

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-09-094**

**PANEL:** Ms Laura Diamond, Chairperson  
Mr. Guy Joubert  
Ms Linda Newton

**APPEARANCES:** The Appellant, [text deleted], appeared on her own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Ms Danielle Robinson.

**HEARING DATE:** August 3, 2011

**ISSUE(S):** Whether the Appellant had a reasonable excuse for the late  
filing of her Application for Review and if so whether the  
Appellant is entitled to myofascial local anaesthetic injections  
as recommended by [Appellant's Doctor #1].

**RELEVANT SECTIONS:** Section 136(1)(a) of The Manitoba Public Insurance  
Corporation Act ('MPIC Act') and Section 5 of Manitoba  
Regulation 40/94.

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE 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 September 16, 2006. She attended the [Hospital] where she was diagnosed with neck and upper back strain with bilateral shoulder strain. Her family practitioner at the time, [Appellant's Doctor #2], also examined her and requested an x-ray of the affected area.

The Appellant worked as a health care aide after the accident. She continued to seek treatment for her injuries and was examined by [Appellant's Doctor #3] and [Appellant's Doctor #4]. On June 11, 2008 she saw [Appellant's Doctor #1], who suggested one session of diagnostic myofascial local anaesthetic injections, with possible treatment to follow. The Appellant sought coverage for this treatment from MPIC.

On January 15, 2009, the Appellant's case manager wrote to her indicating that a review by MPIC's Health Care Services Team had concluded that the intervention treatment proposed by [Appellant's Doctor #1] was not warranted. The case manager indicated that these treatment recommendations were non-medically required and would not be funded by MPIC.

On May 6, 2009, the Appellant filed an Application for Internal Review of this decision. The application was filed outside of the time limits set out in the MPIC Act and the Internal Review Officer requested reasons for the delay.

On May 27, 2009 the Appellant wrote to the Internal Review Officer and indicated that she had not complied with the 60 day time line for filing an Application for Review as she "had to consult a lawyer before making any decision".

An Internal Review Officer for MPIC considered the Appellant's request for an extension of the time for filing an Application for Review. He confirmed that he was not satisfied that she had a reasonable excuse for failing to file her Application for Review within the time period, since the 60 day appeal period provides ample time to consult with legal counsel and obtain legal advice.

The Internal Review Officer also went on to review the merits of the Appellant's application regarding the treatment sought. He concluded that, based upon the evidence on the Appellant's file as well as the opinion of MPIC's medical consultant, [MPIC's Doctor], objective findings of significance were consistently absent from the Appellant's file and there was no role for the elective treatment proposed by [Appellant's Doctor #1]. These treatment recommendations were not medically required in the management of a medical condition secondary to the accident, and as such no benefits or entitlements should be extended to the Appellant.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

#### **Evidence and Submission for the Appellant**

The Appellant testified that since the motor vehicle accident she has suffered from chronic, excruciating pain. Just prior to the motor vehicle accident, in 2005, she had moved to [text deleted] from [text deleted]. She had to get settled and was looking for work, since the employment insurance benefits which were supporting her at that time were running out. Although her health was fine before the accident and she was well and active, she suffered from a lot of stress dealing with the move and the issues it presented for her daughter, who had to be registered in school. She was also dealing with issues arising out of her separation and subsequent divorce. She confirmed upon cross examination that the separation had taken place in 2004, but that she was still dealing with issues of maintenance, alimony and lawyers at the time of the accident and of the case manager's decision.

The Appellant went on to describe the chronic pain she has suffered since the motor vehicle accident. She described pain in her shoulders, migraine headaches, pain in her neck, tingling in her arms and numbness and weakness in her left arm, all since the motor vehicle accident.

She described the difficulty she had doing household chores such as vacuuming, lifting laundry baskets, showering and lifting her arms. She described how the pain worsened over the course of the day and that she also suffered from nausea with headaches. This limits her ability to drive.

The Appellant described the motor vehicle accident and explained how her head hit the rear window of the car when it was rear ended. This caused her pain, which she felt right after the motor vehicle accident. The next day, she was in excruciating pain, which got worse as the weeks progressed. She couldn't go to work for a week. She had pain in her shoulder and could hardly hold up her head or move it from side to side.

The Appellant described her treatment with physiotherapy and acupuncture but indicated that this only helped the pain to subside for a few days. She also explained that she does neck stretching exercises.

[Appellant's Doctor #2] referred her to [Appellant's Doctor #1]. She would like to try the treatment he suggested since she feels her health has deteriorated since the motor vehicle accident. Although she did not pursue the treatment when MPIC refused to fund it, she still feels that she needs it and is willing to try this treatment option.

The Commission also heard evidence from the Appellant's brother and daughter, who were in the motor vehicle with her at the time of the accident. Her brother described the motor vehicle accident and the aftermath, along with the Appellant's transfer to [Hospital] by ambulance. When asked whether the Appellant was suffering from chronic pain, he replied that this is what the Appellant has told him. He said the Appellant has told him that her neck and shoulders bother her and she has numbness in her left arm and hand. He confirmed that the Appellant had

been going through a separation at the time of the motor vehicle accident and he does not know whether she was aware of the 60 day time limit for filing an Application for Review.

The Appellant's daughter also testified that the Appellant has difficulty with lifting shopping bags and her grandchildren and was limiting her chores at home.

The Appellant submitted that she was unable to comply with the time limit for filing an Application for Review because she was going through a terrible time. She was moving and was stressed from trying to establish herself in Manitoba, get her daughter settled, look for work, deal with a lawyer regarding her divorce and try to find a lawyer here to help her with the motor vehicle accident claims.

She submitted that [Appellant's Doctor #2] had referred her to [Appellant's Doctor #1] to try and find relief for her condition and that MPIC should fund the treatment to try and help her get back to a normal lifestyle.

The Appellant indicated that she was not happy with some of the comments made by [Appellant's Neurologist], and by [Appellant's Doctor #2] in their reports. She submitted that she has pain from the discs in her upper neck and that this is related to the motor vehicle accident.

### **Evidence and Submission of MPIC**

In regard to the Appellant's application for an extension of time for filing her Application for Review, counsel for MPIC noted the factors which the commission should look at and consider.

These include the length of the delay, the reasons for the delay, any prejudice resulting and whether MPIC had waived its rights in this regard.

Counsel submitted the actual delay was about 2 months time, which is not an insignificant period when the excuse offered by the Appellant is considered. Her original excuse was that she wanted to consult with a lawyer, but counsel noted that it does not take 4 months to consult a lawyer.

The Appellant testified regarding the other things going on in her life at the time, but counsel noted that she had moved to Manitoba over a year prior to the motor vehicle accident. The case management decision occurred almost 3 years after the motor vehicle accident and 4 years after her move. Her separation had occurred in April 2004, almost 5 years before the case manager's decision. These factors should not have interfered with the Appellant's ability to file an Application for Review.

She submitted that the Appellant was aware of the 60 day time period, but decided to disregard the deadline.

The Application for Review which the Appellant finally did file, was dated March 6, 2009, but not filed until May 6, 2009. It is not a complicated document. Most of the information required is personal information such as name, address, telephone number and date of the motor vehicle accident. A lawyer does not need to be involved in the completion and filing of this form.

Accordingly, counsel submitted that the Appellant's excuse was not a reasonable excuse and the panel should not grant an extension of time for late filing of the Application for Review.

Counsel also submitted that the medical evidence on the Appellant's file does not indicate that the Appellant has met the onus upon her of showing, on a balance of probabilities, that the treatment sought is medically required as a result of injuries sustained in the motor vehicle accident. The Appellant must show, in order to be reimbursed for the treatment, that it is clinically required regarding injuries sustained in the motor vehicle accident.

In this regard, counsel reviewed the medical reports on the Appellant's file. The report from [Appellant's Orthopaedic Surgeon], dated April 9, 2007, indicated that the Appellant's muscular skeletal examination was relatively unremarkable. An x-ray found no significant bone or joint abnormality.

[Appellant's Neurologist] reported on April 18, 2007. His examination of the Appellant's spine revealed no abnormality. He could not find evidence of an organic neurological defect or objective evidence of an organic explanation for any of her symptoms. He also noted that her global weakness disappeared with distraction. Counsel asked the Commission to take note of this important finding regarding the Appellant's credibility.

Finally, counsel reviewed the reports from the Appellant's own general practitioner, [Appellant's Doctor #2], dated June 14, 2007. He noted that a neck examination showed normal range of movement with no neurological deficits. Her entrance complaint at [hospital], listed as head injury, seemed to be at odds with his history and clinical examination, since the Appellant did not suffer any head injuries and informed the physician at [Hospital] that she had no headaches, even though his clinical notes documented that she did suffer from headaches. He reviewed the comments of [Appellant's Orthopaedic Surgeon] and [Appellant's Neurologist] and concluded that as a result of the accident the Appellant suffered neck, upper back and bilateral shoulder

sprains, with an excellent prognosis for a full recovery, which would benefit from physiotherapy, massage therapy and chiropractic treatment and acupuncture.

[Appellant's Doctor #2] went on to make the following comment:

“The possibility of Compensation from MPI led the patient to assume a sick role. This patient may now have a factitious disorder or may be a malingerer.

Patient with a factitious disorder have the following which this patient displays:

- A. The intentional production of feigning of physical signs or symptoms.
- B. The motivation for the behaviour to assume a sick role.
- C. External incentives for the behaviours such as economic gain or improved social well-being.

The fact that the patient was not amenable to try out other therapies for her injuries, raises the possibility of malingering in that the sole purpose was to gain economic benefits.

Malingering features usually not found in genuine illness include:

- Vague symptoms
- Seeking financial gain
- History, examination and evaluative data do not elucidate complaints
- Patient uncooperative and refused to accept a clean bill of health or an encouraging prognosis”.

Counsel noted that the Appellant had made negative comments regarding [Appellant's Doctor #2's] report, but no other report correcting or altering this original report has been provided on the Appellant's indexed file. Therefore the only conclusion that can be taken is that [Appellant's Doctor #2] stands by his original report, observations and conclusions.

Accordingly, the Appellant's orthopaedic surgeon, neurologist and general practitioner all reported to say there was nothing wrong with the Appellant and some negative implications and observations regarding her credibility were noted in these reports.



Counsel also noted that although the Appellant had testified that [Appellant's Doctor #1] had told her that these injections could help her, this does not meet the test of what is medically required under the MPIC Act. Nor has the Appellant seen [Appellant's Doctor #1] since 2008. Now, in 2011, the Appellant has failed to establish that these injuries remain or that the treatment would now be medically required in [Appellant's Doctor #1's] opinion.

Counsel then reviewed [MPIC's Doctor's] report dated January 6, 2009. [MPIC's Doctor] reviewed the reports of [Appellant's Doctor #2], [Appellant's Orthopaedic Surgeon], [Appellant's Neurologist] and [Appellant's Doctor #1] and concluded that support for further hands-on interventional treatment as proposed by [Appellant's Doctor #1] is not warranted.

Accordingly, counsel submitted that the Appellant has failed to establish, on a balance of probabilities, that injuries sustained in the motor vehicle accident rendered the treatment proposed by [Appellant's Doctor #1] medically required. She submitted that the decision of the Internal Review Officer should be upheld and the Appellant's appeal dismissed.

### **Discussion**

The MPIC Act provides as follows:

#### **Reimbursement of victim for various expenses**

[136\(1\)](#) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Section 5 of Manitoba Regulation P215 RM 40/94 provides as follows:

#### **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....

The onus is on the Appellant to show, on a balance of probabilities, that the treatment sought is medically required in connection with injuries sustained in the motor vehicle accident. In addition, the Appellant must establish that she has provided a reasonable and credible excuse for the late filing of her Application for Review.

The panel has reviewed the documents on the Appellant's indexed file, including the comments made by [Appellant's Neurologist] and [Appellant's Doctor #2]. [Appellant's Neurologist] noted that there was no evidence of an organic basis for any of the Appellant's symptoms and that "...her global weakness disappeared with distraction".

[Appellant's Doctor #2's] comments were more extensive, noting "the possibility of compensation from MPIC lead the patient to assume a sick role. This patient may now have a factitious disorder or may be a malingerer."

The Appellant's only response to the opinions of the specialists was to express her disagreement and dissatisfaction with these opinions. She did not provide any alternate reports or opinions which would support her view, or cause the panel to question the veracity of the opinions of the specialists, who are recognized and well respected as such in the medical community.

The panel has considered the comments of [Appellant's Neurologist] and [Appellant's Doctor #2] in light of the testimony of the Appellant at the hearing as well as her posture, demeanour, body language and ease of movements.

Although the Appellant called evidence from her brother and daughter to support her testimony, the only confirmation they were able to provide was confirmation that the Appellant had subjectively expressed her pain and limitations to them.

The panel does not find the Appellant's evidence on the issues to be credible.

The panel finds that the Appellant has failed to provide a reasonable and credible excuse for the late filing of her Application for Review. She referred to issues of stress and change in her life, which pre-dated the motor vehicle accident by a year or more. We note that she was able to respond to the Internal Review Officer's queries, which were dated May 25, 2009 by May 27, 2009. We do not accept the explanation of the Appellant that it was these issues and the need to consult a lawyer that prevented her from filing the Application for Review which shows a date of March 6, 2009 (within the legislated time frame) until May 2009.

The panel finds that the Appellant has not provided a reasonable excuse for the late filing of the Application for Review and that the time limits will not be extended by the Commission.

The panel also finds that the Appellant has failed to meet the onus upon her of establishing that the treatment benefits she requests are medically required as a result of injury sustained in the motor vehicle accident. The panel agrees with counsel for MPIC that the medical reports in the Appellant's index file do not establish a basis for the Appellant's symptoms arising out of the

motor vehicle accident. The Appellant has failed to provide credible evidence establishing a connection between the symptoms she complains of and the motor vehicle accident. We find that the treatment requested is not medically required in connection with injuries sustained in the motor vehicle accident.

Accordingly, the Appellant's Appeal is dismissed and the Internal Review Decision of July 6, 2009 is hereby upheld.

Dated at Winnipeg this 12<sup>th</sup> day of September, 2011.

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**LAURA DIAMOND**

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**GUY JOUBERT**

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**LINDA NEWTON**