

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-52**

PANEL: Mr. Mel Myers, Chairperson
Dr. Patrick Doyle
Dr. Sharon Macdonald

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATES: July 20, 2010 and January 14, 2011

ISSUE(S): 1. Whether the Appellant has a reasonable excuse for the late filing of her Application for Review of the case manager's decision.
2. Whether the Appellant is entitled to Personal Care Assistance Benefits.

RELEVANT SECTIONS: Sections 131 and 172(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 2(1) and 2(2) 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

On May 14, 2005, the Appellant was the driver of a vehicle that was involved in a collision with another motorist on [text deleted] Street in [text deleted], Manitoba. As a result of the accident, she sustained a facial laceration, bruising to both knees and a re-aggravation of her prior motor vehicle accident soft tissue injuries of March 12, 2003. At the time of the accident in question, her injury claim with respect to the prior accident remained active. The Appellant has never been a recipient of Personal Care Assistance ("PCA") benefits with respect to either accident.

The Appellant's Application for Compensation was completed and signed on May 25, 2005. The Application addresses her functional ability to perform household duties and/or care for herself or her dependents. Based on her self-reporting, her Application indicates that she was capable of managing the lighter household tasks, preparing meals, and managing her own personal care. She also advised that she could clean the bathrooms, complete her laundry (pacing of this task was required), and she also acknowledged that she could drive. She noted that she was capable of vacuum cleaning and washing floors, but experienced pain afterwards.

Case Manager's Decision:

The case manager's decision on August 19, 2005 advised the Appellant that she had not qualified for entitlement to PCA expenses. The case manager further indicated that in order to determine her entitlement to PCA benefits a standard assessment tool was completed on August 15, 2005 by [Rehab Facility #1's Occupational Therapist] with [Rehab Facility #1]. The case manager stated:

“The assessment tool is used to evaluate your personal care needs and the level of care that you require on a daily basis. A score is applied based on your personal care requirements.

In order to qualify for entitlement to personal Care Assistance expenses, a minimum score of “9” is required. Your assessment score was 7 resulting in no entitlement to Personal Care Assistance.”

The Commission notes the score of “7” was comprised of the following:

1. Heavy household – 3
2. Laundry – 1
3. Yard Work - 3

Application for Review:

The Appellant made an Application for Review of the case manager's decision on December 12, 2005 and stated:

“Decision was made on my need for personal care assistance benefits based on my abilities with the assistance of my [text deleted] year old mother. Unfortunately based on her abilities deteriorating she is no longer able to assist. I have been having a lot of trouble getting my cleaning, cooking & shovelling done. My injuries prevent me from doing a lot of things such as driving (in bad conditions, or when my pain is unmanageable), walk for the same reasons. When I am experiencing anxiety due to my pain & inability. I no longer have anyone to assist me in driving, cleaning, meal prep, shovelling, gardening, taking my son to extracurricular activities and functioning day to day. Because of my pain I rarely attend social functions or visit friends & family.”

Internal Review Officer's Decision:

The Internal Review Officer, in her decision of February 6, 2006, stated:

1. “Application for Review filed late.

I am responding to your Application for Review dated December 12, 2005 and received by the Internal Review Office on January 12, 2006.

The claims decision you wanted reviewed was sent to you on August 19, 2005. It contained a standard paragraph required by Section 172(1) of *The Manitoba Public Insurance Corporation Act* (“the Act”) advising you of the 60-day period within which the Application for Review had to be filed. Your Application for Review was received approximately two months after the deadline.

The Corporation may extend the 60-day time limit if it is satisfied that the claimant has a “reasonable excuse” for late filing. The excuse provided in your Application for Review states, “Delay in filing claim is due to increase in pain & decrease in abilities”.

I cannot accept this as a “reasonable excuse”. If motor vehicle accident injury related complaints were a valid excuse, the time limits imposed by legislation would be meaningless. Furthermore, you should be well versed in the requirements of filing for the review of a decision having had three prior reviews.

On January 13, 2006, correspondence was sent to you advising you of another opportunity to present the sort of reasonable excuse contemplated by the legislation. You responded by fax on January 20, 2006 and advised of your deteriorating health since the onset of winter conditions which have caused a lot of stress, as well as tension.

The excuses you presented hardly qualify as the sort of “reasonable excuse” allowed for in Section 172(2). Accordingly, I am rejecting your Application for Review and no hearing will be held.

Our custom is to review the claims decision on its merits when this sort of situation arises.

2. Decision on the Merits

The first indication of your request for Personal Care Assistance benefits is documented approximately three months following the accident in question. [Rehab Facility #1’s Occupational Therapist] attended your home on August 15, 2005 and completed a Personal Care Assistance Assessment Tool to evaluate your personal care needs.

Based on your demonstrated abilities, [Rehab Facility #1’s Occupational Therapist] identified your functional limitations in completing the following tasks:

- Heavy housekeeping
- Laundry
- Yard work

Eligibility for Personal Care Assistance (“PCA”) benefits is governed by Section 131 of the Act. Manitoba Regulation 40/94, Section 2, prescribes the use of a “Personal Care 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.

As a result of the assessment of August 15, 2005, you scored a “7” out of a possible 89 points. Accordingly, your case manager issued a decision letter on August 19, 2005, stating that you did not qualify for personal care expenses because your score was too low to qualify for this benefit.

The decision under review is correct when it observes that there is no entitlement to Personal Care Assistance benefits unless the claimant attains a minimum assessment tool score of 9 points. This is not to say that you do not require assistance around your home. It simply means that you do not qualify for Personal Care Assistance benefits under PIPP, and this review confirms the August 19, 2005 decision.”

The Appellant filed a Notice of Appeal to this Commission on April 18, 2006.

Appeal:

The relevant provisions of the MPIC Act 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.

Application for review of claim by corporation

[172\(1\)](#) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

The relevant provisions 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.

Appeal Hearing:

The appeal hearing was commenced on July 20, 2010. The Appellant appeared on her own behalf and Mr. Morley Hoffman appeared on behalf of MPIC. The Appellant testified on the two motor vehicle accidents that she was involved in 2003 and 2005 in which she sustained significant injuries to her neck and shoulders. She further testified:

1. She used medications in respect of the pain she experiences as a result of walking, reaching, bending, lifting and carrying.
2. She lives with her son, age [text deleted], and she has no immediate family living in the City.
3. When performing meal preparation she tends to rely on frozen or prepared foods and has received assistance from the family centre in respect of laundry cleaning and meal preparation but this assistance does not occur on a regular basis.
4. She does not have the ability to carry large shopping orders and is required to shop on a frequent basis.
5. The difficulties in respect of heavy housecleaning, laundry and yard work.
6. She suffered from depression which has a debilitating effect on her ability to carry out her daily activities.
7. She required assistance to carry out a number of her daily activities in order to look after herself and her son.

The Appellant requested that the Commission reverse the decision of the Internal Review Officer.

Counsel for MPIC indicated that the Internal Review Officer was correct in denying the Appellant's claim on the grounds that she did not obtain a score of at least "9".

The Commission requested that the parties meet and discuss this matter and recessed for a short period of time. On reconvening, the Commission was advised that the parties had reached an agreement as follows:

1. The Appellant would not pursue her appeal in respect of the Internal Review Officer's decision of February 6, 2006.
2. The Appellant and MPIC'S counsel agreed that a new assessment by an occupational therapist would be undertaken to determine whether or not the Appellant would be entitled to PCA benefits at this time pursuant to Section 131 of the MPIC Act and Section 2 of Manitoba Regulation 40/94.

As a result of this agreement the Commission adjourned the hearing and requested that [Rehab Facility #2's Occupational Therapist], an occupational therapist at [Rehab Facility #2], meet with the Appellant, conduct a PCA Assessment to determine whether or not, in her view, the Appellant was entitled to personal care assistance pursuant to the MPIC Act and Regulations.

On September 27, 2010 the Commission received [Rehab Facility #2's Occupational Therapist's] report dated September 17, 2010. In her summary and recommendations, [Rehab Facility #2's Occupational Therapist] stated:

"The Personal Care Assistance Assessment Tool was completed based on the evaluation findings and is enclosed. As per your request, the Personal Care Assistance Assessment Tool findings are compared to the score sheet for personal care activities. Based on the comparison, [the Appellant] would score 3 for heavy housecleaning and 3 for yard work resulting in a total score of "6".

[The Appellant] was advised to pre-plan and pace meal preparation so as not to have to rely heavily on pre-prepared foods. Examples of how this can be achieved were reviewed with the client. The client was also advised to pace and pre-plan her activities as much as possible over the course of the week so as to allow for adequate breaks with more demanding activities.

[The Appellant] would benefit from a long handled swiffer duster in order to decrease the amount of reaching that is required with dusting. She would also benefit from a swiffer sweeper to assist with decreasing the amount of forward reaching and forward bending that is required with sweeping the floor. A laundry bag would allow [the Appellant] to be able to carry a load of laundry (up to 10 lbs) up and down the stairs while concurrently holding on to the hand rail."

On September 28, 2010 the Commission wrote to both the Appellant and MPIC enclosing [Rehab Facility #2's Occupational Therapist's] report advising both parties that the Commission would contact them for the purpose of reconvening the appeal hearing to hear any further submissions with respect of [Rehab Facility #2's Occupational Therapist's] report.

On October 5, 2010 MPIC's legal counsel provided the Commission with a report/assessment from [MPIC's Occupational Therapist], occupational therapist for MPIC Health Care Services. In this report she provided a score of "6" in respect of the Appellant for the following matters:

1. Housecleaning - 3
2. Yard work – 3
- Total 6

She also indicated that in arriving at the scoring she considered [Rehab Facility #2's Occupational Therapist's] report.

A copy of [MPIC's Occupational Therapist's] report was forwarded to the Appellant by the Commission on October 27, 2010.

On January 14, 2011 the Commission reconvened the hearing in the presence of both the Appellant and MPIC's legal counsel. The Appellant was of the view that [Rehab Facility #2's Occupational Therapist] had not spent sufficient time reviewing her activities in respect of meal preparation, heavy housecleaning, laundry, and yard work and community outings. The Appellant submitted that MPIC erred in failing to qualify her for PCA and requested that the Commission direct MPIC to reimburse her for PCA expenses.

In his submission, MPIC's counsel stated that:

1. [Rehab Facility #2's Occupational Therapist's] report came to essentially the same conclusion as the original report of [Rehab Facility #1's Occupational Therapist].
2. [Rehab Facility #1's Occupational Therapist] provided a score of "7" while Rehab Facility #2's Occupational Therapist] and [MPIC's Occupational Therapist] provided a score of "6".
3. The minimum Assessment Tool score of "9" is required in order to qualify for entitlement to PCA benefits.
4. [Rehab Facility #2's Occupational Therapist's] report confirmed that MPIC was correct in adopting [Rehab Facility #1's Occupational Therapist's] report which demonstrated that the Appellant had not met the requirements to qualify for entitlement to PCA expenses.
5. The Commission should dismiss the Appellant's appeal and confirm the Internal Review Officer's Decision.

Decision:

The Commission finds that the Appellant did have a reasonable excuse for failing to file a timely Application for Review of the case manager's decision. The Commission is satisfied that the challenges in the Appellant's life of looking after a child without any other support and her depression provide a reasonable excuse for her delay in filing a timely application for Review of the case manager's decision.

For these reasons the Commission is therefore entitled to consider the merits of the Appellant's application that MPIC erred in failing to determine that she was qualified for PCA benefits.

The Commission has a great deal of empathy for the difficulties the Appellant faces in caring for both herself and her child without any family support and having regard to her psychological challenges. However, according to the three occupational therapists who are all qualified to make these assessments, the Appellant did not meet the minimum assessment tool score of “9” which was required for the Appellant to qualify for entitlement to PCA expenses.

The Commission is satisfied that [Rehab Facility #2’s Occupational Therapist] did a thorough and complete assessment of the Appellant. [Rehab Facility #2’s Occupational Therapist’s] report indicates that the Appellant participated in approximately 2.7 hours of functional evaluation activity.

The Appellant was unable to demonstrate that [Rehab Facility #1’s Occupational Therapist] or [Rehab Facility #2’s Occupational Therapist] had erred in their assessments. For these reasons the Commission therefore concludes that the Appellant has failed to establish on a balance of probabilities that MPIC has erred in determining that she failed to qualify for Personal Care Assistance under the provisions of the Act and Regulations. The Commission therefore confirms the decision of the Internal Review Officer dated February 6, 2006 and dismisses the Appellant’s appeal.

Dated at Winnipeg this 20th day of January, 2011.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

DR. SHARON MACDONALD