

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-48**

PANEL: Ms. Yvonne Tavares, Chairperson
Mr. Wilson MacLennan
Mr. Les Cox

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's representatives]; Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Keith Addison.

HEARING DATES: July 31 & August 1, 2001

ISSUES: Entitlement to Personal Care Assistance Benefits;

RELEVANT SECTIONS: Section 131 of *The Manitoba Public Insurance Act* ("the MPIC Act") and Section 2 and Schedule A of Regulation 40/94 of the MPIC Act.

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 Issue:

On December 5, 1995, the Appellant, [text deleted], was a passenger in a vehicle, which rear-ended a third party. As a result of the accident, [the Appellant] sustained soft-tissue myofascial injuries which led to a decline in her functional abilities. Pursuant to Section 131 of the MPIC Act, the Appellant qualified for reimbursement of personal assistance expenses, in accordance with the regulations to the MPIC Act. Effective June 30, 1999, MPIC terminated [the

Appellant]'s entitlement to reimbursement of personal care expenses on the basis that there was insufficient evidence to support a probable/causal relationship between her ongoing complaints of pain and decreased function to the motor vehicle accident of December 5, 1995.

[The Appellant] appealed the Claims decision to the Internal Review Office. In his decision dated March 27, 2000, the Internal Review Officer confirmed the earlier Claims decision on the basis that the Appellant's ongoing need for personal assistance/home care expenses was due to her pre-existing condition. The Appellant is now appealing the termination of the personal assistance benefits in accordance with the Internal Review decision of March 27, 2000.

The issue, which therefore requires determination in [the Appellant's] appeal, is whether or not [the Appellant] was unable, because of the injuries she sustained in the motor vehicle accident of December 5, 1995, to care for herself or to perform the essential activities of everyday life without assistance, beyond June 30, 1999.

The Law:

Section 131 of the MPIC Act provides that:

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.

Section 2 of Regulation 40/94 to the MPIC Act provides that:

Reimbursement of personal home assistance under Schedule A

2 Subject to the maximum amount set under section 131 of the Act, where a victim incurs an expense for personal home assistance that is not covered

under *The Health Services Insurance Act* or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

Schedule A to Regulation 40/94 sets out grids for evaluation of personal care assistance and home assistance. The points obtained on each grid are added together to obtain a total. The total score corresponds to a percentage. The amount of qualifying expenses for each victim is equal to the percentage applied against the maximum amount prescribed by section 131 of the Act.

Background:

At the time of the hearing before the Commission, [the Appellant] was [text deleted] years old, married, with one child. She had completed Grade 12 and had also completed three courses of the [text deleted] Program at [text deleted], before putting her studies on hold. Prior to the motor vehicle accident, [the Appellant] had functional challenges caused by her significant pre-existing medical conditions. She had been diagnosed as having [text deleted]. In addition to this debilitating progressive disease, she also has pre-existing asthma, migraine and seizure disorder.

In his medical report dated May 30, 1996, [text deleted], the Appellant's general practitioner and primary caregiver since 1988, commented on the Appellant's condition as follows:

[The Appellant] has been followed by myself regularly since her motor vehicle accident of the 5th of December, 1995. During the course of same she suffered with a diffuse right-sided myofascial strain to the cervical, thoracic and lumbar regions. She also suffered with contusions to the right hip, knee, and ankle regions.

...

Since the time of her initial injury [the Appellant's] overall condition has improved. As of her last visit with myself on April 30, 1996 she was suffering with much less in the way of myofascial pain. Her range of motion had returned to pre-accident levels, however there was some ongoing concerns with regards to persistent weakness.

I would note that [the Appellant] has an extremely complicated past medical history. She suffers with [text deleted], and has been confined to a wheelchair since approximately the age of [text deleted]. She has a significant sensory and motor disturbance to her lower limbs, with numbness, paresthesias, and muscular

weakness. She also suffers with reduced dexterity to the lower limbs because of same. There is as well recently evidence of upper limb weakness at the elbows, wrists and hands. She has suffered with ongoing chronic fatigue which she does feel has been worse since the time of her accident. [The Appellant] is also noted to suffer with a seizure disorder, migraine headaches, chronic severe asthma, and intermittent muscle spasms [text deleted].

...
[The Appellant] feels that her pre-existing muscular weakness secondary to the [text deleted] has been exacerbated, and this may well be true, however it is difficult to precisely measure exactly how much progression there has been as a result specifically of the accident. This is secondary to the factors that this disease process is progressive on its own and as well due to the fact that, as noted by her therapist, [the Appellant's] functional status does fluctuate quite significantly on a day to day basis, depending on whether or not any of her concomitant diseases are flaring up or whether or not she has an upper respiratory tract infection. When she is unwell from these other features her functional levels will be much worse than when she is feeling better.

I do think overall that her medical condition has generally deteriorated somewhat more rapidly since December of 1995 and I have had increased difficulties in controlling her ongoing symptomatology. In view of this, she was referred to [Appellant's neurologist #1] of the Department of Neurology for a review of her [text deleted] and she was as well referred to [Appellant's neurologist #2] of Neurology for a review of her seizure disorder.

After his consultation with [the Appellant], [Appellant's neurologist #1] noted in his report of March 21, 1996 to [Appellant's doctor] that:

The pertinent management issues in this patient are in the realm of supportive physical medicine measures, and pain management. As regards the former, she tells me that she has had one brief rehabilitation medicine consultation, however, I would think that ongoing follow-up in this regard would be desirable, and I will be referring the patient to [Appellant's rehab medicine specialist]. As regards pain management, the symptoms of pain in some patients with [text deleted] is certainly well-described, and I would think this patient would be best assisted in this regard by the comprehensive services available through the [text deleted] clinic. At her request, I will be making arrangements in this regard.

Upon the referral by [Appellant's neurologist #1] to the [text deleted] clinic at [hospital], the Appellant was seen by [Appellant's pain management specialist] who prescribed MS Contin (slow release morphine) for the Appellant for pain control.

In response to a letter from [text deleted], a rehabilitation consultant who had been hired to work with [the Appellant], [Appellant's doctor] provided a report on September 10, 1996. In his report, [Appellant's doctor] notes the following:

Prior to [the Appellant's] motor vehicle accident in December of 1995 she was able to transfer on an independent basis fairly consistently. At present she appears to require consistently a one person assist with transferring. She has ongoing difficulties with seating in her wheelchair, which previously were not present. She has difficulties in handling her young child due to a significant increase in muscular weakness. [The Appellant] suffers with a significantly increased amount of diffuse pain in her muscles and joints, such that she is now on MS-Contin (slow release morphine) 60 mg. in the morning and 90 mg. in the evening. She is extremely depressed with regards to the deterioration in her overall condition and is on a course of Prozac 60 mg. daily.

I would note that in my previous correspondence to yourself dated May 30, 1996, I felt that her overall condition had improved. This improvement was minimal and temporary, as in June of 1996, we saw progressive significant deterioration proceed. I noted that I was concerned with ongoing persistent weakness and although I could not precisely measure how much progression there had been as a result of the motor vehicle accident I did feel that this was an ongoing concern. I also noted that I felt that her ongoing medical condition had deteriorated somewhat more rapidly since her motor vehicle accident of December of 1995.

In his report of October 30, 1996, [Appellant's neurologist #1] commented on the nature of the Appellant's [text deleted] disorder as follows:

[Text deleted] disorders such as [text deleted] tend to follow a variable course in different patients, with some patients being relatively severely affected at a relatively early age – as is [the Appellant] – and other patients being considerably more mildly affected until relatively advanced ages. The pattern of involvement, for example in the balance of sensory vs. motor affectation, may be quite variable. Although deterioration generally tends to occur in a chronic, progressive fashion, episodes of greater, step-wise deterioration may occur, either spontaneously, or in relation to specific provocations. Such provocations may include trauma, and other significant intercurrent illnesses... Sometimes the step-wise deteriorations may evidently also be a consequence of the intercurrent illness, or of the deficits consequent on the trauma sustained. In this fashion, peripheral nerves of patients with [text deleted] subject to defined trauma clearly show significantly less recovery than do those of normal individuals, and this is felt to be a direct consequence of the reduced capacity for repairs/regeneration of the nerves in these patients. Except in the latter contexts, specific bases for apparent excessive deteriorations in patients with [text deleted] subject to acute traumas have not been identified.

[The Appellant's] condition continued to be monitored over the next two years by her various caregivers. She was admitted to hospital on several occasions, suffering from pneumonia, upper respiratory tract infections, urinary tract infections, lacerations and contusions resulting from injuries sustained during her seizures, and various other related difficulties. Throughout this time, she was continually assessed by her family doctor, [text deleted], and periodically referred to several specialists for consultations regarding various medical difficulties which she experienced, none of which appeared to be directly related to her motor vehicle accident.

In October, 1998, [the Appellant's] file was referred to [text deleted], one of MPIC's medical consultants. His Inter-Departmental Memorandum, bearing date January 12, 1999, carefully reviews her entire history and concludes that:

Therefore, based on the current medical information available on file, and with a reasonable degree of medical certainty, it appears that there is insufficient evidence to support a probable causal relationship between the claimant's current complaints of pain and decreased function and the motor vehicle accident of December 5, 1995. It would appear that the claimant did initially sustain some soft tissue injuries, which temporarily led to a decline in function likely due to pain experienced with movement. This may have led to some disuse atrophy or weakness. However, the file indicates that there (*sic*) a subsequent improvement in function has been recorded consistent with the resolution of soft tissue injuries and improved Personal Assistance Expenses Worksheet Grid scores. There are periods of fluctuating deterioration in function noted remote from the motor vehicle accident that are more likely related to causes other than the motor vehicle accident in question.

Based on [MPIC's doctor's] report, the Case Manager wrote to the Appellant on May 20, 1999, to inform her that effective June 30, 1999, she would no longer qualify for reimbursement of personal assistance/home assistance expenses. [The Appellant] appealed from that decision to MPIC's Internal Review Officer [text deleted]. [MPIC's Internal Review Officer], in addition to reviewing the entire MPIC file including all of the material partly summarized above, wrote to [Appellant's doctor] requesting an updated medical report.

In his report dated November 2, 1999, [Appellant's doctor] comments that:

There is no doubt that with [the Appellant's] underlying diagnosis of [text deleted] that her condition would have progressively worsened over time even if she had not been involved in the motor vehicle accident. My personal contention and impression is that her condition did worsen at an escalated rate as a result of her motor vehicle accident and she required significant amounts of increased medication and help to maintain her usual level of functioning. I feel [MPIC's doctor's] report is inaccurate and somewhat biased against [the Appellant], given that he has used [text deleted] assessment of [the Appellant] as a baseline. Unfortunately, this baseline is not very accurate as [the Appellant], in August of 1995, was medically unstable. There is also no doubt that [the Appellant's] functional status fluctuated quite widely given any other concomitant problems which might come up, such as respiratory tract infections, viral infections, asthma exacerbations, or migraine headaches. Overall, however, her usual level of functioning in the fall of 1995 was one of reasonable independence with standby family assists, and she was attending school. This clearly was not the case shortly after her motor vehicle accident and she never has recovered to that pre-existing level of function since her motor vehicle accident. The questions of her multiple medications that she is on and whether or not these are called for and whether or not there is drug interactions are all valid. However, I would note that she has ended up on multiple medications due to increased pain that she has suffered with as a result of this motor vehicle accident.

Upon receipt of [Appellant's doctor's] medical report, [MPIC's Internal Review Officer] again referred the file to [MPIC's doctor] in order to indicate whether there was any change in his opinion previously stated. In his report dated December 10, 1999, [MPIC's doctor] concludes that:

In order to attribute the latter deterioration to her motor vehicle collision-related injuries, one would have to quantify the nature of the injuries sustained and account for their failure to heal as of the time of her deterioration in the spring/summer 1996. The types of injuries sustained by the claimant appear to be soft tissue. By functional parameters, these appeared to heal with improved range of motion, decreased pain, and improved independence in self care. It remains unclear, however, how this motor vehicle collision-related condition re-emerged in the spring/summer of 1996 to lead to an ongoing decline in function and increase in symptoms.

Therefore, in summary, and based on the current medical evidence available to me at the time of the preparation of this report, and with a reasonable degree of medical certainty, it appears that the claimant

returned to her baseline level of function as of April, 1996. Her later deterioration, although attributed to the motor vehicle collision, has not been objectively clarified to link it on a probable causal basis to the date of loss. Given the claimant's prior history of intermittent declines in level of function, her previous history of chronic pain, the declining scope of her condition, and her functional improvement in April 1996, it is improbable that the decline subsequent to April 1996 is causally related to the date of loss.

[MPIC's Internal Review Officer] also reviewed the Appellant's pre-accident records from [text deleted] and her entire file from [text deleted] ([Appellant's doctor's] office). This additional material was also provided to [MPIC's doctor] for his review and comment. According to [MPIC's doctor], the additional information gave a chronological history of the claimant's progress from 1987 to-date depicting a slow and gradual functional decline in the years leading up to the motor vehicle collision. He also noted that during this time there were concerns expressed about the development of chronic pain as well as a seizure disorder. None of this additional material changed [MPIC's doctor's] previous opinions.

Taking into account all of the foregoing material, [MPIC's Internal Review Officer] formed the conclusion that based upon the clinical information in the Appellant's file, the payment of personal assistance/home care expenses up until June 30, 1999 adequately compensated her for any step-wise deterioration that may have been attributable to the injuries arising out of the motor vehicle accident. In his opinion, it had not been established that the need for personal assistance/home care expenses beyond that date was attributable to injuries caused by the motor vehicle accident in question. [MPIC's Internal Review Officer] therefore confirmed the decision of the Case Manager terminating reimbursement of personal assistance expenses to the Appellant as of June 30, 1999.

[The Appellant] appealed to this Commission from [MPIC's Internal Review Officer's] decision, by way of a notice bearing date June 7, 2000.

Submissions on behalf of the Appellant:

Counsel for the Appellant, [text deleted], argued that [the Appellant] still requires personal care assistance and home care assistance as a result of the motor vehicle accident. She submits that [the Appellant] was residing with her common law husband and looking after her child and functioning at a reasonable level prior to her motor vehicle accident. Since December of 1995, she has required increasing support with all of her activities of daily living. Her functional status, as clearly documented by her therapists and caregivers, who have followed her for a long time, has deteriorated dramatically since the motor vehicle accident.

In support of her position, counsel for the Appellant referred to [Appellant's doctor's] *vive voce* evidence at the hearing. [Appellant's doctor] testified that [the Appellant's] inability to perform the essential activities of daily life were substantially as a result of the increased pain that she has suffered with subsequent to the motor vehicle accident. The increased pain in turn required an increase in medications - [the Appellant] was previously on anti-inflammatory and analgesic medications and her pain was well controlled with same. Since December 1995, these have no longer been effective and she now requires large doses of morphine as well as anti-depressant medication (Prozac) to help control her symptomatology. These increased medications have lead to a further decrease in the Appellant's functional status.

Further, counsel submitted that the Appellant's pre-existing condition, [text deleted], may or may not deteriorate if there is trauma – none of the medical experts can say for certain what the effect of the trauma would be in [the Appellant's] situation. [Appellant's doctor], the Appellant's

primary caregiver both pre- and post-accident, thought it unlikely that she would be at the level that she is at today had she not been involved in the motor vehicle accident of December 5, 1995.

Submissions on behalf of MPIC:

Counsel for MPIC, Mr. Addison, submitted that the Appellant's present inability to take care of herself is attributable to the progressive nature of her underlying [text deleted]. He argued that the injuries sustained by the Appellant in the motor vehicle accident actually had no effect on the Appellant's pre-existing disease and did not accelerate the disease. He explained that [text deleted] is a disease marked by a wasting of the muscles of the legs and arms, which results in a slow progressive weakness in the feet and hands. It is due to a degeneration of the nerves supplying the muscles, rather than a degeneration of the muscle. As [Appellant's doctor] had testified on cross-examination, the motor vehicle accident did not enhance or worsen the [text deleted], as there was no direct trauma to the nerve endings.

Counsel for MPIC further argued that there are additional factors, other than the motor vehicle accident, that have contributed to the Appellant's current functional decline: her severe asthma, migraines, and seizures have all had a significant impact on her functional ability. The severe seizures that the Appellant experiences are far worse than any injury she had from the motor vehicle accident, submitted Mr. Addison, and are the chief requirement for her ongoing supervision. He further noted that the Appellant's referral to the [text deleted] clinic at the [hospital] was due to the [text deleted]. This referral to the [text deleted] clinic led to her being prescribed morphine to deal with her pain levels, and therefore, her current inability to function because of the side effects of the morphine, is directly attributable to her [text deleted] disorder.

Lastly, Mr. Addison reiterated that [text deleted] is a progressive disease that was not accelerated by the motor vehicle accident and accordingly, the Appellant would sooner or later be in the position that she currently is in, whether or not she had been involved in a motor vehicle accident. Mr. Addison submits that the reimbursement of [the Appellant's] personal care assistance expenses for three and a half years, more than adequately compensated [the Appellant] for any step-wise deterioration that may have resulted from the trauma of the motor vehicle accident.

Disposition:

In order to qualify for reimbursement of personal care assistance expenses pursuant to section 131 of the MPIC Act, [the Appellant] must establish that she is unable to care for herself or to perform the essential activities of everyday life without assistance, and that this inability is because of the motor vehicle accident.

There is no doubt that [the Appellant] is personally unable to attend to her own personal care and home care requirements. The Appellant's own testimony, together with that of her husband and caregivers, convinces us that she continues to require personal care and home care assistance to attend to the essential activities of daily life. Indeed, this need would certainly appear to be greater today than prior to her motor vehicle accident. The difficulty in this case arises in determining whether or not her ongoing requirement for personal care and home care assistance is attributable to the motor vehicle accident of December 5, 1995. After a careful review of all of the evidence, both oral and documentary, we have concluded, on a strong balance of probabilities, that [the Appellant's] ongoing requirement is not related to the injuries sustained in the motor vehicle accident of December 5, 1995.

The motor vehicle accident resulted in comparatively minor musculoligamentous injuries. [Appellant's doctor's] own report of May 30, 1996 identifies improvements in the Appellant's function as of April 30, 1996. He states, "As of her last visit with myself on April 30, 1996 she was suffering with much less in the way of myofascial pain. Her range of motion had returned to pre-accident levels, however, there was some ongoing concerns with regards to persistent weakness". While we accept his contention that the Appellant's functional status does fluctuate quite significantly on a day to day basis, we find that on April 30, 1996, the objective evidence clearly indicated improvements in her physical condition, which are in keeping with the normal course of resolution of soft tissue injuries. There was no objective evidence to relate any ongoing decline in function and increase in symptoms to the motor vehicle accident.

With regards to [Appellant's doctor's] conclusion that [the Appellant's] inability to perform the essential activities of daily life were as a result of the chronic pain she developed after the motor vehicle accident and her subsequent addiction to the medications prescribed to control the pain, we find, on the balance of probabilities, that the Appellant's chronic pain is more likely attributable to her pre-existing [text deleted]. Relying on [Appellant's neurologist #1's] report of October 30, 1996, wherein he states that,

While it is true that I did review [the Appellant] after the latter date - specifically on 11 March 1996 - the latter statement might be construed as implying that I was asked to review this patient specifically in relation to the said vehicular accident, which was neither my interpretation at the time that I saw her, nor the focus of my consultation letter which I subsequently wrote to her physician, nor is at present my interpretation of the basis for my reviewing her at that time. Indeed, as you indicate, I have an interest in neuromuscular diseases, and it is in this context that I reviewed [the Appellant]. [Appellant's doctor] also specifically indicates in the first line of his letter of referral dated 22 December 1995 that his patient herself requested the referral to me "as she has advised me that you have a special interest in [text deleted]",

it is clear, in the above-noted context, that [Appellant's neurologist #1] referred the Appellant to the [text deleted] clinic based on her [text deleted] disorder. In his report to [Appellant's doctor] of March 21, 1996, he had noted that, "As regards pain management, the symptoms of pain in some patients with [text deleted] is certainly well-described, and I would think this patient would be best assisted in this regard by the comprehensive services available through the [text deleted] clinic". It was this referral to the [text deleted] clinic which resulted in her being prescribed the slow release morphine to deal with her pain levels and accordingly her current inability to function because of the side effects of the morphine are most likely attributable to the [text deleted].

Counsel for the Appellant, relying upon the testimony of the Appellant together with [the Appellant's] various caregivers and therapists, argues strenuously that the temporal relationship between [the Appellant's] deterioration and the motor vehicle accident lead to the conclusion that the motor vehicle accident is the cause of the Appellant's inability to regain her functional capabilities. She submits that [the Appellant] was functioning at a reasonable level prior to her motor vehicle accident, but has deteriorated dramatically since the motor vehicle accident and there is no other cause to explain the significant deterioration.

We accept [Appellant's doctor's] testimony that the soft tissue injuries sustained by the Appellant had no direct impact upon [the Appellant's] [text deleted], in as much as it caused no damage to the peripheral nerves or nerve endings. The progressive nature of the disease leads us to the conclusion that [the Appellant's] medical condition would have progressed to her current state sooner or later. We are supported in our view by [Appellant's doctor's] comments in his report dated November 2, 1999 that, "There is no doubt that with [the Appellant's] underlying diagnosis of [text deleted] that her condition would have progressively worsened over time even

if she had not been involved in the motor vehicle accident." Further, given [the Appellant's] extremely complicated past medical history and myriad of medical conditions, we cannot attribute her substantial functional decline solely to a relatively minor motor vehicle accident. While there may have been a step-wise deterioration in her medical condition consequent to the trauma she experienced from the accident itself, we find that the Appellant has been adequately compensated by MPIC, by the reimbursement of personal care assistance expenses for three and a half years.

Despite the forceful arguments of counsel for [the Appellant] and the testimony of the Appellant and her witnesses, for the foregoing reasons we accept the position advanced on behalf of the insurer and must dismiss this appeal.

Dated at Winnipeg this 4th day of October, 2001.

YVONNE TAVARES, CHAIRPERSON

LES COX

WILSON MACLENNAN