Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-132

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Mr. Wilf DeGraves**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Offfice;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**April 12, 2011**
ISSUE(S):	**Entitlement to physiotherapy treatment benefits beyond the 25 treatments allowed by MPIC for primary care (Category 1) treatment.**
RELEVANT SECTIONS:	**Section 136 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 March 20, 2007. She reported neck pain and stiffness as well as facial and low back symptoms and presented with a diminished cervical range of motion. Her physiotherapist diagnosed neck strain/sprain, a Category 1 injury.

The Appellant received physiotherapy treatments funded by MPIC until August 22, 2007.

On January 28, 2008, the Appellant's case manager wrote to her indicating there was no medical requirement for treatment beyond 25 physiotherapy visits and indicating that there would be no coverage under the Personal Injury Protection Plan ("PIPP") for any treatments beyond 25.

The Appellant sought an Internal Review of this decision. On September 23, 2008, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer indicated that in order for MPIC to reimburse the Appellant for expenses incurred for physiotherapy treatment, these expenses must have been incurred because of the accident and must be medically required. The Internal Review Officer indicated that a reasonable time frame for primary care treatments involves 18 to 25 in-clinic physiotherapy treatments and that there was no objective evidence provided that the Appellant required physiotherapy at a higher level than primary care treatment or that she was unable to proceed independently with her own home exercise program.

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

At the hearing into her appeal, the Appellant took the position that she required supportive physiotherapy care to allow greater participation at home and at work and that the Appellant should have received and continue to receive MPIC funded physiotherapy treatment as needed on this basis, as she met objective criteria which had been identified for supportive care.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She described her work at a [text deleted] which she owned and operated with her husband. She did bookkeeping work as well as cultivating [text deleted], pruning trees, watering, weeding, maintenance, planting and budding.

She explained that before the motor vehicle accident she was able to perform all of these duties. However, since the motor vehicle accident she had not been able to cultivate or prune. She could only water and weed for a few hours and could not do it for several days in a row without aggravating her neck.

The Appellant explained that she and her husband had hired a person to help with the watering and to do some of the weeding and cultivating [text deleted].

The Appellant described her symptoms. She explained that she would, from time to time, develop a really bad headache for two or three days. She would find that she was not able to work through this or to work at her duties [text deleted]. At this time, she would then go for a physiotherapy treatment. Before the treatment she described having a very stiff neck with limited availability to move her head as well as crunching and pain when trying to mobilize, and stiffness under her shoulder blades. This was sometimes accompanied by ringing in her ears and numbness on the side of her face.

She would then make an appointment for physiotherapy. She found that her physiotherapist, [text deleted], was able to gently mobilize her neck by putting her head in certain positions and holding her, while asking her to push against him. She found this would loosen up the area between her shoulder blades. Sometimes she would also have a treatment on her hip, at the same time, to keep the pain from extending down her back.

The Appellant described the various treatments she had pursued since the accident, including chiropractic treatment, athletic therapy and home exercises.

She described the mobilization exercises that she did in the morning. Sometimes, with these exercises, and aspirin, the pain would be relieved. However, there were times when the pain in her neck was really "jammed up" and there was nothing that she could do to get relief except to go to the physiotherapist.

The Appellant explained that she sometimes goes for physiotherapy once a month, or every month and a half, depending on what she has been doing. She explained that she has received 36 treatments in just under four years.

When asked, on cross-examination, about her treatment with the athletic therapist, the Appellant explained that while she found it somewhat helpful, she described it as more of a massage based treatment which did not have the same effects that physiotherapy had.

The Appellant's husband also testified at the hearing into her appeal. He described the Appellant's duties [text deleted] and all of the work that she was able to do prior to the motor vehicle accident. He also described the difference which he saw in the Appellant following the motor vehicle accident and the problems and pain she seemed to be having. He then described the differences that he had noticed in her appearance and affect after she received a physiotherapy treatment. He said that he tries to help her to loosen things up when she is pain, but sometimes it is only the physiotherapist who does a good job at this.

Counsel for the Appellant submitted that although the Appellant had received physiotherapy treatments for a previous car accident in 1993, she had weaned herself down to approximately seven treatments per year before the 2007 motor vehicle accident.

Following the motor vehicle accident, the Appellant received 25 Category 1 physiotherapy treatments paid for by MPIC.

A review conducted by [MPIC's Chiropractor], [text deleted], on June 17, 2008 indicated that the Appellant appeared to continue to experience accident-related problems. He recommended a trial of chiropractic treatment as medically required.

On December 18, 2008, [MPIC's Chiropractor] recommended a trial of athletic therapy.

The athletic therapist reported on December 7, 2009. She indicated that with medication and rest from daily activities, the Appellant's symptoms had subsided. However, a slight decrease in improvement was documented while the patient was at work and had not had treatment in a few weeks.

On December 28, 2009, [MPIC's Doctor], [text deleted], reviewed the Appellant's file and indicated that the Appellant's medical status reflected support for Category 1 athletic therapy care.

On April 14, 2010, the Appellant's physiotherapist, [text deleted], noted that at assessment on March 21, 2007, the Appellant's complaints had included neck pain and stiffness, facial pain and numbness and physiotherapy treatment to address same was included in the proposed treatment

plan. After the Appellant attended for 25 MPIC approved therapy treatments, she continued to attend physiotherapy under her own coverage about twice per month, throughout September 2007 to January 2008. She then attended about once per month from February 2008 to October 2008. There was then a therapeutic withdrawal from care related to a plateau in her status, which lasted from approximately October 31, 2008 through May 18, 2009. However, she returned to physiotherapy on May 19, 2009, when her "condition had deteriorated both subjectively and objectively". The physiotherapist cited the objective findings of deterioration:

> "Objectively the most significant findings of deterioration following the withdrawal from care were marked increased restriction of cervical right rotation and extension range of motion with multi level segmental hypomobility dysfunction at C3 / C4 / C5."

The physiotherapist indicated that the Appellant had reached maximum therapeutic benefit as indicated by the lack of progress in her condition, in spite of self-care and adherence to a home exercise program. He recommended supportive physiotherapy treatments, on a periodic basis, indicating that a monthly treatment would be effective in preventing deterioration and sustaining function.

This recommendation was reviewed by [MPIC's Doctor] on September 22, 2010. Her report assumed that the Appellant was not complying with her self-managed exercise program. Counsel submitted that there was no evidence that this was the case, and in fact, the Appellant's oral testimony as well as the physiotherapist's report indicated that the Appellant had been complying and following her home exercise program.

A subsequent letter from the physiotherapist dated November 8, 2010 recommended supportive care for the Appellant in terms of "1-2 hands on physiotherapy treatments per month". He

indicated that this would help her to maintain her present status and provide pain relief, increased mobility and improve function.

Counsel submitted that a withdrawal of physiotherapy care from the Appellant had shown a negative impact upon her condition. She referred to similar situations which had occurred in previous cases before the Commission. She cited the case of *[text deleted]* (AC-05-11) where a panel of the Commission approved reasonable supportive physiotherapy care for an Appellant who had followed the exercise program given to her by her physiotherapist but found that nothing provided permanent relief and that the most effective treatment was manipulation by the physiotherapist on an as-needed basis. The Commission found that the Appellant had established, on a balance of probabilities, that periodic, reasonable supportive physiotherapy care provided the Appellant with the necessary relief to maintain some productivity and general quality of life and facilitate her return to a normal life or reintegration into society or the labour market.

Counsel also referred to the Commission's decision in *[text deleted]* (AC-06-42). The criteria for supportive care was set out, indicating that the claimant must have received maximum medical improvement with any additional care unlikely to have further sustainable therapeutic effect. In addition to this, it must be demonstrated that "withdrawal of care in question has an objectifiable negative impact on the claimant's condition, and that the application of care in question has an equally objectifiable positive effect on the claimant's presentation".

Counsel submitted that [Appellant's Physiotherapist's] reports did establish a withdrawal of care with an objectifiable negative impact, as well as a positive effect from periodic treatment.

On the basis of the evidence and authorities, counsel submitted that the panel should find that the evidence in this case supports further supportive physiotherapy treatments for the Appellant beyond August 2007 on a reasonable basis, to maintain her quality of life. A withdrawal of care had been shown to have a negative impact and periodic physiotherapy treatments were facilitating the Appellant's return to a normal life and reintegration. MPIC should provide coverage by funding ongoing reasonable supportive care.

Submission for MPIC:

Counsel for MPIC reviewed the criteria set out in the Commission's earlier decisions and submitted that the Appellant had not met the onus of showing on a balance of probabilities that a withdrawal of care with objective negative impact and positive impact from further physiotherapy treatment had been demonstrated.

Counsel submitted that supportive care must go beyond pain relief in order for there to be a determination that there was some effect upon the Appellant's underlying condition. As well, the withdrawal of care must be accompanied by evidence regarding deterioration.

Counsel submitted that [Appellant's Physiotherapist's] report of April 14, 2010 did not show an overall withdrawal of care. It merely stated that the Appellant had been absent from physiotherapy care for seven months and that he believed that her condition had deteriorated over this period of time. However, the evidence and documents showed that the Appellant had begun to attend at athletic therapy, and continued to attend at this therapy until December 29, 2009, for approximately 26 treatments. There was also some evidence of chiropractic care during this period. Accordingly, the physiotherapist's report did not accurately describe a period where the Appellant's condition was deteriorating in the absence of care.

Further, the Appellant argued that the withdrawal of care in issue was from physiotherapy treatments and that the athletic therapy did not address her condition. However, the athletic therapist's report indicated that with treatment the Appellant improved, and that the therapist felt that the Appellant would now be able to manage on her own, submitting a discharge plan on December 29, 2009.

Counsel submitted that this showed at least temporary improvement in the Appellant's condition as a result of the athletic therapy which was addressing her pain related symptoms. As such, it was not the case that only physiotherapy treatment was helpful.

Counsel for MPIC also submitted that the physiotherapist had failed to adequately provide objective evidence of deterioration or of a positive impact upon return to physiotherapy care.

Counsel reviewed [MPIC's Doctor's] report of September 22, 2010, and submitted that this report established that even supportive care must relate to a patient's underlying condition. Just because a patient felt temporarily better immediately after treatment does not mean that they had shown the ability to maintain gains from treatment where care is ongoing.

One could see, counsel for MPIC submitted, that the Appellant's symptoms remained consistent throughout physiotherapy treatment.

Counsel submitted that in this case the evidence failed to establish an actual decline in the absence of treatment or reversal of that condition through treatment. The treatment did not have an effect upon the Appellant's underlying condition, and counsel submitted that the Commission should dismiss the Appellant's appeal.

Discussion:

Section 136 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;
>
> (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.

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.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in finding that she was not entitled to further supportive physiotherapy treatment.

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

The Appellant testified that what was effective in treating her condition is the type of "chiropractic style adjustment" performed by her physiotherapist.

[Appellant's Physiotherapist] described the treatments in his report dated April 14, 2010 as a treatment to improve lost mobility through "localized joint mobilization/manipulation/traction to mid cervical region and hold/relax soft tissue release techniques for suboccipital myofascial release".

The Appellant testified that she has tried some other forms of treatment, including chiropractic treatment and athletic therapy, but only this type of physiotherapy treatment provided her with some relief.

The evidence also established that the Appellant underwent a seven month withdrawal from care between October 2008 and May 2009, during which she did not have physiotherapy treatments. She received chiropractic treatments until December 2008 and athletic therapy treatments from the end of 2008 through 2009.

Counsel for MPIC has suggested that a withdrawal of care only meets the test required to establish a need for supportive treatment when it is a complete withdrawal from all forms of treatment. However, the panel notes that the description of the appropriate criteria set out by MPIC's consultant states that supportive care is appropriate when alternative care options,

including home based self-care, have been considered or attempted. Thus, this criteria does contemplate alternative care options being examined and attempted, including home exercise. Continuing home exercise is not a complete withdrawal of care in the sense MPIC is advocating, yet it still falls within the conditions of a trial withdrawal of care.

The Appellant gave evidence that she complied with her home exercise program and gave specific examples of the exercises that she does and when and where she does them.

The panel is of the view that continuing with home based exercises and other alternative care options, including athletic therapy, does not mean that an Appellant fails to fall within the definition of a description of a trial withdrawal of care required by the supportive care criteria. Just because the Appellant continued, at some point between December 2008 and December 2009 with athletic therapy, and continued with her home exercises throughout, does not mean that she had not had a trial withdrawal of physiotherapy care.

In our view, the Appellant still experienced a withdrawal of physiotherapy care and this falls within the criteria required for supportive care. In fact, it was because the Appellant was attending to other forms of treatment, such as chiropractic or athletic therapy, that there is a continuing record of the objective findings of her symptoms throughout this period.

The discharge report from the athletic therapist noted that side rotation was not completely better and still tight, and that the Appellant's shoulders were still stiff, with tight rhomboids and other ongoing issues.

As [Appellant's Physiotherapist] noted in his letter dated April 14, 2010, the panel finds that there was a withdrawal of care from physiotherapy treatment for the period of seven months between October 2008 and May 2009.

Counsel for MPIC also submitted that the criteria for supportive care requires objective evidence of a deterioration in status. He cited the Commission's decision in *[text deleted]* (AC-05-137) in this regard. In that case, the Commission found that the report of [Appellant's Chiropractor], like the report of [Appellant's Chiropractor] in *[text deleted]*, "did not provide adequate objective evidence of deterioration in the Appellant's condition following the discontinuation of chiropractic treatment. While [Appellant's Chiropractor's] report did contain some anecdotal reports of subjective pain and estimates of function, this does not meet the standard required to establish an objective need for supportive care."

However, the panel finds that, in contrast, the reports of [Appellant's Physiotherapist] do describe the Appellant's deterioration. The Appellant described this subjectively in her evidence, and [Appellant's Physiotherapist] confirmed it objectively in his report.

> "[The Appellant's] condition had deteriorated both subjectively and objectively.
>
> Objectively the most significant findings of deterioration following the withdrawal from care were marked increased restriction of cervical right rotation and extension range of motion with multi level segmental hypomobility dysfunction at C3 / C4 / C5."

This was also corroborated by the athletic therapist's report of December 29, 2009 which reported that the Appellant was still not completely recovered, suffering from tight cervical musculature with side flexion of 50% and side rotation at 70%, "70% still not 100% better".

[Appellant's Physiotherapist's] report also touched upon the Appellant's deterioration and the impact of further physiotherapy when he noted:

> "Supportive physiotherapy treatments are periodic in nature. In her case, records indicate that treatment provided on a monthly basis has been effective in preventing deterioration and sustaining function. Often a single treatment will improve lost mobility through localized joint mobilization / manipulation / traction to mid cervical region and hold / relax soft tissue release techniques for suboccipital myofascial release."

In the panel's view, this meets the criteria for objective improvement contemplated by the criteria for supportive care treatment.

Counsel for MPIC also submitted that the Appellant should not be entitled to supportive care if it does not address the underlying condition and only assists her dysfunction. The Commission notes that the purpose of supportive care is different from treatment directed toward obtaining maximum medical improvement. The tests for these two types of care are quite different. The criteria for supportive care do not require a progress towards maximum medical improvement in the Appellant's underlying condition; that is the test for regular or ongoing care which seeks to achieve maximum medical improvement. Supportive care is meant to address ongoing symptoms where the patient has reached maximum medical improvement but failed to sustain this benefit. It is also intended to facilitate a return to normal life and reintegration into society and/or the labour market.

We find that in this case physiotherapy treatment for the Appellant meets the criteria for supportive care. We find that the Appellant, while continuing with her home based exercise program and exploring alternative forms of care, attempted a withdrawal from physiotherapy care. Her physiotherapist and athletic therapist both noted objective findings of deterioration at

the conclusion of this trial period, consistent with the subjective symptoms which the Appellant has described regarding that time period.

The Appellant's testimony and the objective findings reported by her caregivers have established that periodic, occasional physiotherapy treatment provided relief in the Appellant's overall symptoms and conditions, improved her ability to function and assisted with her reintegration into society.

Accordingly, the panel finds that this physiotherapy care has met the criteria for supportive care and that the Appellant shall be entitled to reimbursement for expenses incurred in connection with obtaining this treatment.

In addition, the panel finds that the Appellant should be entitled to ongoing funding for reasonable periodic physiotherapy treatments in a manner consistent with the frequency of physiotherapy treatments that the Appellant has received since the termination of her benefits on a supportive care basis.

Accordingly, the Appellant's appeal is allowed and the decision of the Internal Review Officer dated September 23, 2008, terminating the Appellant's physiotherapy treatment benefits is set aside and the foregoing substituted therefore. Interest pursuant to Section 163 of the MPIC Act shall be awarded upon any amounts owed to the Appellant by MPIC. The Commission will retain jurisdiction in the event that the parties are unable to agree upon the quantum of benefits which are owing to the Appellant.

Dated at Winnipeg this 10th day of May, 2011.

LAURA DIAMOND

MARY LYNN BROOKS

WILF DEGRAVES