

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-42**

PANEL: Ms Laura Diamond, Chairperson
Dr. Patrick Doyle
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: March 13, 2008

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits
Is there a causal connection between the Appellant's left knee injury and her accident of October 27, 2003?

RELEVANT SECTIONS: Section 136 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation 40/94

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on October 27, 2003.

A panel of the Commission found, on January 5, 2006, that the Appellant failed to establish, on a balance of probabilities, that she was unable to perform the duties of her job as a [text deleted], as a result of injuries arising from the motor vehicle accident. However, during the appeal

hearing of December 6, 2005, the panel heard evidence, and reviewed medical reports from [Appellant's Orthopaedic Surgeon] regarding injury and surgery to the Appellant's left knee in 2005. It was not clear whether this injury and surgery were related to the motor vehicle accident of August 27, 2003 as there was insufficient information on the file and before the panel to address the issue of any causal connection between the knee injury and the motor vehicle accident. Accordingly, the panel directed that the effects of the Appellant's knee injury be referred back to the Appellant's case manager for determination.

The Appellant's case manager provided a decision letter dated August 31, 2006, which concluded that the Appellant's knee surgery was not caused by the accident of October 27, 2003 and that the accident resulted only in the temporary exacerbation of a pre-existing knee condition.

The case manager found the Appellant was not entitled to any further benefits.

On March 22, 2007, an Internal Review Officer for MPIC reviewed the Appellant's file, including reports from [Appellant's Orthopaedic Surgeon], and MPIC's medical consultant, [MPIC's Doctor]. The Internal Review officer referred to [MPIC's Doctor's] opinion that the medical evidence did not establish, on a balance of probabilities, a causal relationship between the motor vehicle accident in question and the ongoing symptoms in the Appellant's knee which resulted in surgery and/or treatment. The Internal Review Officer found that the Appellant had failed to establish that the accident in question would have advanced her pre-existing degenerative changes of the knee or resulted in the need for the surgery.

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 that although she had some previous minor problems with her knee, for example when she fell in 2003 and injured her knee, the symptoms from these difficulties lasted only a few days. Following her motor vehicle accident, she developed multiple problems with her knee including pain, difficulty with stairs and walking more than ten (10) minutes. These problems still continue today.

She believed that she may have had a little bit of arthritis in her knee before the accident, but that this was normal for her age.

Counsel for the Appellant reviewed the medical evidence on the file, which, he indicated did show some degenerative changes prior to the motor vehicle accident. However, except for a minor fall in May of 2003, there was no mention in the Appellant's medical records of knee pain until after the motor vehicle accident.

Following the motor vehicle accident, the Appellant reported to her doctor that she thought she had banged her knee on the dashboard, although she could not say for sure, since at the time of the accident she had been more focused on the child in the car and his welfare.

Counsel pointed out that the medical documentation showed that there was a contusion to the Appellant's left knee, following the motor vehicle accident so it was reasonable to conclude that her knee had hit something, in spite of the fact that MPIC's medical consultant, [MPIC's Doctor], opined that given the mechanism of the collision, he did not think the Appellant could have hit her knee on the dashboard.

Counsel for the Appellant relied upon reports submitted by [Appellant's Orthopaedic Surgeon] who treated the Appellant.

A report from [Appellant's Orthopaedic Surgeon] dated October 18, 2006 indicated that while the Appellant had some minor degenerative changes in her knee prior to the motor vehicle accidents, these had progressed, accelerated or been enhanced by the accidents.

A more extensive report from [Appellant's Orthopaedic Surgeon] dated November 20, 2006, indicated that there was likely a certain degree of degenerative change in the Appellant's left knee prior to the October 27, 2003 accident. However, he indicated that the condition present at surgery in 2004 was not totally related to those degenerative changes. It was his view that the complaints about the knee were more diffuse than would be seen in a purely medial compartment arthritic condition. He concluded that without documentation that the Appellant had significant complaints prior to the October 27, 2003 accident, the accident did more than simply aggravate the problem. Considering the Appellant's relatively young age, the injury had played a role in the progression of arthritis, with the knee significantly deteriorating and the condition enhanced.

In a further report dated December 19, 2006 [Appellant's Orthopaedic Surgeon] noted that the time frame from relatively mild arthritis of the knee to well established and advanced arthritis of the knee was fairly short (less than 2 years). He termed this relatively accelerated rather than slow progression, which he attributed to the motor vehicle accident.

Counsel for the Appellant submitted that based upon an almost complete lack of symptoms prior to the motor vehicle accident and upon the duration and severity of the symptoms following the motor vehicle accident, along with the absence of symptoms in the Appellant's right knee and

the rapid deterioration of her left knee, it should be concluded, on a balance of probabilities, that the motor vehicle accident must be considered to have had a major impact in accelerating or enhancing the condition of the Appellant's knee. Accordingly, he submitted that the condition of the Appellant's knee, which required surgery, was a result of the motor vehicle accident.

Evidence and Submission for MPIC

The panel heard evidence from [MPIC's Doctor], a medical consultant with MPIC's Health Care Services Team, with background and experience in sports medicine and in reviewing injury cases for MPIC. [MPIC's Doctor] had provided medical reports regarding the Appellant's file, including reports dated November 21, 2005, May 30, 2006, and most recently, March 13, 2007.

[MPIC's Doctor] had reviewed documentation regarding complaints by the Appellant regarding her knee dating back to 2001, as well as x-rays showing degenerative changes in her knee. He indicated that with degenerative changes of this nature, the natural history of the Appellant's condition would be to get worse, even without a motor vehicle accident. Other factors such as the Appellant's weight could also be a factor.

[MPIC's Doctor] described the collision as relatively minor, and unlikely to have caused direct trauma to her knee, for example by contact with the dashboard. In his view, the accident had caused at most, a mild exacerbation of her pre-existing knee problem.

In reviewing [Appellant's Orthopaedic Surgeon's] reports, [MPIC's Doctor] attached significance to [Appellant's Orthopaedic Surgeon] being unaware of the Appellant's prior knee problems. In his view, the Appellant's knee problems were the result of a "worn down knee" and there was no indication that the motor vehicle accident caused a meniscal tear, bone injury or

anything of that nature. It was [MPIC's Doctor's] view that the motor vehicle accident was not a significant cause (other than a minor, temporary aggravation) of the Appellant's knee problems.

Counsel for MPIC submitted that the medical evidence showed that there were pre-existing degenerative changes to the Appellant's knee, even prior to the motor vehicle accident, as evidenced by x-rays taken prior to the motor vehicle accident.

He submitted that it was unlikely that the motor vehicle accident did anything more than possibly exacerbate the Appellant's pre-existing issue with her knee. He submitted that [Appellant's Orthopaedic Surgeon's] report was not entitled to a lot of weight because he was not aware of these pre-existing issues with the Appellant's knee, and in fact, had admitted, in his letter dated December 19, 2006, that he did not have enough information about the specifics of the motor vehicle accident to gauge the severity of its impact.

Counsel for MPIC also pointed to the Appellant's weight as a factor which could be said to have caused the Appellant's knee problems to progress faster. Counsel submitted that the Appellant had not met the onus of establishing that her ongoing left knee complaints were related to the motor vehicle accident, and accordingly, the Internal Review decision of March 22, 2007 should be confirmed.

Discussion

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;

- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

Manitoba Regulation 40/94:

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;
- (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to benefits as a result of an injury arising out of the motor vehicle accident.

The panel has reviewed the evidence submitted by the parties at the hearing and in documents on the file, as well as the submissions of counsel for the Appellant and for MPIC.

The panel agrees with counsel for the Appellant that the evidence establishes only minor complaints regarding the Appellant's knee, prior to the motor vehicle accident. For the most part, these complaints are attributable to a fall suffered in May 2003, from which the Appellant was improved or improving prior to the motor vehicle accident. The evidence does not establish that this fall significantly aggravated the pre-existing knee condition.

However, the evidence does establish significant complaints following the motor vehicle accident, and a significant, accelerated deterioration of the Appellant's knee condition following

that event.

We accept the evidence of [Appellant's Orthopaedic Surgeon], a specialist who had the opportunity to assess, examine and treat the Appellant. [Appellant's Orthopaedic Surgeon] was asked several times for his opinion and given many opportunities to change it. However, he continued to maintain, and express the view that the motor vehicle accident of October 27, 2006:

. . . did more than simply aggravate the problem. That question can only be answered by the patient, and a review of the previous medical files for treatment of a knee condition prior to the October 27, 2003 MVA. It is not uncommon in my practice, to find patients going on for long periods with quiescent underlying degenerative change, only to become chronically symptomatic after some type of traumatic event. Therefore, in the absence of other background information, it appears that the accident was the point in time following which the knee significantly deteriorated and the condition was enhanced. Considering her relatively young age, it again suggests that injury played a role in the progression of arthritis. It must also be kept in mind though that [the Appellant] is overweight, and an individual's BMI (body mass index) is now being considered a factor in the progression of arthritis of the knees.

When [Appellant's Orthopaedic Surgeon] reported again on December 19, 2006 he again agreed with the Appellant's view that the motor vehicle accident caused an accelerated rate of deterioration of the Appellant's knee.

Accordingly, the Commission finds that the Appellant has met the onus upon her of establishing, on a balance of probabilities, the causal connection between the Appellant's knee condition and the requirement for surgery to her knee and the motor vehicle accident.

The decision of the Internal Review Officer dated March 22, 2007 is therefore overturned. The Appellant's appeal is allowed and the Commission finds that she is entitled to Personal Injury Protection Plan benefits as a result of the injury to and/or accelerated aggravation to her left knee.

Dated at Winnipeg this 8th day of May, 2008.

LAURA DIAMOND

DR. PATRICK DOYLE

PAUL JOHNSTON