Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-17-048

PANEL:	**Pamela Reilly, Chairperson** **Carolyn Weiss** **Keith Poulson**
APPEARANCES:	**The Appellant, [text deleted], was self-represented. Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Andrew Robertson ("Counsel").**
HEARING DATES:	**July 12, 2023.**
ISSUE(S):	**Whether the Appellant's November 27, 2013 accident caused her right hip muscle tear, as well as her dyspnea and fatigue, thereby entitling her to IRI and other PIPP benefits.**
RELEVANT SECTIONS:	**Sections 70(1), 81(1) 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

On November 27, 2013 the Appellant's vehicle rear-ended a cement truck resulting in an estimated $5,911.51 damage to her vehicle (the "MVA"). The Appellant commenced chiropractic treatment on December 2, 2013 to address her symptoms of neck pain and shooting pain in her right thigh. Her chiropractor diagnosed cervical strain and VSC, as well as muscular inhibition, VSC and lumbar strain.

On August 12, 2016, the Appellant submitted her Application for Compensation in which she described her MVA-related injuries as “neck, RT hip” and noted that her injuries did not affect her ability to perform household duties or care for herself. The Appellant noted that she was off work as of October 2014 due to shortness of breath and had “muscle repair surgery” in September 2015. She returned to work part time in April 2016.

The Appellant believed her shortness of breath was caused by her muscle tear and related pain. The Appellant sought Personal Injury Protection Plan (“PIPP”) benefits in relation to her lost income from nursing.

On February 9, 2017, the MPIC Internal Review Office issued a decision that upheld the case manager’s decision denying PIPP benefits (the “IRD”). The IRD relied upon two Health Care Services (“HCS”) Medical Consultant Reports, which concluded that the partial tear in the Appellant’s gluteus medius muscle was not caused by her MVA, and her inability to work was related to her dyspnea and fatigue rather than her MVA-related cervical and lumbar strain injuries.

Issue

Did the Appellant’s MVA cause her gluteus medius partial muscle tear leading to pain, fatigue and shortness of breath, which prevented the Appellant from performing her duties as a [text deleted]?

Decision

The Panel upholds the IRD and dismisses the appeal.

The Hearing

In preparation for each hearing, the Commission compiles an Indexed File, which contains all documents agreed upon by the parties as evidence that the parties and Panel may refer to, and rely upon, at the hearing. The Commission numbers these documents for ease of reference by the parties and the Panel. Attached to these reasons and marked as Schedule “A” is a copy of the Indexed File Table of Contents.

Appellant testimony and documents

The Appellant testified that she has been a nurse for over 50 years. The Appellant, her husband and sons operate a farm in [text deleted] Manitoba. She described herself prior to the MVA as physically fit and active, with a love of the outdoors.

The Appellant described her November 27, 2013 MVA in which her vehicle slid on ice and rear-ended a stopped gravel truck. She said that about five days after the MVA she had “shooting pain”, which she gestured as shooting down the front of her right leg. The shooting pain would occur whether she was sitting or standing, and she never knew when the pain would occur. She was afraid of falling when the shooting pain suddenly appeared. Nonetheless, she was eager to return to work as a [text deleted], which she did.

The Appellant said that, over time, she developed shortness of breath and fatigue. She underwent medical tests that could not determine the cause. The Appellant suggested

that her high tolerance for pain, and her denial that she was suffering anything serious, led to her symptoms of dyspnea and fatigue, which took 10 months to develop. She confirmed that the onset of her dyspnea was abrupt but her fatigue developed over time.

The Appellant referred to the April 5, 2019 report of a [doctor] who reviewed and commented on her August 12, 2014 MRI. She quoted [doctor] report at page 2, which states that “there is a partial tearing identified involving the anterior abductors. The hip abductors are comprised of gluteus medius and minimus.” The Appellant said that all symptoms and issues from her MVA were eliminated after the hip surgery. The Appellant concluded that her muscle tear, hip pain, shortness of breath and fatigue were all caused by her MVA.

Cross-examination: Hip pain

In response to Counsel questioning, the Appellant said that after the MVA, she was sure she did all her household chores while experiencing the shooting pain. With reference to a December 10, 2013 “Initial Chiropractic Report”, the Appellant agreed that she saw chiropractor [Chiropractor] “many times”, saying it “kept me going – that and my physio.”

The Appellant denied that she suffered from hip pain before the MVA, but could not recall when her hip pain began. Her main concerns were the shooting pain down her right leg and her fear of falling. She said that she could not remember any details of her examination by [Chiropractor] on December 2, 2013 and did not know why he did not document any hip issues. She also stated that she was “sure” she was not complaining of hip issues at that point.

When referred to the April 29, 2014 chart notes of her family physician, [family doctor], in which [family doctor] recorded that the Appellant experienced no pain on palpation of her right hip/thigh, the Appellant said that she did not know if that was accurate. With reference to [family doctor] note that the Appellant had good muscle tone and good strength of her "hip flexors/ab/ad/extensor" muscles, the Appellant did not concede the note's accuracy. The Appellant said that she probably did not pay attention to any weakness in her muscles. She could only say she was concerned about falling "because of my frequent, unexpected jolting".

When asked about orthopaedic surgeon [orthopaedic surgeon] comment in his June 6, 2014 report that she experienced no pain during an internal or external rotation of her right hip, and that there was no tenderness over the trochanteric area, the Appellant said it was a very fast visit and did not recall those tests being performed by [orthopaedic surgeon]. The Appellant said that prior to the MVA she was very active and had no pain; she was an avid hiker, able to hike in rugged conditions.

The Appellant acknowledged that she had pre-existing osteoarthritis. The Appellant disagreed with [orthopaedic surgeon] comment that she suffered hip pain for more than three years, and said that this comment was incorrect. She said her "hips were [her] strong point" before the MVA and she "had done everything with no pain." The Appellant denied that her pain following the MVA was related to her arthritis.

Cross-examination: Dyspnea and fatigue

The Appellant agreed with the medical records that her onset of dyspnea (shortness of breath) was “abrupt” and started about 10 months after her MVA. She said however, that her fatigue started after her MVA and “built up in my body.” When asked if her fatigue started first or at the same time as her dyspnea, the Appellant said she could not recall.

In response to questions about whether her dyspnea and fatigue stopped immediately or took time to resolve after her surgery, the Appellant testified that upon waking from the anesthetic, she felt like a new person and all of her stress was gone.

When referred to [family doctor] April 24 and May 5, 2015 pre-operative assessment and chart note, documenting her suspicion that the Appellant’s shortness of breath may be related to GERD (gastroesophageal reflux disease) because it had improved with medication, the Appellant could not recall suffering from heartburn/acid reflux, nor whether she took medication for this condition.

When referred to [family doctor] post-surgery medical note that said the Appellant still experienced some shortness of breath, albeit improved, the Appellant thought that she no longer had breathing problems after her surgery, and only recalled struggling with pain. The Appellant acknowledged respirologist [respirologist]’s comment to her on December 17, 2014 that the numerous tests did not disclose a breathing issue. She explained her belief that she was in a situation where ‘your body gives way.’

Panel Questions

In response to Panel questions about [respirologist] suggesting her dyspnea was caused by anxiety, the Appellant said that she could have had some anxiety, but recalled [respirologist] telling her to be careful she did not develop anxiety. She confirmed that she could not say whether her fatigue started before the dyspnea. She described her experience by saying “my body gave way… It didn’t occur to me that I had a high pain tolerance… my body gave way.”

When asked to comment on her medical records, which stated that she quit working in 2014 due to her dyspnea, she explained, “No, my body just gave way. I had such an exhausted pain in my body… I had no energy. My body just gave way.”

Appellant closing submissions

The Appellant said that she had been a nurse for 50 years and rarely called in sick. She was very active until her November 2013 MVA after which she had shooting pain. She said she dealt with this pain internally, which caused a slow build up, resulting in her dyspnea and her having to leave her [text deleted] career.

She pointed out that [orthopaedic surgeon] said that her muscle tear was likely due to her MVA. She requested that MPIC provide financial compensation for her nine years of lost work income, as well as associated benefits.

MPIC closing submissions

MPIC Counsel noted that the Appellant has the burden of proving her appeal on a balance of probabilities. The issue is whether the MVA caused the Appellant's muscle tear and her dyspnea, which, if proven, may then entitle her to PIPP benefits.

Counsel submitted that MPIC does not dispute that the Appellant experienced a muscle tear. MPIC disputes that the MVA caused the muscle tear. Counsel submitted that there is no evidence that the muscle tear could only result from a traumatic event. Counsel pointed out the various medical records from various medical care providers, closer to the MVA, none of whom diagnose a muscle tear. In particular, the chiropractic examination on December 2, 2013 did not reveal such symptoms.

Counsel referred to the HCS Medical Consultant opinion, which noted that the Appellant did not report symptoms that identify a muscle tear. That is, the records show no tenderness in the area, no loss of muscle strength, no pain with resisted hip abduction, and no skin discolouration. [Orthopaedic surgeon] report of June 6, 2014 also does not record tenderness over the trochanteric area, but only slight weakness of the abductors with no pain.

Counsel pointed out the various medical records that diagnose the Appellant with osteoarthritis, and [Orthopaedic surgeon] comment that she had hip pain for more that three years. The March 2, 2014 x-ray image documented degenerative changes involving the right hip. The HCS Medical Consultant noted that osteoarthritis is common in aging populations.

Counsel pointed out that the August 12, 2014 MRI states there is tendinosis of the gluteus minimus tendon but otherwise, the gluteus minimus and medius tendons are intact. He acknowledged that [doctor] review of the MRI concluded that there was a partial tear in the anterior abductors. However, he submitted that the HCS Medical Consultant reviewed [doctor] report and concluded that the information in the report was consistent with a degenerative process.

Counsel submitted that given the Consultant's consideration of all of the Appellant's medical records, the Panel should give the HCS opinion considerable weight. Such evidence does not support a causal connection. Therefore, the Appellant has not met her burden of proving this issue on a balance of probabilities.

On the issue of the Appellant's fatigue and dyspnea, Counsel submitted that MPIC does not dispute that the Appellant suffered these symptoms, but disputes they were caused by the MVA. Counsel pointed out the discrepancy between [family doctor]'s medical notes (which documented when the Appellant's dyspnea began and ended, and suggested a cause) and the Appellant's testimony in which she did not recall whether she suffered heartburn, whether she took medication for this, nor whether her dyspnea improved pre-operatively.

Counsel submitted that the Appellant has not provided evidence to contradict the HCS medical opinion that the Appellant's dyspnea is not MVA-related. Counsel submitted that the Appellant has not provided sufficient evidence to prove, on a balance of probabilities,

that her dyspnea was caused by the MVA. Counsel submits that the entire appeal should be dismissed.

Legislation

The applicable sections of the MPIC Act and Regulations are as follows:

> **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, . . .
>
> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;
> (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
> (c) the full-time earner is deprived of a benefit under the Employment Insurance Act (Canada) to which he or she was entitled at the time of the accident.
>
> **Powers of commission on appeal**
> **184(1)** After conducting a hearing, the commission may
> (a) confirm, vary or rescind the review decision of the corporation; or
> (b) make any decision that the corporation could have made.

Discussion

MPIC denied the Appellant PIPP benefits on the basis that her muscle tear, shortness of breath and fatigue were not caused by her MVA. The Appellant alleges that the MVA caused her torn hip muscle, which caused her pain, which in turn caused her shortness of breath and resulted in her having to quit her [text deleted] job.

The issues involve MPIC Act section 70(1) and whether the Appellant's bodily injuries were caused by her MVA. The Appellant bears the burden of proving her position, on a balance of probabilities.

Torn hip muscle

The Panel considered [Chiropractor]'s chiropractic report, which is the medical record closest to the MVA. [Chiropractor]'s recorded symptoms are "neck pain" and "right thigh shooting pain". His physical findings include "right psoas spasm with tenderness to palpation." His diagnosis is generally, "cervical strain" and "lumbar strain". He noted that the Appellant is currently working as a [text deleted]. This one page Initial Chiropractic Report is the only chiropractic record before the Panel.

The Panel considered [family doctor]'s April 22, 2014 chart note, which states at page 1, as follows:

> . . .
> gets shooting pain that goes to anterior thigh into medial distal thigh esp with raising flexed hip, ex: going upstairs, gets the shooting pain into her thigh, this occurs intermittently, not always reproducible
>
> o/e able to heel/toe walk, able to squat with keeping heels to the ground- was very tentative to do this but no pain on this exam- patient reports that often she will get a shooting pain
>
> no pain to palpation of her hip/thigh, good muscle tone, good strength of hip flexors/ab/ad/extensors [emphasis added]
>
> no pain to L-spine, good ROM
>
> unable to ext rotate R hip for Faber test due to pain- pain in thigh not SI joint with this
> . . .

> IMP: hip pain NYD- had previous issues with her R hip but since MVA much worse, mechanism of injury is suspicious for hip- head/acetabulum injury esp speed with foot on bread [sic] and instant hip pain
>
> Will do hip MRI
>
> Refer to orthopedist for opinion.

Orthopedic surgeon, [text deleted], examined the Appellant and provided a report dated June 6, 2014, which stated, as follows:

> HISTORY OF THE PRESENT ILLNESS: [the Appellant]…presented to the clinic with history of right hip pain for more than three years [emphasis added]. Her pain is in the groin, buttock, and radiates to her knee. This is still full functioning with walking unlimited, sitting with no problem, standing up to 10 minutes, and lying down with some discomfort…
>
> PHYSICAL EXAMINATION: She walks with no limping. She has no limb length discrepancy. She had full range of motion of both hips. She has no pain during internal or external rotation of the right hip. Her neurovascular examination is normal. There is no tenderness over the trochanteric area. Her abductors are slightly weak. [emphasis added]
>
> INVESTIGATIONS: X-ray shows mild/moderate osteoarthritis of the right hip.
>
> PLAN & MANAGEMENT: I think this lady's symptoms are coming from her hip and I think this is because of the moderate amount of arthritis [emphasis added]…she is already booked for MRI in August for her hip. I will assess her after she gets the MRI done to discuss the options of treatment in further detail. I encouraged her to avoid running and walking long distances and try to replace this with biking and swimming.

On August 12, 2014, the Appellant had an MRI and the radiologist's report reads in part, as follows:

> MRI RIGHT HIP:
> There is moderate chondromalacia involving the right hip most pronounced superiorly. There is subchondral marrow edema. There is a small right hip effusion…There is irregularity of the acetabular labrum with degeneration. There is a small paralabral cyst adjacent to the posterior superior labrum measuring 6 mm in diameter. There is marginal osteophyte formation at the femoral head and acetabulum

> There is tendinosis of the gluteus minimus tendon. The gluteus minimus and medius tendons are intact.
> . . .
> IMPRESSION:
> Moderate degenerative change at the right hip.

[Orthopaedic Surgeon]'s September 4, 2014 follow-up report to [family doctor] speaks to his re-assessment of the Appellant. The report notes that "She had MRI of the right hip which shows moderate degenerative changes of the right hip." [Orthopaedic Surgeon] concluded that the Appellant was not ready for hip replacement and encouraged the Appellant to continue with her modified lifestyle. [Orthopaedic Surgeon] stated that he would see the Appellant again if her symptoms changed or when she was ready for hip replacement.

On February 10, 2015, [family doctor] again referred the Appellant to [Orthopaedic surgeon] with the comment in the cover letter that he had previously seen the Appellant "for OA of hip". [Orthopaedic surgeon] performed hip arthroplasty surgery on August 7, 2015. The operative report states "the gluteus medius was partially torn."

In response to MPIC's request that [Orthopaedic surgeon] provide a narrative report outlining his diagnosis of the injury that the Appellant sustained in her MVA and to comment on whether the right muscle tear was related to the MVA, [Orthopaedic surgeon] provided a two paragraph response dated October 28, 2015. [Orthopaedic surgeon] did not respond to MPIC's request for his diagnosis.

On the question of whether the right muscle tear was MVA-related, the Panel noted that [Orthopaedic surgeon] response was equivocal. In his second paragraph, he initially states, “This gluteus medial partial tear probably happened during the accident”. However, the final sentence concludes, “I think the muscle tear might be related to her motor vehicle accident, especially since she was complaining of pain in her right hip and over the trochanteric area after the accident.” [Emphasis added].

[Orthopaedic surgeon] equivocation between “probably” and “might be” in relation to the MVA, does not establish causation on a balance of probabilities. The Panel also noted that [Orthopaedic surgeon] comment about pain complaints over the “trochanteric area right after the accident”, is inconsistent with his June 6, 2014 assessment that the appellant had no tenderness over her trochanteric area. [Orthopaedic surgeon] did not explain this inconsistency, nor did he reconcile his October 28, 2014 opinion, that the muscle tear and pain were MVA-related, with his June 6, 2014 comments that the Appellant’s arthritis was causing her hip pain.

The Panel considered the HCS Medical Consultant’s opinion, which was based upon a review of the Appellant’s medical file. In his December 9, 2014 report, the Consultant sets out the basis for his opinion that the Appellant’s gluteus medius partial tear is not MVA related. In particular, he points out that the medical evidence shortly after the MVA showed a history of right hip osteoarthritis, no tenderness over the Appellant’s gluteal/trochanter area, no loss of hip abduction strength, no ecchymosis (skin discolouration) and no pain with resisted hip abduction.

The Medical Consultant considered [Orthopaedic surgeon] June 2014 medical assessment (seven months post-MVA) that revealed full hip range of motion, no trochanteric area tenderness and mild hip abductor weakness (which the Consultant considered common in older individuals with osteoarthritis). He also noted the August 12, 2014 MRI, which stated that the gluteus minimus and medius tendons were intact and that the Appellant was able to manage her right hip symptoms conservatively until the symptoms worsened in April 2015.

With reference to the April 5, 2019 letter from [doctor], the Panel noted that this letter is not on letterhead and the Panel has no evidence of the doctor's specialty, if any. [doctor] interpreted the August 12, 2014 MRI as showing, among other things, moderate effusion (collection of fluid) and moderate degenerative changes. [doctor] opined that these features noted in the MRI "are most consistent with partial tearing". He concluded at page two, as follows:

> The MRI…demonstrates moderate right hip osteoarthritis. There is partial tearing identified involving the anterior abductors. The hip abductors are comprised of the gluteus medius and minimus [muscles].

Notably, [doctor] does not opine on whether the Appellant's MVA caused the partial tearing. While [doctor] does not specifically speak to causation, his report consistently refers to "moderate degenerative change" and states that the MRI demonstrates moderate right hip osteoarthritis.

MPIC's HCS Medical Consultant reviewed additional medical information provided by the Appellant, including [doctor]'s letter. The Medical Consultant stated that the findings

identified in x-ray and MRI imaging are indicative of “changes in keeping with a degenerative process.” As such, the changes probably developed over time and “cannot be linked to a specific event.” The new medical information did not change the Medical Consultant’s opinion that the tear was not a medically probable outcome of the MVA.

Dyspnea and fatigue

The Panel noted that the Appellant’s medical providers could not diagnose her shortness of breath (dyspnea) and fatigue, despite numerous tests. The Appellant confirmed that the onset of her dyspnea was abrupt and occurred 10 months post-MVA. She thought her fatigue may have started first and built up over time, but could not specifically recall.

[respirologist]’s December 17, 2014 medical report outlined the “extensive series of investigations” the Appellant underwent to diagnose her dyspnea. He noted that the Appellant quit her [text deleted] job “as a consequence of her dyspnea” and during their discussions, she also described “a significant degree of generalized fatigue.” [respirologist] recorded that the Appellant experienced shortness of breath “with speaking, with dressing, with cooking, with walking and any other physical activity” but said the dyspnea was not proportional to her level of speaking or activity. The Panel noted that there is no reference to shortness of breath due to hip, or any, pain.

[respirologist] believed that the Appellant had “a functional cause for her dyspnea” and questioned whether she had some degree of “anxiety, depression or other psychosocial stress” that was contributing to her symptoms. He noted the Appellant adamantly disputed this suggestion. [respirologist] recommended that the Appellant increase her physical

activity. There is no indication in the report that the Appellant discussed an inability to increase physical activity due to hip, or any, pain.

[family doctor]'s April 22, 2015 and May 5, 2015 pre-operative examination notes both indicate that the Appellant's shortness of breath had improved. [family doctor] questioned whether the Appellant's GERD (gastroesophageal reflux disease) had caused her respiratory symptoms, which appeared to improve with medication.

The Panel noted that [family doctor]'s medical note (that the Appellant was still experiencing shortness of breath two months after her hip surgery) is at odds with the Appellant's testimony that her shortness of breath immediately resolved after her surgery.

The Panel considered the HCS Medical Consultant opinion that reviewed all of the Appellant's medical records documenting the Appellant's dyspnea and fatigue. The Medical Consultant concluded that her symptoms were likely functional and not secondary to an organic disease process. He therefore concluded that it was "medically improbably the symptoms developed from a…motor vehicle incident." As pointed out by Counsel, there is no medical opinion that the Appellant's dyspnea and fatigue were MVA-related.

Findings and Disposition

Muscle tear

The Panel prefers the HCS medical opinion over the equivocal opinion of [Orthopaedic Surgeon] on the issue of causation. The Panel finds that, on balance, the evidence does not support that the Appellant's MVA caused her muscle tear.

Dyspnea & Fatigue

The Panel also prefers the medical records and chart notes over the Appellant's testimony. The Appellant was honest in stating that she could not recall certain medical appointments or records. This is understandable given the passage of time. Nonetheless, the chart notes are essentially uncontradicted and the Panel places weight on these contemporaneous medical notes and records. Finally, the Panel accepts the HCS Medical Opinion that opined there was no causal relationship.

The Panel finds that the Appellant has not proven, on a balance of probabilities, that her MVA caused her right hip muscle tear, or her dyspnea and fatigue. The Panel therefore upholds the IRD and dismisses the appeal.

Dated at the City of Winnipeg, in the Province of Manitoba, this 24th day of August, 2023.

PAMELA REILLY

CAROLYN WEISS

KEITH POULSON