

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-22**

PANEL: Ms Laura Diamond, Chairperson
Dr. Neil Margolis
Ms Deborah Stewart

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

HEARING DATE: April 8, 2010

ISSUE(S):

1. Whether the Appellant is entitled to a Permanent Impairment Award for scarring to her left kidney.
2. Entitlement for assistive medical devices (including funding for a Scooter and an Orthopedic mattress from a case manager's decision dated December 2, 2009).
3. Entitlement to funding for further physiotherapy treatment benefits.

RELEVANT SECTIONS: Sections 127, 136(1)(a) and 136(1)(d) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 and Section 10(1)(d) 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 September 6, 2002.

As a result of her injuries she received chiropractic treatment and physiotherapy treatment. She also received reimbursement for an assistive medical device, a cane.

The Appellant also sought a Permanent Impairment benefit for scarring to her left kidney. On October 18, 2004 the Appellant's case manager wrote to her to confirm MPIC's position that the scarring to her left kidney predated the motor vehicle accident and therefore is not a rateable impairment that would qualify her for an impairment award under the legislation. The Appellant sought an Internal Review of this decision.

On November 23, 2006, an Internal Review Officer for MPIC reviewed the Appellant's file as well as the ultrasounds and CT Scan reports that showed renal scarring, reports from her family physician, [Appellant's Doctor #1] and reports from [MPIC's Doctor], the Health Care Consultant for MPIC.

The Internal Review Officer concluded that the scarring to the Appellant's left kidney had not resulted from the motor vehicle accident, but rather that it did predate the incident in question. As well, she noted that there was no provision for renal scarring in the Regulations on Permanent Impairment, as the only kidney impairments listed are for removal, loss or reduction of function, none of which affected the Appellant.

The Appellant also sought funding for a scooter and an orthopaedic mattress.

On December 2, 2009, the Appellant's case manager indicated that there was insufficient evidence to support a scooter and an orthopaedic mattress as being medically required in relation to the Appellant's motor vehicle accident and as such, there was no entitlement to funding for these items.

Counsel for MPIC agreed that funding for a scooter and orthopaedic mattress should be included by the Commission in its review of the Internal Review Decision of November 23, 2006, which allowed funding for an assistive aid in the form of a cane.

The Appellant also sought funding for further physiotherapy treatments. On January 20, 2004, her case manager advised that as a result of discussions with her physiotherapist, and based upon reports which indicated she had been non-compliant with her physiotherapy treatment plan and care her treatment plan should be halted. The Appellant requested further physiotherapy treatment, but on November 19, 2004, the case manager issued a decision letter concluding that further physiotherapy was not required to address the medical conditions developed secondary to the motor vehicle accident.

The Appellant sought an Internal Review of this decision.

On July 20, 2007, an Internal Review Officer for MPIC agreed with the case manager and concluded that further physiotherapy was not required to address medical conditions developed by the Appellant secondary to the motor vehicle accident.

It is from these decisions of the Internal Review Officer that the Appellant has now appealed.

Appellant's Submission:

The Appellant testified at the appeal hearing and provided the panel with a written summary of her evidence and submission.

She described the motor vehicle accident (which occurred at a high speed and destroyed her car) and her transfer to [Hospital #1] by ambulance. She described injuries to her lower back, left shoulder, legs and rib cage areas which left her with chronic pain, stiffness and decreased mobility.

Permanent Impairment:

The Appellant noted that a sonogram report taken prior to the motor vehicle accident indicated that her kidneys and spleen appeared unremarkable.

Then, a sonogram dated January 20, 2003 showed that:

“The left kidney measures normal in length but appears irregular in contour with diminished cortex possibly related to renal scarring.”

[Appellant’s Doctor #1] reported on March 3, 2003 and indicated:

“I am sending you a copy of this patient’s old ultrasound and new ultrasound. You will note that the new ultrasound shows scarring to the left kidney. It is therefore possible that this may well have been injured during the accident.

I am bringing this to your attention and perhaps you can consider whether or not this requires compensation. Ion (sic) any case it would appear that the original ultrasound was essentially normal.”

The Appellant also referred to a sonogram report dated April 28, 2003 which stated:

“The right kidney appears unremarkable measuring 13 cm in length somewhat prominent possibly to compensatory hypertrophy. The left kidney was not visualized to advantage and again appears to be a diminished area of renal cortex most notably in the upper pole presumably related to renal scarring.”

On November 8, 2004, [Appellant’s Doctor #1] noted:

“It should be added that prior to the accident there was no evidence of injury to her kidney. A report suggested that there was new scarring which again was not present before the accident.”

The Appellant submitted that no renal scarring had been found prior to the motor vehicle accident and as such, she should receive a Permanent Impairment injury for renal scarring caused by the accident.

Physiotherapy Treatments:

In regard to physiotherapy treatments, the Appellant pointed to a letter from her rehabilitation case manager dated July 21, 2005 which stated:

“With regards to your request for physiotherapy treatments I have approved an initial eighteen treatments. Should you require treatments beyond the initial eighteen; a report will need to be submitted by your physiotherapist in order to determine if further treatments are medically required.”

The Appellant indicated that she had only been allowed to complete nine of the eighteen approved treatments. She indicated that it was her belief that the rehabilitation treatment, in the form of physiotherapy, would assist her in leading a more independent and productive life by possibly increasing mobility to her left shoulder, back and hip.

The Appellant testified that she now uses a cane and Handi-transit and suffers from chronic low back pain and lack of mobility. As such, she requires a scooter, for mobility, and a firmer mattress and bed.

The Appellant referred to her chiropractor, [Appellant’s Chiropractor’s] diagnosis and his findings from a thermal scan, reported on December 13, 2003 showing:

“There is increased imbalance in the nervous system, after the car accident compared to the thermal scan undertaken prior to the September 6, 2002 accident.”

The Appellant also referred to [Appellant's Doctor #1's] letter dated December 17, 2003:

“She is in constant pain and the weakness in her legs is becoming worse. She now has to use Handi-Transit and as stated previously she is using a cane. I am not aware of any pre-existing conditions which may affect recovery although old X-Rays of her back showed some degenerative disease but before the accident she had no pain whatsoever. Regarding her medications she is attempting to use Tylenol and does not want to go on anything stronger at present. I am not sure whether or not she will have any permanent impairment following the accident but in view of the length of time which has transpired since the accident I think it is probable that she will have permanent impairment especially as it is getting worse. (Incidentally because of her difficulty in moving she injured the right shoulder getting out of the tub a couple of weeks ago bracing against the sides of the tub.)”

Assistive Devices:

After [Appellant's Doctor #1] retired, her new physician ([Appellant's Doctor #2]) provided a letter dated November 9, 2009. He indicated:

“The above patient has chronic low back pain since her MVA in 2002. She requires a cane to walk. A scooter might also help her mobility. She has decreased ROM secondary to the pain and has trouble walking. She also has pain when lying down which has improved with a firmer mattress and bed. Please see for coverage for bed, mattress, scooter and cane.”

On cross-examination, the Appellant indicated that she could not recall how old her other bed had been before she purchased a new mattress and bed, but that it had been given to her, although she could not recall when. She just knew that it was not sufficient for a damaged back.

The Appellant submitted that she had developed a medical condition as a direct result of the motor vehicle accident and required medical assistive devices such as a scooter and special bed and mattress, which should be reimbursed by MPIC.

Evidence and Submission for MPIC:

Counsel reviewed the three issues before the panel.

Permanent Impairment

Counsel reviewed the opinion of [MPIC's Doctor] provided on October 7, 2004. [MPIC's Doctor] opined that the scarring to the Appellant's left kidney predated the motor vehicle accident.

The pre-accident ultrasound of May 2, 2002 did not show scarring on the left kidney, although it indicated that:

“The kidneys and spleen appear unremarkable although the left kidney was rather difficult to visualize throughout its entirety.”

A report from [Appellant's Doctor #3], dated April 29, 2003, noted that it was difficult to be certain as to whether the scarring had been present or not prior to the motor vehicle accident:

“I reviewed her abdominal ultrasound which showed some scarring in her left kidney. I reviewed the ultrasound from [Hospital #2] which was done four months before her accident. There was no mention of the scar tissue at that time but the radiologist did mention that he was unable to visualize the entire left kidney. It would be difficult to be certain whether she had the scar then or not but if this becomes a real issue, both sets of films may have to be reviewed by a radiologist to help answer the question.”

[MPIC's Doctor's] report pointed out that there was no documentation on the file to indicate that the Appellant presented with flank and/or abdominal pain that might be in keeping with a contusion and/or injury to the kidney following the motor vehicle accident.

He also noted that there was an absence of documentation indicating that the Appellant was diagnosed as having hematuria (blood in the urine) that might arise from an injury to the kidney that in turn would lead to residual scarring.

According to the reports on file, the urinary incontinence from which the Appellant was suffering could be attributed to the prolapse of her bladder that was discovered by medical investigation.

[MPIC's Doctor] concluded that the scarring could have been present prior to the incident in question.

“Based on the absence of clinical findings one might expect following an injury to a kidney that in turn would result in permanent scarring, it is my opinion the scarring noted on the ultrasound pre-dated the incident in question, in all probability.”

Counsel for MPIC also noted that pursuant to the statute, some kind of renal failure was required in order for a Permanent Impairment award for the kidney. A kidney is an internal organ which cannot yield conspicuous scarring as required by the regulations for permanent impairment compensation.

As such, counsel submitted that the Appellant was not entitled to any Permanent Impairment benefit for kidney scarring, based upon the Regulations and upon a lack of causation.

Physiotherapy Treatments:

Counsel for MPIC reviewed the initial approval for 18 physiotherapy treatments provided by the Appellant's case manager on July 21, 2003. However, a case manager's file note dated October 6, 2003 recorded a conversation held with the physiotherapist. The case manager's understanding was that

“...there has not been a lot of progress since the last report. He stated that clmt has been non compliant. She has not been doing her exercises at home. He stated she is unable to do the exercises in the office because she hasn't been doing them at home. Therefore, the physiotherapist will have to assist her by giving her direction on how to do the exercise. He is unable to give her further exercises until she is able to do the

basic exercises. At times she has come in for an appointment with only a half an hour to stay.”

This understanding was reflected in the health care provider progress report dated November 5, 2003 provided by the [Appellant’s Physiotherapist]. [Appellant’s Physiotherapist] noted that the patient had admitted to not doing her stretches at home for various reasons, and that encouragement had been given for her regarding her home program, but no progression was given because she was not even doing simple stretches.

A further note from the case manager’s contact with the physiotherapist, dated January 20, 2004, indicated that because the claimant had been non-compliant with the treatment plan and care, it was agreed that there was no benefit in continuing with the current treatment plan.

[MPIC’s Doctor] reviewed the Appellant’s file again and reported on November 2, 2004. It was his view that the Appellant had aggravated a pre-existing back problem as the file did not contain documentation indicating her clinical presentation was in keeping with a significant musculotendinous tear. In his view, pre-existing degenerative changes had not been enhanced by the incident in question. He also noted that:

“The file does not contain information indicating [the Appellant] requires any specific therapeutic interventions to address any symptoms she still might be experiencing. In particular, the file does not contain information indicating she requires assistive aids to help her remain functional.

It is my opinion [the Appellant] will likely experience further improvement in her condition if she is compliant with the program she was advised to perform independently.”

Therefore, counsel for MPIC submitted that there was no objective medical evidence on file supporting the Appellant’s contention that medical treatment or physiotherapy was medically necessary or required as a result of the motor vehicle accident.

Entitlement to Assistive Devices:

Counsel reviewed [Appellant's Doctor #2's] request, dated November 9, 2009, for a scooter which might help the Appellant's mobility and a firmer mattress and bed to improve her pain when lying down.

She then referred to [MPIC's Doctor's] opinion dated November 26, 2009 which concluded that the medical evidence does not indicate the Appellant developed a medical condition as a result of the incident in question for which a scooter and/or mattress would be viewed as being medically required in the management of the condition.

Counsel submitted that had a scooter and new bed been medically required, it would have been requested earlier or there would have been earlier complaints of mobility difficulties documented following the motor vehicle accident. This request for a scooter and mattress came seven years after the motor vehicle accident.

As well, even [Appellant's Doctor #2's] report does not set out any concrete evidence of the benefits of a scooter and only indicates that it "*might assist*". This does not satisfy the balance of probabilities test required by the Act. It is speculative with no certainty.

The Appellant did not even recall when she received her old mattress or its condition. MPIC was not able to verify whether a new or used mattress would have resulted in a better sleep or whether the Appellant might have required a new mattress even if the accident had not occurred. [Appellant's Doctor #2] does not explain the benefits that would be derived, and the long delay between the motor vehicle accident and the request for the mattress and bed still remains.

Further, counsel submitted that [Appellant's Doctor #2] was not a specialist and one quick note from a family physician, with very little analysis, could not be enough in the circumstances to satisfy the onus on the Appellant to show, on a balance of probabilities, that these items were medically required as a result of the motor vehicle accident.

Counsel for MPIC submitted that the Appellant's appeal should be dismissed.

Discussion:

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

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.

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (d) reimbursement of the victim at the sole discretion of the corporation for
- (iii) medically required beds, equipment and accessories,

The onus is on the Appellant to show, on the balance of probabilities, that further physiotherapy treatment as well as assistive medical devices are medically required for a condition arising out of the motor vehicle accident.

The MPIC Act also provides:

Lump sum indemnity for permanent impairment

127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

The onus is also on the Appellant to show, on a balance of probabilities that she suffered from a permanent physical impairment because of the accident.

The panel has reviewed the evidence on the Appellant's indexed file, as well as the evidence and submission for the Appellant and the submission of counsel for MPIC.

The panel has noted the evidence regarding the Appellant's pre-existing degenerative back condition. We agree with counsel for MPIC that there is no evidence of a condition arising out of the motor vehicle accident for which further physiotherapy care would be medically required. The Appellant has not met the onus upon her of showing, on a balance of probabilities, that following the long delay in her seeking treatment, her non-compliance with her initial

physiotherapy program and her physiotherapist's opinion that further treatment would not be of assistance, she is entitled to further physiotherapy treatment under the MPIC Act and Regulations.

The Appellant has also failed to meet the onus upon her of showing, on a balance of probabilities that a new bed and mattress and scooter are medically required due to the motor vehicle accident. Although she has provided a brief request for these items from her family physician, stronger evidence is required from a physician to support such a request.

When a qualified professional practitioner describes a particular kind of bedding and it is apparent that in light of all the circumstances, there is a strong likelihood that the items in question will materially improve the victim's chances of recovery, it is reasonable for MPIC's discretion to be exercised in favour of the victim.

However, in the appeal at hand, the Appellant's evidence falls short of establishing these items as a medical necessity.

Upon a careful review of all the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the parties, the panel finds that the Appellant has not established, on a balance of probabilities, that a new mattress and boxspring are medically required pursuant to Section 10(1)(d)(iii) of Manitoba Regulation 40/94. Although the Appellant's family physician indicated that this improved the Appellant's pain, this analysis alone did not render the mattress and bed a medical necessity. There was insufficient evidence submitted to establish that a new mattress and bed would or did materially improve the Appellant's condition or make any meaningful contribution to her

rehabilitation. Rather, the mattress must be considered an elective treatment strategy and not a medical requirement.

As well, [Appellant's Doctor #2's] brief note that a scooter might help her mobility does not meet the standard of the onus upon the Appellant to show that a scooter is medically required as a result of the accident.

The panel also finds that the Appellant has not met the onus of showing, on a balance of probabilities, that she is entitled to a Permanent Impairment benefit for renal scarring under the MPIC Act and Regulations. We find that there is not enough clear evidence that the scarring is connected to the motor vehicle accident and not a pre-existing condition. We also find that the Appellant has not provided any evidence of impaired renal function which might entitle her to a Permanent Impairment award under the legislative scheme.

Accordingly, the decisions of MPIC's Internal Review Officer dated November 23, 2006 and July 20, 2007, as well as the case manager's decision dated December 2, 2009, are hereby confirmed. The appeals of the Appellant are dismissed.

Dated at Winnipeg this 10th day of May, 2010.

LAURA DIAMOND

DR. NEIL MARGOLIS

DEBORAH STEWART