



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-129**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Barbara Miller
Mr. Robert Chernomas

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

HEARING DATE: November 18, 2004

ISSUE(S): 1. Entitlement to personal care assistance benefits beyond
June 4, 2004.
2. Entitlement to further funding for scooter rental.

RELEVANT SECTIONS: Section 131 of The Manitoba Public Insurance Corporation
Act ('MPIC Act') and Section 10 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

[The Appellant] was involved in a motor vehicle accident on July 30, 2003. The Appellant was a passenger in a [text deleted] which rear-ended a second vehicle and, as a result of the motor vehicle accident, the Appellant reported symptoms with respect to his neck and lower back. The Appellant did not seek any medical attention following the motor vehicle accident until August 19, 2003 when he went by ambulance to the [text deleted] General Hospital Emergency Room

with an onset of neck and back pain. The medical records from the [text deleted] General Hospital indicate that on August 19, 2003 he awoke and that he was unable to move due to neck and back pain.

The [text deleted] General Hospital Emergency Report form dated August 19, 2003 reports “*neck/back pain*” and reads, in part:

1-2 days of severe neck & upper back pain. No trauma recently. [Motor vehicle collision with] minor neck pain 2 [weeks] ago. [Patient] states pain [due to] ‘bad bed’.

The stated diagnosis was “muscle spasms”.

The [text deleted] General Hospital Emergency Patient Flowsheet dated August 19, 2003 states that the Appellant reported having awoken that morning being unable to move due to neck and back pain. The note made at 12:30 p.m. reads “[*Patient*] up and walking in hallway, smiling, states he feels much better, wants to keep walking & go home.” The Appellant was discharged fifteen (15) minutes later.

The [text deleted] General Hospital Physiotherapy Functional Assessment dated August 19, 2003 indicates that the Appellant is independently mobile and required “no aids” for ambulation. The handwritten notes state that he has a “safe gait” and that he is “safe to return home [from a] mobility perspective”.

An Occupational Therapy Home Assessment was undertaken October 3, 2003 with recommendations for temporary use of a motorized scooter and that the Appellant needed partial assistance with respect to preparation of meals, light housekeeping, laundry and

purchasing of supplies. It was noted that the Appellant was living in a suite with housecleaning services at the time of the accident.

The Internal Review Officer, in his decision dated July 16, 2004, reviewed a number of medical reports as follows:

There was then a report from your family physician, [text deleted] based on an evaluation October 9, 2003, wherein he stated that there was tenderness, decreased range of motion and a diagnosis of back strain. [Appellant's doctor #2] also saw you on October 9, 2003 and the diagnosis there was whiplash injury, thoracolumbar strain and cerebral palsy. [Appellant's doctor #2] supported physiotherapy and recommended a motorized scooter for short term use.

You attended for an initial physiotherapy assessment October 10, 2003 and at that time you presented with severe lumbar pain radiating to the thoracic spine with marked reduction in overall function and abilities of activities of daily living. The therapist noted risk factors which included worsening symptoms post accident, severe cerebral palsy and possible psycho-social overlay as risk factors for chronic pain.

In the Physiotherapy Discharge Report of November 20, 2003 it was noted that objectively, your walking posture had become more vertical. He also noted that when you were asked to stand as straight as possible, you indicated extreme pain and collapsed forward over a treatment bed. However, when you were distracted, you were able to hold yourself in an almost upright position. The therapist also noted that observation of your mobility after you left the clinic was greater than when you were in the clinic. In fact, when outside the clinic, it was noted that you did not require any assistance to obtain a vertical standing position.

Your physiotherapist noted that due to the difficulty with assessing structural components and the observed pattern of movement, he was unable to identify a structural cause for prolonged pain and severe limit to functional movements. He also noted that considering the nature of the injury and the time post injury, you would have been expected to have recovered. You were discharged from physiotherapy because the physiotherapist felt that ongoing treatment was not indicated.

Turning to the Occupational Therapy Evaluations after October of 2003, you were assessed November 28, December 11, and 19, 2003 and February 4, 2004. It is noted that you were receiving home care bi-weekly prior to the motor vehicle accident for approximately four hours for general cleaning such as bathroom and floors, making of beds and laundry and assistance with meal preparation if you wanted something while the home care worker was there.

By December 19, 2003, it was felt that you were capable of preparing your breakfasts independently, however, any further attempts to assist in your independence were met

with your increased agitation and anxiety and therefore a formal assessment could not be completed.

[Appellant's doctor #2] provided correspondence February 17, 2004 stating that he first saw you September 29, 2003. His diagnosis was of "chronic sequelae that is cerebral palsy and exacerbation of this condition with a muscular strain and whiplash injury". [Appellant's doctor #2] indicated that your motor vehicle accident related problems should not last for a long time but he felt that there was a case to be made for the use of a scooter in the short term but not permanently.

[Appellant's doctor #2] did note that when he assessed you again October 9 that your back pain had increased and that you were also attending physical therapy. He also noted that you appeared somewhat exaggerated in your responses during the physical examination. When you were examined again January 12, 2004 the examination was essentially unchanged. It was [Appellant's doctor #2's] expectation that you would recover and return to your pre-accident status because there were no major issues involving your back as a result of the accident except for a muscular strain.

The attending physiotherapist, [text deleted], provided correspondence dated February 18, 2004, discussing his most recent assessment of February 2, 2004. It was noted that you had demonstrated some objective improvement in mobility, but a more limited ambulation distance without assistance. [Appellant's physiotherapist] advised that he was still unable to identify a structural cause for your persistent pain. He also stated that considering the progress to date, you would likely recover functionally on your own and that following appointments were not appropriate.

The case manager referred the Appellant's entire medical file to [text deleted], Medical Consultant, MPIC Health Care Services, for a review of the available medical documentation and to provide to [MPIC's doctor's] opinion with respect to the following:

1. The nature and extent of any injuries received directly related to the motor vehicle accident of July 30, 2003.
2. Is there objective medical evidence on file identifying an impairment of physical function, which in turn would prevent the claimant from performing his own personal care assistance/essential activities of daily living (i.e. preparation of breakfast, lunch, dinner, laundry, etc.)?
3. A comparison of the claimant's level of function in a clinical setting/OT assessment setting and the level of function as depicted in the investigative material.
4. The medical necessity for further physiotherapy treatment.
5. The medical necessity of the scooter rental.
6. The medical necessity of any other further therapeutic treatment interventions or further investigations.

[MPIC's doctor] had been provided with all of the relevant medical documentation, together with an MPIC Investigation Report dated February 20, 2004, as well as two video cassettes depicting the Appellant's level of function as outlined in the Investigation Report. [MPIC's doctor] in her report to MPIC dated April 5, 2004 stated:

2. Is there objective medical evidence on file identifying an impairment of physical function, which in turn would prevent the claimant from performing his own personal care assistance/essential activities of daily living (i.e. preparation of breakfast, lunch, dinner, laundry, etc.)?

Based on the activities observed on the videotapes provided, the claimant demonstrated capability of sustained standing, sitting and ambulation throughout the area of the sports bar. This activity would, on the balance of probability, be consistent with that required in preparation of basic meals. Light housekeeping and laundry could likely be attempted independently on the basis of the observed activities, noting that the claimant on a pre-accident basis had assistance with such activities twice weekly (approximately four hours per visit).

5. The medical necessity of the scooter rental.

A motorized scooter was provided to the claimant based on recommendation from [Appellant's doctor #2] in October 2003. [Appellant's doctor #2] was specific in stating that he "felt his problems as they related to the motor vehicle accident should not last for a long time, however, there was a case to be made for the use of a scooter in the short term, but no permanently". Having considered this opinion, there is no medical necessity for continued, long-term motorized scooter use, as it relates to the soft tissue injuries sustained at the time of the motor vehicle accident.

Case Manager's Decision

On May 19, 2004 the case manager wrote to the Appellant and relying on [Appellant's doctor #2's] report dated February 17, 2004, the physiotherapist report dated February 18, 2004, the video tapes and the report of [MPIC's doctor] dated April 5, 2004 and stated:

Section 131 of the Manitoba Public Insurance Corporation Act allows for reimbursement of personal assistance expenses to an individual who is unable, because of the accident, to care for himself or perform the essential activities of everyday life without assistance. The Medical Review has concluded, based on the medical information on file and the level of function you have demonstrated, that you have regained the capacity to perform the essential activities of daily living. You are therefore, no longer entitled to reimbursement/funding of personal assistance expenses. Your entitlement to personal assistance expenses will cease as of June 4, 2004.

.....

With respect to the medical necessity of a scooter rental, [Appellant's doctor #2] was specific in stating that he "felt his problems as they related to the motor vehicle accident should not last for a long time, however, there was a case to be made for the use of a scooter in the short-term, but not permanently". The Medical Review concluded that there is no medical necessity for continued, long-term motorized scooter use, as it relates to the soft tissue injuries sustained in the motor vehicle accident of July 30, 2003. You are therefore no longer entitled to the rental of a motorized scooter. Your entitlement to the scooter rental will cease as of June 11, 2004. [Text deleted] has been advised that funding for the scooter rental will cease as of June 11, 2004. This decision is in accordance with Section 5 of the Manitoba Regulation 40/94.

[Appellant's doctor #1] provided a medical note to MPIC dated May 26, 2004 stating that there had been "*definite deterioration in [the Appellant's] muscular capabilities*" since the accident, and that he "*continues to require the use of a motorized scooter*".

Internal Review Officer's Decision

The Appellant, in an Application for Review dated June 16, 2004 applied for a review of the case manager's decision. The Internal Review Officer issued a decision dated July 16, 2004 confirming the case manager's decision dated May 19, 2004 and dismissing the Appellant's Application for Review. The Internal Review Officer, after reviewing all of the relevant medical information on file, and based on her own observations of the manner in which the Appellant was walking from the date of the Internal Review, in relying on the medical opinions of [Appellant's doctor #2] and [MPIC's doctor], stated:

[MPIC's doctor] notes that you had a muscular strain/whiplash injury affecting the thoracolumbar area as a result of the accident of July 30, 2003. [Appellant's doctor #2] was not able to determine that you had developed any significant issues regarding your back other than the muscular strain and your physiotherapist commented that he was unable to identify a structural cause for the prolonged pain and severe limitation of function that you were reporting. As a result of reviewing the videotapes and the medical information, [MPIC's doctor] has the opinion that you would be able to prepare basic meals. She also advised that light housekeeping and laundry could likely be attempted independently noting of course that on a pre-accident basis you had four hours of assistance bi-weekly prior to the accident.

I agree with [MPIC's doctor's] review of the medical information on the file and of the videotapes for your activities February 2 and February 11, 2004

The Internal Review Officer further stated:

. . . it is my decision that you are capable of preparing your own meals and that you may be in partial need of assistance for light housekeeping and laundry and purchasing of supplies however you were also partially in need of assistance prior to the motor vehicle accident for these items. As a result, it is my decision that you are not entitled to any further Personal Care Assistance benefits as a result of your accident of July 30, 2003.

[Appellant's doctor #1] filed a report with MPIC dated August 10, 2004. [Appellant's doctor #1], in his report, stated:

It is my opinion that the motor vehicle accident was the direct cause in this patient's deterioration. It is also my opinion that he would benefit from the use of a motorized scooter.

Appeal

The Appellant filed a Notice of Appeal on July 26, 2004. The relevant provisions of the MPIC Act and Regulations are:

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

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:

....

(d) reimbursement of the victim at the sole discretion of the corporation for

..
(ii) mobility aides and accessories,

The appeal hearing took place on November 18, 2004. The Appellant did not personally attend the hearing but was represented by his mother, [text deleted], and his sister, [text deleted].

In her submission, [Appellant's mother] referred to the Appellant's Notice of Appeal, dated July 26, 2004, which stated:

I still need personal care and the use of a scooter as I have to use a walker because of the accident and cannot go anywhere without assistance.

I also have Cerebral Palsey but before the accident I went everywhere myself, walking to [text deleted] and taking the transit bus.

The submissions of [Appellant's mother] and [Appellant's sister] in respect of the traumatic effect that the motor vehicle accident had on the Appellant's quality of life was very moving. They both discussed the difficulties the Appellant had prior to the motor vehicle accident and the manner in which he had overcome a number of obstacles in order to achieve an independent life under adverse conditions. They further submitted that, as a result of the motor vehicle accident, the Appellant required personal care assistance and the use of a scooter in order to achieve, to some degree, the quality of life he enjoyed prior to the motor vehicle accident. The Commission noted the number of letters that had been filed by individuals who were familiar with the Appellant prior to the motor vehicle accident and described the adverse effects the motor vehicle accident had on the Appellant's quality of life as a result of this accident.

MPIC's legal counsel submitted that a review of the medical evidence did not establish, on the balance of probabilities, that the Appellant was entitled to reinstatement of personal care assistance beyond June 4, 2004 or that he was entitled to further funding for scooter rental.

MPIC's legal counsel further submitted that:

1. the medical opinions of [Appellant's doctor #2] and the narrative report of the occupational therapist both recommended that the Appellant be entitled to a short

- term rental of a scooter and that neither had recommend that MPIC was obligated to provide a scooter to the Appellant on a permanent basis.
2. a review of the medical opinion of [MPIC's doctor], MPIC's Investigation Report and the videotapes confirmed that the Internal Review Officer was correct in deciding that the Appellant was no longer entitled to any further personal care assistance benefits after June 4, 2004.
 3. the medical opinion of [Appellant's doctor #1] and the letters of the Appellant's acquaintances should not be given any weight because they did not provide any objective medical evidence to support the Appellant's position.

The Commission, at the conclusion of the submissions by both parties, noted that there did not appear to be any investigation conducted to determine whether the Appellant's complaints in respect of his pain was the result of a pain syndrome caused by the motor vehicle accident. The Commission therefore suggested to the Appellant's representatives that the Commission was prepared to refer the Appellant for an independent examination by a psychologist to determine whether or not there was any connection between the Appellant's complaints and the motor vehicle accident and, if so, what, if any, treatment could be recommended. The Appellant's representatives advised the Commission that they were prepared to discuss this matter with the Appellant and, as a result, the Commission adjourned the proceedings pending response from the Appellant.

The Commission was subsequently advised by [text deleted], the Commission's Director of Appeals, that in a telephone discussion she had with [Appellant's mother], [Appellant's mother] advised [Commission's Director of Appeals] that the Appellant was not agreeable to being referred by the Commission to a psychologist. As a result, [Commission's Director of Appeals],

on November 30, 2004, wrote to [Appellant's mother] confirming their telephone discussion of November 25, 2004 and advising [Appellant's mother] that the Commission would review the evidence and submissions filed at the appeal hearing and issue a decision in due course. A copy of this letter was provided to MPIC's legal counsel.

Decision

The Commission was very moved by the submissions of the Appellant's mother and sister who described the difficulties the Appellant had during his lifetime in dealing with Cerebral Palsy and the determination of the Appellant to overcome the many obstacles that he faced in order to live an independent life. The Commission accepts the submissions made by the Appellant's representatives that the Appellant's complaints of pain were legitimate and adversely affected his life. The Commission has reviewed all of the letters filed by a number of persons who support the Appellant's position and [Appellant's doctor #1's] medical opinion in support of the Appellant.

Motorized Scooter

[Appellant's doctor #1], the Appellant's physician, was the only health care provider who recommended that the Appellant be provided with a permanent scooter by MPIC. [Appellant's doctor #1's] position appears to be based on his assertion that the Appellant's medical condition deteriorated after the accident and the accident was "the direct cause of the deterioration".

An examination of [Appellant's doctor #1's] clinical notes indicates that he personally saw the Appellant no more than three times in the two years immediately preceding the motor vehicle accident. These clinical notes indicate that the last time [Appellant's doctor #1] appears to have seen the Appellant was on February 18, 2002, which is a period of seventeen (17) months prior

to the accident, which occurred on July 30, 2003. [Appellant's doctor #1] does not provide any objective evidence to support his medical opinion.

[Appellant's doctor #1] referred the Appellant to [Appellant's doctor #2], [text deleted]. [Appellant's doctor #2], in his report dated February 17, 2004, stated that the Appellant should have the use of a scooter in the short term, but not on a permanent basis. [MPIC's doctor] in her Memorandum dated April 5, 2004, after a detailed review of the relevant medical evidence, MPIC's Investigation Report and the videotapes, concluded that there was no medical necessity for the continued long term motorized scooter use as it relates to the soft tissue injuries sustained at the time of the motor vehicle accident. In these circumstances the Commission gives greater weight to the medical opinions of [Appellant's doctor #2] and [MPIC's doctor] in respect of the motorized scooter than it does to the opinion of [Appellant's doctor #1].

The Commission, having regard to the evidence filed at the appeal hearing, and having regard to the submissions of both parties, finds that the Appellant has not established, on the balance of probabilities, that MPIC was required, on a long term basis, to provide a motorized scooter to the Appellant pursuant to Section 10(1)(d)(ii) of Manitoba Regulation 40/94.

Personal Assistance Benefits

It does not appear from an examination of [Appellant's doctor #1's] medical reports that in preparation of these reports he had an opportunity of examining the entire MPIC medical file, MPIC's Investigation Reports or the videotapes. It also does not appear to the Commission that on examination of the evidence submitted to the Commission that [Appellant's doctor #1] had observed the Appellant over a long period of time or in close proximity to the occurrence of the motor vehicle accident.

On the other hand, [MPIC's doctor] examined all of the relevant medical evidence on the MPIC file, the MPIC Investigation Reports and the videotapes, and concluded that there was no objective medical evidence identifying an impairment of physical function which in turn prevented the Appellant from performing his own personal care assistance/essential activities of daily living. In these circumstances, the Commission gives greater weight to the medical opinion of [MPIC's doctor] than it does to the medical opinion of [Appellant's doctor #1].

The Commission therefore, having regard to the evidence filed at the appeal hearing, and having regard to the submissions of both parties, finds that the Appellant has not established, on a balance of probabilities, that the Appellant was entitled to reimbursement of personal assistance expenses pursuant to Section 131 of the MPIC Act.

In conclusion, for the reasons outlined herein, the Commission dismisses the Appellant's appeal and confirms the Internal Review Officer's decision dated July 16, 2004.

The Commission in arriving at this decision based its findings on the information that was currently before it. The Commission was impressed with the submissions made by the Appellant's mother and sister and by the written submissions from a variety of the Appellant's friends and acquaintances. The Commission hopes that the Appellant might reconsider his decision to be assessed by a psychologist in order to determine if there is any connection between the Appellant's complaints and the motor vehicle accident.

Dated at Winnipeg this 4th day of January, 2005.

MEL MYERS, Q.C.

BARBARA MILLER

ROBERT CHERNOMAS