



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-100**

PANEL: Ms Nikki Kagan, Chairperson
Ms Leona Barrett
Dr. Arnold Kapitz

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's mother] was not present at the appeal hearing; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Ashley Korsunsky.

HEARING DATE: October 26, 2018

ISSUE(S): Whether the Appellant's symptoms and difficulties are causally related to the MVA of November 21, 2011.

RELEVANT SECTIONS: Sections 70(1), 184.1(1) and 184.1(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act').

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

Background:

The Appellant was involved in a motor vehicle accident (MVA) on November 21, 2011. As the result of injuries sustained in the MVA, the Appellant received Personal Injury Protection Plan (PIPP) benefits including Income Replacement Indemnity (IRI) benefits.

The case manager advised the Appellant by letter dated November 3, 2014 that based on the medical information available in the file, the Appellant's symptoms, presentation and difficulties were not causally related to the MVA. The case manager further advised the Appellant that her IRI benefits would terminate as of February 1, 2015.

The Appellant filed an Application for Review dated December 17, 2014.

The decision of the Internal Review Officer dated March 6, 2015 concluded that the evidence on file does not support, on a balance of probabilities, a causal connection between the Appellant's reported symptoms, presentation and difficulties and the MVA of November 21, 2011.

The Appellant filed a Notice of Appeal on May 21, 2015. The issue on appeal was whether the Appellant's symptoms, presentation and difficulties were causally related to the MVA of November 21, 2011.

The Notice of Appeal, completed by the Appellant, stated her address as [address on Notice of Appeal]. MPIC forwarded numerous letters to the Appellant at this address and it was apparent that the Appellant was receiving the letters. None of the letters was returned as "undelivered".

The Notice of Appeal indicated that the Claimant Adviser Office (CAO) would represent the Appellant at the hearing. On July 15, 2015, the Commission received an email from CAO confirming that a Claimant Adviser had been assigned. On December 19, 2016, further correspondence was received from CAO stating that they were no longer representing the Appellant.

On May 30, 2016, an authorization/consent form was received from the Appellant allowing the Commission to speak to her mother, [text deleted], on her behalf.

On June 16, 2017, the Commission was advised by the Appellant's mother in a telephone conversation that the Appellant was seeking a lawyer to assist her with the appeal. This conversation was confirmed by letter from the Commission to the Appellant dated June 16, 2017.

The Commission attempted to contact the Appellant on several occasions in September 2017 and October 2017. Voicemail messages were left on the Appellant's mother's cellphone but no return call was received. A case conference date was set for February 7, 2018 to move the appeal forward.

On December 21, 2017, a Notice of Case Conference was sent to the Appellant at the [address on Notice of Appeal] by regular mail and Xpresspost. The service of the Notice of Case Conference indicated that the Xpresspost was accepted and signed by "[Appellant's initials]".

Neither the Appellant nor her mother attended the case conference on February 7, 2018. The Commission attempted to telephone the Appellant and her mother on February 7, 2018 to inquire about their failed attendance and a message was left on their voicemail. The call was not returned.

On February 12, 2018, correspondence was forwarded by regular mail to the Appellant's mother at the [address on Notice of Appeal] advising of the outcome of the case conference, specifically,

that MPIC would be submitting a further Health Care Services report and it was likely that another case conference would be scheduled. The Health Care Services psychological consultant report was received on April 13, 2018. MPIC confirmed that no further evidence would be submitted and a further case conference date was set for July 10, 2018.

On May 22, 2018, a Notice of Case Conference was forwarded to the attention of the Appellant's mother (residing at the same [address on Notice of Appeal] as the Appellant) via regular mail and Xpresspost. The Notice of Case Conference sent by Xpresspost was returned to the Commission, noted "refused". The Notice of Case Conference sent by regular mail was not returned.

The case conference commenced on July 10, 2018 at 9:30 a.m. Ms Ashley Korsunsky, legal counsel for MPIC, was present but neither the Appellant or the Appellant's mother attended.

At the commencement of the case conference, it was confirmed that the Appellant had been properly served with a Notice of Hearing pursuant to Section 184.1(1)(b) and Section 184.1(2) of the MPIC Act which provide as follows:

How notices and orders may be given to Appellant

184.1(1) Under sections 182 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an Appellant

(b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.

When mailed notice received

184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

The Commission's secretary was instructed by the Commission to set a hearing date for the appeal and a hearing was set for October 26, 2018. A Notice of Hearing dated August 14, 2018 was forwarded via Xpresspost and regular mail to the Appellant's mother at the [address on Notice of Appeal] set out in the Notice of Appeal.

The Xpresspost mail sent to the Appellant's mother was returned "unclaimed" and the regular mail was not returned.

The Appeal Hearing:

The appeal hearing commenced on October 26, 2018 at 9:30 a.m. Ms Ashley Korsunsky was present but neither the Appellant or her mother attended. As no word was received from the Appellant, the hearing convened without the Appellant's participation at 9:45 a.m.

At the hearing, counsel clarified the issue under appeal as follows:

- Were the Appellant's symptoms, presentation and difficulties causally related to the MVA of November 21, 2011.

Submission for Appellant:

The Appellant's submission was attached to her Notice of Appeal.

The Appellant set out in a 7-page summary her reasons for disagreeing with the Internal Review Decision dated March 6, 2015.

The Appellant's full submission is attached as Appendix "A" and will be summarized herein.

The Appellant stated that the main reason she was off work was due to her jaw injury and difficulty to communicate orally because she could not open her mouth more than 5 millimetres. She was also experiencing balance issues.

The Appellant submitted:

Mpic claimed my full reason I was off work was because of Spinal and peripheral joint. This is not the full reason I am not (sic) off work. The main reason I am off work is due to my jaw injury and difficulty to communicate orally. Which this is the reason [Appellant's chiropractor] was writing the off work disability forms.

...

... [Appellant's prosthodontist] Also (sic) diagnosed me with an acute closed lock due to anteriorly displaced disc R.S TMJoint. [Appellant's prosthodontist] also said there was no cure and TX will be a long term issue.

The Appellant further stated:

... [Appellant's TMJ specialist] also diagnosed me with TM primary disorder with an intracapsular and extracapsular component. He believed the primary cause of the symptoms to be a structural dysfunction and inflammatory conditions. [Appellant's TMJ specialist] did x-rays which found posterior and superior displacement of the condyles in the fossae in centric occlusion.

The Appellant's jaw was examined under anaesthetic. The Appellant stated:

Surgery was not on April 22, 2013 it was on April 17, 2013. When I requested my File (sic) from the [hospital] there were multiple surgical reports on different days saying different things. None of the reports measurements are accurate and every measurement is different in every report. The referral [Appellant's oral surgeon] wrote to [Appellant's physiotherapist], [Appellant's oral surgeon] said under anaesthesia mouth opened to 20 mm. [Appellant's oral surgeon] never stated in the reports that my mouth open to normal levels. In the surgical report it stated that there was bite blocks in my mouth. So if it apparently opened easily why was there was bite blocks in my mouth to keep my jaw open. And when I came out of recovery and was taken back to my mother there was blood in my hair and blood in my mouth and ears and nose and face...

[Appellant's oral surgeon] referred the Appellant to [text deleted], otolaryngologist. The Appellant stated that her appointment with [Appellant's otolaryngologist] was less than 5 minutes long and they were doing construction in the building. It was so noisy and that she could barely hear what [Appellant's otolaryngologist] was saying. Further, [Appellant's otolaryngologist] was frustrated by the noise and how his instruments were not working. The Appellant submitted that [Appellant's otolaryngologist] stated that the progress in her case would likely be slow and it remained to be seen whether she would achieve normal jaw functions.

The Appellant attended for physiotherapy.

The Appellant stated:

... I was not uncooperative towards the examination due to the fear of pain. I was cooperative towards the examination as she examined my neck and shoulders and back and mouth. But she did not like that I could not open my mouth and she did not like that I was writing down my symptoms on a piece of paper. [Appellant's physiotherapist] did not do any physiotherapy treatment on me and would not give me an ice pack after she poked and prodded even though I wrote that I had a two hour bus ride home.

...

... As I started physiotherapy on April 19, 2013 and attended physiotherapy with [Appellant's physiotherapist] until April 2014. I had physiotherapy with

[Appellant's physiotherapist] for 1:30 minutes up to 2 hours every visit. It was recommended I go at least 2-3 times a week and Mpic only approved once a week. And [Appellant's physiotherapist] said it was not helpful because it was not frequent enough to keep the progress that was made.

MPIC referred the Appellant to an independent psychologist, [text deleted], at [psychological health center]. The Appellant refuted the findings of the psychologist. She stated:

... [independent psychologist] was threatening me, in my personal space and locked me and my mother in the room with her. Whenever I would write my answer down she would rudely tell me to change it as I was lying...

Further, the Appellant stated that [independent psychologist] "was a student and not an actual psychologist".

The Appellant stated that MPIC provided her medical information to [independent psychologist #2] and the [psychological health center] office before she even agreed to attend that psychological office and without her authorization. In the Appellant's view, [independent psychologist] already had her mind made up even before she met the Appellant.

The Appellant stated she was fully functional as a cashier customer service clerk as her job at the [business] prior to the MVA and she was completely disabled after the MVA.

The Appellant stated that with her jaw being locked shut for more than 3 years, more damage was being done to her muscles, teeth and bite.

The Appellant submitted that there is medical proof that she was not able to work after the accident from her chiropractor, [text deleted], and from her physiotherapist, [text deleted], in his physiotherapy discharge report, without making specific reference to the evidence in the reports.

The Appellant relied upon numerous reports on file from her chiropractor, [text deleted], confirming that she was disabled and unable to perform her duties as a cashier at the [business]. These reports were predominantly Disability Certificates and not narrative medical reports.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant bears the onus of proving that, on a balance of probabilities, her symptoms, presentation and difficulties were caused by the MVA.

Counsel for MPIC submitted that the MVA was minor in nature. The [paramedic service] report indicated that there was low speed, minor impact, no deployed airbags and no glass breakage. The Appellant was able to call her brother who drove her to the [hospital #2]. The report from [hospital #2] provides a diagnosis of neck strain. There is no jaw pain noted.

In the Appellant's application for PIPP benefits, the Appellant described her injuries as follows:

- No lost of conscious; glasses were out of line and got adjusted; no cuts
- Sore left hip, neck and shoulders
- Sore arms, jaw, ribs, back between shoulder blades
- Sore ankles, low back

Counsel submitted that the Appellant continued to receive IRI benefits from the date of the accident until February 1, 2015 because during this period the Appellant's injuries continued to be investigated. The Appellant saw several dentists and dental specialists in order to determine a physical cause for her inability to open her mouth.

Counsel reviewed the medical evidence of [Appellant's dentist], [Appellant's TMJ specialist], [Appellant's prosthodontist] and [Appellant's oral surgeon] to establish a medical reason for the Appellant's inability to open her mouth.

Counsel submitted that the first mention of any jaw issue was in [Appellant's dentist's] dental report dated January 4, 2012. The report stated:

No tooth injury visible but jaw opens to the right so then maybe TMJ (tempo mandibular joint) or related muscles that are not functioning in a normal manner, causing pain.

Counsel submitted that [Appellant's prosthodontist's] dental report dated January 17, 2012 stated that there is evidence of jaw problems, specifically "acute closed lock R.S. TMJoint".

[Appellant's dentist] referred the Appellant to [text deleted], a TMJ specialist. The Appellant attended an appointment with [Appellant's TMJ specialist] on April 2, 2012.

Of significance is the procedure performed by [Appellant's oral surgeon] on April 22, 2013 wherein under anaesthesia, the Appellant was able to open her mouth to 42 mm.

Counsel argued that based on the medical reports on file, particularly the reports of [Appellant's oral surgeon], no physical cause could be detected that prevented the Appellant from opening her mouth.

Counsel submitted that if a medical explanation for the Appellant's jaw concerns is ruled out, then we must determine if there is a psychological factor that played a role in the Appellant's

pain and impaired function. Specifically, was there a psychological reason that prevented the Appellant from opening her mouth that was caused by the accident.

The investigation into the Appellant's psychological state was made difficult by the Appellant's failure to cooperate. The Appellant would not sign an authorization allowing the psychologist to contact collaterals.

MPIC referred the Appellant to [psychological health center] for an assessment. [Independent psychologist Ph.D., C. Psych] (candidate) met with the Appellant.

[Independent psychologist] reported that:

... Although [Appellant's] high levels of defensiveness and unwillingness to cooperate with the interview and assessment process impedes precise determination of a diagnosis, the information available suggests [Appellant] meets diagnostic criteria for a Conversion Disorder, persistent, with mixed symptoms...

[Independent psychologist's] report further stated:

... Monitoring and the collection of information from collateral sources would be necessary to fully rule out the presence of malingering or a factitious disorder.

The Health Care Services review stated that it is important that malingering and factitious disorder are ruled out in order to establish conversion disorder. According to the Health Care Services report, the difference between conversion disorder and factitious disorder is that the symptoms in factitious disorder are clearly feigned to assume the sick role while in conversion disorder the symptoms of altered voluntary motor or sensory function are not intentionally produced.

Counsel referred to the Health Care Services report dated February 28, 2018 as follows:

Conversion disorder refers to conscious motivation to feign symptoms for secondary gain or in order to assume a sick role. In the absence of information that would allow one to rule out malingering and/or factitious disorder, it cannot be conclusively determined that the psychological factors underlying the claimant's presentation are related to secondary gain or assuming the sick role as with Conversion Disorder.

Counsel also referred to the Health Care Services psychological consultant report dated April 13, 2018 which stated:

... Essentially what is being referred to is the need to obtain alternative sources of information about the claimant's functioning other than that provided by the claimant or family members. For example, information from medical practitioners who regularly see and monitor the claimant would be a very useful source of information regarding her desire for treatment and consistency in presentation. Information could also be obtained from non-clinical settings for example, if the claimant was working, attending school or going to a church on a regular basis.

As discussed, the writer concluded in the November 12, 2013 review that *"based on [independent psychologist's] assessment, in the context of the complete medical file, there are several diagnostic possibilities, none of which are considered to be probable MVA-related diagnosis based on the available information. Therefore, based on the totality of available medical information, there is no current definable MVA-related diagnosis on the balance of probabilities..."*

Counsel for MPIC argued that the Appellant did not attend the hearing to provide an explanation or to satisfy her onus and the medical and psychological evidence does not support a finding that the Appellant's condition is related to the accident.

Discussion

The onus is on the Appellant to show that the decision of the Internal Review Officer dated March 6, 2015 is incorrect. In particular, the Appellant must show that, on a balance of probabilities, her symptoms and difficulties are causally related to the MVA of November 21, 2011. The relevant provision of the MPIC Act is as follow:

Definitions

[70\(1\)](#) In this Part,

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused

- (a) by the autonomous act of an animal that is part of the load, or
- (b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile; (« dommage corporel causé par une automobile »)

The Appellant attended at [Appellant's chiropractor] for 40 chiropractic treatments. Based on medical information on file, [Appellant's chiropractor] stated that the Appellant was unable to perform her duties as a cashier while being employed at [business]. However, [Appellant's chiropractor] does not provide evidence or an opinion that the Appellant was unable to perform her duties because of injuries caused by the MVA.

[Text deleted], an oral surgery specialist, treated the Appellant but found it difficult to do so because the Appellant did not cooperate with the exam. [Appellant's oral surgeon] developed a plan to carry out an examination to determine if the Appellant was able to open up her mouth under anesthetic. In fact, under anesthetic the Appellant's mouth opened with no force to approximately 25 mm and under deep anesthetic the Appellant was able to extend her jaw to what would be regarded as a normal level of opening between the incisor teeth. [Appellant's oral

surgeon] went on to say there was a good range of motion at the joints. There appeared to be no physical cause for the origin of the trismus.

The Appellant was referred to physiotherapy but the Appellant did not perform all of the exercises that would have enabled her to carry out the treatment.

The panel reviewed the reports and medical evidence in the file. The evidence does not support that the Appellant has any structural problems that were caused by the MVA which would impair her from performing the essential duties of a cashier or customer service clerk.

The panel considered whether the Appellant was suffering from a psychological condition because of the MVA. The panel considered the psychological report of [independent psychologist] dated September 13, 2013 and the Health Care Services reports dated February 28, 2018 and April 13, 2018. These reports leave us unable to conclude that the Appellant suffered from a psychological condition caused by MVA.

In her Notice of Appeal, the Appellant challenged the findings of [independent psychologist]. The panel found no evidence or reason to support this position and has accepted the findings of [independent psychologist].

Disposition:

After a careful review of all the medical and psychological reports and other reports filed in connection with this appeal and after hearing the position of counsel for MPIC, the Commission finds that the Appellant is not entitled to further PIPP benefits and that her symptoms, presentation and difficulties are, on a balance of probabilities, not related to the MVA.

Accordingly, her appeal from the Internal Review Decision of March 6, 2015 is hereby dismissed, and the Internal Review Decision is upheld.

Dated at Winnipeg this 2nd day of August, 2019.

NIKKI KAGAN

LEONA BARRETT

DR. ARNOLD KAPITZ