

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-97**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Neil Cohen
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Dan Joannis;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: August 10 and August 24, 2010

ISSUE(S):

1. Whether the Appellant's Personal Care Assistance benefits were correctly calculated (based on the Case Manager decision dated November 24, 2008);
2. Whether the Appellant is entitled to further Personal Care Assistance benefits (based on the Case Manager decision dated December 19, 2008).

RELEVANT SECTIONS: Section 131 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 2 and Schedule C and D of Manitoba Regulation 40/94

AICAC 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 the operator of a motor vehicle which lost control and rolled into a ditch on October 20, 2008. As a result of the accident, the Appellant was taken to the [text deleted] Hospital by ambulance where she was diagnosed with a head injury and cervical stiffness. At the time of the motor vehicle accident the Appellant was receiving CPP Disability benefits due to pre-existing fibromyalgia.

The Appellant is a housewife living on a farm with her husband and was employed at [text deleted].

On November 13, 2008 [Appellant's Occupational Therapist] [text deleted], attended at the Appellant's residence and completed an assessment tool to assess the Appellant's entitlement to Personal Care Assistance ("PCA") benefits. The assessment indicated that the Appellant required assistance for the following:

- Dinner preparation
- Light housekeeping
- Heavy housekeeping
- Laundry

The PCA Assessment Tool prepared by [Appellant's Occupational Therapist] was reviewed by MPIC's case manager. The Appellant obtained 9.0 out of a possible 89 points in respect of the following:

Activity	Score
Meal Preparation: Dinner	3.0
Light Housekeeping	3.0
Heavy Housekeeping	3.0
Laundry	1.0
Total	9.0

The Appellant received no assessment in respect of:

- Meal preparation – lunch and breakfast
- Yard Work

- Community Outings

On November 17, 2008, [Appellant's Doctor], [text deleted] provided a narrative report to MPIC wherein he stated:

“Thank you for your letter requiring a narrative report on [the Appellant] following a MVA October 20th when she lost control on the gravel (sic) and suffered severe whiplash back and neck. This has persisted and she has severe stiffness in the neck and with all movements and particularly in the right levator scapular area.”

[Appellant's Doctor] referred the Appellant for physiotherapy. An initial therapy report completed by [Appellant's Physiotherapist #1], based on an examination of November 6, 2008, documents a diagnosis of cervical whiplash.

Case Manager's Decision:

As a result of this assessment, the case manager wrote to the Appellant November 24, 2008 and indicated that the Appellant required assistance as of November 13, 2008 in respect of the following activities:

- Light housekeeping
- Heavy housekeeping
- Meal preparation
- Yard work

These requirements gave the Appellant a total of 9.0 which equals a monthly maximum of \$404.00 in respect of the Appellant's entitlement to Personal Care Assistance benefits. The

occupational therapist also recommended that MPIC provide the following equipment for the Appellant:

- Long handled dust pan set
- Swiffer wet jet
- Long handled duster
- Laundry bag

On December 16, 2008, the [Appellant's Occupational Therapist] completed a reassessment of the Appellant's PCA needs. The case manager reviewed the assessment made by the occupational therapist which determined that the Appellant scored 3.0 in respect of heavy housekeeping but scored 0 in respect of meal preparation – dinner, housekeeping and laundry. The case manager wrote to the Appellant on December 19, 2008 and advised her that on December 16, 2008 the occupational therapist had completed the Personal Care Assistance Assessment tool and the result had provided a score of 3.0 in respect of heavy housekeeping, but provided no score for meal preparation – dinner, light housekeeping and laundry. As a result the case manager advised the Appellant that since the Appellant had scored only 3 points on the PCA tool, she had not met the minimum of 9 points in order to qualify for benefits and advised the Appellant that the PCA benefits were terminated.

In a note to file dated January 21, 2009 the case manager reported a telephone discussion with the Appellant as follows:

“She advised that she is sore. She advised that she cannot complete her house cleaning and that her daughter is still helping her a lot with this, she stated that she can't even vacuum. She stated that her daughter rubs and massages her as since the weather had been cold her right side is so sore. She advised that she is still attending for PT.

I questioned [the Appellant] as to what she is asking me. She stated that she cannot complete her house duties and therefore would like MPI to cover her. She stated that she pays a lot for Auto pac and she doesn't believe this is fair that her daughter is helping for nothing.

I explained to [the Appellant] that based on [Appellant's Occupational Therapist's] report, she required some help with the heavy housekeeping, and she scored a 3 out of 9. I explained that she must score 9 in order to qualify for PCA. Therefore, her entitlement ended and if she disagrees with this she had the right to appeal.

She said she told [Appellant's Occupational Therapist] she couldn't vacuum, I stated that [Appellant's Occupational Therapist] also provided recommendations to her, in which we reimbursed her for in order for her to complete her tasks. She stated that she couldn't even use them..."

In a note to file dated February 3, 2009 the case manager reported a telephone discussion with the Appellant as follows:

"11:00 a.m. – [the Appellant] called, LMTC...she wants to talk about her claim being ended.

2:30 p.m. – Called [the Appellant]...she inquired why her PCA ended and would like to appeal it. She advised she has pre-existing fibromyalgia as well so taking that into consideration, this accident has really put a damper on everything. She advised even to make a sandwich is an effort. She advised her pain is excruciating and that it took her all morning to get dressed. She advised when [Appellant's Occupational Therapist] came to see her for the last assessment, she took about 15 minutes to assess her and that was it.

I advised that based on last PCA score of "3", she no longer qualifies for PCA. Advised the minimum threshold to qualify for PCA is a score of "9". Therefore we acknowledge that she is not completed (sic) recovered from her injuries, however there is a minimum score that has to be met in order to qualify for continued PCA and as of the most recent assessment she no longer reaches the threshold and therefore no longer qualifies..."

On February 19, 2009 the Appellant made an Application for Review of the case manager's decision.

"I have since the accident developed a constant ache from the right side of the spine neck to middle back but I cannot lay down of my right side with out a sharp searing pain from my middle back right up and into my head, which causes a vertigo or something that causes the walls bed feel like there spinning and only thing I can do is put my hand over my head till it passes this happens more and more often. And some

morning I wake up with this dizziness where I cannot walk sit up or do anything with out feeling like my whole right side is off balance.

I want to add this condition has been corrected by [Appellant's Physiotherapist #1], the Physio therapist I have been seeing.

But due to the swelling and tenderness in the right side of my ear and into my down my neck and shoulder, the whole side from the top of from my neck verterbra to the middle of my back is a constant pain. Pain I never had before the accident.

This constant pain has prevented me from doing my daily duties like washing my hair, cooking, cleaning such as washing the flour a mirror I have tried to vacuum which is impossible at this point. My daughter and children are the only ones who can come to help. But my daughter also has full time job full house and, I think she deserves to least let me pay for her gas and help.

I know what it is like to have to live with pain as I do have fibromyalgia. And with having it I would at least have good days and bad days. But I have mostly bad days because of this pain in my neck and shoulder which I never had it before.

I have to take muclerelaxcents (sic) Tylenol #3 more than before, every morning and night I have to but a rub on my neck and shoulder plus take a sleep medication and special suppository and cream, my stomach bowel movement are still not regular. I can not use the computer or watch TV without constantly getting up to move and try to stretch...

All I'm asking for is a little more time I have had to struggle with the fibromyalgia but this constant added pain is not from the fibromyalgia. Thank you for hearing me.
(underlining added)

Subsequent to the Appellant's Application for Review, [Appellant's Doctor] provided a medical report to MPIC on April 30, 2009 in which he stated:

"Unfortunately her symptoms persevere. She has got neck pain and pain in the right shoulder which curtails her activities at home. She is looking for more home support and for more physiotherapy with [text deleted] Physiotherapy in [text deleted]. If you require any further information please do not hesitate to contact me directly."

On May 7, 2009 [Appellant's Physiotherapist #1] wrote to the Appellant and stated:

"At the last visit [the Appellant] was reassess (sic) for her discharge paperwork. Her main complaints were of pain and tightness in the neck and between scapulae on the right greater than the left. She also complains of decreased function. [The Appellant] responded reasonably well to treatment. Her VAS improved but her Roland Morris and Neck Disability Index actually increased slightly.

Objectively [the Appellant] improved very much. She did have a positive Hallpike-Dix and side lying test which indicated a right posterior canal BPPV which is now resolved completely. Her levels of tightness have decreased but still experiences pain on palpation, this may be partly due to her Fibromyalgia. She now scores at least 4/5 with all muscle testing. Traction, soft tissue massage and electrical muscle stimulation relieved her pain during treatment...

Her diagnosis is a partially resolved cervical whiplash. She is considered in the Primary Injury Category and has been in attendance for 25 visits.”

[Appellant’s Doctor] provided a further report to MPIC dated May 19, 2009 and stated:

“My most recent exam was May 15th. She has approximately 20% reduction of ROM in her neck and local tenderness particularly right side of her face. Since her injury she has been treated with medication and physiotherapy. Her condition has remained static over the last few weeks. She is finding it quite (sic) difficult to complete her household duties, which includes cleaning the house, cooking and shopping and requires assistance in these areas.

She continues to attend physiotherapy with [Appellant’s Physiotherapist #2] at the hospital as her support has been taken away from [text deleted] Physiotherapy in town. She does require ongoing personal assistance. I hope this answers your questions appropriately, if not please feel free to contact above.”

[Appellant’s Physiotherapist #2] provided a report to MPIC dated May 25, 2009 subsequent to the Appellant’s Application for Review. [Appellant’s Physiotherapist #2] states:

“I am writing in regards to the changes I have witnessed in [the Appellant’s] pain since her MVA on October 20, 2008. I have seen [the Appellant] as an out-patient intermittently since 1988. She has a long history of fibromyalgia with pain experienced predominantly around her sacro-iliac joints, lower thoracic spine, shoulder girdle and neck.

[The Appellant] was seen again on April 14, 2009. Her chief areas of pain at that time were right scalenes and a long strip of pain from right upper trapezius down to her mid-thoracic spine. These are areas that had not been previously identified as painful.

Targeted stretches for her scalenes and rhomboids have been helpful, but her pain has not resolved. Her current treatment consists of ongoing home stretches and ultrasound to help to relax the affected muscles.”

Internal Review Officer's Decision:

On June 30, 2009 the Internal Review Officer wrote to the Appellant confirming the case manager's decision dated November 24, 2008 and dismissed the Appellant's Application for Review. In her Reasons for Decision the Internal Review Officer stated:

“Eligibility for PCA benefits is governed by Section 131 of the *Manitoba Public Insurance Corporation Act*. Manitoba Regulation 40/94, Section 2, prescribes the use of a Personal Assistance Assessment Tool to assess entitlement to PCA benefits. A minimum assessment tool score of 9 is required in order to qualify for entitlement to personal care expenses.

[Appellant's Occupational Therapist's] assessment of November 13, 2008, described that you required assistance in the following activities:

- Light housekeeping
- Heavy house cleaning
- Meal preparation
- Yard work

Those requirements gave you a total score of 9 which equalled a monthly maximum of \$404.00. Based on my review of the file, there is no medical evidence to support a change in this assessment or any indication that you required further assistance than what was outlined in the November 13, 2008 assessment. I am therefore confirming the decision of November 24, 2008.

[Appellant's Occupational Therapist's] re-assessment of your personal care needs completed on December 16, 2008, documents that you required assistance with heavy house cleaning. Your total assessment score was 3. As stated previously, you need a score of 9 out of a possible 89 points to qualify for PCA benefits. The decision of December 19, 2008 is correct when it observes that there is no entitlement to PCA benefits unless the claimant attains a minimum score of 9 on the work sheet. Your current residual functional limitations and need for partial assistance with certain tasks is not in dispute. There is however no provision allowing for reimbursement of costs associated with partial assistance you may continue to require as a minimum score has not been attained.

The sole purpose of this review is to ensure you have received the benefits prescribed by legislation. Since there is nothing suggesting that you have not received these benefits, it follows that the review must confirm the December 19, 2008 decision.”

The Appellant filed a Notice of Appeal dated August 24, 2009.

[Appellant's Physiotherapist #2] wrote to MPIC on April 8, 2010 and stated that he had treated

the Appellant as an outpatient since 1988 and he noted complaints at that time. He further states:

“Following the MVA she was first seen by this writer on April 14, 2009. Her chief complaint was pain in her right upper trapezius and neck area. She was found to have increased muscle tension and trigger points in her right upper trapezius and scalene (lateral neck) muscles. She was instructed in stretching exercises for these muscles and received some therapeutic ultrasound to decrease the muscle tension. She then received further physiotherapy in a private clinic.

I have seen [the Appellant] again, once on February 2, 2010 and again on April 6, 2010. Her neck range of motion continues to be limited with 3 fingerbreadths between chin and chest when she flexes, full neck extension with pain, rotations; left 75%, right 90%, side flexion: left 80%, right 75% with pulling on the right side of her neck with all movements. She continues to have a significant trigger point in her right scalenes as well as increased muscle tension and tenderness on palpation of right upper trapezius and scalenes.

Although she attempts to balance her activity and rest, her functional abilities are limited by her pain and difficulty in maintaining any position for very long.”

On March 3, 2010 Mr. Dan Joannis of the Claimant Adviser Office wrote to [Appellant’s Doctor] advising him that he was representing the Appellant and requested that [Appellant’s Doctor] respond to eight questions set out in his letter.

On March 23, 2010 [Appellant’s Doctor] replied to Mr. Joannis and stated:

“I have had an opportunity to discuss your points of interest in respect of [the Appellant’s] single vehicle rollover injury of October 2008. Her level of function prior to her MVA was tolerable as far as housework was concerned. As you know she suffers from underlying fibromyalgia, but she was able to do heavy and light work providing she could rest in between the daily functions and this fluctuated from day to day. Following her accident she was not able to do even the lightest of duties for example peeling potatoes, dusting etc and some of these symptoms have dissipated by February 2010. Her symptoms that she has reported to me are a whiplash form of injury of her neck and sprain of the right upper thoracic spinal area. There was not neurological deficit. The impact obviously was that the symptoms were aggravated onto her underlying fibromyalgia. She was not able to do any form of housework for these number of months as already stated. At this present point in time she is able to now perform light duties in the house but unable to do the heavy duties and she still requires assistance in this matter. If you require any further information, please do not hesitate to contact above. Thank you.” (underlining added)

Appeal:

The relevant section of the MPIC Act is:

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.

The relevant sections of Manitoba Regulation 40/94 are:

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.

SCHEDULE C

**INSTRUCTIONS FOR COMPLETING PERSONAL CARE ACTIVITIES
FUNCTIONAL REPORT**

This document provides for instructions in respect of the term “independent as follows:

Independent

If the victim can perform the activity safely, correctly and efficiently without pain or physical or verbal assistance, check the Independent box for the activity.

If the victim can perform the component of the activity safely, correctly and efficiently without pain or physical or verbal assistance, check the Independent box for that component.

No other comments are required when the Independent box is checked.

SCHEDULE D – PERSONAL CARE ASSISTANCE SCORING TEMPLATE
(Section 2)

**INSTRUCTIONS FOR SCORING PERSONAL CARE ACTIVITIES
LISTED IN FUNCTIONAL REPORT**

NOTE: For victims who are under 16 years of age, please refer to Item 23 below and "Instructions for Scoring with the Developmental Scale".

Level of Assistance Needed

A Independent

The victim can safely complete all of the activity, or the relevant components of the activity, with modifications or adaptive aids if necessary, but without physical or verbal assistance.

B Partially Dependent

The victim can safely complete parts of the activity, or of the relevant components of the activity, with modifications or adaptive aids if necessary. Physical or verbal assistance by another person is required to complete the full activity. The victim may require supervision, set-up or minimal to moderate assistance for part of the activity. Where applicable please score under these headings:

B Min: The victim requires physical or verbal assistance with up to 25% of the activity.

B Mod: The victim requires physical or verbal assistance with up to 50% of the activity.

B Max: The victim requires physical or verbal assistance with up to 75% of the activity.

C Completely Dependent

The victim is completely dependent on the physical or verbal assistance of another person to carry out the activity.

Score Sheet

Choose the score that best reflects the level of assistance that is required by the victim. Scores should reflect the ability of the victim to perform the activities once all approved assistive devices or modifications have been implemented.

Appeal Hearing:

The Appellant testified at the hearing on August 10, 2010 and in her testimony she essentially confirmed the written submission she made in her Application for Review of the case manager's decision. The Appellant testified that:

1. She was a housewife living on the farm with her husband and was employed at [text deleted].
2. She had developed fibromyalgia prior to the motor vehicle accident but had learned to cope with this disease.
3. She suffered from muscle pain and from fatigue and learned to pace herself in carrying out her house duties and her work duties and looking after her [text deleted] children.
4. Prior to the motor vehicle accident she had no pain in her neck, right shoulder and right upper back.
5. After the motor vehicle accident, she developed a sharp pain to her neck, from the top of her neck to the middle of her back and right shoulder. In order to deal with this pain she took Tylenol 3, a muscle relaxant and some anti-inflammatory pills.
6. Prior to the motor vehicle accident she was determined not to stay in bed and carried on with her life.
7. She required no assistance to carry out her home duties prior to the motor vehicle accident.
8. After the motor vehicle accident she required homecare assistance for meal preparation, housekeeping, laundry, yard work.

9. Following the recommendations of the occupational therapist she was provided by MPIC with a long dustpan, long duster, laundry bag and Swiffer WetJet to carry out housekeeping duties but due to her chronic pain she was unable to use these house cleaning instruments.
10. She could prepare breakfast, lunch and in respect to supper was only able to prepare simple meals but required assistance from her husband for more elaborate meals.
11. She required the assistance of her daughter to do both light and heavy housekeeping, such as vacuuming and dusting.
12. In order to do the laundry she had to descend the stairs to the basement which had no handrails. As a result, she was unable to handle the laundry and negotiate the stairs at the same time and therefore slid up and down the stairs pulling the laundry bag.
13. She was required to make several trips down the stairs in order to pull the clothing down to the basement.
14. She was able to put the clothing into the washing machine, but not able to move the wet clothing from the washing machine and place it into the dryer and therefore required assistance in this respect.
15. She was unable to fold the laundry sheets.

The Appellant further testified that in respect of community outings, prior to the motor vehicle accident she was able to do the shopping with assistance from her husband in unloading the shopping bags from her automobile. After the accident, her husband continued to assist her in this activity.

She further testified that:

1. Prior to the motor vehicle accident she could shower, bathe and wash her hair independently.
2. After the motor vehicle accident she could not carry out these activities and required the assistance of her daughter to help her wash her hair and bathe.
3. Since her daughter lived some distance away she could not attend at the Appellant's home on a daily basis.

The Appellant testified that when the occupational therapist completed the second functional report the visit to her home lasted for a period of 10 to 15 minutes. The Appellant also testified that:

1. The occupational therapist only asked her questions and did not conduct any test for the rotation of her neck and shoulders.
2. Did not attend the basement and was unaware of the matter in which the Appellant ascended and descended the basement stairs to do her laundry.
3. The occupational therapist did not discuss with her how she used the new equipment.
4. The occupational therapist was unaware that she was unable to use the equipment in carrying out both the light and heavy housekeeping.

The Appellant testified that:

1. She continued to be unable to prepare dinner meals without the assistance of her husband lifting the roaster and the larger pots.
2. The occupational therapist did not discuss with her whether or not she could independently carry out the meal preparation for dinner.

In respect of light housekeeping the Appellant testified that:

1. She required assistance for dusting due to her pain and difficulty with headaches and breathing and as a result was unable to use the equipment provided by MPIC for that purpose.
2. The occupational therapist at no time discussed with her whether or not she was able to use this equipment.

In respect of laundry the Appellant further testified that:

1. She continued to be unable to transfer the wet laundry from the washing machine to the dryer and required assistance in this respect.
2. She continued to be unable to fold sheets due to her neck and right upper extremity pain and decreased range of motion and required assistance in that respect.
3. The occupational therapist did not inquire as to whether or not she was able to carry out these activities.

In respect of grocery shopping the Appellant further testified that:

1. She continued to require assistance from her husband in unloading grocery bags at home.
2. The occupation therapist never discussed whether or not she was able to carry out that activity independently.

In respect of yard work the Appellant testified that:

1. Prior to the motor vehicle accident she was able to carry out the yard work independently and was unable to do so after the motor vehicle accident.
2. The occupational therapist never discussed this activity with her.

The occupational therapist testified that she then attended at the Appellant's home on December

16, 2008 and conducted a second functional report, which was a period of approximately 4 weeks after the first functional report of November 13, 2008. The occupational therapist further testified that:

1. She noted the Appellant had received the recommended long dustpan, long duster, laundry bag and Swiffer WetJet and assumed the Appellant was using these instruments for the purpose of doing the light housekeeping.
2. She acknowledged that she never discussed this matter with the Appellant and therefore was not aware that the Appellant was unable to do the light housekeeping as she was unable to use the equipment.
3. In respect of preparation of the dinner meal the occupational therapist reported that the Appellant still required assistance from her husband in the preparation of the dinner meal.
4. In respect of laundry she concluded that the Appellant was capable of independently carrying out the laundry activities as a result of receiving a laundry bag and therefore reported in the second functional report that the Appellant was able to carry out this activity independently.
5. In respect of community outings the occupational therapist reported in the second functional report that the Appellant was able to out this activity independently.
6. She had spent 45 minutes with the Appellant contrary to the Appellant's testimony that she had only spent 15 minutes with her when preparing the second functional report.
7. She did acknowledge that on the second functional report she did not conduct any tests to determine the Appellant's ability to rotate her neck, shoulders and arms or her ability to squat.
8. She could not recall whether or not she attended the Appellant's basement to observe the laundry room.
9. She was unaware that the Appellant was unable to independently wash her hair or wash

herself in the bathtub and required the assistance of her daughter to carry out these activities.

10. As a result in the second functional report the occupational therapist indicated that the Appellant was able to independently wash her hair or wash herself in the bathtub.

Discussion:

The Commission finds that the occupational therapist made a number of errors in the preparation of her functional report. In the first functional report in respect of Meal Preparation – Dinner, the Appellant testified that she required assistance in lifting roasters and large pots in the preparation of this food. The occupational therapist noted this activity could not be performed without assistance and as a result the case manager entered a score of 2.0. In the second functional report the occupational therapist reported that the Appellant still required the identical assistance from her husband in the preparation of the dinner meal, but she inexplicably concluded that the Appellant was able to independently carry out this activity.

The Commission finds that there was no substantial difference in the Appellant's ability to independently carry out the Meal Preparation – Dinner during the period between the first and second functional reports. Yet there is no explanation why four weeks after determining that the Appellant could not independently prepare the dinner meal she was able to conclude in the second functional report that the Appellant was able to independently carry out the preparation of the dinner meal. The Commission concludes that there was too short a period of time for the occupational therapist to have concluded that in a period of four weeks the Appellant was able to independently carry out the preparation of the dinner meal which resulted in the initial score of 2.0 to be reduced to 0.

In respect of light housekeeping the occupational therapist reported initially that the Appellant required assistance in respect of dusting and sweeping which resulted in a score of 3.0 by the case manager. In the second functional report, four weeks later, the occupational therapist concluded that the Appellant required no assistance in respect of the dusting and sweeping and as a result the case manager provided a score of 0 rather than 3.0 set out in the initial assessment.

The Appellant testified that because of restricted movement in her neck and shoulders she was unable to use the equipment that was provided by MPIC. The occupational therapist acknowledged that she assumed that the Appellant no longer required assistance for light housekeeping because of the equipment that had been provided to assist her in these activities. The occupational therapist admitted that she did not discuss this matter with the Appellant and in error assumed the Appellant was able to conduct the housekeeping independently. As a result of this error the occupational therapist reported that the Appellant could carry out the light housekeeping activity independently and this caused the case manager to provide a score of 0 in respect of light housekeeping in the second assessment rather than 3.0 which she scored in the first assessment.

There was no change made by the occupational therapist in the Appellant's inability to carry out the activities of heavy housekeeping and as a result the case manager provided a score of 3.0 in both assessments.

In respect of laundry, in the first functional report the occupational therapist concluded that because the Appellant was required to hold onto walls to the basement she required assistance in carrying the clothes basket.

The Appellant testified that in the second visit by the occupational therapist there was no discussion on the issue of laundry, nor did the occupational therapist attend with her into the basement area. The Commission finds that having regard to the testimony of both witnesses, that the occupational therapist was unaware that the Appellant did not walk up and down the stairs to the laundry area in the basement but ascended and descended the stairs by sitting on her bum and sliding down the stairs.

Under the heading transfer of laundry and folding in the functional report, the Appellant testified that when she was seen by the occupational therapist on both occasions she was unable to remove the wet clothing from the washing machine or fold the laundry independently. In the first functional report the occupational therapist indicated the Appellant was unable to do the laundry independently but that in respect of the transfer of the laundry the Appellant could do so independently. In the second functional report the occupational therapist indicated, without any change in the Appellant's ability to do this independently, that the Appellant could now do the laundry independently. As a result the case manager provided a score of 0 for both the transfer of laundry and the laundry.

In respect of yard work the Appellant testified that prior to the motor vehicle accident she was able to carry out this activity independently but after the motor vehicle accident she was unable to carry out this activity independently and required assistance from her husband. The Commission notes that in both functional reports there is a column for raking leaves and mowing lawn where it can be indicated whether these activities could be completed independently. In both instances the occupational therapist indicated that these activities were not applicable because they were seasonal. As a result the case manager provided a score of 0 for these activities.

The Commission finds that there was a requirement on the part of the occupational therapist to determine from the Appellant whether or not the activities of raking leaves or mowing lawn could be carried out independently or not. The occupational therapist failed to address this issue and indicated that neither activity was applicable in preparation of the functional report. The Commission further finds that the occupational therapist erred when she did not indicate in both functional reports that the Appellant was unable to carry out these activities independently. As a result, the case manager was unable to provide any score to the Appellant when she completed her assessments on both occasions.

The Commission notes that under the heading “Community Outings – Carrying items (use of cart or other)” the Appellant testified that both prior to and after the motor vehicle accident she was able to do the shopping but required her husband’s assistance unloading the groceries when she arrived at home. As a result the occupational therapist indicated in her functional report that this activity could not be carried out independently.

The Appellant testified that at the time of the second functional report she still required her husband’s assistance in unloading groceries but the occupational therapist concluded, without discussing this matter with her, that the Appellant could now carry out this activity independently. There is no evidence that the occupational therapist ever inquired whether her husband no longer assisted her in removing groceries from the car. As a result of this error the case manager was unable to provide a score about the Appellant’s ability to carry out this activity independently.

In respect of bathing and showering the Appellant required the assistance of her daughter for bathing and washing her hair. The Commission notes however that in both functional reports the

occupational therapist noted that the Appellant was capable of carrying out these activities independently. The occupational therapist did not indicate in her testimony on what basis she determined that the Appellant was capable of independently bathing herself and washing her hair.

The Commission notes however that in respect of these activities the Appellant did testify that she was unable to carry them out independently and required her daughter to attend at her home on several occasions during the week to assist her with these activities. The Commission accepts the Appellant's testimony in this respect and finds the Appellant was unable to carry out these activities independently. As a result of this error the case manager was unable to provide a score which indicated that the Appellant was not capable of carrying out these activities independently.

The Commission determines that the Appellant testified in a direct manner without equivocation and her testimony was consistent throughout in both her reports to MPIC and in her examination and cross-examination. The Commission also finds that the testimony of the Appellant as to her inability to carry out her daily activities independently was corroborated by the medical reports of [Appellant's Doctor] (May 19, 2009 and March 23, 2009).

The Commission agrees with [Appellant's Doctor] that the Appellant's pre-existing fibromyalgia was exacerbated by the injuries she sustained in the motor vehicle accident. This rendered her unable to carry out her daily duties independently until the month of February 2010 as reported by [Appellant's Doctor]. Having regard to the nature of the Appellant's injuries and her pre-existing fibromyalgia, the Commission considers it improbable that there was a dramatic change in the Appellant's inability to carry out her daily activities to result in a score of 9.0 being reduced to 3.0. MPIC has provided no explanation that there was such a significant

improvement in the Appellant's recovery from the motor vehicle accident that she was capable of independently carrying out the daily activities within a period of one month.

The Commission accepts the Appellant's testimony that the occupational therapist spent approximately 15 to 20 minutes on her second visit.

The Commission notes that:

1. The occupational therapist was unaware of the manner in which the Appellant ascended and descended the stairs and in error made the assumption that the Appellant held onto the walls of the house for the purpose of ascending or descending the stairs.
2. The occupational therapist could not recall whether or not she attended in the basement to observe the laundry area in the Appellant's home.
3. The occupational therapist on the second visit could not recall where she had conducted tests to determine the Appellant's range of motion in respect of her neck and back.
4. The Appellant testified that the occupational therapist did not carry out this testing in her second visit.
5. The occupational therapist acknowledged that she erred in assuming the Appellant was using the equipment provided by MPIC in order to carry out the light housekeeping and was unaware that because of the Appellant's chronic pain and fatigue she was unable to use the equipment and was therefore unable to independently carry out the light housekeeping.

For these reasons the Commission gives greater weight to the testimony of the Appellant than it does to the occupational therapist and finds that in respect of any issue in dispute between the two of them the Commission accepts the Appellant's testimony. The Commission therefore

concludes that as a result of the occupational therapist's error the Appellant's score in the first and second assessments would have been more than 9.0.

Decision:

The Commission has considered the documentary evidence, the testimony of the Appellant and the occupational therapist and has concluded that the Appellant has established on a balance of probabilities:

1. That MPIC incorrectly calculated the Appellant's PCA benefits based on the case manager's decision of November 24, 2008 and refers this matter back to MPIC in order to make a correct calculation and compensate the Appellant as a result thereof.
2. MPIC erred in terminating the Appellant's PCA benefits as a result of the case manager's decision date December 19, 2008 and directs MPIC to reinstate the Appellant's PCA benefits until February 2010.

The Commission therefore allows the Appellant's appeal and rescinds the Internal Review Decision dated June 30, 2009.

Dated at Winnipeg this 1st day of October, 2010.

MEL MYERS, Q.C.

NEIL COHEN

LINDA NEWTON