

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by A. J.  
AICAC File No.: AC-06-128**

**PANEL:** Ms Laura Diamond, Chairperson

**APPEARANCES:** The Appellant, A. J., appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

**HEARING DATE:** November 5, 2007

**ISSUE(S):** Entitlement to reimbursement for Personal Care Assistance for November 2, 2007 to November 8, 2005

**RELEVANT SECTIONS:** Section 131 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 2 of Manitoba Regulation 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**

The Appellant was injured in a motor vehicle accident on September 18, 2000. As a result of the accident, she sustained injuries involving her jaw, neck and back. These injuries necessitated four (4) separate temporomandibular joint (TMJ) surgeries.

For the first three (3) surgeries, the Appellant was in receipt of IRI benefits, and personal and child care expenses. However, MPIC indicated that there was no indication on her file that her qualification for personal care assistance benefits was ever assessed prior to the reimbursement

of those expenses. In spite of this, she was indemnified for both personal care assistance and child care expenses for those three (3) surgeries.

When the Appellant needed surgery again, in November of 2005, she was denied compensation for expenses for personal care assistance and child care.

On May 15, 2006, an Internal Review Officer for MPIC reviewed the Appellant's claim. She found that the Appellant was entitled to receive reimbursement for child care costs for the period from November 2 to November 8, 2005, when she was recuperating from her surgery.

However, the Internal Review Officer noted that a personal care assistance assessment of her post-operative functional restrictions and independence had not been initiated. She noted that the Appellant's medical file and personal care assistance expense submission had been reviewed by two (2) members of MPIC's Health Care Services Team, including occupational therapist, Janet Kumka, and medical director, Dr. Neil Craton.

. . . Given the natural history of arthroscopic TMJ surgery, the consultants took into account the symptoms that you may have experienced following the procedure including facial swelling, pain and eardrum sensitivity. This may have resulted in limitations with tasks involving repetitive lifting as well as lower level functions (i.e. cleaning the bath tub).

- |                      |          |
|----------------------|----------|
| • Heavy Housekeeping | 3 Points |
| • Light Housekeeping | 3 Points |
| • Laundry            | 1 Point  |

If a PCA assessment took had been completed subsequent to your surgical procedure of November 2, 2005, in all likelihood, it would have resulted in a score of 7 points. This conclusion is based on the available information on your file, and supported by our Health Care Services consulting opinions.

Since a minimum assessment tool score of “9” is required in order to qualify for entitlement to personal care expenses, the Internal Review Officer found that the Appellant did not qualify for such a benefit.

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 at the hearing into her appeal. She indicated that she had the exact same surgery three (3) times before, and each time, she had been given personal care assistance benefits. She indicated that she followed the same procedure at the time of her previous surgeries, and did so again in 2005.

Before her surgery in November 2005, the Appellant testified that she called her new case manager a few times but was unable to reach him. Finally, she left him a message indicating that she was having another surgery and asking him to advise her if anything had changed. She advised that if there was any new paperwork she needed to sign, to just please mail them to her or to leave her a message. She indicated that in this way, she followed the same procedure that she had followed for her previous three (3) surgeries.

As the Appellant did not hear anything further from her case manager or receive any new paperwork, she assumed that everything would be the same as it had been for her previous surgeries.

The Appellant testified that for her surgery, she underwent a general anesthetic. Her husband took her home and left her with her mother, as he had to go to work. Her mother helped with

caring for the children. Her mother also provided the supervision for the Appellant which the hospital had indicated was necessary during the twenty-four (24) hour period following surgery. She indicated that she believed that the hospital would not have released her without someone to watch over her in this way.

The Appellant also testified that her mother helped her in getting to the washroom, helped provide her with and change her ice packs for both sides of her face, and gave her her medication. The Appellant testified that she was feeling nauseas after the surgery, and taking two Tylenol 3's every four (4) hours, which caused her to be disoriented.

The Appellant testified that she had never had a personal care assessment done in the past, and was surprised when she learned of the requirement for it. She indicated that if her case manager had told her that she was supposed to undergo a personal care assistance assessment, she would have been happy to comply. She wondered why her case manager had not looked in her file to see that she had received personal care assistance for her previous surgeries. Then, she submitted, it would have been a simple matter for her to allow someone to attend at her house to perform an assessment in this instance.

The Appellant submitted that she required personal care assistance and would have complied with the request for an assessment had MPIC requested it.

#### **Submission for MPIC**

Counsel for MPIC indicated that although no personal care assistance assessment had been performed at the time, MPIC's Health Care Services Team attempted to reconstruct the situation,

and following this reconstruction the Appellant received a score of 7/89. This falls short of the 9 (nine) points required to qualify for personal care assistance benefits.

Counsel admitted that MPIC had not provided any evidence of this score of 7/89, as the reports of Ms Kumka and Mr. Craton were not on the Appellant's indexed file and were not filed by counsel for MPIC at any point prior to or during the appeal hearing. However, she submitted, that in spite of this, the Commission should accept the assertion of Ms Goertzen in her Internal Review decision that these assessments existed and were correct.

In any event, counsel submitted that even if the Commission were to find that the Appellant was entitled to personal care assistance benefits, according to the evidence of the Appellant, she really only needed this assistance for the twenty-four (24) hour period following the surgery and not for the entire period of November 2 to November 8, 2005, as claimed.

### Discussion

Section 131 of the MPIC Act provides:

#### **Reimbursement of personal assistance expenses**

**131** Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

Manitoba Regulation 40/94 provides:

### **PERSONAL HOME ASSISTANCE EXPENSES**

#### **Definition**

**2(1)** In this section, “**personal care assistance**” means assistance with an activity where

- (a) the activity is described in Schedule C and, in accordance with that Schedule,
  - (i) it applies to the victim,
  - (ii) it is appropriate for the victim's age, and
  - (iii) the victim had the capacity to perform it at the time of the accident; and
- (b) the assistance

- (i) is provided directly to and solely for the benefit of a victim, and
- (ii) has been evaluated in accordance with Schedule C.

**Interpretation – section 131 of the Act**

**2(2)** For the purposes of section 131 of the Act, qualifying personal care assistance is personal home assistance.

The onus is on the Appellant to show, on a balance of probabilities, that she was unable, because of the accident, to care for herself or to perform the essential activities of everyday life without assistance.

The regulations provide that the corporation shall reimburse a victim for such expenses if the personal care assistance meets the minimum score prescribed in the schedule.

However, MPIC failed to undertake or request that the Appellant undergo a personal care assistance assessment. The Corporation has not provided any evidence regarding the Appellant's need for personal assistance.

Although counsel for MPIC has submitted that the Commission should accept Ms Goertzen's assertion of the health care consultant's "fictionalized", after-the-fact assessment of the Appellant's needs, there is no evidence of this assessment before the Commission. We were not provided with either Ms Kumka's or Mr. Craton's reports, and so, the Commission is not able to assess their value or weight in this matter.

On the other hand, the Appellant has provided evidence of her condition following her surgery, and the assistance that she required as a result. In the absence of any evidence submitted by MPIC on this point, the Commission is of the view that the Appellant has met the onus upon her

of showing that she required personal home assistance as she was unable, because of the accident, to care for herself or to perform the essential activities of everyday life without assistance.

Accordingly, the Commission concludes that the Appellant is entitled to personal care assistance benefits for the twenty-four (24) hour period following her return from the hospital on November 2, 2005. Accordingly, the Internal Review decision of May 15, 2006 is hereby rescinded and the foregoing substituted therefore. The Appellant will be entitled to personal care assistance benefits for the twenty-four (24) hour period following November 2, 2005, together with interest thereon.

Dated at Winnipeg this 27<sup>th</sup> day of November, 2007.

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**LAURA DIAMOND**