

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by S.J.F.
AICAC File No.: AC-97-87**

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mr. Charles T. Birt, Q.C. Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC') represented by
Mr. Terry Kumka
S.J.F., the Appellant, represented by Mr. Shane Perlmutter

HEARING DATE: October 29th and 30th, 1998

ISSUE: Whether Appellant, a C4 Paraplegic, entitled to certain capital costs and vehicle driving expenses.

RELEVANT SECTIONS: Section 138 of the MPIC Act and Sections 10(1)(a), 10(1)(d)(iii) and 10(1)(e) of Manitoba Regulation No. 40/94

MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

REASONS FOR DECISION

MEDICAL BACKGROUND:

On January 11th, 1996, the Appellant was driving his Mercury Sable automobile north on Highway 44 in Manitoba, approximately four miles south of [text deleted], when his vehicle collided with a moose. As a result of that accident, the Appellant sustained a C4 spinal cord injury, leaving him completely paralyzed below the neck. His ability to move is limited to a slight shrug of his shoulders and slight movements of his head. He has no feeling below his neck except for occasional pain and "pins and needles" in his lower limbs. None of the muscles within his rib cage is functioning but, fortunately, the autonomic centers at C3, C4 and C5 keep the diaphragm alive and therefore permit

S.J.F. to breath, albeit not without some occasional difficulties. He has no bowel or bladder control and, although he and his caregivers do their best to manage that aspect of his life by following a specific regimen, incontinence can still occur and, when it does, the action that follows must be prompt and meticulous. S.J.F. testified that he is also susceptible to pressure sores or skin ulcers, which he tries to avoid by arranging to be shifted a little from time to time - a process that, as he points out, becomes even more difficult when his clothing has become soiled as a result of incontinence.

The Appellant has physiotherapy three times per week, using a tilt table both to help his breathing system and to guard, as best he can, against potential osteoporosis.

Dr. Patricia W. Nance, an associate professor in the section of Rehabilitative Medicine, Department of Internal Medicine at the University of Manitoba and an expert of impressive credentials, gave evidence on behalf of S.J.F. In corroborating all of the Appellant's own evidence with respect to his current medical condition, Dr. Nance added that a patient sustaining a C4 quadriplegia, such as S.J.F., is also susceptible to autonomic dysreflexia, which is an abnormal, exaggerated response by the autonomic nervous system to stimuli which, in the ordinary course, would produce minimal reaction in a healthy body. Those stimuli are usually initiated by a distended bladder or bowel, but can be caused by any one of innumerable external agents - anything from a broken bone, a mosquito bite, an ingrown toenail, a bowel impaction or a loss of bowel or bladder control. The body responds by effectively shutting down the normal blood vessels, resulting in extremely high blood pressure or hypertension, throbbing headache, congestion of the nose, nausea, blurred vision and a very slow pulse. Hemorrhage into the brain and eye may occur. There is also a respiratory

component: when the Appellant has difficulty breathing his first inclination is to tilt his chair back but, in more difficult situations, it is necessary for him to lie down (although he must still ensure that his head is raised to an elevation higher than that of his heart) and his assistant on duty helps him with assisted coughing. Patently, the onset of autonomic dysreflexia, which can happen at any time, calls for immediate action.

In the Appellant's case, hypotension (a precipitous drop in blood pressure) may also occur, but this condition is normally manageable by tilting the postural angle of the chair.

Dr. Nance also testified that, if a quadriplegic is likely to be on a bed, unmoving, for more than about fifteen minutes, the protruding portions of the patient's body will start losing blood circulation and this, in turn, is likely to create pressure sores or skin ulcers of the type to which, S.J.F. testified, he is apparently prone.

The foregoing, clearly, does not purport to be an exhaustive list of the physical problems faced on a daily basis by S.J.F., but it at least touches upon the salient aspects of his condition relevant to this appeal.

ACADEMIC AND SOCIAL ACTIVITIES:

At the time of his accident, S.J.F., who has degree a in Geological Engineering, was working at a gold mine at [text deleted], Manitoba, as a geological engineer. On the day before his accident, he testified, he had received an excellent job offer from the [text deleted] in Ontario to work there as a

mine planner. Currently, and remarkably, he is enrolled in the Master of Business Administration program at the [text deleted] which he started in the fall of 1997. He participates fully in many professional and social activities on campus, is a student representative on the Senate of the University and plans to run for President of the [text deleted] Students' Union. He is also President of the [text deleted], a position whose duties he performs as best he can from his bedside.

S.J.F. was confined to the Health Sciences Centre in Winnipeg from the time of his accident until December of 1996 and now lives in an apartment with Self-Managed Care, to which MPIC contributes a portion of the funding. Needless to say, he requires 24 hour care.

S.J.F.'s parents live at what would ordinarily be called a reasonably short distance from his apartment, but a distance which, for S.J.F., would be insurmountable without effective transportation. That same transportation is required to transport him between his home and the campus of the University and, in general, to allow him to maintain a social and academic life to the maximum degree practicable. MPIC, in addition to paying him the maximum amount allowable for permanent disability, has continued to pay income replacement indemnity based upon his income at the time of his accident, has contributed, along with the Province of Manitoba, to the cost of home care and has equipped him with what may be referred to as a 'high tech' self-propelled wheel chair. The monthly funds payable by MPIC are indexed to the cost of living, pursuant to the MPIC Act. As noted below, MPIC has also paid for certain modifications to the van that S.J.F. needs in order to give him the mobility that he requires.

To quote a portion of S.J.F.'s own evidence:

The van has changed my life. For the first two years after my accident I was stuck at hospital or at my one-bedroom apartment.

I use the van for getting to school, of course, but also for 'networking' by attending a wide variety of events such as the Chamber of Commerce, the [text deleted] Senate meetings, a [text deleted] fund-raising dinner and so on.....I was able to check out the University of Minnesota MBA facilities; during the summer I was able to visit former classmates in positions of influence in Alberta. I could fly to places like that, but there is no vehicle available at the airport to take me where I need to go.

THE ISSUES:

S.J.F. seeks reimbursement or payment for six separate sets of costs: a 36 inch by 84 inch bed frame installed in his van; a Hoyer lift; a low-air-loss mattress; the difference between the cost of the extended, Ford Econoline van that he actually purchased and the cost of the medium-sized vehicle, such as a Chevrolet Cavalier 4-door sedan which, he testified, he would have purchased had he not been involved in his accident; the difference in operating expenses (including insurance) between those for which he currently pays and those that he would have paid by using a Cavalier vehicle; and certain additional items, primarily related to the interior of the van, that will be listed below.

THE LAW:

The relevant sections of the MPIC Act and Regulations to which we shall have reference are these:

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

and the following portions of Section 10 of Manitoba Regulation No. 40/94:

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (a) funds for an extraordinary cost required to adapt a motor vehicle for the use of the victim as a driver or passenger;.....
- (d) reimbursement of the victim at the sole discretion of the corporation for
 - (iii) medically required beds, equipment and accessories;.....
- (e) funds for occupational, educational or vocational rehabilitation that is consistent with the victim's occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence.

DISPOSITION:

The Bed:

We are satisfied that S.J.F. does, indeed, require a bed to be available to him at all times, including those times when he is traveling in his vehicle. S.J.F. is six feet three inches tall and the standard, moveable cot would be quite inadequate to accommodate him. We have been provided with evidence that a bed frame, 36 inches wide by 84 inches long has been purchased from Northland Health Care Products Limited at a price of \$600.00 plus tax, for which he is entitled to reimbursement. While MPIC's Medical Co-ordinator, Claims Services, expresses the views that respiratory distress and autonomic dysreflexia can be relieved by the use of the reclining wheelchair, we are persuaded that situations can arise - e.g. the need to change soiled clothing or the urgent

need for bowel disimpaction - in which the patient needs to be lying down.

We are satisfied that the provision of the bed frame is medically required and is therefore covered under Section 10(1)(d)(iii) of Regulation 40/94.

The Hoyer Lift:

It seems to be a matter of common accord between the medical consultants for both the Appellant and MPIC that, if S.J.F. requires a bed in his van it follows that he needs a Hoyer lift, since this is the only practical way in which he can be moved by another individual within the van from his wheelchair to the bed. The lift has already been purchased by S.J.F. and installed in the vehicle at a cost of \$2,500.00 plus tax (a total of \$2,850.00), for which he is also entitled to be reimbursed.

We find that the provision of the Hoyer lift falls squarely within the meaning of Section 10(1)(a) of Regulation 40/94, being an extraordinary cost required to adapt the van for the use of S.J.F. as a passenger.

The Mattress:

MPIC, recognizing at least the need for a low air loss mattress for S.J.F.'s use on a journey of any length, has offered to make one available to him on a rental basis at the Corporation's expense, given 24 hours' notice. With deference, we do not regard that proposal as practicable. Firstly, the Appellant's social and professional life does not always allow him the luxury of knowing, 24 hours

beforehand, of his need for such a mattress. Secondly, it would deny him the ability, when visiting with family or friends, to elect at the last minute to stay with them overnight. Thirdly, and most importantly of all, the clear evidence is that the need for the Appellant to make use of his bed and a mattress of this sort may arise at any time as a matter of emergency; a lengthy journey is not needed for its justification. Finally, availability on even 24 hours' notice cannot be guaranteed, particularly if the need arises on a Friday evening or Saturday morning and the supplier is not able to make delivery prior to the following Monday.

S.J.F. is entitled to an Acucair Continuous Airflow System mattress at the expense of the insurer.

This, too, falls within the ambit of Section 10(1)(d)(iii) of Regulation 40/94, being an 'accessory' to a medically required bed.

Partial Capital Cost of Vehicle:

MPIC has already paid the cost of modifying or extending the van purchased by S.J.F., not only by paying for the cost of installing a heater but, as well, the modifications required to accommodate S.J.F.'s wheelchair and the fact that his attendant must be able to stand upright inside the van when moving S.J.F. from the wheelchair to the bed. Those modifications included a 24-inch raised roof, raised doors, a basic cloth interior, three side windows, a rear heater and air-conditioner, a Ricon wheelchair lift and a Q-strait restraint, at a total cost of \$17,115.00. The Appellant seeks, as well, reimbursement for the capital expenditure that, he says, he necessarily incurred in purchasing his van at a cost of \$31,274.00, less the amount that he would have spent on a more modest vehicle, such as

a Chevrolet Cavalier, had his accident never happened. When challenged on his selection of a Cavalier as the basic model that he would normally have chosen, S.J.F. testified that, from the time when he started earning, he has always regarded a vehicle merely as a means of transportation from one place to another and has never been interested in the more expensive models, nor had he foreseen the need for a 4-wheel drive despite the more rugged terrain over which he might have been expected to drive as a geological engineer. We have no reason to doubt the principle embodied in his testimony, but we note that the Chevrolet Cavalier is the lowest priced of all of the compact-sized cars available on the North American market, at a list price of \$14,915.00. When making the comparison between what S.J.F. actually expended and what, on a reasonable balance of probabilities, he probably would have expended, we have taken the list prices of five of the most popular compact cars (excluding those in the higher price ranges) and have averaged those prices, as follows:

Chevrolet Cavalier	\$14,915.00
Ford Contour	18,395.00
Chrysler Avenger	18,630.00
Mazda 626	20,140.00
Nissan Altima	<u>19,398.00</u>
Total	\$91,478.00

Those list prices give us an average of \$18,295.00 which, when Goods and Services Tax and Provincial Sales Tax are added, gives an average, gross price of \$20,856.00. The difference between that and \$31,274.00 (being the actual amount paid by S.J.F. for his van, excluding the modifications already paid for by MPIC) is \$10,418.00. We find that the Appellant's acquisition and use of his van, modified as noted above, is essential for his occupational and educational rehabilitation, consistent with his occupation prior to his accident and his skills and abilities after that accident. As well, the

ownership and use of that vehicle is essential in order to improve his earning capacity and level of independence and we find that this aspect of his claim falls squarely within the intent of Section 10(1)(e) of Manitoba Regulation 40/94, entitling him to reimbursement of that \$10,418.00.

Vehicle Driving Costs:

By the same token, to the extent that S.J.F. is using his vehicle while pursuing his Master of Business Administration degree, or using his vehicle in the course of his eventual employment (including travel between his home and his place of work) we find that Section 10(1)(e) would also entitle him to recover from MPIC the difference between his ownership and operating costs related to his van and those same costs that would have been incurred had he purchased a vehicle at a gross capital cost of \$20,856.00. The only evidence in that context with which we have been provided was gleaned from a brochure published by the Canadian Automobile Association, entitled "1998 Driving Costs" and the unchallenged evidence in that regard was that the driving costs per kilometer of a full-sized van such as that owned by S.J.F. amounts to \$0.578 per kilometer, whereas the driving costs of a Cavalier vehicle total \$0.381 per kilometer. While there is a slight difference of some \$45.00 between the insurance premium attributable to a Cavalier and the premium for a Ford Contour, the aggregate operating costs of the Cavalier and a vehicle with a list price of \$18,395.00 are not far apart when spread over an entire year. S.J.F.'s counsel tendered a calculation based upon an assumption of 18,000 kilometers of driving per year; no oral testimony was offered in that regard, either directly or on cross-examination. We are of the view that it is highly unlikely that S.J.F. would travel a distance of 18,000 kilometers per year in his van for the purposes contemplated by Section 10(1)(e) and that a distance of 10,000 kilometers, at the most, is a more reasonable

probability. Upon that basis, and using the criteria adopted by CAA, the operating and ownership costs applicable to S.J.F.'s van would amount to \$5,780.00 per annum, compared to \$3,810.00 that would have been applicable to the smaller vehicle - a difference of \$1,970.00 per annum, or \$164.17 per month. However, we shall remain seized of this aspect of S.J.F.'s appeal for 30 days from the date of mailing these Reasons, to give the parties an opportunity to make further representations as to the quantum allowable under this head, should either of them disagree with our calculation which, of necessity, has been based upon our own estimate.

Automotive Accessories

S.J.F. is also claiming a number of additional items by way of modifications to or accessories for his van. These were all purchased from Northland Healthcare Products Limited. Some of those items are, in our view, covered by the language of Section 10(1)(a), being "extraordinary costs required to adapt a motor vehicle for the use of the victim as a passenger"; others are not.

We find that the following items, which have already been installed in S.J.F.'s van at the costs noted below, do qualify under Section 10(1)(a) of the Regulation, entitling him to reimbursement:

Upgrade to no-slip floor	\$350.00
110 volt electrical system	235.00
10-foot portable ramps	650.00
Shoulder harness	70.00
Extra strap tie-down for wheelchair	35.00
Extra curtain across cab for privacy	100.00
Extra bracket for ramps	70.00
Move safety strap on lift handles	70.00

GST	110.60
PST	<u>110.60</u>
Total	\$1,801.20

(The portable ramps referred to above, along with the extra bracket to accommodate them, are needed for emergency use against the possibility that the existing mechanism for raising and lowering the wheelchair between the floor of the van and the ground outside might fail.)

Those items claimed, but which we find do not qualify for reimbursement, are these:

Roof windows	\$360.00
Cab carpet, head liner front seat covering, visors	1,000.00
Removable rear bench complete with shoulder belts	1,240.00
Extra seat guards - rear of buckets	<u>70.00</u>
Total	\$2,670.00 (plus GST and PST)

While each of the items last listed above may be desirable, they are not, in our view, medically necessary nor required to fit the vehicle for S.J.F.'s use nor for his greater safety.

There was one other item on the list of accessories for which S.J.F. sought reimbursement, namely a 17,000 BTU propane heater with tank, costing \$1,463.00 plus taxes, but MPIC has already undertaken to pay that, upon the recommendation of its consultant, Dr. Sommer.

Of the foregoing items, we find that the Appellant is entitled to interest at the statutory rate on the \$10,418.00 partial capital cost of his van from June 5th, 1997, (the date of its delivery) to the date of actual payment to him by MPIC.

With respect to the bed, mattress, Hoyer lift and the items totalling \$1,801.20 under the sub-heading 'Automotive Accessories', we are of the view that their medical necessity did not become fully apparent until the evidence of Dr. Nance had been adduced. The purchase of each of those had not been wrongfully withheld by MPIC and, therefore, should not bear interest unless payment is delayed unduly following delivery of these Reasons. In the latter event we would be prepared to hear counsel on the point and shall retain jurisdiction for that limited purpose also.

The decisions of MPIC's Internal Review Officer is therefore rescinded and the foregoing substituted for it.

Dated at Winnipeg this 27th day of November 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED