

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-42**

PANEL: Ms Laura Diamond

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Dan Joannis, Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Alison Caldwell.

HEARING DATE: November 9, 2010

ISSUE(S): Whether the Appellant is entitled to reimbursement for physiotherapy treatment.

RELEVANT SECTIONS: Section 136(1)(a) 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 operating a motorcycle on August 31, 2007. He reported hitting a large bump on the road, which jarred and hurt his neck. He saw his family doctor on November 2, 2007 and was referred for physiotherapy.

The Appellant contacted MPIC in March 2008 to report an injury claim. The case manager received the medical information and referred the file to [MPIC's Doctor]. Following this review, the Appellant's case manager wrote to him on October 7, 2009 indicating that there was insufficient evidence to support a causal relationship between his signs and symptoms and the

motor vehicle accident of August 31, 2007 so there would be no entitlement to funding of the Appellant's physiotherapy treatment by MPIC.

The Appellant sought an Internal Review of the case manager's decision. On February 19, 2010 an Internal Review Officer for MPIC reviewed the Appellant's file and concluded that as the medical documentation referred to the onset of pain around mid-October, he concurred with [MPIC's Doctor] that the Appellant's signs and symptoms were not, in all probability, related to the August 31, 2007 accident. The Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing of his appeal.

He described the motor vehicle accident of August 2007. He said that he was on a motorcycle ride that day and was on his way home on the [text deleted] and [text deleted]. The road was not in good shape and was rough and dippy. He hit a bump and because of the weight of his helmet on his head and neck, he heard a crunch inside his helmet. He continued driving the few blocks home, as he could not drive farther with the weight of his helmet on his head. The pain increased throughout the day and was bad that night. By three days later it was very sore.

The Appellant testified that he noticed his symptoms immediately, but since he did not fall off his bike and was able to get home, he did not realize that this could be considered a motor vehicle accident.

The Appellant described the headaches which he suffered following this incident. He found it hard to move and hold his head down, although he continued working as a [text deleted]. He was only able to ride a little bit after that and soon afterwards sold the bike, about a year later.

The Appellant testified that he did not seek immediate medical attention after this incident as he hoped it would feel better. He went to some physiotherapy treatments that he expected would be paid for by his insurance plan at his job, but when he lost his job he didn't have a chance to collect reimbursement for these amounts.

The Appellant testified that he first sought medical attention approximately three months after the motor vehicle accident. He saw [Appellant's Doctor #1] on approximately November 2, 2007, after waiting approximately three weeks for the appointment to see him. He indicated that he did not go to see the doctor before that because he kept hoping that his condition would get better.

Later on, after talking with friends, it was suggested to him that he should put file an MPIC claim.

The Appellant explained that prior to this incident he had not suffered from neck pain for over 30 years. No other incident had occurred which could have caused this pain in his neck.

He described his health before the motor vehicle accident as good. He had been in a rear-end collision in the early 1980's which resulted in a hairline fracture in his neck. He wore a brace for

4 – 6 weeks but had healed with no symptoms or problems in his neck until that day on the motorcycle.

Although [Appellant's Doctor #1's] clinical notes indicated that the Appellant had stated he had no recall of a trauma to his neck, the Appellant testified that he did not think he told [Appellant's Doctor #1] that. [Appellant's Doctor #1] did not ask him specifically whether he had been involved in a motor vehicle accident.

When he went to see the physiotherapist she asked him about the cause of his pain. He told the therapist that his symptoms had started from the date of a motor vehicle accident. The physiotherapist started to record this, but when he indicated that there had not really been a motor vehicle collision, she crossed the information out of her notes.

The Appellant then saw [Appellant's Doctor #2], who was located closer to his new job. He told [Appellant's Doctor #2] about the motor vehicle accident with the motorcycle and when it had occurred.

Aside from physiotherapy treatment, the Appellant took extra strength Tylenol for his severe headaches and used ice. Then, after he saw [Appellant's Doctor #1], he started taking prescription medication for the pain.

He submitted a list of physiotherapy treatments for which he had paid but not been reimbursed.

On cross-examination the Appellant was asked why he did not see a doctor after the accident, if he was in so much pain. The Appellant explained that this was because he had just started a new

job. Also on cross-examination, the Appellant maintained that his motorcycle ride occurred on a weekend day (the only time he had for such rides), although August 31, 2007 fell on a weekday.

Counsel for the Appellant reviewed [MPIC's Doctor's] report of February 9, 2010. [MPIC's Doctor] had stated that audible sounds and sensations such as snapping and clicking of soft tissue such as tendons, muscles, ligaments, tissues or joints was common for the majority of individuals and not representative of a traumatic injury process. Since the Appellant had reported the onset of neck and upper extremity symptoms in approximately mid-October, a causal association with the August 31, 2007 incident was, in her view, improbable.

Counsel also noted the limitations of [MPIC's Doctor's] review. She had not had an opportunity to examine the Appellant and was not provided with evidence to make her aware of his subjective reporting of symptoms from August 2007. It is not clear that she was aware that the Appellant had reported to his physiotherapist that his symptoms began in 2007. As such, [MPIC's Doctor's] comments should be considered in that context.

The Internal Review Officer went on to conclude that since there was no onset of symptoms before mid-October and no recall of trauma reported to [Appellant's Doctor #1] in November, the injury was due to something other than the motor vehicle accident.

Counsel submitted that it was clear MPIC had made its decision based on that evidence, but that a further analysis of all the evidence was warranted and would lead the Commission to a different conclusion.

Counsel submitted that the motor vehicle accident on the motorcycle caused the Appellant's injuries. A review of [Appellant's Doctor #1's] clinical notes confirmed that the Appellant had no pre-existing difficulties with his neck immediately before the accident. The Appellant confirmed this in his testimony before the Commission, and in his application for compensation, statement to MPIC, Application for Review and Notice of Appeal.

Counsel for the Appellant submitted that no other incident or fall occurred that could have caused the symptoms in the Appellant's neck and that these symptoms were related to the motor vehicle accident in August.

Counsel urged the Commission to consider the Appellant's early reports to his doctor and physiotherapist in the context of the Appellant's belief that there had been no motor vehicle accident. This was a result of the Appellant's unfamiliarity with the definitions contained within the MPIC Act.

The Appellant's symptoms began immediately after the motor vehicle accident. Further reports by him to [Appellant's Doctor #2] were consistent with the Appellant's recollection that the pain was caused by the motor vehicle accident. Counsel noted [Appellant's Doctor #2's] report of December 22, 2008, where the Appellant described the pain in his neck and weakness in his hands as occurring for approximately 1 to 1½ years.

[Appellant's Doctor #2] stated:

“He was involved in a motor vehicle accident on August 31st, 2007, and sustained a soft tissue injury to the cervical spine and both shoulders. This soft tissue injury he sustained also exacerbated his pre-existing degenerative disc disease of the cervical spine region and associated mild spinal stenosis at the C6-C7 disc space level. His progress has been prolonged and protracted and rate of recovery has been slow. I anticipate no permanent

impairment and no sequelae from the effects of his motor vehicle accident, and in my opinion, his prognosis for the further is good for a satisfactory recovery.”

Counsel submitted that there are many instances where claimants do not report injuries to caregivers or MPIC until sometime after the motor vehicle accident. He noted a previous decision of the Commission in *AC-02-121* where there was a delay between the motor vehicle accident and the reporting of symptoms and the failure to immediately report was not found to be fatal to the Appellant’s appeal.

Counsel submitted that there can be various reasons why an Appellant might not report symptoms immediately after a motor vehicle accident. In this case, the Appellant, based upon his previous experience with some back pain, assumed that the pain would get better. He tried ice packs to treat his pain. It was only when he concluded that he was not getting better that he went to see a doctor.

Section 141 of the MPIC Act allows claimants to report injuries up to two years following the motor vehicle accident. In the circumstances, the Appellant did not act unreasonably in attempting to manage his pain at home.

Counsel submitted that on a balance of probabilities, when the case is considered in its entirety, the Appellant had clearly established that the motor vehicle accident caused the injuries to his neck even though he did not immediately seek medical care. Accordingly, he should be entitled to reimbursement for \$381.00 plus interest for physiotherapy treatments.

Evidence and Submission for MPIC:

Counsel for MPIC noted that the appeal concerned the issue of physiotherapy funding for

injuries the Appellant alleges were caused by the motor vehicle accident. However, the totality of the evidence establishes that there is very little possibility that the Appellant's injuries were caused by the motor vehicle accident. Counsel submitted that the objective evidence is clear that the two were not related.

MPIC did not take the position that the incident did not occur. However, what was in dispute was when the pain started and what caused it. Inconsistencies in the Appellant's evidence and reporting of events cast doubt upon the connection between the incident and the Appellant's symptoms.

Counsel submitted that the pain and symptoms of which the Appellant was complaining and regarding which he went to [Appellant's Doctor #1] in November of 2007, was not pain caused by a motor vehicle accident on August 31, 2007.

The Appellant testified that he felt pain right after the motor vehicle accident and every day after that. He tried to treat it with ice but the pain persisted and got worse after three days. He noted that he had constant headaches every day from the date of the motor vehicle accident. Why then, counsel queried, did the Appellant not attend to a doctor for treatment even one or two weeks after the motor vehicle accident?

Counsel indicated that while such delay is not a bar to recovery, it does bring the Appellant's evidence into question and cause it to be unreliable. This is compounded by the evidence that the Appellant never reported his idea of how the pain was caused to his treating physician. Although the Appellant indicated that [Appellant's Doctor #1] did not ask whether he had been in a motor vehicle accident and simply asked him what had caused his pain, the evidence still

established that the Appellant simply replied that he did not know. He did not report what it was that he supposedly believed was causing his pain. Counsel submitted that if the Appellant had been feeling such intense pain every day since the motor vehicle accident and wanted the best treatment possible he would have indicated to his practitioner exactly when the pain started and what caused it.

Still, [Appellant's Doctor #1] noted that the Appellant recalled no trauma. Through objective reporting of seven visits with [Appellant's Doctor #1], [Appellant's Doctor #1] never noted that a motor vehicle accident had occurred. On cross-examination, when the Appellant was asked why he finally decided to see [Appellant's Doctor #1] about the motor vehicle accident, he indicated that he had told him at that point because MPIC would be asking [Appellant's Doctor #1] questions about it.

There is no evidence that the Appellant told a doctor about the motor vehicle accident until after he had made his application for compensation with MPIC. Nor did the Appellant's physiotherapist note that the Appellant's pain had been caused by a car accident.

The Appellant went on to see [Appellant's Doctor #1] on November 16, December 11, January 24, March 28, April 25, May 23 and July 14 for neck pain. None of the notes from these meetings mention that the Appellant sustained pain as a result of the August 31 incident. Counsel queried how the Appellant could not report such a traumatic event to his doctor if it was causing him such pain he sought medical care.

Counsel submitted that [Appellant's Doctor #2's] report should be considered in totality and that it was not even clear in that report when the Appellant had reported the motor vehicle accident to

[Appellant's Doctor #2]. [Appellant's Doctor #2] did not provide any record of a description of the motor vehicle accident being provided to him. In any event, this occurred quite some time after the motor vehicle accident. Nor did [Appellant's Doctor #2] provide any reasoning for his statement that he believed the motor vehicle accident exacerbated a pre-existing degenerative disc disease of the Appellant.

[MPIC's Doctor] indicated that if the Appellant had reported pain and disability in association with the perceived snapping sensation involving his neck, the idea of tissue injury might have merit. However, after reviewing all the information and objective evidence she concluded that the Appellant's symptoms were caused by factors other than the motor vehicle accident.

In summary, counsel submitted that the Appellant's failure to report his pain earlier and to connect that pain to the motor vehicle accident in his reports to his caregivers should lead the Commission to find that the Appellant's pain was not related to the motor vehicle accident of August 31, 2007. She submitted that the expenses the Appellant had incurred for treating this pain should not be reimbursed by MPIC and that the Appellant's appeal should be dismissed.

Discussion:

The MPIC Act provides:

[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;

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;

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to reimbursement for treatment of injuries and symptoms resulting from a motor vehicle accident.

The Commission has reviewed the documents on the Appellant's file, as well as the Appellant's testimony at the hearing and the submissions of counsel.

The Commission agrees with counsel for the Appellant that late reporting of an injury and incident is not, in and of itself, a bar to entitlement under the Act. It is clear that the Appellant now has a sincere belief that he did not suffer this pain prior to the motor vehicle accident and that the temporal connection between the pain and the accident established that the motor vehicle accident caused his injury.

Yet, as counsel for MPIC also pointed out, there were credibility issues regarding the Appellant's evidence, including specific holes in his memory regarding the day of the incident of August 31, 2007, and his failure to report his symptoms in a timely manner.

The essence of the Appellant's argument is temporal. He submits that he did not feel pain prior to the motor vehicle accident and did feel this pain afterwards. However, there are problems

with his memory and credibility regarding the temporal reporting of his pain.

In addition, there is a lack of documentation to show that the Appellant clearly reported a connection between his injuries and the motor vehicle accident until he made his application for compensation to MPIC in April of 2008. [Appellant's Doctor #2's] report of December 22, 2008 was based upon visits with the Appellant on October 1, and October 31, 2008, well over a year after the incident.

The Commission agrees with counsel for MPIC that regardless of what the Appellant believed regarding the legal and insurance implications of his actions, it is reasonable to expect that an individual who believed a trauma had caused (or exacerbated) an injury would, when seeking care and treatment for that injury, report this belief to his caregiver, or at the very least, respond affirmatively when actively asked whether he recalled a trauma to the affected area. The Appellant did not do so.

The Commission finds that the Appellant has failed, on a balance of probabilities, to meet the onus upon him of establishing that his symptoms and injuries are connected to the motor vehicle accident on August 31, 2007.

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated February 19, 2010 is upheld.

Dated at Winnipeg this 16th day of December, 2010.

LAURA DIAMOND