

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-215**

PANEL: Ms Jacqueline Freedman, Chairperson
Mr. Brian Hunt
Ms Sandra Oakley

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

HEARING DATE: June 22, 2016

ISSUE(S): Whether the Appellant is entitled to Personal Injury Protection Plan benefits for her current right knee, neck, back and hand complaints.

RELEVANT SECTIONS: Subsections 70(1) and 136(1) 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

Background:

The Appellant, [text deleted], was riding her bicycle on September 18, 2009, when she collided with the open door of a parked vehicle. She was thrown from her bicycle. The Appellant suffered various injuries as a result of this motor vehicle accident (“MVA”) and received physiotherapy treatments pursuant to the Personal Injury Protection Plan (“PIPP”) provisions of the MPIC Act. The allotted physiotherapy treatments concluded effective January 11, 2010 and

the Appellant was accordingly discharged. The Appellant attended one session of athletic therapy on July 29, 2010.

The Appellant contacted her case manager in late 2011 and again in late 2012, to inquire about further physiotherapy treatments for her back. No treatments were authorized at that time. The Appellant again contacted her case manager in early 2013 to advise of ongoing knee pain. She contacted the case manager further in March and April of 2015, to advise of ongoing right knee pain and back pain. The Appellant indicated to the case manager that she wanted physiotherapy treatment for her right knee, neck, hands and back.

The case manager considered the request of the Appellant for physiotherapy and issued a decision dated April 23, 2015, which states as follows:

“... At this time there is no entitlement for funding for treatments or related expenses under the Personal Injury Protection Plan (PIPP):

- Based on a review of your file completed on September 30, 2010 there is insufficient evidence on file to support that your current signs and symptoms are causally related to the above noted accident.
- Any soft tissue injuries sustained in the above noted accident have had time to heal. It is probable you are at maximum medial (sic) improvement with respect to in-clinic treatment.”

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager and agreed with it. An Internal Review decision was issued on August 7, 2015, which provides as follows:

“Upon reviewing the medical information on file it appears that you have recovered from any injuries sustained in the accident. There is a lack of medical evidence to support that your current complaints are due to the accident. [Appellant’s doctor #1’s] report of August 24, 2010 opined that you had recovered from any accident related injuries. A further review by the MPI Health Care Services physiotherapy consultant dated September 30, 2010 concurred with [Appellant’s doctor #1’s] opinion. There is no mention in any of the medical reports of knee complaints at all. Despite your

concerns to the contrary, I am unable to find any medical evidence to support that any of your current complaints are accident related.

While I can appreciate your conviction that a causal relationship between your current complaints and the accident exists, I cannot ignore the medical conclusions that there is insufficient chronological and medical evidence to conclude that a cause and effect relationship, on the balance of probabilities, has been established.

In light of the above, I am upholding the case manager's decision of April 23, 2015 and dismissing your application."

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to PIPP benefits for her current right knee, neck, back and hand complaints.

Decision:

For the reasons set out below, the panel finds that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits (specifically physiotherapy treatment) for her current right knee, neck, back and hand complaints.

Evidence and Submission for the Appellant:

Evidence:

The Appellant testified at the appeal hearing. She described the circumstances of the MVA, and said that it changed her life. She said that as she was travelling along on her bicycle, she approached a grey sports car. The driver opened his door just as the Appellant pulled alongside the car and she connected with the car door. She was thrown across the street and her bicycle was damaged. She testified that the occupant of the parked car assisted her and a friend took down his particulars and accordingly there was no immediate need for an ambulance.

The Appellant testified that she had previously had spinal surgery in [text deleted], which fused the vertebrae in her neck. She said that she knew that as soon as the MVA happened that she was going to have further neck and back problems. She testified that as a result of the MVA, she suffered pain in her neck, back, right knee and left elbow. She was very concerned about the damage to her neck and back.

The Appellant testified that although she had had problems all her life with her neck, and specifically since her spinal surgery in [text deleted], she had managed to lead a very successful and active life prior to the MVA. She noted that she did not drive a car, even prior to the MVA, due to her limitations. Due to her not driving, the Appellant testified that she walked and rode a bicycle a considerable amount. She has also done dancing and been otherwise physically active, including chopping trees and doing martial arts. She also took great pride in becoming a mother. However, after the MVA she felt like all of her dreams were shattered. In addition, now she ached everywhere. The Appellant testified that she felt like she was in shock as a result of the MVA.

The day after the MVA the Appellant went to see her physician, [Appellant's doctor #2]. He indicated to her that she needed physiotherapy. The Appellant testified that two days after the MVA, on September 20, 2009, she had to call an ambulance because she was in so much pain. A day or two later she contacted MPIC to initiate her claim.

The Appellant attended at physiotherapy, as prescribed by [Appellant's doctor #2]. She indicated that at physiotherapy, the concentration was on her neck and back. She testified that she performed the home exercises given to her by the physiotherapist and she said she completed the physiotherapy to the best of her ability. However, the Appellant testified that she feels that even

though the allotted number of physiotherapy treatments was used up, she did not fully recover. Prior to the MVA, she was very fit, she was able to walk long distances daily and she was in good shape. Now she fears that she will never be the same. She has headaches and back pain, dizziness, and pain in her left arm and knee. In addition, she can't swim due to problems with her left arm.

The Appellant testified that she has not received significant support from her medical providers. [Appellant's doctor #1], who performed her spinal fusion in [text deleted], has continued to be one of her medical providers since that time. The Appellant testified that although [Appellant's doctor #1] has been a source of support for her, his main therapy for her has been to recommend that she take Tylenol. In addition, he recommended that she do arm circle rotations as therapy for her sore arm. However, the Appellant testified that this has not been beneficial and it still hurts her to pull the cord on the bus. The Appellant testified that she is of the view that [Appellant's doctor #1] is perhaps too old to be of great service to her.

The Appellant testified that she also sees [Appellant's doctor #3]. She said that when she mentioned the MVA to him he was dismissive, although he did mention that she walked with a limp. The Appellant testified that [Appellant's doctor #3] was the one who diagnosed her with scoliosis and she noted that it could be as a result of trauma. However, the Appellant said that [Appellant's doctor #3] indicated he does not want to get involved at this point, and that he wouldn't fill out any forms. The Appellant was uncertain whether she filled out any of the authorization forms to return to MPIC, in order to enable MPIC to seek additional information from her physicians. She testified that she did everything that she was supposed to do; however, she couldn't specifically recall filling out the authorization forms.

Counsel for MPIC questioned the Appellant on cross-examination. Counsel asked the Appellant whether she recalled providing MPIC with information regarding her injuries at the time of the MVA. The Appellant indicated that she must have done so, although she had no specific recollection. When asked in particular regarding what she told the physiotherapist during her initial visit on September 18, 2009, the Appellant said that whatever she may have initially told the physiotherapist should not be considered to be determinative. The Appellant testified that the physiotherapist was focused on her back and neck. The Appellant said that she let the physiotherapist complete the paperwork because the Appellant was in shock. Counsel for MPIC reviewed all of the symptoms listed by the physiotherapist on the initial therapy report dated October 21, 2009 related to the September 18, 2009 visit and noted that there was no reference to symptoms relating to the Appellant's right knee. The Appellant acknowledged this. The Appellant noted, however, that the therapist did not show her what was written on the form. The Appellant said that at the initial physiotherapy visit she was given an ice pack for her right knee and also given an exercise on a ball which she understood to be for her knee. The Appellant testified that she did mention her right knee at the time, although physiotherapy treatment was concentrated on her neck.

Counsel for MPIC questioned the Appellant regarding a subsequent therapy report from the physiotherapist dated January 11, 2010. That report refers to tightness on the outside of the arm. The Appellant agreed that her arm still hurt significantly at that point. The Appellant testified that her back and her knee were also hurting at that time. Counsel for MPIC also referred to the therapy discharge report dated March 15, 2010, relating to the last physiotherapy visit of January 11, 2010. Counsel noted that the discharge report does not refer to any knee pain. The Appellant agreed that there is no mention of knee pain in the report. The Appellant testified that

although her knee pain was not the focus of the treatment in therapy, she did home exercises for it.

Counsel for MPIC questioned the Appellant regarding the initial therapy report for athletic therapy dated July 29, 2010. The Appellant acknowledged that there was no reference to any knee pain in that report.

Counsel for MPIC questioned the Appellant regarding the report of her physician, [Appellant's doctor #1], dated August 24, 2010. Counsel noted that [Appellant's doctor #1] discusses a strain of the neck and abrasions on her left elbow. Counsel noted that there is no reference to any other injuries. The Appellant testified that she was of the view that [Appellant's doctor #1] didn't take her injuries seriously enough. Counsel for MPIC referred to [Appellant's doctor #1's] conclusion that the Appellant had made a satisfactory recovery from her injuries. The Appellant testified that she totally disagreed with this conclusion.

Counsel for MPIC questioned the Appellant regarding her contact with MPIC's case manager in 2013 to ask for treatment regarding her right knee. According to the case manager's notes, there was no prior mention in the file of pain in the Appellant's right knee. The Appellant testified that she was certain she had mentioned it to the physiotherapist and she doesn't understand why it is not in the physiotherapist's notes. When questioned by counsel for MPIC regarding the reason for initiating contact with MPIC, the Appellant indicated that [Appellant's doctor #3] had told her to see if MPIC could find a doctor for her.

Counsel for MPIC asked the Appellant whether any doctor has prescribed physiotherapy for her, since that is what she is seeking. The Appellant testified that the only doctors she has to advise

her are [Appellant's doctor #1] and [Appellant's doctor #3] and she doesn't know what else to do. The Appellant said that nobody has currently suggested physiotherapy, but [Appellant's doctor #2] had suggested it right after the MVA and it was helpful then. The Appellant said that she is still doing her home exercises but she is looking for assistance.

Submission:

The Appellant acknowledged that she did have some pre-existing injuries and she was not in her youth at the time of the MVA. However, she submitted that she was in good health and very fit at the time of the MVA. She submitted that the MVA made her pre-existing injuries worse, and caused her additional injuries and pain. She indicated that no one can appreciate the kind of pain she has and the suffering that she is having. She submitted that she would like to receive physiotherapy or some kind of help in order to better manage her activities of daily living. She noted that she has to lie down in the middle of the afternoon and she has two doctors that don't want to help her. She has to work hard to stay physically sound and to get her mind and body on track. The MVA was a significant event in her life and it has made things very hard for her.

She noted that right after the MVA, early in the physiotherapy treatment, there was a great focus on her neck and that as a result, there was a lack of appropriate treatment of her knee. However, she still does have pain in her knee and that pain was as a result of the MVA. She said that some days her knee will simply lock up on her. She submitted that the MVA has made all of her pre-existing injuries worse. She submitted that she is entitled to compensation, and in her view the best form of compensation would be physiotherapy.

Submission for MPIC:

Counsel for MPIC submitted that the issue is whether the Appellant is entitled to PIPP benefits for her right knee, neck, back and hand complaints. MPIC acknowledges that at the time of the accident the Appellant suffered injuries to her neck, left shoulder and low back and an abrasion to her left elbow. As of August 24, 2010 the Appellant's physician, [Appellant's doctor #1], said she had made a satisfactory recovery. The reports from the Appellant's physiotherapist say that she has made an improvement through physiotherapy treatment and support [Appellant's doctor #1's] conclusion. MPIC's physiotherapy consultant reviewed the medical information on the file and provided a report dated September 30, 2010. The consultant stated as follows:

“Any soft tissue injuries sustained in the motor vehicle accident of September 25 (sic), 2009, have had ample time to heal, currently over a year later. With respect to physical therapy, it is probable that the claimant is at maximum medical improvement with respect to in-clinic treatment.”

With respect to any injuries to the Appellant's right knee, counsel for MPIC submitted that the first mention of any pain in the Appellant's right knee is in the notes of the case manager dated January 8, 2013, more than three years after the MVA. Counsel submitted that in looking at the material on the indexed file from immediately after the MVA, there is no mention of any right knee symptoms. Counsel submitted that there is no objective medical evidence on the file that the Appellant sustained an injury to her right knee. Therefore, counsel submitted, the Commission is faced with a request made by the Appellant in 2015, which is six years after the MVA, without any medical evidence that her symptoms at that time, or her symptoms currently, are related to injuries sustained in the MVA. Further, there is no recommendation from any of her healthcare practitioners that her requested treatment, physiotherapy, would be of any benefit for her current symptoms.

Counsel submitted that it is therefore MPIC's position that the Appellant has not discharged the onus upon her of showing that her current symptoms are related to the MVA or that she is entitled to PIPP benefits in respect of those symptoms. Counsel for MPIC submitted that the Appellant's appeal ought to be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer dated August 7, 2015, is incorrect. In particular, the Appellant needs to show, on a balance of probabilities, that she is entitled to PIPP benefits for her current right knee, neck, back and hand complaints. The Appellant is seeking physiotherapy treatment regarding those complaints. In order to be entitled to physiotherapy treatment, she needs to show that those complaints were caused by the MVA and that such treatment is medically required. The relevant provisions of the MPIC Act are as follows:

Definitions

70(1) In this Part,

"accident" means any event in which bodily injury is caused by an automobile;

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile ...

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; ...

Manitoba Regulation 40/94 provides, in part, 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, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant; ...

MPIC has acknowledged that the Appellant suffered certain injuries in the MVA. The Appellant received physiotherapy treatment shortly after the MVA, which was funded by MPIC. In the physiotherapy discharge report, dated March 15, 2010, physiotherapist [text deleted] noted that the Appellant's status at discharge was "condition much improved", although it was acknowledged that the Appellant continued to have some "pain in the anterior lateroe (sic) shoulder that gets worse [with] repetitive motions or over shoulder height activity".

A report from the Appellant's physician, [Appellant's doctor #1], dated August 24, 2010, states:

"In my opinion, she has made a satisfactory recovery from the injuries sustained in this motor vehicle accident."

MPIC's Health Care Services consultant reviewed these reports and provided a report dated September 30, 2010, which stated as follows:

"The claimant reportedly sustained injuries involving the neck and left shoulder, as well as low back pain. She received a course of physiotherapy. ...

... With respect to physical therapy, it is probable that the claimant is at maximum medical improvement with respect to in-clinic treatment.

A complete course of Category 1 Athletic Therapy is not medically required. ..."

The physiotherapist's report dated March 15, 2010, [Appellant's doctor #1's] report dated August 24, 2010 and the Health Care Services report dated September 30, 2010, all deal with the

injuries to the Appellant's neck, back and left arm and shoulder. [Appellant's doctor #1], the Appellant's treating physician since [text deleted], concluded in his report that she had made a satisfactory recovery in respect of those injuries, and he has made no further recommendations for treatment for the Appellant, other than that she should take Tylenol. The panel accepts [Appellant's doctor #1's] conclusion as well as the conclusion of MPIC's Health Care Services that "With respect to physical therapy, it is probable that the claimant is at maximum medical improvement with respect to in-clinic treatment" regarding the Appellant's neck, back and left arm and shoulder. There is no medical evidence before the panel to the contrary.

The Appellant's last physiotherapy treatment was in January, 2010. Twenty-two months later, in November, 2011, she contacted MPIC to advise that her back was bothering her and to inquire as to whether additional physiotherapy treatments may be available to her. The case manager's note from November 16, 2011 states as follows:

"... Claimant called. Told me that her back is bothering her and that xrays from her md showed that she had scoliosis. I asked her if her MD had advised if it was MVA related. She said that he said it could be degenerative. She said she had researched and that it could be due to injury. She inquired about further physio because (sic) her back was not addressed when she was going, I advised her to go see her doctor to address her problems and that if any of the issues were related to her mva that our health care services team would have to review her requests. She understood and said she will address her concerns with her doctor."

The Appellant's evidence was that her physicians, [Appellant's doctor #1] and [Appellant's doctor #3], were not very supportive of her. A file note from October 9, 2012, indicates that she told her case manager as follows:

"Claimant said [Appellant's doctor #1] seems to think she should just put up with the back issue and take Tylenol for it."

It appears that the Appellant was seeking medical advice from MPIC, in the absence of direction from her physicians. The Appellant asked the case manager during that October, 2012, call

whether additional physiotherapy would be helpful. The case manager's note from October 9, 2012 goes on to state as follows:

“Claimant asked if a physiotherapist could help her back. I advised that I could not direct care, and that she would need to check with a PT [physiotherapist]. I advised that she has used all the PT tx [treatment] on her claim. Explained that a PT can request Category 2, but needs to show a change in diagnosis. I advised that she ask her doctor if she would like advice on how to deal with her back issues. Claimant understood.”

Unfortunately, it appears that the Appellant's physicians have not provided any further advice or recommendations to her in this regard. There is no medical evidence before the panel to indicate that the Appellant's physicians have considered whether her current neck, back and arm complaints are connected to or caused by the MVA.

On January 8, 2013, the Appellant contacted MPIC to discuss her right knee pain. The case manager's note from that date states as follows:

“[The Appellant] called with concerns regarding ongoing issues. She advised that her right knee has been getting progressively worse and gives out on her. ... She said that initially following the claim, she was more concerned with her neck and shoulder and so the physiotherapist and athletic therapist primarily worked on those areas. She wasn't focusing on the right leg because she wanted to make sure her neck and arm were better.

I reviewed the medical reports on file and note that there is no mention of the right knee initially following the accident and we will need to order medical information to have reviewed to determine what is related to the MVA. She commented that it was a long time ago and she can't really remember but feels that she would have mentioned the right leg to the therapists and doesn't know why it wouldn't be mentioned in the initial reports.

I also reviewed correspondence dated August 24, 2010 from [Appellant's doctor #1] and noted that there was mention of a limp on the left side but that the right side had normal range of motion and again no mention of issues with the right leg. She then said that it hasn't really started bothering her until recently. ...”

The case manager's note from January 8, 2013, references the report of [Appellant's doctor #1] from August 24, 2010. In that report, [Appellant's doctor #1] notes that he examined the Appellant on several occasions. He notes in his report as follows:

- On examination on September 21, 2009, “Both hips and knees had full movements.”
- On examination on October 5, 2009, “Both hips and knees had full movements.”
- On examination on February 22, 2010, “Both knees had full movements.”
- On examination on June 3, 2010, “Her hips, knees, ankles and feet had full movements.”

Accordingly, the medical evidence from immediately after the MVA until at least June, 2010, is that the Appellant had full range of motion of her right knee, and there is no mention of knee pain in any of these examinations. The panel accepts the testimony of the Appellant that she is suffering from pain in the areas as she described. However, there is no evidence from a medical practitioner indicating that the knee pain suffered by the Appellant is connected to or caused by the MVA. We do understand the Appellant’s conviction that this is the case; however, there is no medical evidence supporting her position.

Furthermore, no physician has prescribed any physiotherapy as a treatment for the Appellant’s current right knee, neck, hand and back complaints. As such, there is no medical support for the Appellant’s contention that physiotherapy treatment is medically required in the management of her symptoms.

After a careful review of all the reports and documentary evidence filed in connection with this appeal and after careful consideration of the testimony of the Appellant and of the submissions of the Appellant and counsel for MPIC and taking into account the provisions of the relevant legislation, the panel finds that the Appellant has not met the onus of establishing, on a balance of probabilities, a causal connection between the Appellant’s current right knee, neck, back and hand complaints and the injuries sustained in or caused by the MVA. In addition, the Appellant has not met the onus to establish, on a balance of probabilities, that physiotherapy treatment for

the Appellant's current right knee, neck, hand and back complaints would be considered to be medically required. Consequently, the Appellant is not entitled to PIPP benefits with respect to these complaints.

Disposition:

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer of August 7, 2015, is upheld.

Dated at Winnipeg this 3rd day of August, 2016.

JACQUELINE FREEDMAN

BRIAN HUNT

SANDRA OAKLEY