Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-148

PANEL:	**Ms Yvonne Tavares, Chairperson** **Mr. Neil Cohen** **Mr. Les Marks**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATE:	**February 1, 2011**
ISSUE(S):	**1. Entitlement to further chiropractic treatment.** **2. Appellant's 180-day determination of employment.**
RELEVANT SECTIONS:	**Sections 84(1), 106, and 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) 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, [text deleted], was involved in a motor vehicle accident on April 13, 2008. As a result of that accident, the Appellant sustained soft tissue injuries to her neck, back and shoulders, dental injuries and post-concussion symptoms including headaches, dizziness and fatigue. Due to those injuries, the Appellant became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

The Appellant is appealing two separate decisions of MPIC's Internal Review Officer:

1. Internal Review Decision of September 10, 2009 - she is appealing the Internal Review Officer's decision to confirm the termination of reimbursement of her expenses for chiropractic treatment; and
2. Internal Review Decision of April 1, 2010, she is appealing the Internal Review Officer's decision which rejected her Application for Review for failure to comply with Section 172 of the MPIC Act and which confirmed her 180-day determination of employment.

1. Entitlement to Reimbursement of Further Chiropractic Expenses

On August 10, 2009, MPIC's case manager issued a decision which advised as follows:

> This is in response to [Appellant's Chiropractor's] request for further treatment as outlined in his report dated July 13, 2009.
>
> That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. The medical information on file supports that you have reached a plateau in your recovery and that additional treatment is not "medically required." Therefore, there is no entitlement to further funding of chiropractic treatment beyond Track II, Phase 4, which is a maximum of 74 treatments including your initial assessment.

The Appellant sought an Internal Review of that decision. In a decision dated September 10, 2009, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the medical documentation on the file did not support further chiropractic treatment as a medical requirement.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to reimbursement of her ongoing expenses for chiropractic treatment. (It should be noted that the Internal Review Decision of

September 10, 2009 also determined that the Appellant was not entitled to a permanent impairment benefit pertaining to "nerve damage and range of motion restrictions". At the appeal hearing, the Appellant was seeking a permanent impairment award for disc herniation. As this matter was not dealt with by the Internal Review Decision of September 10, 2009 it was referred back to MPIC's case manager for determination. If the Appellant is not satisfied with the case manager's decision on that matter, she will of course have the option to seek an internal review and appeal any future internal review decisions with respect to her entitlement to further permanent impairment awards. It was also determined that the appeal of the Appellant's entitlement to a permanent impairment benefit arising out of the September 10, 2009 Internal Review Decision would be heard at a subsequent appeal hearing).

Relevant Legislation:

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

> **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(a) of Manitoba Regulation 40/94 provides that:

> **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;

Appellant's Submission:

The Appellant submits that as a result of the injuries she sustained in the motor vehicle accident of April 13, 2008, she requires ongoing chiropractic treatment. The Appellant argues that chiropractic treatment, and specifically ART therapy, has helped her condition continue to improve. She testified that she has continued to attend her chiropractor for ART therapy, at her own expense, after MPIC terminated funding for her chiropractic expenses. Her attendances depend on how she is feeling. Generally when her condition has deteriorated and she is in a great deal of pain, she will attend for an adjustment.

Additionally, the Appellant argues that there was insufficient medical evidence before MPIC's chiropractic consultant to determine whether further chiropractic treatment would be required in her case. She submits that it is unreasonable for her to live in pain when chiropractic treatment alleviates her pain. Therefore, the Appellant submits that she should be entitled to ongoing reimbursement of her expenses for chiropractic treatment.

MPIC's Submission:

Counsel for MPIC submits that ongoing chiropractic care, "beyond Track II, Phase 4", was not medically required for the Appellant. Counsel for MPIC argues that the Appellant has had more than 60 chiropractic treatments, with no indication that further chiropractic treatments are improving her condition. Counsel for MPIC notes the Appellant's own testimony that the chiropractic treatments provide temporary relief only. She submits that the temporary relief provided by the chiropractic treatments does not meet the test of medically required set out in the legislation. Counsel for MPIC therefore argues that further chiropractic treatments will not significantly improve the Appellant's condition. Additionally, counsel for MPIC contends that

there is no evidence that removing the chiropractic treatment made the Appellant's condition any worse. As a result, counsel for MPIC submits that the Appellant is not entitled to funding for further chiropractic treatment. She submits that the Appellant's appeal should be dismissed and the Internal Review decision of September 10, 2009 confirmed.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant is not entitled to reimbursement of her outstanding expenses for chiropractic treatment.

Reasons for Decision:

Two conditions must be met in order for an Appellant to become entitled to reimbursement of expenses for chiropractic treatment:

1. the expenses must have been incurred to treat injuries sustained in a motor vehicle accident; and
2. the treatments must be "medically required".

The Commission finds that the Appellant has failed to establish, on a balance of probabilities, that ongoing chiropractic treatment "beyond Track II, Phase 4" was medically required. In determining whether treatment is medically required, one of the key considerations is whether there is any real likelihood that it will lead to a demonstrable improvement in the condition of the patient. The Appellant's testimony was that chiropractic care provided temporary relief of her symptoms. Based upon the Appellant's testimony and the chiropractic reports on the file, we

find that further chiropractic treatments are no longer a "medical necessity" within the meaning of the PIPP legislation. Additionally, the evidence before the Commission did not establish that ongoing chiropractic care would provide further sustainable improvement with respect to the Appellant's motor vehicle collision related injuries. As a result, we are unable to conclude that ongoing chiropractic treatment was medically required in this case.

Accordingly, the Commission finds that the Appellant is not entitled to reimbursement of ongoing expenses for chiropractic care. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated September 10, 2009 regarding entitlement to reimbursement of further chiropractic treatment is confirmed.

2. Appellant's 180-Day Determination of Employment

At the time of the accident, the Appellant was employed as an assistant art director and dresser for films and theatre productions. As the Appellant was unable to return to her employment after the motor vehicle accident, due to her motor vehicle accident related injuries, she became entitled to income replacement indemnity ("IRI") benefits pursuant to Section 83(1)(a) of the MPIC Act. In a decision dated June 25, 2009 (*AC-08-117)*, the Commission determined that the Appellant was a temporary earner within the meaning of the MPIC Act. As a temporary earner, the Appellant's entitlement to IRI from the 181st day post motor vehicle accident is determined in accordance with Section 84(1) of the MPIC Act, which provides as follows:

> **Entitlement to I.R.I. after first 180 days**
>
> 84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income

> replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

Section 106 of the MPIC Act provides as follows:

> **Factors for determining an employment**
>
> 106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.
>
> **Type of employment**
>
> 106(2) An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

On the 181st day following the accident, a determination of employment was completed pursuant to Section 106 of the MPIC Act for the Appellant. In a decision dated October 30, 2008, MPIC's case manager advised that the Appellant's 180-day determination of employment was that of "Support Occupations in Motion Pictures, Broadcasting and the Performing Arts".

In an Application for Review dated March 8, 2010, the Appellant sought a review of the case manager's decision of October 30, 2008. The Internal Review decision of April 1, 2010, dismissed the Appellant's Application for Review on the basis that the Application for Review did not comply with Section 172 of the MPIC Act. The Internal Review decision also considered the 180-day determination on its merits and confirmed the case manager's decision of October 30, 2008. The Internal Review Officer was satisfied that the 180-day determination of employment – "Support Occupations in Motion Pictures, Broadcasting and the Performing Arts" was done correctly and in accordance with the applicable statutory provisions.

The Appellant has now appealed that decision to this Commission. At the appeal hearing, it was determined that the Commission would extend the time for the Appellant to file for review of the October 30, 2008 case manager's decision. The issue which therefore requires determination on this appeal is whether the Appellant's 180-day determination of employment within the classification – "Support Occupations in Motion Pictures, Broadcasting and the Performing Arts" was appropriate.

Appellant's Submission:

The Appellant submits that she is responsible for a variety of jobs that fall within both National Occupational Classification ("NOC") 5227 - Support Occupations in Motion Pictures, Broadcasting and the Performing Arts and NOC 5226 – Other Technical and Co-ordinating Occupations in Motion Pictures, Broadcasting and the Performing Arts. She maintains that she may be employed as an assistant art director, a dresser, and/or a property assistant. She does whatever needs to be done on a set. The Appellant also contends that she is responsible for coordinating matters between various departments including sets, props and special effects. She therefore argues that her duties involve more coordinating functions for motion picture productions and theatre and stage productions and therefore she should be classified within NOC 5226.

MPIC's Submission:

Counsel for MPIC submits that the 180-day determination of the Appellant's employment as "Support Occupations in Motion Pictures, Broadcasting and the Performing Arts" was appropriate. She argues that the Appellant's testimony was more closely linked to the support occupations identified in NOC 5227 rather than NOC 5226. Counsel for MPIC maintains that NOC 5227 is more in keeping with the Appellant's duties and experience as set out in the

documentation before the Commission. As a result, counsel for MPIC contends that the 180-day determination was correct. Therefore she submits that the Appellant's appeal should be dismissed and the Internal Review decision of April 1, 2010 should be confirmed.

Decision:

Upon a careful review of all of the oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the 180-day determination of the Appellant within the classification "Support Occupations in Motion Pictures, Broadcasting and the Performing Arts" was done correctly and in accordance with the MPIC Act and Regulations.

Reasons for Decision:

Upon a careful review of all of the evidence before it, the Commission finds that the majority of the positions which the Appellant held fall within the NOC Classification 5227 - "Support Occupations in Motion Pictures, Broadcasting and the Performing Arts". This unit group includes workers who perform support duties relating to the production of motion pictures and the performing arts. Example titles included in this classification include dresser and props person. We find that the Appellant's various positions were most closely aligned with support occupations and accordingly the determination of employment was appropriate.

Accordingly, the Appellant's appeal is dismissed and the Internal Review Decision of April 1, 2010 respecting the Appellant's 180-day determination of employment is confirmed.

At the appeal hearing, the Appellant raised the issue of whether her IRI benefits had been correctly calculated in accordance with s. 84(1) of the MPIC Act. Specifically, the Appellant was concerned that the IRI from the determined employment was less than the IRI she received during the first 180 days after the accident. This issue was not before the Commission on this appeal. However, this matter shall be referred back to MPIC's case manager for a determination of whether the Appellant's IRI benefits were correctly calculated in accordance with s. 84(1) of the MPIC Act.

Dated at Winnipeg this 23rd day of February, 2011.

YVONNE TAVARES

NEIL COHEN

LES MARKS