

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-018**

PANEL: Ms Yvonne Tavares, Chairperson
Dr. Sheldon Claman
Ms Sandra Oakley

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

HEARING DATE: May 31, 2012, and June 4, 2012

ISSUE(S):

1. Late filing of Application for Review.
2. Entitlement to further chiropractic treatment benefits.
3. Entitlement to permanent impairment benefits.

RELEVANT SECTIONS: Sections 129, 136(1)(a), and 172 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 APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant, [text deleted], has been involved in several motor vehicle accidents - on October 15, 1991, February 21, 1991, March 26, 1993, May 13, 2001 and July 11, 2003. In 1997, [the Appellant] had retired from his employment with [text deleted] due to lower back complaints and depression.

Motor Vehicle Accident – May 13, 2001:

On May 13, 2001, [the Appellant] was the driver of a [text deleted]. He was travelling on a highway and had stopped behind a line of vehicles. He was rear-ended by a [text deleted] that was loaded with a freezer in the back. He testified that as a result of the collision, his vehicle was thrown forward, hitting the vehicle in front and pushed into the ditch. His right foot hit the dash and his seat was broken as a result of the impact. He testified that everything seemed to go white following the collision. Initially, the Appellant testified that he had difficulty with movement and generalized aches, pains and headaches. Following this accident, he developed neck, back, shoulder, left arm symptoms, and right leg and hip symptoms.

A medical report dated March 8, 2002 from [Appellant's doctor #1], [the Appellant]'s family physician notes that:

On May 31 I saw [the Appellant] regarding injuries from his motor vehicle accident on May 13, 2001. At that time the prognosis was myofascial injuries to the neck, trapezius, upper back and lower back as well as a sprain of the right ankle. The prognosis at that time was guarded due to his history of persistent musculoskeletal symptoms after previous injuries, his depressive symptoms, and his external locus of control.

1. The injuries and specifically the diagnoses related to the accident are mentioned above. Pre-existing injuries are numerous including myofascial injuries to the neck, trapezius, upper back, mid back and lower back. These previous injuries occurred prior to my taking over the care of [the Appellant] from [Appellant's doctor #2]. The patient blames the motor vehicle accidents during which these injuries occurred for other conditions including depression, anxiety, fibromyalgia, chronic fatigue syndrome and sleep disturbance. I am not able to comment in any significant way on the relationship between these symptoms claimed and the motor vehicle accidents that he was in, however these conditions certainly could potentially have an impact on a person's musculoskeletal injuries aggravating the symptoms.
2. [The Appellant] has experienced repeated injuries of the neck and back. Prior to the motor vehicle accident of May 13, 2001, he remained symptomatic from these injuries. At this time I am not able to state whether he continues to experience an increase in symptoms or disability as a result of the injury of May 13, 2001.

Regarding the ankle injury, this would appear to be completely separate from previous injuries experienced. He has not had much in the way of significant improvement to this point. He has ongoing moderate tenderness on examination and pain with use. Given his past history of poor recovery from musculoskeletal injuries, I am concerned that he will suffer permanent impairment as a result of the right ankle injury.

3. It is my understanding, by history alone, that [the Appellant] did have permanent impairment and disability prior to the accident of May 13, 2001. I was not involved in any of the previous cases which were apparently coming to a close when he came to my practice. It is my understanding by history that the patient was not capable of working prior to the accident of May 13, 2001.

On June 16, 2003, [Appellant's doctor #1] referred the Appellant for athletic therapy for injuries sustained in the motor vehicle accident of May 13, 2001. In his referral, [Appellant's doctor #1] noted that these injuries include the wrists where he was gripping the steering wheel, his right ankle and his neck/back.

Motor Vehicle Accident – July 11, 2003:

The Appellant testified that he was the driver of a [text deleted]. Another vehicle ran through a stop sign and impacted the right front side of his vehicle. The Appellant testified that he injured his left leg and left ankle and wrist in this accident. Additionally, he noted that there was aggravation of prior symptoms of the neck, back, shoulders and hip in addition to these new symptoms in the left leg, left knee and sprains to both wrists. Due to the injuries which the Appellant sustained in this accident, he attended for chiropractic treatment.

Case Manager's Decision dated January 20, 2005:

In a decision dated January 20, 2005, MPIC's case manager advised [the Appellant] that there would be no further funding for chiropractic treatments as of November 1, 2004, confirming a previous decision dated October 19, 2004. MPIC's Health Care Services Team had reviewed the Appellant's file and found that [Appellant's chiropractor #1]'s updated report did not contain

information specifically identifying the Appellant as having objective physical findings of a condition requiring further supervised interventions. Rather, [Appellant's chiropractor #1] indicated that the Appellant's condition was improving and that he was likely close to maximal therapeutic benefit.

The Appellant disagreed with this decision and filed an Application for Review of the January 20, 2005 case manager's decision on March 6, 2006.

At about the same time, an Internal Review Decision dated January 12, 2005 was issued by MPIC's Internal Review Officer regarding the Appellant's entitlement to funding for orthopaedic boots. The Internal Review Decision confirmed the case manager's decision on the matter and dismissed the Appellant's Application for Review. The Appellant filed a Notice of Appeal from that Internal Review Decision on February 9, 2005 with this Commission.

Case Manager's Decision dated June 7, 2005:

On June 7, 2005, MPIC's case manager issued a decision regarding the Appellant's entitlement to reimbursement of travel expenses and a permanent impairment award as a result of his knee injuries. Specifically, the case manager found that:

The review states that based on the documentation of a pre-existing condition and the absence of documentation indicating clinical findings indicative of an exacerbation of pre-existing problems, your knee difficulties are not causally-related to the above noted accidents. Accordingly, the surgeries for your knees are not medically required to address your motor vehicle accident related injuries.

In light of the above, you are not entitled to travel expense reimbursement or a permanent impairment as a result of the injuries sustained to your right and left knees.

The Appellant disagreed with the case manager's decision and filed an Application for Review of the decision dated June 7, 2005 on March 6, 2006.

Case Manager's Decision dated February 5, 2008:

On February 5, 2008, the case manager advised the Appellant that there was no medical requirement for further chiropractic treatment as related to his motor vehicle accident related injuries. As a result, MPIC would not provide funding for chiropractic treatment proposed by [Appellant's chiropractor #2].

The Appellant disagreed with this decision and filed an Application for Review of the decision dated February 5, 2008 on February 20, 2008.

Internal Review Decision dated May 23, 2006:

The Internal Review Decision dated May 23, 2006, considered the Appellant's Application for Review of the case manager's decisions dated January 20, 2005, June 7, 2005, January 20, 2006 (respecting the reimbursement of an orthopaedic boot), and the case manager's decision of July 29, 2005 (respecting the reimbursement of expenses for A535 rub).

Regarding the decisions of January 20, 2005 and June 7, 2005, the Appellant's Applications for Review were rejected for failure to comply with Section 172 of the MPIC Act. The Internal Review Officer found that the Appellant had not provided a reasonable excuse as to why he failed to apply for reviews of the case manager's decision within the 60 day time limit set out in Section 172(1) of the MPIC Act. The Internal Review Officer also dismissed the Appellant's Applications for Review on the merits of the claim. The Internal Review Officer found that there was no evidence to support that further chiropractic treatment was medically required regarding injuries sustained in the accidents of May 13, 2001 or July 11, 2003. Accordingly, the

Internal Review Officer confirmed the decision of January 20, 2005. The Internal Review Officer also determined that the Appellant was not entitled to be reimbursed for travel expenses or to a permanent impairment award as a result of injuries sustained to his right and left knees. As a result, the Internal Review Officer also confirmed the decision of June 7, 2005.

Internal Review Decision dated April 8, 2008:

The Internal Review Decision dated April 8, 2008 dismissed the Appellant's Application for Review and confirmed the case manager's decision of February 5, 2008. The Internal Review Officer found that there was ample evidence on the Appellant's file to support the decision to not provide funding for a further course of chiropractic treatment.

The Appellant has now appealed the Internal Review Decisions dated May 23, 2006 and April 8, 2008 to this Commission. The issues which require determination on this appeal are:

1. Whether the Appellant has provided a reasonable excuse for the late filing of the Applications for Review of the case manager's decisions of January 20, 2005 and June 7, 2005.
2. Entitlement to funding for further chiropractic treatments.
3. Entitlement to permanent impairment award and reimbursement of travel expenses.

Appellant's Submission:

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant has a reasonable explanation for his failure to comply with Section 172 of the MPIC Act. In support of that position, the Claimant Adviser relies on the October 29, 2007 report of [Appellant's doctor #3], clinical psychologist and neuropsychologist, wherein [Appellant's doctor #3] documents a

history of depression and chronic pain for the Appellant. On page three of his report, [Appellant's doctor #3] notes the following:

However, the issues that are more related, I believe, to his failure to comply with deadlines have to do with characterological, coping, mood-related, stress intolerance-related and medication-related issues.

[The Appellant] has the following issues that would interfere, individually and most importantly collectively, that render him less functional and can easily be "reasonable excuses" for missing time limits.

These relate to:

1. Obstructive sleep apnea, to be treated with CPAP. His physician indicates to me that he is not always compliant with his CPAP. This leads to meaning decreases in cognitive efficiency.
2. He has significant sleep reversal.
3. He has ongoing, intermittently more significant depression.
4. He has fatigability.
5. He dealt with the death of his [text deleted], from what I have reviewed in [Appellant's doctor #1]'s notes.
6. He has multiple-region pain, and he has a Pain Disorder with Physical and Psychological Perpetuating Factors.
7. He has stress intolerance.
8. He has low frustration tolerance.
9. He has obesity.
10. His characterological style is one where he is rigid, perseverative and he does not cope well with stressors. This is associated with relative behavioural inertia, helplessness, and very sticky perseverative ideation.

Hence, in my view, there are multiple synergistic factors here related to [the Appellant]'s mental status, as can be extrapolated from my previous knowledge of him and can be retrospectively assessed. The physician indicated he was on the Fluoxetine as well as Diazepam, his sleep cycle was essentially reversed, he was very fatigued, he reported to learning disability and, frequently complained of depression.

All of these entities would lead to cognitive inertia, problems with behavioral and ideational organization, task completion, and I have seen him previously and seen him currently as rigid, inflexible, perseverative, to have low tolerance for frustration and to

have difficulty with logical and appropriate decision-making. He is not incompetent nor is he grossly cognitively impaired, although his cognitive functioning is inefficient and will decrease further with his medication use, sleep reversal, and chronic sleep apnea if he is not taking his CPAP.

Additionally, the Claimant Adviser relies on the Appellant's testimony at the hearing, wherein the Appellant explained that his previous experience dealing with MPI prior to the May 13, 2001 motor vehicle accident was in the tort system, in which his lawyer took care of most of the details. The Appellant testified that he was under the misconception that once he had filed his appeal with the Appeal Commission, all of his issues would be dealt with at the same time. Therefore, [the Appellant] testified that he did not realize that it was necessary to seek an Internal Review of each case manager's decision separately. As a result, the Claimant Adviser argues that the Appellant's failure to file an Application for Review within the 60 day time limit was not due to indifference, but rather due to a combination of his mental state at the time and his confusion about the process.

The Claimant Adviser submits that the Appellant is entitled to reimbursement of travel expenses and a permanent impairment benefit for his right knee. He submits that there is evidence that the Appellant's right knee was asymptomatic prior to the 2001 motor vehicle accident, with the exception of one isolated report of right knee "discomfort" in 1993. However, the right knee has been symptomatic ever since the May 13, 2001 motor vehicle accident. The Claimant Adviser argues that there are numerous reports on the medical file demonstrating that the right knee problems never resolved. Additionally, [Appellant's orthopedic surgeon] performed arthroscopic surgery on the right knee and found meniscal tearing. While [Appellant's orthopedic surgeon] could not rule out some pre-existing meniscal tears, [Appellant's orthopedic surgeon] opined that the motor vehicle accident of May 13, 2001 caused further tearing, at the least. The Claimant Adviser maintains that this constitutes an enhancement of the degenerative condition, if any, that may have existed in that knee prior to the May 13, 2001 motor vehicle

accident. Accordingly, the Claimant Adviser submits that causation of the right knee problems have been established on a balance of probabilities.

With respect to the Appellant's requirement for chiropractic care, the Claimant Adviser submits that the Appellant is entitled to ongoing supportive chiropractic care. In support of his position, he relies upon the Appellant's testimony that his knees and ankle benefited from periodic chiropractic treatment and that his condition would slowly deteriorate until the next treatment. The Claimant Adviser argues that MPIC failed the Appellant by not allowing further chiropractic care in order to determine whether or not ongoing supportive care was required for this Appellant. The Claimant Adviser argues that there is some evidence in favour of the need for ongoing supportive care and the Appellant should be entitled to reimbursement of those expenses.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has not provided a reasonable excuse for his failure to file the Applications for Review of the case manager's decisions of January 20, 2005 and June 7, 2005 within the 60 day time limit. She maintains that the Appellant's personal stressors at the time did not prevent him from his ongoing dealings with MPIC. Further, on February 9, 2005, he was able to file a Notice of Appeal with the Commission. Counsel for MPIC submits that the Appellant did not misunderstand the process involved and any possible confusion between the Internal Review process and the appeal process at the Commission does not provide a reasonable excuse for the Appellant's failure to file his Application for Review in a timely manner. As a result, counsel for MPIC submits that the Appellant's appeals should be dismissed for failure to file his Applications for Review within the 60 day time limit provided in Section 172(1) of the MPIC Act.

With respect to the Internal Review Decision dated May 23, 2006, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision should be confirmed. She notes that by the end of November 2004, the Appellant had attended for 53 athletic therapy treatments in conjunction with 77 chiropractic treatments. Counsel for MPIC submits that those treatments were sufficient to treat the Appellant's motor vehicle accident related conditions. With respect to the Appellant's requirement for chiropractic treatment beyond November 1, 2004, counsel for MPIC relies upon [Appellant's chiropractor #1]'s report dated June 9, 2004 wherein [Appellant's chiropractor #1] notes that the Appellant does not seem to be improving to any lasting degree with his interventions. As a result, counsel for MPIC submits that the Appellant had likely reached maximum therapeutic benefit from chiropractic treatment by that date and chiropractic treatment beyond November 1, 2004 was not medically required.

With respect to the Appellant's requirement for chiropractic treatment in 2007 and 2008, counsel for MPIC relies upon [MPIC's chiropractor]'s inter-departmental memorandum dated January 25, 2008 wherein [MPIC's chiropractor] noted that:

[The Appellant] continues to suffer musculoskeletal pain, as he did prior to this MVA. It is not possible to state that he was worsened by the accident. However, his previous interventions appear to have little if any impact on his pain symptoms or function. For this reason it is improbable that the chiropractic treatment currently proposed by [Appellant's chiropractor #2] would have sustained or progressive benefit for this individual, for this reason, in my opinion, this intervention would not be considered a medical requirement in the management of [the Appellant]'s injuries.

Accordingly, counsel for MPIC submits that the Appellant's appeals with respect to reimbursement of chiropractic treatments should be dismissed.

With respect to the Appellant's knee complaints, counsel for MPIC submits that the Appellant was not healthy prior to the 2001 motor vehicle accident. She argues that from 1991 and onward, the Appellant complained of knee pain. Further, with respect to [Appellant's orthopedic surgeon], she submits that his evidence cannot be relied upon with respect to the right knee symptoms. [Appellant's orthopedic surgeon] relied upon the Appellant to give him accurate information regarding his symptoms and history. Additionally, [Appellant's orthopedic surgeon] testified that the Appellant's obesity could have been a major contributing factor to his knee problems. With respect to the left knee issues, counsel for MPIC submits that there is no objective evidence that the Appellant's left knee problems are related to the motor vehicle accident of July 11, 2003. As a result, counsel for MPIC submits that the Appellant's appeals should be dismissed and the Internal Review Decisions dated May 23, 2006 and April 8, 2008 should be confirmed.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical, and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant, and of counsel for MPIC, the Commission finds that:

1. The Appellant has provided a reasonable excuse for failing to file the Applications for Review of the case manager's decisions dated January 20, 2005 and June 7, 2005 within the 60 day time limit;
2. the Appellant is not entitled to reimbursement of expenses for further chiropractic treatments;
3. the Appellant is not entitled to a permanent impairment benefit or reimbursement of travel expenses as a result of injuries sustained to his knees.

Reasons for Decision:**Extension of Time to file Application for Review:**

Section 172 of the MPIC Act provides as follows:

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 Commission, having considered the totality of the evidence before it, finds that the Appellant has provided a reasonable excuse for his failure to file both Applications for Review within the time period set out in Section 172(1) of the MPIC Act. The Commission accepts the Appellant's explanation that once he had filed the Notice of Appeal with the Commission, he was under the impression that all further issues would be dealt with under that appeal. Additionally, the Commission accepts [Appellant's doctor #3]'s opinion set out in his report dated October 29, 2007 that there were multiple factors related to the Appellant's mental status that would have affected his cognitive functioning in early January 2005. In these circumstances, we find that the Appellant has provided a reasonable excuse for failing to apply

for a review of the case manager's decisions within the statutory time period. Accordingly, the time for filing the Applications for Review is extended.

Entitlement to Further Chiropractic Treatment Benefits:

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;

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 on or after March 1, 1994;

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 was medically required as a result of injuries sustained in either the motor vehicle accident of May 13, 2001 or the accident of July 11, 2003. As noted by [Appellant’s chiropractor #1] in his report of June 9, 2004:

It has become difficult if not impossible for me to differentiate the symptoms caused by the most recent motor vehicle accident versus previous trauma or pre-existing health conditions.

[Appellant’s chiropractor #1] was also of the opinion that the Appellant had reached maximum therapeutic benefit from chiropractic care. [Appellant’s chiropractor #1] was the Appellant’s chiropractor at the relevant time. The Commission accepts [Appellant’s chiropractor #1]’s opinion and accordingly the Internal Review Decision dated May 23, 2006 denying the Appellant’s entitlement to funding for further chiropractic treatment is confirmed and the Appellant’s appeal is dismissed.

With respect to the Appellant’s requirement for chiropractic treatment in December 2007, the Commission accepts [MPIC’s chiropractor]’s opinion set out in his inter-departmental memorandum dated January 25, 2008 that it is improbable that chiropractic treatment proposed by [Appellant’s chiropractor #2] would have sustained or progressive benefit for the Appellant. Accordingly, further chiropractic treatment would not be considered a medical requirement in the management of [the Appellant]’s injuries. As a result, the Appellant’s appeal is dismissed and the Internal Review Decision dated April 8, 2008 is confirmed.

Entitlement to Permanent Impairment Award for Knees:

The Commission finds that the Appellant has not established, on a balance of probabilities, that either his right knee or left knee condition is attributable to either the motor vehicle accident of May 13, 2001 or the motor vehicle accident of July 11, 2003. Prior to the May 13, 2001 motor vehicle accident, the Appellant had numerous pre-existing injuries including myofascial injuries to the neck, trapezius, upper back, mid back and lower back. Additionally, the Appellant suffered with other conditions including depression, anxiety, fibromyalgia, chronic pain syndrome and sleep disturbance. At the time of the May 13, 2001 motor vehicle accident the Appellant was symptomatic from these injuries. A review of the medical reports after the May 13, 2001 motor vehicle accident describe the right ankle problems as being the most problematic regarding the Appellant's right lower limb. There is very little mention of any symptoms involving the right knee following the May 13, 2001 motor vehicle accident. Further the Commission finds that [Appellant's orthopedic surgeon]'s testimony at the hearing establishes at most that the tearing of the Appellant's meniscus could have possibly happened as a result of the motor vehicle accident. [Appellant's orthopedic surgeon] also testified that the tearing could have occurred from ordinary activities, including activities such as twisting or squatting. Additionally, [Appellant's orthopedic surgeon] testified that the Appellant's weight was a significant factor in his osteoarthritis in his knees and that one can develop a tearing of the meniscus due to osteoarthritis. As a result, the Commission finds that the Appellant has not established a causal connection between his right knee complaints and the motor vehicle accident of May 13, 2001 on the balance of probabilities.

With respect to the July 11, 2003 motor vehicle accident, and the Appellant's left knee complaints, the opinion of [Appellant's orthopedic surgeon] is clear that the July 2003 motor vehicle accident would not likely cause a meniscal tear of the left knee. [Appellant's orthopedic surgeon] testified that the forces involved in that collision would not have likely led to a

meniscal tear and the 2001 motor vehicle accident did not affect the left knee. Additionally, [MPIC's doctor] found that the most likely cause of his left knee condition was a possible degenerative cartilage tear associated with arthritis of the knee. A CT scan confirmed the presence of osteoarthritis that on a balance of medical probabilities preceded the July 11, 2003 motor vehicle accident.

Accordingly, the Commission finds that the Appellant has not established that his left knee problems were caused by either the May 13, 2001 or the July 11, 2003 motor vehicle accidents, on a balance of probabilities. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated May 23, 2006 is confirmed with respect to the issues arising from the case manager's decisions dated January 20, 2005 and June 7, 2005.

Dated at Winnipeg this 27th day of July, 2012.

YVONNE TAVARES

DR. SHELDON CLAMAN

SANDRA OAKLEY