



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]

AICAC File No.: AC-05-99

PANEL: Mr. Mel Myers, Q.C., Chairman
Dr. Patrick Doyle
Mr. Paul Johnston

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

HEARING DATE: October 3, 2005

ISSUE(S): Entitlement to Personal Injury Protection Plan ('PIPP') benefits

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) 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

On February 26, 2004, [the Appellant] was injured when the motor vehicle in which she was a seat-belted passenger was involved in an accident. As a result of her injuries she became eligible for benefits under the MPIC Act.

The Appellant testified that she experienced immediate neck, back and shoulder pain as she exited the vehicle. She was taken by ambulance to the [text deleted] where she was examined and x-rays were taken of her spine. She was diagnosed with a soft-tissue injury and advised to

see her family physician. The Appellant attended her regular employment as a cashier/supervisor with [text deleted] two (2) days later and was unable to perform her work due to pain in her neck and back. On March 4, 2004 the Appellant attended [Appellant's doctor #1] who was looking after the patients of [Appellant's doctor #2], her family physician at the time. The Appellant was diagnosed with a contused chest wall and Whiplash Associated Disorder I (WAD I), given time off work and prescribed Vioxx and physiotherapy.

On March 15, 2004, the Appellant attended [Appellant's doctor #2] complaining of continuing pain. [Appellant's doctor #2] ordered x-rays of the "ribs to include chest PA and left shoulder". The x-rays revealed a lesion in the left humerus. The diagnosis, following a CT scan March 22, 2004, was of either an aneurysmal bone cyst, a chondroid lesion, or a giant cell tumour. [Appellant's doctor #2] referred the Appellant to [Appellant's orthopedic surgeon #1], [text deleted], and suspended the physiotherapy due to his fear that it could cause a fracture at the location of the lesion.

The injuries suffered in the motor vehicle accident remained untreated as the diagnosis and treatment of the tumour were arranged. [Appellant's orthopedic surgeon #1] arranged for an MRI which was performed July 12, 2004 and confirmed the existence of a tumour. [Appellant's orthopedic surgeon #1] arranged for surgery for the Appellant for September 22, 2004 and recommended a short course of physiotherapy to ready the Appellant for surgery.

On August 19, 2004, [Appellant's doctor #3], who replaced [Appellant's doctor #2] as the Appellant's family physician for a short time, forwarded to MPIC a Health Care Provider Progress Report that noted the Appellant's diagnosis as WAD 2 with pain in neck and left shoulder. On August 23, 2004, [text deleted], [Appellant's physiotherapist #1], who provided

the short course of physiotherapy for strengthening prior to surgery, reported to MPIC that the Appellant continued to suffer from WAD 2 with neck and shoulder symptoms.

Following surgery September 22, 2004, [Appellant's orthopedic surgeon #1] was of the opinion that the lesion existed before the accident and was not affected by the accident. The post-operative condition of the Appellant, he noted, was satisfactory. He recommended observation of the tumour site and physiotherapy.

The Appellant was not completely satisfied with the medical care she was receiving with [Appellant's orthopedic surgeon #1] and sought a second opinion with [text deleted], [Appellant's orthopedic surgeon #2]. He ordered no physiotherapy and arranged for her to attend for further treatment with [Appellant's orthopedic surgeon #3] in [text deleted].

[Appellant's orthopedic surgeon #3] reviewed the file and commented that it was not possible to be certain as to the nature of the tumour. He concluded:

[G]iven the initial concern related to the diagnosis of giant cell tumour as well as the extensive cortical destruction, we felt that resecting the entire lesion to have a definitive diagnosis and then reconstructing this was the best repair.

On November 24, 2004, [Appellant's orthopedic surgeon #3] removed the tumour and rebuilt the opening in the bone with grafted bone and a plate. The Appellant returned to [text deleted] and the care of [Appellant's orthopedic surgeon #2].

Case Manager's Decision

Shortly before the surgery was undertaken in [text deleted], November 24, 2004, the case manager sought a review of the file from [text deleted], Medical Consultant with MPIC's Health Care Services. In his report, dated November 22, 2004, [MPIC's doctor] commented:

It is documented that [the Appellant] reported difficulties with her neck and shoulder following the incident in question. ... The file leads me to conclude the [the Appellant] developed symptoms around her shoulder that might be the result of contusion or soft tissue strain. In the process of investigating her symptoms, [the Appellant] was identified as having an abnormality that pre-dated the [accident]. ... The information on file indicates that [the Appellant] may undergo further investigations and treatments for the humeral lesion. It is my opinion the interventions and /or investigations she undergoes would not be the responsibility of Manitoba Public Insurance.

On December 1, 2004, the case manager issued a decision terminating the Appellant's benefits.

She stated:

A member of Manitoba Public Insurance's Health Care Services Team was asked to review the medical information provided. The review indicated that from the accident, contusion or soft tissue sprain would have resulted. In the process of investigating the symptoms, a condition was identified that pre-dated the accident. The investigations and treatment were performed to address the pre-existing condition, which was not adversely affected by the accident.

Further investigations and treatments relating to the humeral lesion are not related to the injury and the accident. As this condition pre-dated the accident, no further entitlement to benefits is provided under the Personal Injury Protection Plan as this condition is not related to the accident.

Income Replacement Indemnity (IRI) benefits were terminated as of December 19, 2004.

Internal Review Officer's Decision

On December 31, 2004, the Appellant sought a review of the decision on the basis that the termination was "premature." In her Request for Review, she stated:

Medical assessments, management strategies and implications on my function and ability to do my job as relating to other orthopedic, soft tissue and structural injuries in this same motor vehicle accident are only beginning.

I understand and concur that the etiology and pathology of my left humeral lesion was not caused by but discovered as a result from being assessed.

I am now proceeding with assessments through my family practitioner, [text deleted] with whom I have an appointment on December 15, 2004. In synopsis, the

decision regarding continuance or discontinuance of my income replacement is most appropriately made after all my injuries have been assessed and you have written medical reports concerning them and how they impact my employment function.

On February 3, 2005, the Internal Review Officer again referred the file to [MPIC's doctor] for review. [MPIC's doctor] formed the opinion that the WAD had been treated and would, in any case, have resolved itself by December 19, 2004. He was also of the opinion that the ongoing difficulties experienced by the Appellant were due to the surgery related to the tumour. On February 11, 2005, in a Memorandum to the Internal Review Officer, [MPIC's doctor] stated:

It is documented that [the Appellant] received a course of physiotherapy treatments to address the symptoms associated with her Whiplash Associated Disorder, Type II.

The natural history of Whiplash Associated Disorder, Type II is one of recovery with time in the absence of therapeutic interventions in the majority of cases. The file does not contain documentation indicating [the Appellant] developed a condition as a result of the incident in question that in turn would lead to long term symptoms and/or a permanent impairment of function.

It is reasonable to conclude that the diagnostic tests and surgical procedures [the Appellant] underwent to assess the bony defect in the left humerus might in turn result in localized pain and dysfunction involving the left shoulder girdle and upper back regions. It is my opinion that it would be difficult for an individual to determine as to whether any of [the Appellant's] left shoulder girdle and upper back symptoms are a byproduct of the incident in question.

... Based on the type of medical conditions the [Appellant] developed secondary to the incident in question, it is not unreasonable to assume that she might have had difficulties performing all her occupational duties for a short period of time after the incident in question. The file does not contain documentation indicating [the Appellant] would experience an extended period of occupational disability as a result of the medical conditions arising from the incident in question.

It is reasonable to assume that the problems [the Appellant] was identified as having involving her left humerus and the procedures she underwent, could have a negative impact on her ability to perform her required work duties.

... [the Appellant's] entitlement to income replacement benefits ceased on December 19, 2004. It is my opinion ten months would be ample time for the medical conditions [the Appellant] developed secondary to the incident to resolve to the extent that [the Appellant] could perform her pre-accident occupational duties at the level she so desired. In other words, the medical evidence on file does not indicate [the Appellant] was identified as having a physical impairment of function arising from the incident in question that would preclude her from returning to her occupational duties as of the week ending December 19, 2004. (underlining added)

On March 18, 2005, as part of her preparation for the review, the Appellant attended [text deleted], a Certified Athletic Therapist for an Independent Athletic Therapy Assessment. After reviewing her file, taking the Appellant's history and conducting an extensive examination of her, [independent athletic therapist] described the Appellant's symptoms as:

1. Left glumeral humeral adhesive capsulitis secondary to prolonged immobilization/dysfunction.
2. Left cervical anterolateral mild myofascial pain with underlying segmental dysfunction of the lower cervical region.
3. Mechanical low back pain with left S1 dysfunction.

[Independent athletic therapist] then commented:

It is understood that a natural history of Whiplash Associated Disorders is one of eventual recovery with time in the absence of therapeutic interventions in the majority of the cases. However, there are the incidences of chronicity also associated with these disorders especially in the incidences of myofascial pain. Documentation of the file does not lead to a clean conclusion as the development of chronicity to those WAD to the cervical and lumbar spine, however it is the writer's opinion that the absence of this documentation is due to the focus of assessment and treatment of the humeral lesion due to it's potential severity and not the absence medical condition to the cervical and lumbar regions. In the writer's opinion those injuries sustained in the motor vehicle accident in question of Whiplash Associated Disorder to the cervical and lumbar spine due to [the Appellant's] lack of appropriate intervention and inactivity have become quite chronic in nature developing a myofascial component to the cervical region as well as the left gluteal region. Also, in review of the provided literature it is apparent that a reasonable course of treatment for her whiplash associated disorders has not been undertaken. It would be prudent in the absence of treatment to date, to attempt a reasonable course of treatment in the form of Active Release Technique, Segmental Mobilization and possible Acupuncture as it is quite likely that she will receive symptomatic relief with such therapies and subsequently increase her level of function.

As for her ability to perform her pre-accident employment of a cashier/supervisor for [text deleted] as it relates to those injuries sustained in the motor vehicle incident in question, it is not unreasonable to assume that [the Appellant] would be able to perform many of her occupational duties in lieu of her whiplash associated disorder. Postural tolerances for standing would likely be the greatest challenge posed to [the Appellant]. ... [D]ue to her left shoulder adhesive capsulitis, her workplace duties would be increasingly problematic due to the painful condition. (underlining added)

[Independent athletic therapist] concluded that the Appellant's inability to perform her workplace duties was "at least in part ... the responsibility of the insurer, Manitoba Public Insurance". (underlining added)

The Internal Review Officer requested [MPIC's doctor] to once again review the file in light of [independent athletic therapist's] report. In his report dated May 9, 2005, [MPIC's doctor] concluded:

[Independent athletic therapist] was of the opinion that [the Appellant] sustained a Whiplash Associated Disorder involving the cervical and lumbar spine and that due to lack of appropriate interventions and inactivity, her condition became chronic with the development of myofascial component in the cervical region as well as left gluteal region. [Independent athletic therapist] was of the opinion that [the Appellant] might benefit from a reasonable course of treatment consisting of active release technique, segmental mobilization and possibly acupuncture.

.....

It would not be unreasonable for [the Appellant] to receive a short course of therapy to address the symptoms she is experiencing involving cervical and lumbar spine that might be in some way related to the incident in question. ... It is my opinion [the Appellant] should be provided active interventions to assist in improving mobility, strength and overall endurance, as well as education with regard to proper posturing. (underlining added)

Following a hearing, on May 19, 2005, the Internal Review Officer confirmed the case manager's December 1, 2004 decision to terminate IRI benefits, but overturned the decision in part authorizing a "short course of therapy to assist in improving mobility, strength and overall endurance as well as education with regard to proper posturing." (underlining added)

Appeal to the Commission

On May 31, 2005 the Appellant filed a Notice of Appeal with the Commission stating:

I feel that the decision is wrong and unfair. I never had a problem with my shoulder neck or back prior to the accident. ... If I had not been in the car accident, I would be working. ... All I ask is that I be compensated for the wages lost.

On May 31/June 1, 2005, the Appellant attended [Appellant's physiotherapist #2] for assessment in relation to the approved physiotherapy for the neck and lower back. He recommended a course of physiotherapy for 8 to 10 weeks. He commented:

[the Appellant] did receive some physio treatments in April and May 2004, in relation to neck and low back pain resulting from the motor vehicle accident], but this was stopped secondary to medical concerns. Subsequently, she has not received any treatment for her neck and low back. ...

Subjectively, [the Appellant] complains of sharp central low back pain with no radicular symptoms. ... Her back pain is worsened with sitting greater than 20 minutes, prolonged stationary standing, and twisting of the trunk. ...

[the Appellant] should attend twice per week for approximately 8-10 weeks. The surgery on her left shoulder and added stress are factors which may delay her recovery.

The treatment was approved by the case manager June 8, 2005 and was ongoing at the time of the hearing.

In a letter dated July 15, 2005, [Appellant's doctor #2] wrote to MPIC:

[The Appellant] is an extremely hard, dedicated and responsible worker and mother. It was fertitious (sic) that the x-ray revealed this precancerous lesion. It did and [its treatment] has hindered her recovery from overcoming the other injuries. She should be reconsidered for coverage. She has been extremely compliant in all aspects of therapy.
(underlining added)

Appeal Hearing

The hearing was held October 3, 2005. The Appellant appeared for herself and Mr. Morley Hoffman appeared for MPIC.

The Appellant testified that she had no symptoms of the tumour in her upper arm before the accident. Following the accident, she returned to work but found lifting difficult and experienced pain in her left shoulder, left arm and neck. The Appellant told the Commission that she attended [Appellant's doctor #1] as her own family physician was unavailable, and was prescribed painkillers and physiotherapy. When the pain got worse, she went to [Appellant's

doctor #2], her regular family physician and, as a result of x-rays taken at that time, the tumour was discovered.

She told the Commission that she had a CT scan and that [Appellant's doctor #2], concerned as to the nature of the lesion, suspended physiotherapy and referred her to [Appellant's orthopedic surgeon #1]. [Appellant's orthopedic surgeon #1] ordered an MRI and later performed a biopsy and curettage of the tumour, September 22, 2004, and, when she returned to have her staples removed from the site of the biopsy, the Appellant stated, [Appellant's orthopedic surgeon #1] recommended physiotherapy and observation of the tumour site with no further intervention unless indicated.

The Appellant told us that she was not satisfied with her care under [Appellant's orthopedic surgeon #1] and felt it useful to get a second opinion. She found [Appellant's orthopedic surgeon #2] who, after looking at the x-rays, was of the opinion that it might be a giant cell tumour and referred her to [Appellant's orthopedic surgeon #3] in [text deleted]. [Appellant's orthopedic surgeon #2], like [Appellant's doctor #2], she told the Commission, prohibited any physiotherapy without his consent.

[Appellant's orthopedic surgeon #3] was also concerned as to the nature of the tumour, the Appellant stated, and recommended surgery to remove it. She had the surgery, November 24, 2004 and recovered quickly from the surgery, leaving hospital on the fourth day and returned, she told the Commission, to the care of [Appellant's orthopedic surgeon #2] in [text deleted].

In December, her benefits were terminated, she noted. The Appellant told the Commission that she has not worked since the time of the accident due to the pain in her neck, shoulder and back. She added that if she had not been in the accident, should would be back at work.

The Appellant told us that she worked as a cashier\supervisor and had been with [text deleted] for nine (9) years. She also informed the Commission that [text deleted] did not want her to return to work until she was fully able to perform all the necessary functions of her position. She also noted that she and [text deleted] had shared the costs of a course of physiotherapy in February 2005.

The Appellant told the Commission she was getting better. She testified that her neck and back are much improved and, she added, but for the shoulder problem, she would be working now. She added that the physiotherapy authorized by the Internal Review Officer was ongoing until the end of October and that following that, she would have a regime of home exercises to sustain her recovery. She noted that she would be attending [Appellant's orthopedic surgeon #2] for a review of her progress in relation to the tumour in November.

[Appellant's doctor #2] appeared as a witness for the Appellant. He discussed the early treatment of the Appellant and explained that he had noticed swelling in the upper arm area during the March 15, 2005 physical examination of the Appellant on her first visit to him in relation to the injuries suffered in the accident. He ordered the x-rays and the CT scan and, upon receiving the reports suggesting that there was a defect that may be a giant cell tumour, referred the Appellant to [Appellant's orthopedic surgeon #1]. [Appellant's doctor #2] explained he discontinued the physiotherapy prescribed earlier by [Appellant's doctor #1], because he was concerned that the bone at the site of the cyst was sufficiently weakened and that it could easily

break. [Appellant's doctor #2] also told the Commission that he instructed the Appellant to be very careful with her left arm and not to do any strenuous exercise, heavy lifting with it and not to bump it.

[Appellant's doctor #2] noted that he had approved the short course of physiotherapy that was undertaken in August 2004 to strengthen the Appellant for surgery. Following the September 22, 2004 surgery, [Appellant's doctor #2] told the Commission that he also had some concerns in relation to [Appellant's orthopedic surgeon #1's] prescribed treatment of the Appellant.

[Appellant's doctor #2] explained that but for a short period of time in the summer of 2004 [text deleted], he has seen the Appellant regularly as her family physician both before and after the accident. [Appellant's doctor #2] confirmed that in his opinion she was not capable yet of returning to work because she needs to lift as part of the job. Bagging the purchases of the customers, he explained, is not conducive to the Appellant's recovery. [Appellant's doctor #2] stated that it was his opinion that, but for the delay in treatment necessitated by the surgery, the Appellant would by now have healed from the injuries suffered in the accident. It was his firm opinion, he stated, that it was the need to delay the treatment of those injuries that has resulted in the delay in healing and is the cause of the Appellant's inability to return to her employment. (underlining added)

[Appellant's doctor #2] agreed that normally one could expect a WAD disorder, even without treatment, would resolve itself in approximately ten (10) months. But, he added, that if he had not delayed the physiotherapy, and if he had not required the Appellant to be very careful of the left arm, a fracture could easily have resulted. Had that happened, [Appellant's doctor #2] stated, the outcome for the Appellant would have been much worse.

[MPIC's doctor] appeared as a witness for MPIC. He noted that the first indication of problems with the shoulder in the file appear March 15, 2004, more than two (2) weeks after the accident. He suggested that it was unlikely that it would take that long for symptoms related to the accident to arise. And, he added, the fact that there was no bruising in the area, further suggests that the shoulder problems were not related to the accident. In his opinion, [MPIC's doctor] stated, it was possible that the accident could have made the pre-existing condition symptomatic but he felt that the shoulder problem was a condition for which MPIC was not obligated to provide benefits.

[MPIC's doctor] stated that the termination of benefits at December 1, 2004 was appropriate. He noted that it was his opinion that, but for the intervention in the shoulder made necessary by the discovery of the pre-existing tumour, the WAD would have resolved itself by that time. [MPIC's doctor] stated that it was his opinion that the adhesive capsulitis which currently prevents the Appellant from returning to her work, results from the interventions in relation to the tumour. There is no indication in the file, he added, that suggests that the WAD experienced by the Appellant in the accident, would resolve into a chronic condition that would last beyond the ten (10) months to December 2004.

[MPIC's doctor] pointed out that [independent athletic therapist], in his report of April 28, 2005, is also of the opinion that the difficulties with the shoulder arose after the surgery and as a result of the surgery. It was reasonable, he suggested, given that the shoulder problems and the accident could be related, to offer the additional 8 to 10 weeks of physiotherapy. He also felt, he told the Commission, that since the Appellant could do most of the duties associated with her

work, and since the shoulder difficulties could not be related to the accident, the decision to deny income replacement indemnity benefits was appropriate.

Submissions

The Appellant stated that before the accident she had no pain in her shoulder and no symptoms at all relating to her shoulder. Following the accident, she explained, she had some bruising and stiffness but thought she was able to continue to work. She did attend her regular employment February 28 and 29, 2004, she told the Commission, just two (2) days after the accident and found that due to increasing pain in her left arm, shoulder and neck, it became impossible for her to continue to work.

Over the next few days, despite the pain killers and physiotherapy prescribed by [Appellant's doctor #1], she told the Commission, the pain continued and she returned to her doctor and it was that visit that led to the discovery of the tumour. The physiotherapy was stopped and while the pain persisted, her focus and the focus of her medical caregivers, she explained, became fixed upon the tumour and its treatment.

Throughout the treatment of her tumour, the Appellant stated, she was told by her doctors that the discovery of the tumour was a lucky accident which was found as a result of the treatment of the injuries suffered in the motor vehicle accident. Once the tumour had been dealt with, she explained, it became possible to resume the treatment of the accident injuries. The treatment began again following the approval, June 8, 2005, of the current course of physiotherapy by the case manager.

The treatment was working, she told the Commission, and at the time of the hearing, she had another seven (7) physiotherapy treatments to go. The Appellant told the Commission that she anticipated being well enough then to return to her employment. Until she is able to successfully return to work, she argued, she should continue to receive IRI benefits. Those benefits should not have been cut off in December 2004, she argued further, because the injuries still needed treatment.

If it were not for the motor vehicle accident, the Appellant stated, she would be at work. The IRI benefits should continue, she argued in closing, until she is able to return to work.

Mr. Hoffman argued for MPIC that but for the tumour, the Appellant would, by December, 2004, have recovered from the injuries sustained in the motor vehicle accident. The discovery of the tumour led to the enforced inactivity that resulted in the adhesive capsulitis, not the motor vehicle accident. Consequently, he argued, it is the tumour that led to the Appellant's inability to return to work and, he reasoned, since the tumour was a pre-existing condition that was apparently not impacted by the accident, MPIC should not be held responsible for the investigations, treatments and therapies made necessary as a result of the treatment of that pre-existing condition.

In most cases, Mr. Hoffman argued, recovery from Whiplash Associated Disorder is rapid and he noted that the Appellant's problems with her neck and back are healed. The problems with the shoulder are the only ones which remain and they arise as a result of the surgery. Those problems he urged, are not the responsibility of MPIC. Consequently, he argued, the decision to terminate benefits on December 1, 2004, was correct.

Mr. Hoffman further submitted that the ongoing physiotherapy has been funded by MPIC in order to grant the Appellant the benefit of the doubt. It should not be seen as an admission of liability. There is no evidence, Mr. Hoffman pointed out, that the injuries to the back and neck are preventing the Appellant from doing her job. The Internal Review Officer acted appropriately, he stated, when he approved the termination of IRI benefits.

Discussion

The relevant provisions of the MPIC Act in respect of the matter under appeal is set out in Section 110(1)(a) of the MPIC Act and Section 5(a) of Manitoba Regulation 40/94:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

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;

MPIC determined that as of December 19, 2004:

- (a) the Appellant had fully recovered from her motor vehicle accident injuries;
- (b) she was capable of returning to her pre-accident employment as a cashier/supervisor and did not require further physiotherapy treatments;
- (c) her PIPP benefits were terminated.

The Appellant appealed this decision. In her testimony before the Commission she asserted that MPIC had erred in terminating her PIPP benefits because she was unable to return to her previous employment due to the motor vehicle accident injuries she had sustained and that she is required to continue to receive physiotherapy treatments in order to recover from these injuries.

The Commission finds, upon a review of all of the evidence that was submitted to the Commission, the Appellant has established, on a balance of probabilities, that:

1. as of December 19, 2004 the Appellant had not recovered from the injuries she sustained in the motor vehicle accident;
2. these injuries caused or materially contributed to her inability to return to her pre-accident employment;
3. it was medically required that she continue to receive physiotherapy treatments for these injuries.

1. As of December 19, 2004 the Appellant had not recovered from the injuries she sustained in the motor vehicle accident

The Appellant testified that:

1. (a) prior to the motor vehicle accident on February 26, 2004 she did not have any pain to her neck, back and left shoulder and that this pain commenced immediately after the accident occurred;
- (b) she attended at her regular employment on February 28 and 29, 2004 but due to the pain to her back, neck and left shoulder she was unable to continue her work and saw [Appellant's doctor #1] on March 4, 2004 who diagnosed Whiplash Associated Disorder and prescribed pain killers and physiotherapy;

- (c) on March 15, 2004 she saw her regular physician, [Appellant's doctor #2], who testified that the Appellant complained of pain to her chest, neck, left upper shoulder and back and, as a result, he ordered an x-ray report on March 15, 2004 wherein he requested the x-rays "ribs to include chest PA, and left shoulder";

As well, the documentary evidence filed at the hearing indicates that:

1. (a) the case manager was aware, by March 19, 2004, before the diagnosis of the tumour was complete and before any intervention into the possible tumour had taken place, that the Appellant's injuries included difficulties with her shoulder.

In a Note to File she commented:

She is having problems with her left shoulder, left ribs and left shoulder blade. ... She cannot use left arm for repetitive motion of lifting arm above L shoulder.

- (b) the Health Care Provider Progress Report of [Appellant's doctor #3] to MPIC, dated August 17, 2004, which confirms "WAD 2 with pain in neck and left shoulder";
- (c) the August 23, 2004 report to MPIC of [Appellant's physiotherapist #1], [text deleted], who prepared the Appellant for surgery, confirms "WAD 2 with neck and shoulder symptoms";
- (d) [MPIC's doctor] too, in his review of the file for the case manager, November 22, 2004, acknowledged that the shoulder difficulties could be related to the accident. He stated:

It is documented that [the Appellant] reported difficulties with her neck and shoulder following the incident in question. ... The file leads me to conclude the [the Appellant] developed symptoms

around her shoulder that might be the result of contusion or soft tissue strain.

- (e) the case manager, in a report dated December 1, 2004, stated that [Appellant's orthopedic surgeon #3], the Orthopaedic Surgeon who had removed the Appellant's tumour, reported that the Appellant's condition was caused by the motor vehicle accident;
- (f) On May 9, 2005, approximately four and one-half (4 ½) months after the Appellant's termination of PIPP benefits, [MPIC's doctor] in his review of [independent athletic therapist's] report dated April 28, 2005, stated that the symptoms being experienced by the Appellant "might in some way be related to the (accident)".
- (g) The Internal Review Officer, in her May 19, 2005 decision, adopted [MPIC's doctor's] opinion that some of the symptoms may be a by-product of the motor vehicle accident and in her decision directed that MPIC fund a short course of therapy to treat these symptoms.

An examination of this evidence clearly establishes that the Appellant complained about her shoulder pain immediately following the motor vehicle accident and continued to complain about the left shoulder pain subsequent to termination of her PIPP benefits on December 19, 2004. Notwithstanding that MPIC terminated the Appellant's PIPP benefits on this date, MPIC approximately four and one-half (4 ½) months later, acknowledged that the Appellant's medical complaints might be related to the motor vehicle accident and agreed to reimburse a short course of physiotherapy treatments for the Appellant. The decision of MPIC to fund physiotherapy treatments in May of 2005 is inconsistent with their decision to terminate the Appellant's PIPP

benefits on December 19, 2004 and corroborates the Appellant's testimony that she had not fully recovered from the motor vehicle accident injuries on December 19, 2004.

The Appellant further testified that the physiotherapy treatments she received following the Internal Review Officer's decision of May 19, 2005 assisted her in recovering in respect of her injuries and at the date of the appeal hearing they had not been completely resolved.

2. The motor vehicle accident injuries caused or materially contributed to the Appellant's inability to return to her pre-accident employment

Existence of the tumour

The Commission is satisfied that there was no medical evidence, on the balance of probabilities, to establish that the Appellant suffered any pain directly from the existence of the tumour, which would have prevented her from returning to her pre-accident status as of December 19, 2004.

[Appellant's orthopedic surgeon #1], the orthopaedic surgeon who initially performed a surgical procedure for biopsy in respect of the tumor of the Appellant's left humerus, in his report to MPIC dated November 15, 2004 stated:

In conclusion my involvement in this case has been with the management of a bony lesion of the proximal left humerus which existed before the motor vehicle accident of February 26, 2004 and was not affected by this accident. (underlining added)

[Appellant's doctor #2], who had experience with such tumours early in his medical career, told the Commission that tumours of this sort are typically not symptomatic and are not accompanied by pain.

[Appellant's orthopedic surgeon #3], the Orthopaedic Surgeon who removed the Appellant's tumour, came to the same conclusion. In a File Note dated December 1, 2004, the case manager reported:

[Appellant's orthopedic surgeon #3] (sic) had described that likely from how [the Appellant's] head was turned & air bag deployed from the accident, velocity of impact must have brought about pain issue. Even though condition was there previous, appears accident had caused the pain. Without high velocity impact to arm, pain in arm would not have been there. (underlining added)

Testimony of [MPIC's doctor], [Appellant's doctor #2] and [independent athletic therapist]

[MPIC's doctor], on a review of the documentation, in an Inter-Departmental Memorandum to the Internal Review Officer, dated February 11, 2005, stated that:

1. the Appellant's motor vehicle accident injuries should have resolved themselves within ten (10) months from the date of the accident and that as of December 19, 2004 the Appellant should have recovered from these injuries and been able to return to her pre-accident employment.
2. the Appellant's problems which prevented the Appellant from returning to her pre-accident employment, were due to the surgery relating to the biopsy and the removal of the tumour, which were totally unrelated injuries the Appellant sustained in the motor vehicle accident.

[MPIC's doctor] reiterated this opinion in his Inter-Departmental Memorandum to the Internal Review Officer dated September 12, 2005 when he stated:

It is reasonable to conclude that the extensive and evasive (sic) surgery [the Appellant] underwent adversely affected the musculotendinous structures of the neck and shoulder girdle regions.

[Appellant's doctor #2], the Appellant's personal physician both before and after the motor vehicle accident, agrees with [MPIC's doctor] that but for the surgery the Appellant's injuries would have resolved themselves within a short period of time. He testified that the delay in treating the Appellant's motor vehicle accident injuries was caused by the existence of the tumour which prevented the timely recovery by the Appellant from her motor vehicle accident injuries. As a result of the delay in treatment, [Appellant's doctor #2] testified, the Appellant was unable to return to her employment as of December 19, 2004 and the Appellant required further physiotherapy treatments in respect of these injuries.

[Independent athletic therapist], agreed with both the medical opinions of [Appellant's doctor #2] and [MPIC's doctor] in respect of the reasons why the Appellant was unable to continue her pre-accident employment as of December 19, 2004. [Independent athletic therapist] had been requested by the Internal Review Officer to provide MPIC with an Independent Athletic Therapy Assessment. In his report to the Internal Review Officer dated April 28, 2005 he concluded that the Appellant's inability to perform her pre-accident employment as a cashier/supervisor was primarily due to the Whiplash Associated Disorder and myofascial pain that the Appellant sustained in the motor vehicle accident and that these injuries adversely affected the Appellant's ability to stand during the course of her employment. In this report [independent athletic therapist] stated:

It is understood that a natural history of Whiplash Associated Disorders is one of eventual recovery with time in the absence of therapeutic interventions in the majority of the cases. However, there are the incidences of chronicity also associated with these disorders especially in the incidences of myofascial pain. Documentation of the file does not lead to a clean conclusion as to the development of chronicity to those WAD to the cervical and lumbar spine, however it is the writer's opinion that the absence of this documentation is due to the focus of assessment and treatment of the humeral lesion due to its potential severity and not the absence medical condition to the cervical and lumbar regions. In the writer's opinion those injuries sustained in the motor vehicle accident in question of Whiplash Associated Disorder to the cervical and lumbar spine due to [the Appellant's] lack of appropriate intervention and inactivity have become

quite chronic in nature developing a myofascial component to the cervical region as well as the left gluteal region. Also, in review of the provided literature it is apparent that a reasonable course of treatment for her whiplash associated disorders has not been undertaken. It would be prudent in the absence of treatment to date, to attempt a reasonable course of treatment in the form of Active Release Technique, Segmental Mobilization and possibly Acupuncture as it is quite likely that she will receive symptomatic relief with such therapies and subsequently increase her level of function.

As for her ability to perform her pre-accident employment of a cashier/supervisor for [text deleted] as it relates to those injuries sustained in the motor vehicle incident in question, it is not unreasonable to assume that [the Appellant] would be able to perform many of her occupational duties in lieu of her whiplash associated disorder. Postural tolerances for standing would likely be the greatest challenge posed to [the Appellant]. (underlining added)

The above statement fully supports [Appellant's doctor #2's] opinion that the delay in treating the motor vehicle accident injuries has prevented the Appellant from returning to her pre-accident employment. However, [independent athletic therapist] also in part agrees with [MPIC's doctor] that factors independent of the motor vehicle accident made it difficult for the Appellant to return to work. [Independent athletic therapist] states in this report:

. . .Currently however, due to her left shoulder adhesive capsulitis, her workplace duties would be increasingly problematic due to the painful condition. The adhesive capsulitis however is not directed (sic) related to the motor vehicle incident in question and is a direct result of her prolonged immobilization following her surgical humeral lesion excision. .

[Independent athletic therapist] nevertheless concluded that although both the motor vehicle accident injuries of whiplash and myofascial pain, as well as the non-motor vehicle accident problems relating to the surgery, were all factors in affecting the Appellant's inability to return to her employment. However, [independent athletic therapist] stated that the major factor preventing the Appellant from returning to her pre-accident employment relates to her low postural tolerance due to the whiplash injuries caused by the motor vehicle accident.

[Independent athletic therapist] in his report further stated:

. . . Upon review of the provided Physical Demands Analysis, upper extremity reaching, heavy lifting and carrying are not significant job demands, and therefore this condition should be less limiting in her workplace duties. Thus it would appear there is a shared responsibility as it relates to her ability to perform her pre-accident employment with postural tolerance due to her WAD being of the greatest significance.

Causation

The Commission has dealt with the issue of causation in the past. In [text deleted] (*AC-01-42*) (decided September 19, 2001, and in [text deleted] (*AC-02-34*) (decided October 7, 2002), and in [text deleted] (*AC-00-145*) (decided on January 6, 2003). In [text deleted] (*AC-00-145*) the Commission stated that in [text deleted] (*AC-01-42*) and [text deleted] (*AC-02-34*), the Commission adopts the principles of causation as set out by the Manitoba Court of Appeal in *McMillan v. Thompson (Rural Municipality)*, (1997) 115 Man. R. (2d) 2 (Man. C.A.).

The Commission also referred to the decision of the Supreme Court of Canada in *Athey v. Leonati et al* (1996), 140 D.L.R. (4th) 235. In a unanimous decision, Mr. Justice Major states:

A. *General Principles*

(13) Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

(14) The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

(15) The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, (supra). A contributing factor is material if it falls outside the de minimis range: *Bonnington Castings Ltd. v. Wardlaw*, (supra); see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.) aff’d [1989] 2 S.C.R. 979.

In *Liebrecht v. Egesz et al*, 135 Man.R. (2d) 206 Justice De Graves, in arriving at his decision cites *Athey v. Leonati et al* (supra) and states:

“(64) Causation must be proved on a balance of probabilities. But it is only necessary by that civil standard of proof to prove that the defendants’ negligence materially contributed to the injury.

(65) On the question of causation Major, J., for the court (S.C.C.) in *Athey v. Leonati et al* (1996). . . restated the principle in the context of competing causes as follows:

“It is not now necessary, nor has it ever been for the plaintiff to establish that the defendant’s negligence was the sole cause of the injury.

“The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the ‘but for’ or material contribution test. Future or hypothetical events can be factored into the degrees of probability, but causation of the injury must be determined to be proven or not proved. (p. 245-246)

This decision was appealed to the Manitoba Court of Appeal, and on the issue of causation, the Manitoba Court of Appeal unanimously confirmed the decision of Mr. Justice De Graves. (150 Man. R (2d) 257).”

The Commission, in applying the legal principles set out in *Athey v. Leonati et al (supra)* and *Liebrecht v. Egesz et al (supra)*, finds that there were a number of factors rendering the Appellant unable to return to her pre-accident employment status as of December 19, 2004, including the Appellant’s surgery, adhesive capsulitis, the whiplash disorder and myofascial pain. The Commission however finds that the major reason for her inability to return to work on December 19, 2004 was due to the motor vehicle accident injuries and not the surgery.

For these reasons, the Commission finds that the Internal Review Officer erred in concluding that the Appellant’s inability to return to work on December 19, 2004 were due to factors which

were solely unrelated to the motor vehicle accident injuries, contrary to Section 110(1)(a) of the MPIC Act.

[MPIC's doctor] was requested by the Internal Review Officer to review [independent athletic therapist's] report and in an Inter-Departmental Memorandum to the Internal Review Officer, dated May 9, 2005, does not disagree with [independent athletic therapist] assessment and states:

[Independent athletic therapist] was of the opinion that [the Appellant] sustained a Whiplash Associated Disorder involving the cervical and lumbar spine and that due to lack of appropriate interventions and inactivity, her condition became chronic with the development of myofascial component in the cervical region as well as left gluteal region. [Independent athletic therapist] was of the opinion that [the Appellant] might benefit from a reasonable course of treatment consisting of active release technique, segmental mobilization and possibly acupuncture.

[MPIC's doctor] agreed with [independent athletic therapist] in his report dated May 9, 2005, approximately thirteen (13) months after the Appellant's PIPP benefits were terminated, that the Appellant required physiotherapy treatments in respect of the whiplash injuries that the Appellant suffered as a result of the motor vehicle accident. However, [MPIC's doctor] concluded that the Appellant was, notwithstanding the need for physiotherapy treatment, able to return to her pre-accident employment as of December 19, 2004. The Commission finds that in arriving at this conclusion [MPIC's doctor] erred by failing to consider [independent athletic therapist's] opinion that the Appellant's greatest challenge in returning to her employment was due to her low postural tolerance due to her whiplash injury.

The Commission, after careful consideration, gives greater weight to the medical opinion of [Appellant's doctor #2] and the opinion of [independent athletic therapist] than it does to [MPIC's doctor] as to the reasons why the Appellant was unable to perform her pre-accident employment duties as of December 19, 2004 for the following reasons:

1. While [Appellant's doctor #2] and [independent athletic therapist] are consistent in their opinion as to the connection between the motor vehicle accident injuries and the Appellant's inability to work, [MPIC's doctor] was inconsistent in his opinion and ignored the issue of the Appellant's low postural tolerance.
2. The Commission notes that the Appellant had been a patient of [Appellant's doctor #2] before and after the motor vehicle accident. [Appellant's doctor #2] had treated the Appellant in respect of the injuries the Appellant sustained in the motor vehicle accident and, therefore, had an opportunity of assessing the Appellant's medical condition and her credibility from the date of the motor vehicle accident until he appeared before the Commission. [Independent athletic therapist] also had the opportunity of personally examining the Appellant and assessing both her medical condition and her credibility in order to provide his report. However, [MPIC's doctor] did not personally examine the Appellant and therefore did not have the opportunity of assessing the Appellant's credibility. It is for these reasons the Commission gives greater weight to the medical opinion of [Appellant's doctor #2] and [independent athletic therapist] than it does to the medical opinion of [MPIC's doctor].

The Appellant testified at the hearing and stated that as a result of the motor vehicle accident injuries she was unable to return to her pre-accident employment when MPIC terminated her PIPP benefits as of December 18, 2004. The Commission finds that the Appellant testified in a direct and candid fashion, without equivocation, and was consistent both in her examination-in-chief and cross-examination. The Commission finds that she was a credible person and that her testimony is corroborated by the medical opinion of [Appellant's doctor #2] and the opinion of [independent athletic therapist].

The Commission finds, for the reasons set out above, that the motor vehicle accident injuries to the Appellant's left shoulder caused or materially contributed to her inability to return to her pre-accident employment on December 19, 2004.

Inability to Work

The Commission finds that [MPIC's doctor] in arriving at his opinion that the Appellant was capable of returning to work after December 19, 2004, failed to consider that the position of cashier/supervisor included a great deal of physical activity, constant standing, frequent trunk rotation, frequent neck flexing, frequent lifting of 1-5 pounds and occasional lifting of 5–20 pounds.

The Commission is satisfied that the Appellant has established, on a balance of probabilities, that having regard to the nature of the work the Appellant was required to perform as a cashier/supervisor that the motor vehicle accident injuries prevented her from carrying out the work.

The Physical Demands Analysis of the Appellant's job conducted by [rehab clinic], May 10, 2004, for MPIC, indicates the following requirements for the Appellant's position as a cashier/supervisor:

- Constant standing – as required for cashier duties (75% of position); ...
- Frequent trunk rotation to the left and right – as required for cashier duties (75% of position);
- Frequent neck flexing – as required for cashier and cash office duties (100% of position);
- Frequent lifting of 1-5lbs – as required for cashier duties (75% of position);
- Occasional lifting of 5-20lbs during cashier duties.

The report concludes:

[text deleted] ... states that the claimant has been a valuable and reliable worker.

[The Appellant's] position ... is available to her upon her rehabilitation. However, ... a gradual return to work and/or job modifications can not (sic) be accommodated by [text deleted]. Therefore, [the Appellant] must be capable of performing all of her pre-accident job duties prior to returning to her position as a cashier. (underlining added)

This report is supported by the following medical evidence:

1. [Appellant's doctor #2's] opinion that, as a result of injuries suffered in the accident, the Appellant was unable, after December 19, 2004, to perform the lifting required in her work and that the bagging required by the position is not conducive to the Appellant's recovery;
2. [Appellant's doctor #2's] opinion that, as a result of injuries suffered in the accident, the Appellant has not been capable of returning to work through all the time that he has been attending her since the accident;
3. A June 3, 2004 Note to File by the case manager reporting a phone conversation with the Appellant in which she noted that the claimant could not stand or sit for long periods of time, cannot lift a 4 litre milk jug with her left arm, and experiences more discomfort the more she uses her arm during the day;
4. [Independent athletic therapist's] conclusion, April 28, 2005, that "Postural tolerances for standing would likely be the greatest challenge posed to [the Appellant];
5. In his May 9, 2005 review of the file, [MPIC's doctor] does not address the issue of prolonged standing that [independent athletic therapist] flagged as her "greatest challenge", although he does suggest active treatment of the difficulties that aggravate standing.

The Commission finds that the Internal Review Officer erred in adopting [MPIC's doctor's] medical opinion and confirming the case manager's decision that the Appellant was not functionally incapable of working as a result of the motor vehicle accident after December 19, 2004.

3. Medical requirement of physiotherapy treatments

The Appellant testified that the physiotherapy treatments she received in respect of her motor vehicle accident injuries after December 19, 2004 have assisted her recovery in respect of these injuries. The Commission notes that subsequent to MPIC's termination of the cost of the Appellant's physiotherapy treatments, MPIC approved a limited physiotherapy treatment program in respect to the Appellant on June 20, 2005. The Commission finds that MPIC's approval to reinstatement of limited physiotherapy treatments on June 20, 2005 is inconsistent with their decision to terminate the reimbursement of the cost of physiotherapy treatments on December 19, 2004. The Commission, having found the Appellant to be a candid witness, accepts the Appellant's testimony in respect of her need for further physiotherapy treatments subsequent to December 19, 2004.

The Commission finds that the Appellant has established, on a balance of probabilities, that since the Appellant's motor vehicle accident injuries were not resolved by December 19, 2004 that any physiotherapy treatments the Appellant obtained subsequent to that date in respect of her motor vehicle accident injuries were medically required pursuant to Manitoba Regulation 40/94, Section 5(a). As a result, MPIC erred in terminating reimbursement of physiotherapy treatments from the date following the completion of the twenty (20) physiotherapy treatments as ordered by the case manager in his decision dated June 20, 2005.

Decision

The Commission finds, on the balance of probabilities, that the ongoing symptoms experienced by the Appellant which are preventing her return to work, are causally related to the motor vehicle accident she suffered February 26, 2004. The Commission finds that the Internal Review Officer, in her decision dated May 19, 2005, erred in confirming the case manager's decision to terminate the Appellant's PIPP benefits. As a result, the Commission allows the appeal and rescinds the Internal Review Officer's decision dated May 19, 2005.

Dated at Winnipeg this 1st day of December, 2005.

MEL MYERS

DR. PATRICK DOYLE

PAUL JOHNSTON