

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-90**

PANEL: Ms Laura Diamond

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Leanne Zabudsky.

HEARING DATE: January 28, 2010

ISSUE(S):

- 1. Did the Appellant have a reasonable excuse for filing the Application for Review later than the deadline?**
- 2. Is the Appellant entitled to further physiotherapy care benefits?**

RELEVANT SECTIONS: Sections 136(1)(a) and 172(1) and (2) 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 PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on October 20, 2000. She had a history of previous motor vehicle collisions dating back to 1985 and 1989. The Appellant was also diagnosed with fibromyalgia in 1989 – 1990 and eventually stopped [text deleted] in 1994, due to disability. Prior to the motor vehicle accident she was receiving treatment intervention from a physiotherapist, psychologist and psychiatrist.

Following the motor vehicle accident, the Appellant attended for further physiotherapy treatment. On July 19, 2002, the Appellant's case manager wrote to her to indicate that physiotherapy treatment was no longer medically required as a result of injuries sustained in the motor vehicle accident and that the Appellant's physiotherapy benefits would end as of June 16, 2002.

On August 19, 2003, the Appellant sought an Internal Review of this decision.

On April 2, 2004, an Internal Review Officer for MPIC, having noted that the Appellant's Application for Review was not filed within the 60-day time period set out by the MPIC Act and the case manager's letter of July 19, 2002, reviewed the Appellant's file and determined that there was no reasonable excuse offered for the fact that the Application for Review was filed over one year from the date of the decision letter.

The Internal Review Officer also reviewed the Appellant's file and determined that the medical evidence on the file did not support a finding that physiotherapy care was medically required as a result of the Appellant's motor vehicle accident of October 20, 2000.

It is from this decision that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal.

In regard to her late filing of the Application for Review, the Appellant explained that in May of 2002 she became aware that MPIC had some concerns regarding her treatment but that she had

some difficulties in ensuring that her physiotherapist submitted timely reports. Then, that same month, her husband was rushed to hospital. She explained that it had been her husband who had always taken care of the paperwork on her MPIC files, for this motor vehicle accident and for her previous ones.

When her husband became ill, he was misdiagnosed and both she and her husband spent a lot of time dealing with his illness.

When she was contacted by MPIC in July of 2002 regarding the termination of her physiotherapy benefits, she was still dealing with her husband's illness. However, she spoke to her physiotherapist, who indicated that he would submit a report to MPIC shortly. She testified that she was later stunned to discover that her physiotherapist still had not submitted that report.

The Appellant indicated that after being contacted by her case manager in October and advised that there were still no further reports from her physiotherapist, she began to monitor the situation and attempt to obtain a further physiotherapy report. In June of 2003, she wrote to MPIC who sent her an Application for Review which she then filed in August of 2003.

The Appellant submitted that with all her own health difficulties, and those of her husband, along with her history and tendency to rely upon her husband to take care of her MPIC claims, she missed the deadline for filing. She also mistakenly continued to contact her physiotherapist, seeking further reports on the issue of entitlement to funding, instead of filing the Application for Review. She submitted that this was a reasonable excuse for her failure to submit her Application for Review within the time limits specified.

The Appellant described the problems which she suffered as a result of the motor vehicle accident.

She described spinal disc problems which were created by previous motor vehicle accidents, as well as her fibromyalgia. She testified that she needs realignment quite often and needs physiotherapy to help her function.

The Appellant testified that the motor vehicle accident in 2000 created bilateral problems which she did not suffer from previously. She began to have problems in her right and left side to the point where her discs pop out and need to be realigned. Physiotherapy is the only thing that helps her get them back in place. The physiotherapist uses “Tens” and other therapies to help her continue functioning.

The Appellant noted that her family practitioner, [Appellant’s Doctor #1], had reported that:

“[The Appellant] states that she had significant activation of the symptoms of her fibromyalgia and depression following the motor vehicle accident of October 20, 2000.” (see letter from [Appellant’s Doctor #1] dated October 25, 2004)

[Appellant’s Doctor #1] continued:

“In summary then, [the Appellant] has a history of fibromyalgia which has been diagnosed and treated through the 90’s under the supervision of [Appellant’s Doctor #2]. The accident that occurred on October 20, 2000 has acted as a trigger exacerbating her clinical presentation. Recent therapy changes have been introduced. Medication changes have been introduced, specifically Tryptophan. This drug has had some improvement in her sleep pattern. She has been receiving pool therapy. This has been helpful. The recommendation for aggressive pain management has been put forward to the patient. However, she has been reluctant as described above to taking narcotics.

The long term outlook for significant recovery is clearly guarded, as indicated previously by other physicians. The long term expectation for significant recovery

for [the Appellant] to be able to return to work is limited. I concur with this diagnosis after my clinical examinations. The depression is under the supervision of [Appellant's Doctor #3]. He is monitoring any changes. The goal of my therapy recently has to moderate her pain to improve some of her symptoms as outlined by the clinical changes that have been done. She will be followed on a regular basis to assess the effects of these medication changes. Also she is taking some physical therapy which I would recommend she continue."

The Appellant also referred to a report from [Appellant's Physiotherapist] dated October 7, 2003.

In this report he noted:

"Many other forms of treatment were tried to eliminate [the Appellant's] symptoms and return her to a normal active person. None have provided any long term relief.

Physiotherapy has always provided relief both short and long term, i.e.: it has kept [the Appellant] functioning as well as trying to move forward to improved function."

He indicated that:

"Physiotherapy continues to provide temporary pain relief and improved function, but to date this is short term."

In his view:

"...I feel she has not achieved her pre accident status to date and it is my opinion that [the Appellant] needs more regular care or increased frequency of care to possibly obtain improvement or possibly a reconditioning program which would include regular treatment for pain relief..."

The Appellant submitted that each of her motor vehicle accidents built upon what is happening to her today. She needs releases and physiotherapy in order to function and have day to day ordinary living. She submitted that without physiotherapy it is very difficult for her to continue.

Evidence and Submission for MPIC:

Counsel for MPIC noted that the case manager's decision of July 2002 contained the standard paragraph advising the Appellant that she had 60 days to file an Application for Review. However, physiotherapy invoices continued to be sent to MPIC and the case manager wrote

letters to the Appellant on October 25, 2002, April 29, 2003, June 3, 2003, and June 16, 2003, returning the physiotherapy invoices and reminding the Appellant that these would not be covered by MPIC.

There is no evidence that the Appellant provided any response to any of these letters until June 19, 2003 when she wrote to the case manager claiming to be entitled to coverage for medical costs resulting from her motor vehicle accident.

The Appellant did not provide reasons for her delay in filing an Application for Review at that time. It appears that no such reasons were provided until she wrote to MPIC in May of 2005 stating:

“My husband was looking after the file but at the end of May 2002 he took ill and did not come back to full health until the fall of 2002. At that point he began negotiations with MPIC to grant an appeal hearing. This was granted in the Fall of 2003. The question of not responding within the 60 day period continually arose. My husband dealt with all correspondence and I believe that the due date was missed because of his illness.

P.S. My husband passed away Jan. 27/05. I now have to deal with this situation myself.”

Counsel for MPIC submitted that it was not reasonable to hand over all aspects of one's claim to a third party. Further, even if the Appellant was dealing with her husband's illness, she indicated that he was recovered by the fall of 2002, yet the Application for Review was not submitted until August of 2003. There is no indication on the file that the Appellant is not capable of handling her own affairs and dealing with her own claim. Counsel submitted that there had been no reasonable excuse provided for such a lengthy delay.

In regard to the necessity for physiotherapy treatments, counsel for MPIC noted that the MPIC Act requires that such treatment be medically necessary and required as a result of the motor vehicle accident of October 2000. Initial health care reports indicated that the Appellant was receiving physiotherapy at the time of the motor vehicle accident, and the Appellant's testimony indicated she received physiotherapy as far back as 1985.

The [Appellant's Physiotherapist's] report of October 7, 2003 indicated he had been seeing the Appellant for quite some time. His report recognized that:

“Physiotherapy continues to provide temporary pain relief and improved function, but to date this is short term.”

[MPIC's Doctor], [text deleted], provided a report dated October 22, 2003, after reviewing [Appellant's Physiotherapist's] reports. [MPIC's Doctor] questioned the causal relationship between the Appellant's symptoms and the motor vehicle accident:

“OPINION

From documentation review, the claimant suffered soft tissue injuries to the posterior neck and spine region consistent with an acceleration deceleration mechanism of injury. While it would be expected that pre-existing symptoms associated with the musculoskeletal system would be temporarily aggravated, long term aggravation would not be expected. On the balance of probabilities, it would be unlikely that permanent aggravation or deterioration of her pre-existing status would ensue. This writer cannot explain the apparent deterioration in the claimant's physical or mental status nor in her apparent inability to cope with perceived pain. A causal relationship between her reported deterioration and the motor vehicle collision is not evident.”

[MPIC's Doctor] also noted [Appellant's Physiotherapist's] reference to short term relief and indicated:

“[Appellant's Physiotherapist] opined in his report that “*Physiotherapy continues to provide temporary pain relief and improved function, but to date this is short term*”. Causality aside, it does not appear that benefits of a lasting nature are resulting from her attendance for physiotherapy care...”

Counsel for MPIC reviewed [Appellant's Doctor #1's] letter of October 25, 2004, which recommended continued physiotherapy. However, she also noted that [Appellant's Doctor #1] stated:

“The long term outlook for significant recovery is clearly guarded, as indicated previously by other physicians. The long term expectation for significant recovery for [the Appellant] to be able to return to work is limited...”

Counsel also submitted that [Appellant's Doctor #1] did not provide any objective evidence that would support the ongoing need for physiotherapy.

A letter from [Appellant's Doctor #4] date November 18, 2003 provided a prognosis that:

“It's doubtful that almost 20 years later things are going to improve.”

[Appellant's Doctor #2] reported on March 22, 2004. He indicated that:

“[The Appellant] has not been able to work over the past 10 years. There is no evidence to show that she has improved in her symptoms or physical functioning since I last examined her in 1995. There is no treatment that can lead to improvement in her current level of functioning. She has a medical disorder, both disabling and prolonged with no reason to expect any type of improvement in the future.”

Counsel for MPIC submitted that the evidence suggests that not only is the Appellant's request for physiotherapy benefits not related to injuries arising out of the motor vehicle accident in 2000, but that physiotherapy treatment is not medically required, as there is no hope that it will improve the Appellant's condition or make any changes to her circumstances. As a result, counsel submitted that the appeal should be dismissed.

Discussion:

The onus is on the Appellant to establish, on a balance of probabilities, that she is entitled to further physiotherapy benefits.

Her Application for Review was filed over one year outside of the statutory time frame.

Section 172(1) and (2) of the MPIC Act provide:

Application for review of claim by corporation

172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

Corporation may extend time

172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

The Appellant has submitted that the health difficulties suffered by her and her husband, as well as her reliance upon her husband to deal with all issues surrounding her MPIC claim are the reasons for her failing to file her Application for Review on a timely basis. The Commission accepts that these are the reasons for the Appellant's initial delay in filing the Application for Review. However, in spite of several letters which were sent to her by her case manager indicating that physiotherapy was no longer covered by MPIC, she did not complete an Application for Review for over a year. Although the Commission appreciates that her reliance upon her husband, and his subsequent illness contributed to some understandable delay, the length of the delay in this case is not reasonable when one considers the lack of complexity of the Review Application document, the numerous letters from her case manager and the 60 day time period set out in the MPIC Act. Accordingly the Commission will not exercise its discretion to find that the Appellant had a reasonable excuse for failing to apply for a review within the specified time

In addition, the Commission does not find that the Appellant would be entitled to further physiotherapy benefits as a result of injuries from the motor vehicle accident.

Section 136(1)(a) of the MPIC Act provides:

Reimbursement of victim for various expenses

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

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

Section 5 of Manitoba Regulation 40/94 provides;

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.

A review of the testimony of the Appellant, the medical information on file and the submissions of the Appellant and counsel for MPIC leads to the conclusion that the Appellant has failed to establish, on a balance of probabilities, that further physiotherapy care is medically required as a result of the accident.

The Commission agrees with [MPIC's Doctor's] conclusion that a continuing need for physiotherapy treatment is not, on a balance of probabilities, related to injuries sustained in the motor vehicle accident and that physiotherapy continues to provide only short term pain relief, without any benefits of a lasting nature resulting from her attendance for physiotherapy care. This does not meet the standard for medically required care.

Although the Appellant sincerely felt that ongoing physiotherapy treatment was required in order to treat her condition, based upon the evidence, the Commission finds she derived no lasting benefit from the physiotherapy treatments. The Commission finds that, on a balance of probabilities, the Appellant had likely reached maximum therapeutic benefit of her motor vehicle injuries from physiotherapy treatment and the objective evidence on file does not substantiate ongoing physiotherapy treatments as a medical requirement.

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated April 2, 2004 is confirmed.

Dated at Winnipeg this 25th day of February, 2010.

LAURA DIAMOND