Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-116

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Keith Addison;** **the Appellant, [text deleted], was represented by [Appellant's chiropractor]**
HEARING DATE:	**January 19th, 1999**
ISSUE(S):	**1. Whether Appellant, victim of 1996 MVA already decided by the Commission, entitled to payment for chiropractic services arising from 1994 MVA;** **2. Whether Commission without jurisdiction - res judicata?**
RELEVANT SECTIONS:	**Sections 136(1), 171, 174 and 184 of MPIC Act; Sections d5 and 9 of 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

This is an appeal from a decision of MPIC's Acting Review Officer, [text deleted], whereby he disallowed a claim for the cost of the Appellant's chiropractic treatments for the period from October 23rd, 1996 to May 10th, 1997. The basis of [MPIC's Internal Review Officer's] decision

was that the claim in question was, in effect, res judicata, having already been embodied in an earlier decision of this Commission bearing date July 4th, 1997, of which a copy is annexed to and forms part of these reasons. For greater completeness, we shall also attach a copy of [MPIC's Internal Review Officer's] decision, which bears date July 6th, 1998.

At the commencement of the hearing of the present appeal, Mr. Addison, counsel for MPIC, moved for an order of this Commission declaring that we were without jurisdiction since the subject matter of the appeal had already been decided.

It is important to note that this present appeal purports to be based upon injuries sustained by [the Appellant] in a motor vehicle accident on July 14th, 1994; our attached decision of July 4th, 1997, had its origin in a motor vehicle accident in which the Appellant was a victim on March 8th, 1996.

It is true that neither at the hearing of [the Appellant's] appeal respecting her 1996 accident, nor in any correspondence or other documentation leading up to that appeal, was this Commission specifically asked to deal with chiropractic expenses related to her 1994 accident. However, on March 27th, 1996 MPIC's Claims Examiner dealing with [the Appellant's] case wrote to her, to tell her that, since her new accident of March 8th, 1996 had apparently reaggravated the injuries she had sustained in 1994, MPIC would close the first claim file and would open a new one, from which all of her benefit claims would thenceforth be handled. Patently, then, the insurer was treating both claims as one - understandably, since under the current Personal Injury

Protection Plan there is no longer any need for the parties to think in terms of separate and distinct tort claims. If an insured is injured as a result of more than one motor vehicle accident, it no longer matters which particular accident caused the injury: the benefits, including chiropractic and other physical therapies, flow for as long as they are found to be medically necessary.

The decision of this Commission of July 4th, 1997, while it certainly refers primarily to [the Appellant's] 1996 accident (since that was the one giving rise to the claim that was then before us) obviously took into account her entire physical condition as of the date when MPIC had decided to terminate her benefits. How could it have been otherwise? It was not open to us to find, nor did the Appellant or her advocate, [Appellant's chiropractor], even suggest that we should find, that certain aspects of her condition were attributable to the 1994 accident and others to the 1996 event. In other words, none of the evidence adduced before us in 1997 and none of the arguments submitted then contained any indication that [the Appellant's] injuries and resultant claim were somehow to be divided into two parts - the 1994 and 1996 accidents, to be dealt with separately.

This Commission heard and read evidence as to the totality of [the Appellant's] physical condition over the course of several years, both before and after her 1996 automobile accident, and concluded that the continuance of [Appellant's chiropractor's] chiropractic treatments for [the Appellant] at MPIC's expense beyond the point referred to in our July 4th, 1994 decision was not justified.

If we allow the hearing of this new appeal to proceed we shall effectively be reopening the original case, inviting the Appellant, through [Appellant's chiropractor], to adduce new evidence covering [the Appellant's] physical condition, chiropractic treatments and their perception of her need for the continuance of those treatments through exactly the same timeframes as were already covered in great detail during nearly two days of testimony in June of 1997.

It is especially noteworthy that, at the hearing of that first appeal in 1997, [the Appellant] sought an order requiring MPIC to pay for all of her chiropractic adjustments from October 23rd, 1996 until the end of 1997. She now seeks payment for some 72 chiropractic treatments between October 25th, 1996 and May 7th, 1997 - some of the very same treatments for which she sought payment based on the 1996 motor vehicle accident. As counsel for MPIC puts it: 'If her argument in 1997 is to be given any credence, and assuming she was then acting in good faith, then all of the evidence related to the present appeal has already been heard'.

[Appellant's chiropractor], in opposing Mr. Addison's motion, relied in part upon two factors which, in fairness to him, need to be addressed here:

1. He felt that he had been taken by surprise, having been given no prior indication from MPIC nor from this Commission that the question of jurisdiction would even be raised; he had come prepared to argue the merits of [the Appellant's] claim and to persuade the Commission that the chiropractic treatments for which he now sought payment were, indeed, necessary and beneficial. He was not a lawyer, did not feel equipped to respond

professionally to Mr. Addison's arguments and, had he known that the question of jurisdiction was going to be raised at all, he would not have even bothered to appear. [Appellant's chiropractor] felt that the presentation of Mr. Addison's motion at this late date was grossly unfair, that he himself was losing approximately $1,000.00 worth of professional fees by attending on [the Appellant's] behalf - an expense that he felt obliged to pass along to his client, thus increasing her indebtedness to him from about $2,000.00 to about $3,000.00. He felt, therefore, that the whole process was inequitable and that, given those circumstances, the failure of [the Appellant's] claim was predestined. In light of his perception of the total unfairness of the procedure and, in particular, of the Commission's declared need to reserve for a day or two its decision upon Mr. Addison's motion for a short while, [Appellant's chiropractor] announced that, whatever the Commission's decision on that motion might be, he personally would not be returning to pursue [the Appellant's] appeal, even if that decision were favourable to his patient; neither he nor [the Appellant] could afford the time and, therefore, the expense to which they would be put as a result of that delay. With all due deference to the views of [Appellant's chiropractor], we have to say that we believe his indignation is misplaced. Firstly, neither he nor [the Appellant] can really claim to have been taken by surprise since the point made by Mr. Addison - that is, that the matter under appeal has already been decided - was the very subject matter of [MPIC's Internal Review Officer's] decision. It is hardly illogical or unexpected that Mr. Addison would raise the same point. Secondly, while we have to agree that it would have been helpful both to [Appellant's chiropractor] and to this Commission had Mr. Addison raised the

jurisdictional question by way of a pre-hearing motion, there is no requirement either in law, in equity or in practice that this be done. Thirdly, it was [the Appellant's] choice to retain the services of [Appellant's chiropractor] to appear on her behalf in the dual capacity of witness and advocate at an apparent fee of at least $285.00 per hour - [Appellant's chiropractor] advised the Commission that he had set aside three and one-half hours for the hearing, at a cost of about $1,000.00; that choice was, of course, hers to make but, as we noted at the conclusion of our reasons in 1997, there is no provision in the MPIC Act or Regulations that permit us to award a professional fee for an expert witness beyond that contained in Section 148 of the MPIC Act and Section 43 of Manitoba Regulation 40/94 - not relevant here.

2. [Appellant's chiropractor] relies upon an exchange of correspondence between himself and the Chairman of this Commission shortly after the rendering of our decision in July of 1997. In his letter to the Chairman, [Appellant's chiropractor] (amongst numerous other matters) asked the following question:

> In your report, you state that the Commission feels that by October 23rd, 1996 [the Appellant] had been restored to the status she was immediately prior to her auto accident of March 8th, 1996. Are you stating that she had returned to pre-accident status or that she had indeed recovered to her normal and natural state? At the time of her March 8th, 1996 accident, she was being cared for injuries relating to her previous car accident.

In his reply, the Chairman, after noting that this Commission follows the long established practice of declining comment upon any decisions that it has made, said:

> Our decision, and the accompanying reasons for it, speak for themselves. [The Appellant's] appeal dealt with injuries sustained in her motor vehicle accident of March 8th, 1996. We concluded that, by October 3rd, 1996, she had been restored to her status immediately prior to that accident. That was what we were being asked to decide.

> It is, perhaps, unfortunate that the Chairman, in electing to reply at all to [Appellant's chiropractor's] letter, did not go on to summarize what was also contained in this Commission's reasons, namely that the Commission was not necessarily deciding that [the Appellant] had recovered "to her normal and natural state" but, rather, that further chiropractic care of the kind that she had been receiving from [Appellant's chiropractor] was not, in the Commission's view, justified. The latter conclusion is certainly clear enough from a reading of the Commission's 1997 decision.

The position of counsel for MPIC is that, although the Corporation itself is given the power to reconsider its own decisions under Section 171 of the Act, this Commission has no such jurisdiction. Under Section 174 of the Act, a claimant is given the right to appeal to this Commission, and Section 184 gives the Commission power to conduct a hearing and to confirm, vary or rescind the decision of the Internal Review Officer, but those rights and powers only exist once the Commission has determined that it has jurisdiction. Since the very remedy that was sought in [the Appellant's] 1997 appeal embraced the remedy that she seeks in the present appeal, and since all of the facts relevant to the present appeal are the same facts that were relevant to the 1997 appeal, we are of the view that an appeal based upon her 1994 accident really amounts to an attempt to enter by the back door a structure that has already been entered by the front door and decided accordingly. The effect of hearing this appeal would be to re-hear her original appeal while, at the same time, giving the Appellant and her advocate an opportunity to adduce additional evidence that was fully available at the time of the initial hearing.

In summary, then, we are of the view that the subject matter of the present appeal has already been decided and that we have no jurisdiction to re-hear the matter in the absence of some new and substantive evidence that was not available in June of 1997.

Dated this 21st day of January 1999.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED