major, J., for the court (S.C.C.) in *Athey v. Leonati et al* (1996), ... restated the principle in the context of competing causes as follows:

“It is not now necessary, nor has it ever been for the plaintiff to establish that the defendant’s negligence was the sole cause of the injury.

“The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the ‘but for’ or material contribution test. Future or hypothetical events can be factored into the degrees of probability, but causation of the injury must be determined to be proven or not proven. (p. 245-246)

This decision was appealed to the Manitoba Court of Appeal, and on the issue of causation, the Manitoba Court of Appeal unanimously confirmed the decision of Mr. Justice De Graves. (150 Man. R (2d) 257)

The Commission finds that:

1. the motor vehicle accident materially contributed to the Appellant’s complaints as diagnosed by [Appellant’s doctor #2];
2. the Appellant’s complaints were corroborated by [Appellant’s doctor #2];
3. the Appellant has established on a balance of probabilities that there was a causal connection between the motor vehicle accident and his neck complaints, sleep disturbance, and poor neck range of motion.

Although [MPIC’s doctor] disagreed with [Appellant’s doctor #2] in respect of the issue of causality between the Appellant’s complaints and the motor vehicle accident she did not disagree that the Appellant would benefit from a multi-disciplinary approach addressing his complaints and in particular, his mental/psychological status. The Commission notes that [Appellant’s doctor #2] had requested, on several occasions, funding from MPIC to carry out a multidisciplinary treatment program but MPIC refused to provide such funding.

[Appellant's doctor #2's] letter to the Internal Review Officer dated September 27, 2005 stated:

“He has a chronic neck pain syndrome, with superimposed mood and sleep disturbance, was on maintenance narcotics, and has poor range of motion of the neck at present.

He requires a combination of medication adjustments, cognitive pain therapy, and an active therapy program. All facets of his program have to be delivered in concert, and although he has had physiotherapy programs in the past, a comprehensive approach as discussed above has not to my knowledge been attempted.”

The Commission finds that pursuant to Section 136(1)(a) of the Act that MPIC should fund a multidisciplinary treatment program for the Appellant that includes psychological intervention in order to deal with the Appellant's complaints of a chronic neck pain syndrome, superimposed mood and sleep disturbance and a poor range of neck motion, as described by [Appellant's doctor #2] in his report to the Internal Review Officer dated September 27, 2005.

The Commission therefore allows the Appellant's appeal and rescinds the Internal Review Officer's decision dated May 31, 2005.

Dated at Winnipeg this 9th day of December, 2009.

MEL MYERS, Q.C.

LEONA BARRETT

NEIL COHEN