Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-053

PANEL:	**Ms Laura Diamond, Chairperson** **Dr. Sharon Macdonald** **Ms Lorna Turnbull**
APPEARANCES:	**The Appellant, [text deleted], appeared by teleconference and was represented by Ms Laurie Gordon, Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**March 14, 2012**
ISSUE(S):	**Entitlement to physiotherapy treatment benefits beyond December 31, 2007.**
RELEVANT SECTIONS:	**Section 136 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 was injured in a motor vehicle accident on July 31, 1999. As a result of the accident the Appellant sustained the following injuries: fractured left clavicle, fractured right ankle, fractured left tibia and fibula, multiple contusions and lacerations, and soft tissue injury to her neck and back.

The Appellant was in receipt of MPIC funded physiotherapy treatments as a result of her injuries. On April 10, 2007, her treating physiotherapist submitted a subsequent therapy report requesting ongoing support of physiotherapy treatment. This request was reviewed by MPIC's Health Care Services Team. Based on this review, the Appellant's case manager approved treatments at a frequency of one treatment per month on a supportive basis until December 31, 2007.

The Appellant's physiotherapist wrote a subsequent therapeutic report on November 28, 2007 requesting ongoing supportive physiotherapy treatment. This report was reviewed by MPIC's Heath Care Services Team who concluded that there was no ongoing indication that the monthly visits were progressing the Appellant more than home strengthening would, concluding that the monthly visits were, on a balance, not medically required at that point.

The Appellant's case manager wrote to her on December 31, 2007 indicating that the Appellant had reached a plateau in her recovery. Additional physiotherapy treatments were not a medical necessity and would not be funded by MPIC effective December 31, 2007.

The Appellant sought an Internal Review of this decision. On February 29, 2008, an Internal Review Officer for MPIC reviewed the case manager's decision and the Appellant's submission that she continued to work hard at her recovery and had seen improvement. She felt that without physiotherapy treatments her condition would deteriorate and she would lose quality of life. She requested an extension of physiotherapy treatments for at least another year.

The Internal Review Officer concluded that as the Appellant had already undergone extensive therapy since the accident (approximately 485 physiotherapy treatments), it seemed unlikely that

further physiotherapy treatment would result in any demonstrable improvement. The case manager's decision was upheld.

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 into her appeal. She described the motor vehicle accident, the pain and injuries which resulted and her treatment at the [Hospital]. Her injuries were extensive, requiring a week in bed, then assistance with any transfers and use of a wheelchair. She had physiotherapy every day while in the hospital as well as other treatments and was not discharged from the hospital until October 29, 1999, almost three months following the motor vehicle accident.

The Appellant described the changes made to her life at home, including some use of a wheelchair, then crutches and finally a cane, as well as modifications required to her home.

The Appellant continued to attend at physiotherapy for four outpatient physiotherapy treatments per week at the hospital, until January 2000. She then began seeing another physiotherapist three times a week for 2½ to 3 hours each visit. They used the whirlpool, hands-on manipulation, myofascial release, acupuncture, muscle stimulation and ultrasound. She was also given exercises involving wobble boards and stretching and did workouts with machines and weights. She progressed from a wheelchair, to crutches, to two canes and then down to one cane, adding a variety of strengthening exercises to her routine. These included work on an elliptical machine, walking, weight machines, free weights, stretches, yoga and work with a personal trainer.

The Appellant continued with her physiotherapy until she was only attending once or twice a month. Then, in June of 2005 she moved to [text deleted] and saw a new physiotherapist who was a specialist in myofascial release as well as mobilization and acupuncture. She saw a physician in [text deleted] regarding her back pain, and he referred her to another physiotherapist named [Appellant's physiotherapist #1]. She went to see her once a week for close to one year. Treatment involved manipulations and she was referred to a Pilates class. Her doctor also sent her for cortisone injections.

The Appellant described the relief she found with all of these difference types of physical therapy. She described her pain and her difficulty even straightening up, followed by intensive physiotherapy which helped her move and straighten. Eventually, she was able to go for a couple of months at a time without physiotherapy, trying to manage with stretching on her own. However, after a couple of months she would find she needed help again and would go to physiotherapy for a couple of treatments. This seemed to help her go on for another month or two.

The Appellant also described her home exercise program when she lived in [text deleted], and now in [text deleted] where she currently lives. The Appellant joined the Y and went there three or four times a week to exercise. She also attended yoga classes twice a week, walked and started hiking. She indicated that there are some yoga stretches that she does regularly throughout the day to help her mobility. She also attends for cortisone shots a couple of times a year, which allows her to use less medications such as Celebrex. She described attending for massage therapy along with Pilates, gym, hiking and yoga.

On cross-examination, the Appellant confirmed that she had received approximately 485 physiotherapy treatments up to the time that her benefits were terminated by MPIC at the end of 2007. She estimated that, in the four years since then, she had attended for less than 100 further physiotherapy treatments, including 10 or 11 in the last year.

The Appellant also confirmed that she had been diagnosed with a mild scoliosis at about age [text deleted], but indicated that she had had no pain or alignment issues, and nothing that affected her life, as a result of this diagnosis.

The Appellant was also asked about any periods of withdrawal from physiotherapy which she had attempted. She indicated that between January 3, 2008 and May 26, 2008 she was out of town and did not see a physiotherapist. She also explained another withdrawal period between December 15, 2008 and February 12, 2009, when she was away on holidays [text deleted].

The Appellant was asked whether, when she goes without physiotherapy treatment, her condition gets worse steadily or goes up and down. The Appellant indicated that this depends upon her activity level. When she is more active her condition definitely gets worse and she tries to self-medicate with stretches, etc. However, she indicated there comes a point where she feels she needs help to get back to where she can manage. Sometimes she would need several treatments to improve her condition, but sometimes she felt she just needed one treatment, and then it would take a couple of days and she would start to feel better.

Reports were also filed by the Appellant from a variety of caregivers, including her physiatrist, [Appellant's physiatrist]; manual physiotherapist, [Appellant's physiotherapist #1];

physiotherapist, [Appellant's physiotherapist #2]; and her family physician, [Appellant's doctor #1].

Counsel for the Appellant submitted that the Appellant had been involved in a severe motor vehicle accident. She spent a good deal of time in hospital, progressing from bed to reclining wheelchair, reclining back slab, and then learning to walk again. The Appellant had some difficulty learning to walk again but came to achieve weight bearing status. Her testimony and the reports on file show how persistent the Appellant was. She had to learn to walk all over again, and now, through her testimony, we see she is at the point where she is walking and hiking with Nordic poles.

Counsel reviewed the reports regarding the Appellant's injuries, as well as reports from the occupational therapist regarding a list of equipment that would be required to assist her when she returned home. Treatment strategies, including manual therapy, and acupuncture, were reviewed along with the challenges the Appellant faced in regaining loss of motion and dealing with her persistent pain. For example, a report from [Appellant's doctor #2], described her complaints of chronic pain in her left leg with "persistent weakness and painful hyperesthesia, marked weakness in the lower leg extensor muscles with obvious atrophy in the lower leg, a Grade III motor impairment of the peripheral nervous system (specifically the deep peroneal and superficial peroneal nerves below the knee) and a Grade II sensory impairment of the leg below the knee as well".

In a subsequent report dated August 31, 2005 [Appellant's doctor #2] noted:

> "It has come to my attention that [the Appellant's] benefits for ongoing physiotherapy have been discontinued since she has moved to [text deleted]. As a consequence of that accident she continues to have significant weakness in her leg as well as hyperesthesia.

> She has developed chronic facet joint arthropathy in the lumbar spine. Despite regular at home work-out program she continues to have flare-ups of back pain and pain in the leg which have responded very well to physiotherapy.
>
> These symptoms are almost certainly as a consequence of her accident.
>
> Hopefully this will be helpful for you to assess her eligibility for ongoing physiotherapy."

The Appellant's physiotherapist, [Appellant's physiotherapist #2], reported at the same time, on August 10, 2005. He reviewed the Appellant's condition and treatment and stated:

> "The ongoing limitations [the Appellant] suffers from currently are progressive in nature and will significantly compromise her basic Activities of Daily Living without continued intervention. This is because the Myofascial restrictions evident in [the Appellant] anchor about her hemi-pelvis that is rotated as a result of an area of increased fascial density residing in her left lower leg. Although fasciotomies (similar to the one performed on [the Appellant]) are rightly performed as an intervention to reduce the incidence of tissue necrosis, the resultant change in fibrotic structure (increased density in remaining fascia) creates a spiral restriction in the areas superior to the lesion; thereby contributing to rotational lesions in the pelvis. As these restrictions continue to progress, they cause compressive shearing forces along the axial spine from the lumbar through the cervical regions. Left untreated, these lesions leave the client in a progressive state of chronic pain and movement dysfunction, incapacitating them from basic daily function.
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> [The Appellant] requires progressive Physiotherapy follow-up on a monthly basis in conjunction with a comprehensive home management program to treat her restrictions. The notion of discontinuing the benefits necessary to continue the follow-up care for [the Appellant] lacks both forethought and conscience."

Some two years later, on May 15, 2007, [Appellant's physiotherapist #2] reported again, recognizing the significant advances in activities of daily living which the Appellant had achieved. He stated:

> "Further to the report forwarded to you dated April 10th, 2007, Ms. [the Appellant] has been receiving once monthly sessions of Advanced Myofascial Release techniques, soft tissue and bony mobilizations, exercise therapy, ergonomic and activities of daily living education, IR Laser and Percutaneous Electrical Nerve Stimulation. [The Appellant]. has complimented her clinic visits with a comprehensive home program.
>
> [The Appellant]. has made significant advances in her activities of daily living over the past twelve sessions. It would be prudent to facilitate these progressive advances with continued monthly visits for a 1 year period."

This was followed by [MPIC's doctor's] recognition, on May 31, 2007, that supportive physiotherapy visits on a monthly basis would benefit the Appellant, for a twelve month period.

Improvement continued to be reported by [Appellant's physiotherapist #2], in a report dated November 28, 2007. Yet a further review, in a handwritten note by [MPIC's doctor] on December 28, 2007 indicated that there was no ongoing indication that monthly visits were progressing the Appellant. This, counsel submitted, contradicted [MPIC's doctor's] earlier report recommending supportive monthly visits for one year from May 31, 2007. But there were no reports from any doctor or physiotherapist, between May 31, 2007 and December 28, 2007 which supported [MPIC's doctor's] statement. Counsel submitted that as a result, the statement was completely unsubstantiated and cannot be relied upon.

Counsel pointed to a number of caregiver reports supporting further physiotherapy treatments for the Appellant including reports from:

- [Appellant's doctor #1], November 7, 2008:

  "[The Appellant] has managed fairly well on Celebrex, and in combination with physiotherapy, allows her to manage her activities of daily living.

  She has recently been assessed by a physiatrist who recommended additional manual physiotherapy..."

- [Appellant's physiatrist], May 5, 2008:

  "I would like her to see a Manual Physical Therapist and I have recommended that she book at the Centre for Manual Physiotherapy. She would also potentially benefit from intramuscular stimulation and depending on the results may need more invasive treatment such as prolotherapy..."

- [Appellant's physiatrist], December 17, 2008:

  "...It was noted that she had progressed very well with manual therapy, IMS and Pilates...recommending possible facet joint injection. It was noted that prolotherapy may also be an option..."

- Physiotherapist [Appellant's physiotherapist #1], January 20, 2011:

  "...She was being treated for symptoms of pain and stiffness, namely pain in the distribution of the L5 and S1 spinal segments aggravated by walking, sitting prolonged, standing prolonged, and being woken at night with pain...

  Please state whether [the Appellant] reached maximum therapeutic benefit.
  My answer is twofold. From a physiotherapeutic point of view, yes. However, from a medical point of view, no. Facet joint injections proved very beneficial in April, 2009 of the L4/5 segment and L5/S1 segment. This one time injection can be followed up with a 2nd, 3rd, and possibly a rhizotomy under the care of her physician in [text deleted]. Research has shown that Physiotherapy Intervention after facet joint injection is beneficial to the patient."

- [Appellant's physiotherapist #2], February 13, 2011:

  "The last assessment of [the Appellant] from the undersigned was September 8th, 2009. [The Appellant] demonstrated continued increased benefits from therapy; therefore, the answer to this question [4. Please state whether [the Appellant] reached maximum therapeutic benefit] is no."

Counsel submitted that all of these opinions were confirmed by the Appellant's testimony.

Once she moved to [text deleted] she was treated by different physiotherapists, attempting different types of treatment, to supplement all of the physical exercise she was pursuing.

The only evidence for MPIC came from [MPIC's doctor], who contradicted herself in two different reports, first recommending 12 months of therapy and then, after six months, concluding that no more physiotherapy was required.

Counsel submitted that the Appellant's appeal should be allowed. Although at one point MPIC had characterized her request as one for supportive care, it was submitted that she required ongoing physiotherapy treatments on a therapeutic basis, still moving towards maximum medical

recovery. The remedy she was seeking was funding for 12 to 15 physiotherapy treatments per year from December 2007 to date, and funding for ongoing physiotherapy treatment at a rate of approximately once a month.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that for treatment to be considered medically required under the MPIC Act, it must positively advance the Appellant's recovery and condition based upon objective medical evidence.

In this regard, counsel pointed to evidence contained in the most recent review by MPIC's Health Care Services Team, as well as the testimony of the Appellant that she had received 485 outpatient physiotherapy treatments prior to the termination of her benefits at the end of 2007. She had attended for approximately 12 treatments per year since that time, for a total of between 550 total treatments since the motor vehicle accident. This is a significant long-term use of physiotherapy, and counsel submitted that it showed little objective improvement over time. Although the Appellant's subjective reports may have focused upon improvement, counsel submitted that there was little in the medical reports to objectively substantiate this.

Counsel for MPIC described the Appellant's early condition following the motor vehicle accident as mostly consisting of left knee and leg pain, weakness, limited flexion, and pain and tenderness on palpitation. Caregivers' reports on file from 2001 and 2002 show a consistency of complaints over that time. However, much of the evidence on the Appellant's file after 2002 and 2003 suggests that physiotherapy treatment was useful for pain and symptom management or to maintain a level of function already achieved, rather than providing any objective benefit. Caregivers' reports suggested that physiotherapy was necessary to prevent deterioration in the

Appellant's condition, which would be considered under the supportive care umbrella, rather than lead to a resolution of the condition. Even [Appellant's doctor #2] recommended physiotherapy to treat flare-ups, and none of these older reports support the Appellant's argument for continuing physiotherapy on a maximum medical improvement basis.

More recent reports from 2007 through 2009, for the most part, show a consistency in the Appellant's symptoms even though physiotherapy was ongoing during this period. [Appellant's physiatrist's] report of May 5, 2008 describes restrictions, such as those involved with lumbosacral flexion and spine dysfunction, substantially similar to symptoms described in the earlier reports. Most reports show significant improvement in that period (2007 through 2009) after the facet joint injections began. Although [Appellant's physiatrist's] report of December 17, 2008 indicated that the Appellant had progressed well with manual therapy, IMS and Pilates, it is not clear whether this is based upon subjective or objective findings.

[Appellant's physiotherapist #1's] report of January 20, 2011 contained the most in depth discussion of whether the Appellant had reached maximum therapeutic benefit. From a physiotherapeutic point of view she indicated yes, and it was only from a medical point of view that she felt the Appellant had not reached this level. Counsel for MPIC maintained that supportive care was a different type of care than one targeted towards maximum medical improvement, which was being sought in this appeal. There was not enough supporting documentation on the Appellant's file to show that further physiotherapy was targeted at such improvement rather than just subjective pain control unsubstantiated by objective measurement.

Even the Appellant's testimony regarding increased ability to walk and even hike, had not necessarily been demonstrated to be linked to the benefits of physiotherapy treatment, and in fact

could just as well be related to the Appellant's efforts with her home program. Even objective measures, such as a two millimetre differential in heel height and lift were outside the bounds of clinically significant measurement and effect.

Counsel submitted that pain relief alone would not support further physiotherapy treatment. The treatment must advance the Appellant towards recovery and in this appeal that had not been established. Accordingly, counsel also submitted that the Appellant's appeal should be dismissed and the decision of the Internal Review Officer dated February 29, 2008 should be upheld.

Discussion:

The MPIC Act provides:

> **Reimbursement of victim for various expenses**
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> 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:
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> (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 further physiotherapy treatment is medically required as a result of the injuries she sustained in the motor vehicle accident.

The panel has reviewed the evidence on the Appellant's file, as well as her testimony at the hearing and the submissions of both counsel. Both the documentary evidence and the testimony of the Appellant clearly outline the effects of the accident on the Appellant in terms of pain and impact upon her functionality. We found the Appellant to be a credible witness who gave her evidence with detail and clarity. Much of this detail was confirmed in the documentary reports from her caregivers.

The panel was struck by the Appellant's ongoing efforts to comply with and advance her own rehabilitation program through walking, hiking, strength training, tai-chi, home stretching, yoga, Pilates, injections and various physiotherapy treatments.

Several caregivers, including [Appellant's doctor #2], [Appellant's physiatrist] and the physiotherapists, [Appellant's physiotherapist #2] and [Appellant's physiotherapist #1], documented improvement. It is quite clear that until September 10, 2009, the evidence supported ongoing physiotherapy. The Appellant had not reached maximum medical improvement prior to that date and she continued to improve in function thereafter.

Following September 10, 2009, [Appellant's physiatrist] and the two physiotherapists ([Appellant's physiotherapist #2] and [Appellant's physiotherapist #1]) continued to recommend ongoing physiotherapy at a frequency of 12 to 15 sessions per year.

[Appellant's physiatrist's] report dated February 14, 2011 described his last visit with the Appellant on September 10, 2009 prior to her move to [text deleted]. He stated:

> "She was last seen on September 10, 2009 and was to be moving to [text deleted]. It was my impression that she required further extensive treatment with the possibility of repeat injections and prolotherapy, an injection technique to strengthen ligaments. These treatments were to complement her rehabilitation and it was noted that she would need ongoing physiotherapy treatment with a Manual Therapist who had skills in intramuscular stimulation...
>
> It was my impression that she had not reached maximum therapeutic benefit and I was recommending further treatment as described. I do not know if she went without physiotherapy, the dates, etc as this was never addressed with her. I cannot state how often she would need physiotherapy, as she has not been since September 2009.
>
> As noted, as best can be determined, the expenses incurred were due to the accident and in my opinion the treatment that I recommended was medically required. The hope with recommending further treatment was that she would have some clinical improvement and the expectation was that she would have deterioration in her condition, with an increase in symptoms, without ongoing physiotherapy treatment. It needs to be stressed that any "passive" treatment such as intramuscular stimulation, injections, etc are meant to complement the rehabilitation program with the physiotherapist."

[Appellant's physiotherapist #1], in her report dated January 20, 2011, recommended physiotherapy treatment once per month, with an extra three per year "for treatment of unavoidable flare-ups/ reinjury/ treatment of subsequent lower kinetic chain dysfunction and pain. Therefore, 15 physiotherapy treatments per year."

The Appellant's testimony established that physiotherapy treatments continued both before and after September 2009 and continued to the present day. They help her maintain her functionality with daily living, with self-reported ongoing increases in ability to walk, hike, live an active life and increase, or at least maintain, her capacity.

Accordingly, the panel agrees with counsel for the Appellant. We find that the Appellant has established, on a balance of probabilities, that further physiotherapy treatments, on the basis

recommended by [Appellant's physiotherapist #1], are medically required as a result of injuries sustained in the motor vehicle accident.

The Commission finds that MPIC should be required to reimburse the Appellant for physiotherapy expenses incurred up to the present time, on the basis of 12 to 15 visits per year, as recommended by her caregivers. We also find that MPIC should be responsible to fund such treatments on an ongoing basis, at the same frequency of 12 to 15 treatments per year.

Accordingly, the Appellant's appeal is upheld, and the decision of the Internal Review Officer dated February 29, 2008 is rescinded. The panel refers the question of reimbursement for physiotherapy expenses incurred and funding of future physiotherapy treatments back to the Appellant's case manager. The Commission will retain jurisdiction in the event that the parties are unable to agree to the amount of entitlement which flows as a result.

Dated at Winnipeg this 16th day of May, 2012.

LAURA DIAMOND

DR. SHARON MACDONALD

LORNA TURNBULL