Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-69

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Ms. Yvonne Tavares** **Ms. Deborah Stewart**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') was represented by Keith Addison;** **the Appellant, [text deleted], appeared on her own behalf, accompanied by her husband, [text deleted]**
HEARING DATE:	**August 21st, 2000**
ISSUE(S):	**(i) whether Appellant entitled to continued personal care assistance;** **(ii) permanent impairment benefit—whether correct amount awarded.**
RELEVANT SECTIONS:	**Sections 127 and 131 of the MPIC Act and Schedule A to Manitoba Regulation No. 41/94**

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 the victim of a motor vehicle accident on March 24th, 1996, in which she sustained a 20% compression fracture to the anterior aspect of her T12 vertebra, as well as extensive soft tissue injuries, primarily in the lumbosacral region, with aggravation of pre-existing degenerative disease. In this latter context, [the Appellant] had generalized osteoporosis and a degenerative spondylolisthesis at the L4-5 level of her spine.

[The Appellant] was involved in a second accident on December 19th, 1996, which, while fortunately not too serious, does appear to have caused some additional, soft tissue symptoms involving her right shoulder. [The Appellant] was involved in yet another motor vehicle accident on November 3rd, 1998, when, as in the second accident, the [text deleted] family car in which she was a passenger was rear-ended. Although there were no objective signs of any further deterioration in [the Appellant's] musculoskeletal condition as a result of that third accident, her evidence was that she suffered severe pain at the time and was obliged to take to her bed again.

It should, perhaps, be noted at this point that [the Appellant] also underwent a left total knee arthroplasty on October 15, 1998, having already undergone a right total knee arthroplasty for osteoarthritis of the right knee in September of 1992. Both those procedures were performed by [text deleted], an orthopedic surgeon.

The cost of repairing the [text deleted] vehicle after the accident of December 1996, including labour and taxes, was $401.83; the cost of repairing the damage from the November 1998 accident was $611.

It seems clear from the evidence that, for at least the first year or more following her initial accident, [the Appellant] spent about 18 hours out of every 24-hour period in bed.

Even by the time of the hearing of her appeal, [the Appellant] and her husband testified that she still needs his assistance in putting on her shoes and socks, that she feels unable to do housework

or to cook, apart from warming up frozen food that one of the out-of-town members of her family has already prepared for them.

MPIC provided [the Appellant] with Home Care assistance from the time of her first accident until December 14th, 1998, at which point [the Appellant] and her husband travelled to California to spend a month with their daughter. The case manager at MPIC having charge of [the Appellant's] claim advised her that, at that point, the provision of Home Care assistance would cease since, in the view of MPIC's Medical Services Department, her condition no longer appeared to be causally related to any of her accidents.

We have carefully considered the numerous medical and paramedical reports and opinions made available to us in connection with [the Appellant's] claim. For the reasons noted below, we do not believe that any useful purpose can be served by an analysis of those reports and opinions.

In the normal course, the first issue that we would have to address is whether [the Appellant's] present condition may, on a reasonable balance of probabilities, be ascribed to one or more of the motor vehicle accidents briefly noted above. Were we to answer that question in the affirmative, then we would need to consider compensation in one or more of the following forms:

(i) an award for permanent impairment. This has already been calculated and paid to [the Appellant], in the sum of $2,082.76. That calculation was made and the award paid to [the Appellant] pursuant to the provisions of Manitoba Regulation No. 41/94 and, more particularly, under Part 1, Division 1, Subdivision 3, Section 20 of Schedule A to that regulation. This Commission has no power to vary the provisions of that Regulation; our views as to the sufficiency of that award are not relevant. There is no evidence before us

of any other form of permanent impairment sustained by [the Appellant] in any one or more of her accidents that would give rise to a further, lump sum award.

(ii) a referral of [the Appellant] for physiotherapy. [The Appellant] herself, strongly supported by [Appellant's doctor], insists that physiotherapy would be of little, if any, practical value in restoring her functional capacity. That view seems to be shared by [text deleted], medical consultant to MPIC's Claims Services Department.

(iii) Since the prime causes of [the Appellant's] functional incapacity are her ongoing pain and her own perception of permanent disability, in the normal course a referral to the [text deleted] would be another option, particularly if accompanied by some counselling sessions from a clinical psychologist experienced in the field of pain management. [The Appellant] firmly refuses any therapy of those kinds. She is supported in that position by her husband.

(iv) reinstatement of her Home Care assistance. This, given a probable chain of causation, would have been another, logical method whereby we might have been able to assist [the Appellant]. The Commission explained to [the Appellant] and to her husband that this would entail three steps: firstly, an occupational therapist would need to attend at their home in order to complete a personal assistance expenses worksheet, consisting of two grids. In those grids, numbers are assigned to a series of personal and domestic activities, depending on whether the claimant is completely dependent, partly dependent or not dependent at all upon the assistance of others. [Appellant's husband] and [the Appellant] are familiar with that system, since [the Appellant] has been assessed on at least two earlier occasions in order to qualify for Home Care assistance; secondly, the total qualifying expenses would be calculated as a fraction of $3,000, the numerator being the total 'score' taken from the two grids, and the denominator being 51; thirdly, MPIC would then reimburse [the Appellant] to a maximum of the resultant total, for

> expenses that she might incur for personal care and home assistance. This is the system that was followed until December of 1998 and with which, therefore, both [Appellant's husband] and [the Appellant] are fully familiar.
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> However, [the Appellant] adamantly refuses any assistance of that kind. [Appellant's husband], speaking on behalf of his wife, said "Anything that makes my wife dependent upon the receipt of a monthly payment from Autopac should be totally ruled out". Upon being asked by the Commission whether this was also her own view, [the Appellant] made it very clear that she was in full agreement with that statement. To be dependent on monthly payments of that kind, she said, would result in her becoming "enslaved" and this was something which, [text deleted], she was simply not prepared to do.
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> The Commission asked [the Appellant] just what form of remedy she was seeking. She replied that she was simply seeking "justice". When asked just what form she felt justice should take, the response that we were given was to the effect that we should be ordering MPIC to pay such large, lump sum of cash to the Appellant as would enable her to make her own plans and hire such domestic assistance as, in her own unfettered discretion, she might from time to time require. The Commission has explained to [Appellant's husband] and [the Appellant] that we have no such mandate and that, by refusing any of the possible courses of action that are open to us, she would effectively be tying the Commission's hands. That advice appeared to be acceptable to [Appellant's husband] and [the Appellant], in the sense that it did not cause them to re-think their position.

Where does this leave us, then? [The Appellant] tells us that she cannot even get out of bed without discomfort, that she needs at least some minimal help in putting on her shoes and socks,

that her husband does all of the laundry and prepares all of the meals because she can neither bend down to get pots and pans out of lower cupboards nor reach up to get plates and other equipment from cupboards above shoulder level, and that the only in-home care she has received since her personal care assistance was discontinued by MPIC has been from occasional family visits; her family all live out of town. She testifies that [Appellant's husband], who is now [text deleted] years of age, does what little shopping is needed and that the only cooked food they eat is prepared by members of her family in Ontario or California in bulk, frozen and shipped in to the Appellant's home where it is placed in their freezer until needed; [Appellant's husband] brings the frozen food up from the basement in order to place it in the oven (which she cannot open) or in a microwave. As [Appellant's doctor] expresses it:

> [The Appellant] suffered an injury which we would not have expected to cause as much disability as it has. However, her pre-existing diseases have remained stable during this period of time and were asymptomatic prior to the accident in 1996. Since that accident she has remained in pain and has developed a chronic pain syndrome. She may indeed exhibit chronic pain behavior but that is a direct result of the pain incurred around the time of the accident and that which has persisted since then…..In summary, there we have it. A person who was 100% functional prior to the accident, has an accident, has intractable pain, and becomes non-functional…..I have no doubt that at least 92% of patients would have had a better outcome from this type of injury than [the Appellant] did, but unfortunately she did not.

The difficulty facing this Commission is that, even given everything that [Appellant's doctor] says and accepting all of the factual evidence to which [the Appellant] herself testified, the Appellant in this case steadfastly refuses to accept any of the forms of assistance that are within the power of this Commission to give her. The only form of 'justice', or benefit, that [the Appellant] says she is prepared to accept is a lump sum that she may then use for domestic purposes at her own discretion. Since none of the statutory remedies available to us is acceptable to [Appellant's husband] and [the Appellant], who speak in unison on the subject, the result is to leave this Commission with no path of assistance along which we may walk. We are, therefore, obliged to dismiss her appeal.

Dated at Winnipeg this 29th day of August, 2000.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

DEBORAH STEWART