Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-09-091

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Neil Cohen** **Mr. Les Marks**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.** **Interpreter: [text deleted]**
HEARING DATE:	**October 11, 2011**
ISSUE(S):	**1. Whether the Appellant is entitled to be reimbursed for a brace (exogen electrical stimulator)** **2. Whether the Appellant is entitled to be reimbursed for a nitroglycerin patch.**
RELEVANT SECTIONS:	**Section 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 and 38 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 March 3, 2005. She has also been involved in prior motor vehicle accidents in September 1995 and March 2002. At the time of the March 2005 accident she had completed a work hardening program and began a graduated return to work program.

Following the March 3, 2005 motor vehicle accident, the Appellant complained of headaches, neck, shoulder, pelvis and back pain and developed right ankle pain in her right foot. She received physiotherapy treatments and further work hardening treatment.

The Appellant's right ankle pain was eventually diagnosed as a peroneal tendon split syndrome, which is a rupture of the peroneal muscle tendon. She was referred to an orthopaedic surgeon who performed surgery on the ankle in April 2008. He also provided a prescription for an exogen electrical stimulator brace for the ankle and a nitroglycerin patch.

The Appellant's case manager wrote to her on October 9, 2008 and April 22, 2009 denying coverage by MPIC for the brace and nitroglycerin medication expenses. MPIC took the position that the brace and nitroglycerin patch were prescribed for conditions not related to the motor vehicle accident and denied reimbursement.

An Internal Review Officer for MPIC reviewed the Appellant's file and, on April 27, 2009 concluded that there was insufficient evidence to show that the peroneal tendon split syndrome in the Appellant's ankle was related to the motor vehicle accident. As such there was insufficient evidence that the need for the brace and nitroglycerin were related to the motor vehicle accident. Accordingly, he found that they would not be reimbursable expenses.

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 and provided medical documentation from her family physician, from [Appellant's doctor] and from [Appellant's orthopaedic surgeon].

The Appellant described her earlier motor vehicle accidents in 1995 and 2002 and the injuries which resulted. She described her job [text deleted], which involved a lot of time on her feet, with lifting duties.

The Appellant then described the motor vehicle accident of March 2005, when she was stopped at a red light with her right leg on the brake. She explained that a car went through a red light and hit another car which bounced back and hit her car from the front. As a result, she suffered pain in her back, ankle, shoulders, neck, ribs and hands, mostly on her left side. She also suffered from what she described as terrible headaches. She explained that after the motor vehicle accident she was shaking and in shock and everything hurt. She noted that she felt a burning pain in her right ankle. The Appellant explained that she had never experienced this kind of severe pain in her right ankle before the March 2005 accident. In her testimony, including cross examination, the Appellant explained that while she had experienced some passing pain, swelling or tenderness in that ankle in the past, it was minor and had never disturbed or interfered with her ability to work.

After the motor vehicle accident, she made complaints regarding this pain which was noted by her family doctor in his clinical notes in April and June of 2005. She described it as burning and stabbing that felt like someone was pushing a knife in her ankle, she had difficulty exercising and her ankle was swollen.

An examination by [Appellant's doctor] on December 12, 2005, resulted in a diagnosis of right lateral ankle pain secondary to peroneal tendon split syndrome/degenerative tendonopathy.

An MRI in 2006 confirmed this diagnosis.

[Appellant's doctor] reported on January 20, 2006 regarding possible causation:

> "Causation Concerning Diagnoses and the MVA: Unfortunately I do not have a detailed explanation regarding the exact accident mechanisms, and her immediate complaints. Peroneal split syndrome can be caused by:
> i) an acute tendon load, most often eccentrically;
> ii) be the results of chronic tendon subluxation; or
> iii) be a degenerative phenomena.
>
> Given the MRI explanation, with no evidence of peroneal subluxation or retinacular tears, and given the description of fissuring, it is most likely that the probable etiology for her right ankle tendonopathy is degenerative.
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> [The Appellant] did not complain of any pains or problems prior to the motor vehicle accident, and depending on the nature and circumstance of her injury, there may be potential for the right mechanism to have caused an aggravation of clinically silent tendonopathy."

The Appellant was referred to [Appellant's orthopaedic surgeon], an orthopaedic surgeon who treated her with cortisone, a boot leg brace and other medication, but the Appellant testified that nothing helped. Finally in 2008 she had surgery, which she stated improved her condition. However she had some difficulties with infection and then with inflammation. [Appellant's orthopaedic surgeon] prescribed the exogen electrical stimulator brace to assist with the inflammation. Although MPIC had reimbursed the Appellant for the first boot leg brace prescribed, it declined to reimburse her for the stimulator, so the Appellant did not try it.

[Appellant's orthopaedic surgeon] also prescribed topical nitroglycerin patches for the Appellant's ankle, but the Appellant testified that this caused her to have bad headaches so she discontinued use of the patches.

Counsel for the Appellant submitted that while the Appellant had occasionally reported minor ankle pain before the motor vehicle accident, at the time of the March 2005 accident she was having no problems with her right ankle or leg and was ready to go back to work following her previous motor vehicle accidents. The car collision then jammed her foot onto the brake and the Appellant reported severe ankle pain to her family doctor and various other caregivers. This is documented in their reports. Initially, her caregivers were more concerned with treating her myofascial pain resulting from the accident, but by April of 2005 the Appellant was reporting significant ankle pain.

Counsel noted that the medical evidence on the Appellant's file included [Appellant's doctor's] opinion that although the most likely etiology for the right ankle tendonopathy was degenerative, he recognized that there was potential that a mechanism of accident could have "caused an aggravation of clinically silent tendonopathy."

[MPIC's doctor], a Medical Consultant for MPIC Health Care Services Team, reviewed the Appellant's file on May 10, 2010. He agreed that the medical evidence indicated that the Appellant sustained a probable peroneal tendon split syndrome, and this was probably related to the event in question, based on the information at hand. However, at that time, [MPIC's doctor] indicated that the exogen electrical stimulator brace was an elective device, not medically required in the treatment of her condition and that nitroglycerin was traditionally used to treat heart disease related to coronary artery blockage and was not a treatment medically required for a condition causally related to the motor vehicle accident.

[MPIC's doctor] reversed his position in a report dated August 5, 2010. He indicated that his May 10, 2010 opinion did not represent his medical causality assessment, but only recognized some of the opinions expressed by the patient's treating practitioners. He concluded that peroneal tendon split syndromes are conditions of unknown etiology which are considered degenerative conditions but can be associated with trauma.

Counsel for the Appellant submitted that in coming to the conclusion that the right ankle problem was not caused by the motor vehicle accident, [MPIC's doctor] was focusing on an isolated report of her family physician a few days after the motor vehicle accident which did not note a probable injury related to the ankle. However, counsel submitted that a more complete review of the caregivers' reports following the motor vehicle accident showed that this complaint was made in the months following the motor vehicle accident, leading one to the conclusion that [MPIC's doctor's] abrupt change in position, on that evidence alone, was not reliable.

Finally, counsel relied upon the reports of [Appellant's orthopaedic surgeon], the orthopaedic surgeon who treated the Appellant.

[Appellant's orthopaedic surgeon] reported on February 16, 2011 noting that the flare up of the Appellant's right foot and ankle symptoms at that time were "due to an exacerbation of her pre-existing condition as a result of the recent trauma". He noted that the cause of the original peroneal tendon pathology was certainly very consistent with a motor vehicle accident mechanism of injury and opined that on a balance of probabilities, she likely did suffer this pathology as a result of the documented motor vehicle accident.

[Appellant's orthopaedic surgeon] was then provided with further documentation from the Appellant's file and asked by the Commission to advise whether the Appellant required the exogen electrical stimulator for a medical reason related to the motor vehicle accident and to assess whether the Appellant's peroneal tendon split syndrome was probably causally related to the motor vehicle accident. [Appellant's orthopaedic surgeon] was also asked why the nitroglycerin patch was required for the Appellant's treatment.

[Appellant's orthopaedic surgeon] reported again on May 3, 2011. While he declined to review the documentation from the Appellant's file, he explained that he was treating the Appellant's right lateral ankle pain due to peroneal inflammation. He had tried all other treatment options except for an exogen electrical stimulator and that these treatments had included the use of a nitroglycerin patch directly on the skin overlying the tendon. He recommended the use of the exogen electrical stimulator. He also indicated:

> "I believe that my involvement in her treatment is simple and that the problem that she has in her ankle is well defined and treatment options are well defined. I performed surgery, which I believe was done well and results were not 100% successful. We have tried all of the other treatment options available. The mechanism of injury that she describes is consistent with her injury. I was mailed a documentation package regarding her appeal and measured it today and it weights 4.6 kg. There is no possible way that 4.6 kg of paper could be relevant in my treatment of this patient.
>
> I would suggest the use of the exogen electrical stimulator."

Although counsel for the Appellant conceded that [Appellant's orthopaedic surgeon] could have been more detailed or diplomatic about how he framed his report, he submitted that [Appellant's orthopaedic surgeon's] opinion was clear that the injury was caused by the motor vehicle accident and that the treatments that he was now prescribing (including the stimulator and the nitroglycerin patch) were in order to treat injuries arising from the motor vehicle accident.

Counsel submitted that the panel should not second guess the opinions of the Appellant's attending doctors and orthopaedic surgeon, as this would create an injustice to the Appellant. The Appellant gave credible evidence regarding the pain in her ankle and its connection to the accident, which was collaborated by [Appellant's doctor], [Appellant's orthopaedic surgeon] and even, at one point [MPIC's doctor]. The treatments in question were prescribed by the surgeon who indicated that they could possibly help her. Counsel submitted that this was the best evidence of the doctors and that the Appellant's appeal should be allowed, with reimbursement for any patches she had utilized and provision of payment for an exogen electrical stimulator brace.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that the Appellant's right ankle condition was not related to the motor vehicle accident. She noted that the Appellant's general practitioner had documented, in his notes, complaints of right ankle pain in May and June of 2004, approximately 1 year prior to the motor vehicle accident.

A report dated April 15, 2009 from [Appellant's occupational therapist], occupational therapist, indicated that on June 24, 2004, while undergoing treatment at the [rehab clinic], the Appellant had reported that her right ankle was sore and that her doctor had felt this was from being on her feet at work. On July 29, 2004 the [rehab clinic] reports indicated that she reported some swelling in her ankle which she used ice to decrease.

Counsel for MPIC noted that the Appellant made no complaints to her health care providers regarding her ankle immediately after the accident. In a Primary Health Care report from [physiotherapy clinic], dated March 21, 2005 (a couple of weeks after the motor vehicle accident) no check mark indicating ankle or foot pain was made by the physiotherapist recording her symptoms.

There is no documentation of right ankle pain complaints following the motor vehicle accident until April 8, 2005, one month later.

An MRI disclosed the peroneal split syndrome which was diagnosed by [Appellant's doctor]. [Appellant's doctor's] report of January 20, 2006 reviewed possible etiology. He recognized that the probable etiology was degenerative although "there may be some potential for the right mechanism to have caused an aggravation of clinically silent tendonopathy". He did not make a full statement regarding causation, suggesting that the MPIC Health Care Services Team review the file and make a determination. Counsel for MPIC submitted that [Appellant's doctor] was in error when he concluded that there was a possible aggravation resulting from the motor vehicle accident, as he was not aware of the Appellant's family doctor's clinical notes noting ankle pain in May and June of 2004.

Counsel then reviewed [MPIC's doctor's] opinion of April 24, 2006 which opined that, "on a balance of probability the motor vehicle accidents would not have caused the patient's peroneal split syndrome". He viewed it more as an aggravation and "temporary worsening of symptoms related to the tendon in question from the March 2005 accident".

This led the Appellant's case manager to seek physiotherapy treatment for the area.

[Appellant's doctor] then reported on July 21, 2006, indicating that following review of her MRI, which showed a degenerative peroneal tendon, the Appellant should have restrictions regarding walking and standing.

Counsel also dealt with MPIC's original funding of the boot liners and boot casts. She explained that, as indicated by a memorandum by the case manager dated July 21, 2008, these items had been paid for in error.

A review of [Appellant's orthopaedic surgeon's] original prescription for the exogen stimulator brace, dated September 19, 2008, showed that no objective medical information was included with the prescription to show how the prescription was medically required due to the motor vehicle accident.

As a result, [MPIC's doctor's] review of September 29, 2008 indicated that the condition for which the brace was prescribed was not related to the motor vehicle accident and that the clinical information did not indicate a medical requirement for the device. This led to the case manager's decision of October 10, 2008, which was upheld by the Internal Review Officer on April 27, 2009.

When [MPIC's doctor] reviewed the file again on August 5, 2010, March 16, 2011 and May 30, 2011 he provided not a reversal, as counsel for the Appellant had suggested, but rather a clarification of his previous report of May 10, 2010. He clarified that his earlier statement had not represented his opinion regarding medical causality, but was simply a review of the opinions of the treating practitioners.

[MPIC's doctor] had reviewed [Appellant's orthopaedic surgeon's] reports and as a result opined, on March 16, 2011 that [Appellant's orthopaedic surgeon] had failed to reference pre-accident documentation of pain and swelling that was eventually labelled peroneal split

pathology. Thus, [MPIC's doctor] concluded that [Appellant's orthopaedic surgeon's] opinion regarding causation was not sufficient to prompt him to change his prior opinion.

Even when [Appellant's orthopaedic surgeon] was provided with the entire medical package, his report of May 3, 2011 indicated that he did not look at the package. [Appellant's doctor] had been given the wrong information. Thus, neither of these doctors' opinions could be given the same weight as that of [MPIC's doctor], who considered the complete file and found that the right ankle condition was not related to the motor vehicle accident.

On May 30, 2011, he clearly set out his view of that:

> "...my opinion is that these syndromes are conditions of unknown etiology. They are related to conditions called tendonopathies, which are generally considered to be degenerative in nature, related to mechanical loading of tendons over time. I indicated that the notes from the family physician indicate chronic swelling demonstrated over the right lateral ankle, described as a bursa. In my opinion, this would more probably have been related to the peroneal tendon split syndrome, and regional inflammation in that area."

As a result, counsel submitted that neither the brace nor the nitroglycerin patch were medically required for treatment of a condition resulting from the motor vehicle accident. Accordingly, the Appellant's appeal should be dismissed and the decision of the Internal Review Officer dated April 27, 2009 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:

(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 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;
(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.

Medication, dressings and other medical supplies

38 The corporation shall pay an expense incurred by a victim for the purchase of medication, dressings and other medical supplies required for a medical reason resulting from the accident.

The onus is on the Appellant to show, on a balance of probabilities, that the treatment benefits she seeks are medically required as a result of a condition arising out of the motor vehicle accident.

The panel has considered and reviewed the evidence of the Appellant, the medical documentation on the indexed file and the submissions for the Appellant and MPIC.

In her testimony the Appellant admitted to having made some minor complaints to her family doctor regarding her right ankle, on two or three occasions in 2004, almost a year before the motor vehicle accident. However, she indicated that the pain was minor and did not interfere with her ability to work or participate in a return to work/work hardening program. Her symptoms were not so severe as to require treatment, aside from ice.

The pain the Appellant described following the motor vehicle was of a different character. She described it as a more intense pain, which was stabbing and burning. The Panel finds the Appellant's evidence to be credible and reliable on this point.

It is also supported by the evidence on the Appellant's indexed file, which aside from her family doctor's notations of pain/swelling in May and June of 2004, does not contain evidence of other complaints to caregivers, or of professional treatment for ankle problems prior to the motor vehicle accident.

Counsel for MPIC questioned the Appellant on cross-examination and took the position that the Appellant failed to report right ankle pain immediately following the motor vehicle accident. She pointed to the Appellant's Application for Compensation dated March 30, 2005, an earlier report from her family doctor dated April 14, 2005 and a report from the physiotherapist dated May 21, 2005.

However, the Appellant testified that she did feel intense pain and did report this to her caregivers. A review of the documents on the Appellant's indexed file shows that within one

month after the motor vehicle accident she had reported such pain to her family doctor (April 8, 2005) and physiotherapist (April 25, 2005).

The Appellant's position that her ankle problems were caused by the motor vehicle accident was even supported, at one point, by MPIC's Health Care Consultant, [MPIC's doctor]. On May 10, 2010, he appeared to recognize causation, although he was of the view that the particular brace prescribed was not medically required for treatment of the condition.

> "The medical evidence at hand indicates that this woman sustained a probable peroneal tendon split syndrome, and this was probably related to the event in question, based on the information at hand. It was this condition, for which the patient had undergone extensive non surgical care, as well as surgical care."

[MPIC's doctor's] opinion in subsequent reports evolved to the view that pre existing evidence of ankle complaints on the Appellant's family doctor's chart notes led to the conclusion that the ankle problems were a result of a pre existing degenerative condition and not causally related to the motor vehicle accident, beyond perhaps a temporary worsening of symptoms.

[Appellant's doctor] examined the Appellant and was less clear that the ankle symptoms were solely due to a pre-existing condition. He considered three possible causes for the peroneal split syndrome:

> "...peroneal split syndrome can be caused by:
> i) an acute tendon load, most often eccentrically;
> ii) be the result of chronic tendon subluxation; or
> iii) be a degenerative phenomena."

He went on to surmise that the most probable etiology was degenerative, but that there may be potential for the motor vehicle accident to have caused an aggravation of clinically silent tendonopathy.

In a later report dated July 21, 2006 [Appellant's doctor] notes:

> "Causation: The writer agrees with [MPIC's doctor's] April 24, 2006 Manitoba Public Insurance Inter-departmental memorandum in which he opined that there is a probable cause and effect relation between [The Appellant's] noted ankle symptoms post MVA, in that the collision led to a temporary worsening of symptomatic enhancement versus an aggravation of [The Appellant's] tendonopathy, with time ultimately deciding between enhancement and aggravation."

The Appellant's orthopaedic surgeon, [Appellant's orthopaedic surgeon] expressed a contrary opinion to that of [MPIC's doctor's] later view. He clearly took the position, in reports dated February 16, 2011 and May 3, 2011 that on a balance of probabilities the Appellant suffered this "pathology" as a result of the documented motor vehicle accident.

It is most unfortunate that [Appellant's orthopaedic surgeon] declined to fully review the material provided to him in the Appellant's indexed file or comment upon it, as it may have been helpful to the panel to have the benefit of his opinion in this regard. However, in spite of the lack of further comment from [Appellant's orthopaedic surgeon] regarding the May and June 2004 chart notations from the Appellant's family doctor, we find [Appellant's orthopaedic surgeon's] evidence, and the evidence on the whole, supports the Appellant's position that the motor vehicle accident did, on a balance of probabilities, cause, aggravate and enhance the Appellant's right ankle symptoms.

The panel finds that the Appellant's testimony was credible and was supported by a lack of evidence regarding treatment for ankle pain prior to the motor vehicle accident, her reports of ankle pain to her caregivers within approximately one month following the motor vehicle accident, and the opinion of her surgeon that the injury was consistent with the mechanism of the motor vehicle accident. The Commission therefore concludes that the Appellant has met the

onus upon her of showing on a balance of probabilities, that her right ankle condition was aggravated or enhanced by and is a result of the motor vehicle accident.

Counsel for MPIC also took the position that the treatments recommended by [Appellant's orthopaedic surgeon] for management of the right ankle condition, i.e. the brace and nitroglycerin patch, are not medically required.

The panel reviewed [Appellant's orthopaedic surgeon's] prescription and continuing support for treatment with the brace. Counsel for MPIC relied on comments by [MPIC's doctor]. On September 29, 2008 he stated that there was no information to establish that the brace was medically required. On May 10, 2010, he stated that the medical literature regarding this device would indicate that it was an elective device and that nitroglycerin was traditionally used to treat heart disease.

Then on May 30, 2011, [MPIC's doctor] stated that the exogen medical stimulator was probably not being prescribed for a medical reason related to the motor vehicle accident and that the same comments applied to the nitroglycerin patch. He believed at that time that they were being prescribed for a degenerative condition which probably existed prior to the event in question.

On May 3, 2011 [Appellant's orthopaedic surgeon] confirmed that the nitroglycerin patch was to be used on the skin overlying the ankle tendon, and that there was nothing wrong with the Appellant's heart. He also continued, at that time, to recommend the use of the exogen stimulator.

The panel accepts the opinion of the specialist who treated the Appellant that these treatments are medically required to assist the Appellant with the management of her right ankle condition and pain, and find that the Appellant has met the onus upon her of establishing that the Internal Review Officer was in error in denying funding for this treatment.

We find that [Appellant's orthopaedic surgeon] continues to support the funding of the exogen stimulator brace and accordingly, the Appellant's appeal is allowed in this regard and the decision of the Internal Review Officer overturned. The Commission finds that MPIC should fund the exogen stimulator brace for the Appellant.

As the evidence indicated that the Appellant could not tolerate the side effects of the nitroglycerin patch, we find that MPIC should reimburse the Appellant for the cost of any patches she may have used for the brief period during which she used that medication, prior to discontinuation of its use due to adverse side effects. Accordingly, the Appellant's appeal is upheld and the decision of the Internal Review Officer dated April 27, 2009 is overturned in that regard.

Dated at Winnipeg this 1st day of December, 2011.

LAURA DIAMOND

NEIL COHEN

LES MARKS