

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-124**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Dr. Sheldon Claman
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted].
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATE: November 20, 2012

ISSUE(S):

- 1. Entitlement to an increase in the Personal Care Assistance Assessment of April 3, 2009.**
- 2. Whether the Permanent Impairment benefits were correctly assessed and calculated.**

RELEVANT SECTIONS: Section 131 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 2 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 May 1, 2005 and suffered a number of physical injuries and a severe traumatic brain injury ("TBI"). Prior to the motor vehicle accident the Appellant owned a [text deleted] business. As a result of the injuries sustained in the accident he was unable to continue operating the [text deleted] business and was in receipt of Income Replacement Indemnity ("IRI") benefits.

MPIC requested that [text deleted], a clinical neuropsychologist, assess the Appellant. On June 22, 2007 [MPIC's neuropsychologist] provided a report in which he concluded that the Appellant:

1. Had certain cognitive limitations with mild slowness in his left hand fine motor coordination.
2. Had impairments in recalling information that he hears with a number of details and other verbal information that is difficult to relate together.
3. Had a severe impairment in one type of visual memory.
4. Had an inability to focus on two factors simultaneously which made it challenging for him to multi-task.

[MPIC's neuropsychologist] noted that:

1. In respect of the Appellant's cognitive abilities, he was functional in his intellectual skills, problem solving, and all other types of attention and concentration apart from the multi-tasking difficulties.
2. The Appellant was more depressed than when he had first seen him 1½ years before the date of this report.
3. With respect to his emotional status, the Appellant was having behavioural inertia as described by his wife.
4. There was a credible personality change with lowered initiative and noted that accompanying his depression there were some passive wishes to die, as well as reports of suicidal ideation.
5. This information was consistent with [Appellant's doctor #1's] report in which he diagnosed the Appellant with a Major Depressive Episode.

6. The Appellant does not have the cognitive abilities to fill out all the tasks required to be an active owner/operator of a [text deleted] business.

[MPIC's neuropsychologist] also reported that the Appellant's wife stated that he had:

1. Demonstrated improvement in the first six months after the motor vehicle accident, but his level of motivation remained very low.
2. A lack of interest in completing household tasks and hygiene.
3. He was relatively sedentary, primarily watching television, especially game shows.
4. He does not complete tasks that she may give to him, such as washing the truck, watering plants, etc.

On May 8, 2008 MPIC's senior case manager requested a Personal Care Assistance Assessment from [occupational therapy consulting company #1].

MPIC requested [text deleted], a psychiatrist, to assess the Appellant regarding his multiaxial diagnoses, including a description of the Appellant's subjective report of his difficulties and [MPIC's psychiatrist's] objective findings. [MPIC's psychiatrist] provided a report to MPIC dated September 10, 2008 wherein he stated:

1. The Appellant spends the majority of his day watching television while sitting on the couch and doing nothing.
2. The Appellant stated he slept only 3 to 5 hours per night.
3. The Appellant acknowledged there was little in his life that he now enjoyed.

[MPIC's psychiatrist] reported collateral information received from the Appellant's daughter who stated:

“...that her father is severely impaired with regard to motivation, including daily self-care such as washing and eating. She reports that his sleep disturbance is much more severe since the accident than prior to the accident and that his social interactions are dramatically different. She reported that prior to the accident her father was an extremely sociable, likeable and gregarious man. Since the accident he is awkward and inappropriate in social situations.

[The Appellant’s] daughter reported that although his history of aggression and threats were likely more intense and dramatic prior to the injury, their family is more concerned since the injury as [the Appellant] appears to have impaired impulse control, increased hopelessness and a level of desperation that they had never seen prior to the accident, which leads them to believe that he is at an increased risk of caring (sic) out these threats.”

[MPIC’s psychiatrist] provided the following assessment:

“Multiaxial Diagnosis:

Axis I Personality change secondary to Traumatic Brain Injury
 R/O Major Depressive Disorder possibly secondary to Traumatic Brain Injury
 Amnesic Disorder due to Traumatic Brain Injury – chronic
 R/O Dementia secondary to Traumatic Brain Injury

Although [the Appellant’s] neurological assessment is not consistent with dementia as his function was not considered to be significantly impaired, clinically [the Appellant] appears to have significant difficulty with planning, organizing, sequencing and abstracting.

Axis II Nil

Axis III Complications arising from his motor vehicle accident

Axis IV Social isolation
 Unemployment
 Marital Conflict

Axis V 50

On October 22, 2008 the Appellant’s wife contacted the case manager and stated that:

1. The Appellant was continuing to provide her with grief and she was calling to see what was being done with respect to providing her with assistance around the house for chores that the Appellant used to perform on his own.

2. The Appellant had not improved and in her opinion he had deteriorated since she last spoke to the case manager.
3. The Appellant did nothing around the house and continued to fight all the time.
4. The Appellant does not look after himself, rarely gets off the couch even when he is hungry and when he does eat it is mostly fast food or junk food.

Case Manager's Decision – October 23, 2008 – Personal Care Assistance:

On October 23, 2008 MPIC advised the Appellant that following an assessment by [Appellant's occupational therapist #1], of [occupational therapy consulting company #1], regarding his entitlement to Personal Care Assistance ("PCA") benefits he was entitled to assistance with the following activities:

- Meal preparation: Breakfast
- Light housekeeping
- Bathing/showering
- Dressing/Undressing
- Yard Work
- Grooming/Hygiene

The case manager indicated that these requirements gave the Appellant a total score of 12.5 which equalled a monthly maximum of \$573.

In an undated file note (between December 6, 2008 and January 30, 2009), the case manager reported a discussion he had with the Appellant's wife and reported that:

1. The Appellant would not perform the activities of daily living unless prompted to do so.

2. The Appellant was unable to accept that he had a brain injury and in fact felt he had no problems dealing with anything when in fact he rarely bathes, has soiled his pants on occasion, lays around all day and doesn't eat properly.
3. A modified version of the program would be undertaken for a 10 week period to prompt the Appellant to perform the activities of daily living.
4. The occupational therapist would be attending the Appellant's residence one day a week to provide structured homework assignments.
5. The Appellant's wife advised the case manager that she did not think that this program would succeed and that she definitely needed some respite from the Appellant with someone coming in from the outside on a regular basis to assist the Appellant.
6. She further indicated that the Appellant would require prompting, supervision and cuing to perform these duties for the rest of his life.

On or about April 2, 2009 [Appellant's occupational therapist #1] prepared a Personal Care Assistance Assessment Tool for MPIC, which MPIC adopted and as a result a new PCA was issued on April 3, 2009. The new PCA indicated the Appellant required assistance in respect of the following:

1. Meal Preparation: Breakfast
2. Meal Preparation: Dinner
3. Light Housekeeping
4. Heavy Housekeeping
5. Laundry
6. Yard Work
7. Grooming/Hygiene
8. Dressing/Undressing
9. Bathing/Shower

These requirements gave the Appellant a total score of 18.5, which increased the monthly maximum to \$862. The assessment also indicated that services in the amount of 1.54 hours per day would be provided which was unchanged from the Appellant's prior assessment.

In a note to file dated May 14, 2009 the case manager had a discussion with [Appellant's wife] who indicated:

- "I received a call from [Appellant's wife] who advised that she again is frustrated and requires more help from MPI than what we have been giving her.
- She advised that 1.54 hours per day is not enough time and she said MPI should provide her with at least twice as much PCA hours (i.e. 3.08 per day).
- She advised that [the Appellant] is getting worse, and will not listen to her at all anymore. She said he is crazy and we have no clue how it is to live with him.
- She went on and on about his behaviour, and advised that he doesn't even wipe himself properly after he goes to the bathroom.
- There are numerous notes on file since my involvement and earlier documenting similar frequent calls from [Appellant's wife] of this nature.
- We also discussed [the Appellant's] competency at length and I explained once again that no doctor has deemed him incompetent; therefore we must deal with him directly. I explained that he does not qualify for supervision under the Personal Care Assistance provisions, and that has been explained to her numerous times as well. She again advised that if she chose to leave the relationship, which she has stated that she would be doing on numerous occasions, then what would we do with [the Appellant].
- I advised that we would address that situation if and when it arose. [The Appellant] presently has no thoughts of leaving and wants to remain in his current situation. Her (sic) PCA has been established and I will send a letter documenting the recent increase in his PCA entitlement and will enclose an appeal form since she feels it is inadequate."

Case Manager's Decision – June 8, 2009 – Personal Care Assistance Benefits:

On June 8, 2009, the case manager wrote to the Appellant confirming the reassessment of his entitlement to PCA benefits. The case manager indicated that in respect of the personal care needs of the Appellant the total score was 18.5, which translated to a monthly maximum of \$862 and provided for 1.54 hours of service per day.

On June 17, 2009, the Appellant made an Application for Review of the case manager's decision.

In an undated submission to MPIC, the Appellant's daughter outlined her greatest concern with regards to her father's condition:

"My father was given a series of tests within the first couple of years after his accident with which the decision was made on his condition both mentally and physically. No further testing has been completed since then other than those involving his Activities of Daily Living. These tests were once relevant but I feel are no longer due to the nature of his injury: (New cells are no longer replacing old ones) and the notable digression that his(*sic*) taken place in his mental condition.

As we all know one suffering from a brain injury only has a two year recovery period immediately after that injury has happened. With this being noted I feel that my father was doing a lot better within the first two years following his accident with comparison to today. I do not think that your organization realizes the severity of his mental condition.

For instance:

Summer 09

- My father urinated off my balcony instead of knocking on my bathroom door to let me know he needed to use the bathroom. When confronted he looked at me and laughed and said "What? I had to go!"
- I was watching TV with him and he was watching the same movie he did the week before, when I asked him why he was watching it again he said "I've never seen this before!"

Winter 08

- After dinner at a nice restaurant my father proceeded to have a cigarette in the bathroom instead of going outside.
- He left on Christmas day for dinner with his mom and did not say goodbye or Thank You for the gifts
- He had no interest in spending time with my sister who was in for a short visit from [text deleted] over Christmas

These are only some of the many examples in his behaviour. But some of the greatest differences in his behaviour are listed below:

2007-2009

- My father no longer takes interest in his personal appearance, does not like to shower or change clothes
- He is obsessive over the winning the lottery
- He will not make himself something even if he is very hungry

- His life revolves around watching T.V and he no longer takes interest in thing he did just after the accident
- He gets mad if he has to pay his portion of the bill at the restaurant
- He goes from high to lows very quickly
- If asked to help with anything he gets very angry even aggressive and then takes off
- He cries and laughs inappropriately
- He no longer talks about future plans/hopes or dreams: He only has interest in the T.V or gambling
- He has no recognition for people he once knew very well (even initially after the accident)
- He does not have a valid sense of right or wrong during conversation or social outings
- He no longer remembers all the details of his week i.e.) what he watched, what he ate, where he went, who he went with etc etc

VS

2004-2007

- My father used to shower on his own accord with assistance from my mother
- He used to gamble within reason or occasion
- He used to make himself a sandwich if he was hungry
- He used to offer to pay for supper or for ice cream
- His moods were much more stable and predictable
- He used to offer minimal assistance i.e.) load dishwasher, wipe tables, put clothes away etc.
- He used to talk about getting his business back together and his life on track
- He used to have a larger capacity of facial recognition
- He used to try to make conversation in social outings
- He used to remember a lot more of events/ details about recent events”

In an undated submission to MPIC the Appellant’s wife stated:

- “Never wants to take a bath, have to chase him and get angry before he complies
- Never cleans his glasses, will look through them no matter how dirty they are
- Fixated with lotteries and the fact he thinks he is going to win and how that would effect (sic) his income when he does
- Peed in the front of the garage smoking a cigarette looking around like it is a natural thing to do
- Moved money from chequing account to a closed business account
- Doesn’t fix himself nothing to eat, no matter how hungry he is just lays on the couch till someone does it for him
- Won’t sleep in a bed, sleeps on couch and watches t.v. right around the clock and does not take his clothes off to sleep, stays in the same clothes day and night ...Longest time without taking clothes off and having a bath is eleven days.
- Always has accidents in underwear
- Refuses to help with anything, Inside or outside of the home

- Won't let me get rid of anything in garages but won't ever look at the stuff or clean it
- Listened when I threatened with a time out chair when he peed in the front yard
- Has no memories of anything in our lives, the kids or the marriage
- Can't reason with him about anything just doesn't understand
- Gets overwhelmed if you send him to the store for more than a couple of things even though you write it down.
- At Christmas or other times he will leave the house without even saying goodbye, just leaves and no one knows he is gone
- Has no conversational skills
- No personality
- Has no sense of what to do with money to make interest
- Doesn't know what to do in a panic
- Won't ever wash his truck or do oil change or put air in his tires even though he needs it
- He will watch a space channel for unlimited time if that is the only channel that works
- He will watch a tv that only has sound and no picture due to it being broken
- Was on [text deleted] looking for his bank that is on [text deleted]
- Sometimes gets very disoriented and white looking and can't remember simple things and slurs his words.
- Cannot do laundry or the ability to know that he has to clean anything
- Is docile one minute and sometimes has charged outbursts
- Anyone can tell him certain things have happened and to do certain things and he will listen and not think for himself
- Won't take his medication that is prescribed to him"

Internal Review Officer's Decision – September 22, 2009:

The Internal Review Officer stated that:

1. The Appellant's wife or other care providers had not sent a submission for the hours of care they had extended to the Appellant.
2. As a result it was impossible to substantiate that the monthly maximum of \$862 for PCA was not sufficient funding for the Appellant's day to day needs.
3. There was no information on the Appellant's file to suggest that the occupational therapist's assessment of April 3, 2009 excluded any relevant information which in turn would increase his monthly maximum entitlement.
4. Concerns were raised at the hearing in respect of the Appellant's inability to manage his own finances.

5. The Appellant's file included a report from [MPIC's neuropsychologist], a neuropsychologist, who stated "This will confirm that [the Appellant] is mentally competent to manage his affairs".
6. She was unable to extract any information from the file which would present evidence to the contrary.

The Internal Review Officer determined:

"This review has confirmed the decision letter of June 8, 2009. Based on the totality of information on your file, I am unable to conclude that an error in assessing your personal care needs occurred. I would encourage your care providers to submit the hours of care that have been provided to initiate the reimbursement of this benefit."

As a result the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision.

On October 9, 2009 a Notice of Appeal was filed with the Commission.

The relevant provision 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 provision of Manitoba Regulation 40/94 is:

- 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.

The occupational therapist, [Appellant's occupational therapist #1], issued a progress report on April 15, 2010. [Appellant's occupational therapist #1] reported on the Appellant's behavioural features and functional performance issues as a result of his motor vehicle accident injuries:

- "Mild to moderate distractibility and memory deficits
- Mild degree of perseveration in thinking (e.g.: he talks about the same issues or topics over and over)
- Moderate degree of lack of drive or behavioural inertia: Although he is able to plan an activity, with good organization and sequencing skills, he has difficulty carrying it out
- A pattern of decision-making characterized by "want to do" or satisfying impulses rather "should do" or "need to do"
- Indifference and decreased attention to personal appearance and hygiene
- Decrease in social graces (e.g.: volume of voice); however, does not display any significant socially inappropriate behaviours.

The Appellant's wife and daughter were unhappy in the manner in which the personal care assessments were conducted by [Appellant's occupational therapist #1]. Upon receipt of the April 15, 2010 progress report, the Appellant's wife testified that she again complained to MPIC's case manager in 2010. As a result, MPIC arranged for an assessment to be done by [Appellant's occupational therapist #2] of [occupational therapy consulting company #2].

On June 10, 2011 [occupational therapy consulting company #2] provided a report to MPIC's case manager and stated:

"Presenting Issue: [the Appellant] and his wife [text deleted] were involved in a motor vehicle accident on May 1, 2005. Though they had recently separated at the time of the accident, however, they began living together again as roommates after the accident in order to provide [the Appellant's] necessary support. [Appellant's wife] reports that

living with [the Appellant] has become increasingly difficult due to behavioural issues as well as his decreased capacity to complete basic self-care. [Appellant's wife] reports that she is no longer able to handle the situation and requests assistance with determining alternate supportive living arrangements for [the Appellant].

Summary of Counselling Session: This writer met with [the Appellant], [Appellant's wife] and their adult daughter [text deleted] who has recently moved back home. Part of the session was spent with all three family members, time was also spent individually with [the Appellant] and individually with [Appellant's wife] and [Appellant's daughter].

The session was characterized by frequent angry outbursts from [the Appellant] and denial regarding all issues presented by [Appellant's wife] and [Appellant's daughter]. [The Appellant] stated several times that the car accident was [Appellant's wife's] fault; "you did this to me!" though reportedly [the Appellant] was driving at the time. [Appellant's wife] and [Appellant's daughter] reported that this is an argument that occurs on a daily basis as [the Appellant's] mother has "brainwashed him" into believing that the accident was a set-up in order to collect Insurance money.

[Appellant's wife] reported that [the Appellant] has lost the capacity to complete basic self-care and requires constant reminders to shower and change his clothing. She reports that at this point he has two baths a week as a result of physiotherapy swimming appointments. Many disputes in the home centre around coaxing [the Appellant] to complete basic self-care. He also does not prepare food for himself.

[Appellant's wife] has put the home up for sale. It is a large home and she feels that she is no longer able to manage it on her own. [The Appellant] is reportedly not involved in household duties. [The Appellant] is extremely angry about this as he does not wish to move or to sell the home that he built. He did state, however, that he will try to keep an open mind regarding alternative living options.

[Appellant's daughter] and [Appellant's wife] expressed concern over [the Appellant's] gambling habit. It is felt that he is going through his money very quickly as a result of this. [The Appellant] downplayed this issue, stating that he never spends more than \$20 at a time, even if he wins. Both women stated that [the Appellant] spends many hours a day watching TV and that it is best not to interrupt him during this time in order to keep the peace.

[Appellant's wife] reported concerns over her safety as [the Appellant's] temperament is increasingly volatile (related to his ABI). This writer frequently witnessed [the Appellant] raise his voice and swear at [Appellant's wife] throughout the session. [Appellant's wife] stated that she is "unable to handle this situation" and is "desperate" to find other supportive living options for [the Appellant].

Recommendations: This writer recommends that alternative living arrangements be researched should approval be received. This writer will work together with [occupational therapy consulting company #2], [Appellant's occupational therapist #2], to determine an appropriate support system for the client in light of his acquired brain injury ("ABI") related issues."

In a note to file the case manager reported a discussion with the appellant's wife on June 27, 2011:

- "I advised that I would be sending her a letter soon that will entitle them to claim 3.96 hours per day effective June 1, 2011 which was the date of the assessment.
- [Appellant's wife] advised that she has been telling us for years that [the Appellant] has required more Personal Care Assistance and has needed an increase in his personal care allowances due to a deterioration in his condition.
- She advised that scans were taken and that [Appellant's doctor #2] and [Appellant's doctor #3] both stated that there was an obvious deterioration in the condition of his brain based on the scans, and that based on this [Appellant's wife] feels that [the Appellant] should have been receiving more Personal Care Assistance than we have been paying for the past several years.
- She advised that she expects us to go back at least two years and reimburse them for the difference in PCA based on 3.96 hours per day.
- She advised that she told me for a long time that she wanted OT [Appellant's occupational therapist #1] off the case as she was unhappy with her and described her as unprofessional.
- She advised that she [Appellant's occupational therapist #1] didn't listen to anything that she [Appellant's wife] told her about [the Appellant] and that she expected that a new Personal Care Assistance assessment should have been done long ago by another OT based on the information she gave to me. She advised that I should have booked this assessment with another occupational therapist as she requested."

On June 28, 2011 the case manager wrote to the Appellant and his wife indicating that an assessment was completed by [Appellant's occupational therapist #2] on June 1, 2011. This assessment indicated that the Appellant required assistance with the following activities:

- "Meal Preparation; Breakfast
- Meal Preparation; Lunch
- Meal Preparation; Dinner
- Light Housekeeping
- Heavy House Cleaning
- Laundry
- Yard Work
- Community Outings
- Financial Management
- Grooming/Hygiene
- Dressing/Undressing
- Bathing/Showering
- Toileting

These requirements give you a total score of 37.5, which results in a monthly maximum entitlement of \$2,237.00."

In a separate letter dated June 28, 2011 the case manager wrote to the Appellant and his wife and stated that in respect of the assessment the Appellant would require 3.96 hours of care per day.

On August 18, 2011 [Appellant's doctor #3], the Appellant's personal physician, sent a letter to the case manager which stated that:

1. She first became involved with the Appellant's care on December 11, 2009.
2. She reported a long discussion with the Appellant's wife in respect of her increasing concerns about his ability to perform self care and specifically her significant concerns about his ability to manager his own hygiene and increasing difficulties with memory loss and that he had developed a gambling addiction.

[Appellant's doctor #3] indicated that she felt the Appellant's wife was credible and that the Appellant was quite unrealistic in his thought processes. [Appellant's doctor #3] stated:

“...I was quite concerned at that time that he was having deterioration of his situation as a result of his brain injuries.”

[Appellant's doctor #3] further stated:

“He was seen again on February 22nd, 2010 and again significant concerns were presented. His wife again expressed severe concerns about his hygiene and about his cognitive impairment which was increasing. I concurred with this on my conversation with [the Appellant] and felt that his wife's concerns were warranted.” (Underlining added)

[Appellant's doctor #3] further reported that she saw the Appellant again on June 3, 2010 and indicated that the Appellant's wife was again reporting that the situation was regressing and that the Appellant was increasingly needing help with even simple activities of daily living such as

cleaning, self care and kitchen help and was not able to perform even basic cooking skills required to take care of himself. [Appellant's doctor #3] also stated:

"I do in fact feel that [the Appellant's] deterioration and cognitive decline is all related to the traumatic brain injury he sustained in May of 2005. I do feel that ever since I met him that he has deteriorated and agree with the assessment done by the occupational therapist, stating that [the Appellant] is having increasing difficulties with self care, even simple meal plans and coordination and I do not feel that he is safe to be on his own and the he requires increasing levels of assistance.

I do feel that [the Appellant] requires increasing levels of support and care and his wife will no longer be able to provide this care for him. I do not feel that he is safe at this time to be living on his own without significant supports. He is unable to demonstrate the organizational skills required for living on his own and this is briefly noted by the occupational therapist in terms of his brief kitchen assessment, as one example."
(Underlining added)

In a report relating to the need for the Appellant to commence independent living, the case manager reported:

- "Although he has not been deemed incompetent by the attending neuropsychologist, he has cognitive and psychological deficits attributable to his acquired TBI and has been noted to be digressing in this regard based on recent medical and psychological information on file.
- He does not possess the organization skills to live on his own and has demonstrated ongoing behavioural inertia, increasing difficulties with self care, memory loss, a gambling addiction, and a need for assistance with even simple activities of daily living such as cleaning, and meal preparation."

On November 19, 2012, one day prior to the commencement of the hearing, MPIC's legal counsel provided the Commission with a letter from the case manager to the Appellant and his wife dated May 15, 2012, wherein the case manager stated:

"This letter will confirm our decision in regard to payment of outstanding Personal Care Assistance (PCA) benefits under the Personal Injury Protection Plan.

Approximately 2 years ago, you provided your opinion that [the Appellant's] condition had deteriorated and that he now required further supervision in regard to all activities of daily living. You subsequently requested increased allowances for Personal Care Assistance (PCA) and a reassessment of his personal care assistance needs.

At the time, [Appellant's occupational therapist #1] was the attending occupational therapist working with [the Appellant]. You asked that she be replaced by another occupational therapist, due to conflict between yourself and [Appellant's occupational therapist #1]. [Appellant's occupational therapist #2] was retained to replace [Appellant's occupational therapist #1] and an updated review of [the Appellant's] personal care needs was performed on June 1, 2011.

This assessment resulted in an increase in his personal care needs which are outlined in the enclosed PCA decision letter of June 28, 2011. As your concerns about [the Appellant] were presented and acknowledged approximately one year prior to his June 1, 2011 assessment, reimbursement of outstanding PCA performed for [the Appellant] from June 1, 2010 to May 31, 2011 will be considered as follows:

- Allowable hours based on PCA reassessment June 1, 2011 – 3.96 hours per day.
- Allowable hours prior to June 1, 2011 – 1.5 hours per day.
- Difference between allowable hours is 2.42 hours per day.
- June 1, 2010 to September 30, 2010 – 122 days x 2.42 hours x \$9.00/hr. (minimum wage) = \$2,657.16
- October 1, 2010 to May 31, 2011 – 243 days x 2.42 hrs./day x \$9.50/hr (increased minimum wage) = \$5,586.57
- **Total PCA payable June 1, 2010 to May 31, 2011 = \$8,243.73**

Appeal Hearing:

The Appeal hearing in the above matter was held on November 20, 2012.

The Appellant's wife and daughter both testified to the conduct of the Appellant subsequent to the 2005 motor vehicle accident where the Appellant suffered a severe traumatic brain injury and both stated:

1. Prior to the motor vehicle accident the Appellant owned a [text deleted] business, was capable of not only operating his business, but capable of living independently without any assistance in carrying out his daily activities.
2. The motor vehicle accident caused the Appellant a number of cognitive deficits which affected his intellectual skills, problem solving and lack of concentration.
3. The Appellant suffered from depression as a result of the impact on his cognitive ability.

The Appellant's wife and daughter testified that after the motor vehicle accident the Appellant appeared to improve but after a six month period the Appellant commenced to deteriorate in respect of his ability to look after himself properly. Both the Appellant's wife and daughter described the Appellant's inability to care for himself and, in substance, repeated what they had provided in written notes to the case manager. They spoke of the Appellant's inability to care for himself in a safe manner, his depression, his inertia, his memory loss, gambling addiction and his need for assistance for simple activities of daily living such as cleaning and meal preparation.

Both the Appellant's wife and daughter testified that [Appellant's occupational therapist #1], the occupational therapist, who prepared the PCA Assessments in October 2008 and April 2009 and the April 15, 2010 progress report failed to consider their concerns as to the Appellant's inability to care for himself and as a result [Appellant's occupational therapist #1] produced assessments that were totally unsatisfactory to the Appellant's wife.

In 2009 the Appellant's wife and daughter made written submissions to the case manager specifically outlining the Appellant's inability to care for himself and requested that the PCA services to the Appellant should be expanded.

As a result of their complaints to the case manager, [Appellant's occupational therapist #2] of [occupational therapy consulting company #2] was retained by MPIC to conduct an assessment of the Appellant in respect of his PCA needs. [Appellant's occupational therapist #2] completed an assessment on June 10, 2011. This assessment showed an increase in the Appellant's total score to 37.5, which resulted in a monthly maximum entitlement of \$2,237.

The Appellant's wife and daughter both testified that [Appellant's occupational therapist #2] had correctly reviewed the Appellant's inability to care for himself and the total score of 37.5 accurately reflected the Appellant's condition. The Appellant's wife further testified that MPIC finally agreed with [Appellant's occupational therapist #2's] assessment and reimbursed her for PCA commencing June 1, 2010. The Appellant's wife testified, however, that in her view the PCA, as determined by [Appellant's occupational therapist #2], should be retroactive to June 1, 2009.

MPIC did not call any witnesses.

The Appellant's wife advised the Commission that she wished to adjourn the matter of the Appellant's appeal in respect of the permanent impairment benefits because she wanted to obtain further information on this issue. The Commission granted the adjournment in respect of the permanent impairment benefits.

Discussion:

The issue in this appeal is whether the retroactive PCA payment should occur on June 1, 2009 as requested by the Appellant's wife, or should it be retroactive only to 2010 as determined by MPIC's case manager.

The Commission found that the Appellant's wife and daughter both testified in a clear and consistent fashion and the Commission found them to be credible witnesses. The Commission notes that MPIC did not challenge the testimony of either the Appellant's wife or daughter on their criticism of the inadequate manner in which [Appellant's occupational therapist #1] conducted her assessments of the Appellant's PCA needs.

The Commission finds that MPIC's case manager erred in his letter to the Appellant and his wife dated May 15, 2012 when he found that the Appellant's wife had made her criticism of [Appellant's occupational therapist #1] known to the case manager approximately one year prior to June 1, 2011. The Commission finds that the Appellant's wife and daughter provided detailed written complaints to the case manager which set out specifically the Appellant's inability to personally care for himself in 2009. The written submissions to MPIC's case manager by the Appellant's wife and daughter relating to the Appellant's conduct between 2007 and 2009 clearly demonstrate that he was unable to personally care for himself in 2009.

Despite the claims by the Appellant's wife and daughter that the Appellant was incapable of looking after himself, [Appellant's occupational therapist #1's] reports did not arrive at the same conclusion. [Appellant's occupational therapist #1], in her progress report of April 2, 2009 stated that the Appellant was suffering from a mild to moderate distractibility and memory deficit, moderate degree of lack of drive or behavioural inertia, a decreased attention to personal hygiene and a decrease in social graces. The Commission finds that [Appellant's occupational therapist #1] did not conclude that the Appellant was not capable of looking after himself.

[Appellant's occupational therapist #1's] assessment is contradicted by the written submissions made by the Appellant's wife and daughter to MPIC in respect of the Appellant's inability to care for himself in 2009 and their testimony before the Commission which repeated their complaints in this respect. MPIC did not challenge the submissions of the Appellant's wife and daughter or their testimony in respect of the complaints they made to the case manager in 2009 with respect to the Appellant's inability to care for himself and the need for increased care.

The Commission further notes that the testimony of the Appellant's wife and daughter about the significant deterioration in the Appellant's ability to care for himself between 2007 and 2009 is corroborated by [Appellant's doctor #3], the Appellant's personal physician who reported to the case manager on August 18, 2011. In this report, [Appellant's doctor #3] indicated that she became involved in the Appellant's care in December 2009. She further reported that she had a long discussion with the Appellant's wife in respect of the Appellant's inability to care for himself and manage his hygiene; his increasing difficulties with memory loss and the development of a gambling addiction. In her letter, [Appellant's doctor #3] indicated that she felt the Appellant's wife was credible and that the Appellant was quite unrealistic in his thought processes. [Appellant's doctor #3] stated:

"I was quite concerned at that time that he was having deterioration of his situation as a result of his brain injuries". (Underlining added)

[Appellant's doctor #3] again reported on February 22, 2010 that she saw the Appellant and that significant concerns were presented. She stated that the Appellant's wife expressed deep concern about the Appellant's hygiene and his cognitive impairment, which was increasing. [Appellant's doctor #3] concurred, based on her conversations with the Appellant, that she felt the Appellant's wife's concerns were warranted. The Commission finds that the reports from [Appellant's doctor #3] corroborate the testimony of the Appellant's wife as to the Appellant's inability to care for himself in 2009.

It is also significant that [Appellant's occupational therapist #2's] assessment in June 2011 demonstrates that there was a doubling of the total score on the PCA Assessment from 18.5 in 2009 to 37.5 in 2011 and an increase in the monthly maximum of \$862 to \$2,237 in 2011. This assessment clearly demonstrates that [Appellant's occupational therapist #1's] assessments were clearly incorrect and that MPIC's case manager consistently ignored the complaints made by the

Appellant's wife and daughter on [Appellant's occupational therapist #1's] failure to properly assess the Appellant's inability to look after himself.

The Commission notes that one day prior to the appeal hearing, MPIC's legal counsel provided the Commission with a letter from the case manager dated May 15, 2012 which indicated that the Appellant's wife had provided her opinion of the Appellant's deterioration approximately 2 years before his requirement for further supervision. The Commission finds that the case manager erred in failing to find that the Appellant's wife and daughter did make complaints in respect of the Appellant's deterioration and the need for additional supervision in 2009 and not only in 2010. The Commission further finds that the written complaints from the Appellant's wife and daughter in 2009 were ignored by the case manager and [Appellant's occupational therapist #1].

In his May 15, 2012 letter, MPIC's case manager justified the retroactive payment of the PCA to June 2010 on the basis that the Appellant's wife had made a complaint in 2010 of the Appellant's deterioration which required additional supervision. The Commission finds that the case manager erred in not determining that the Appellant's wife and daughter made a complaint in 2009 about the Appellant's deterioration which required additional supervision. The Commission therefore finds that the case manager should have justified the retroactive PCA payment to commence in June 2009 and not June 2010.

The Commission finds that the case manager acted arbitrarily in determining the appropriate commencement date for the retroactive payment without investigating the matter properly. If the case manager had conducted a thorough investigation, he would have determined that the Appellant's wife and daughter did make a complaint in 2009, as well as in 2010 about the Appellant's inability to look after himself.

The Commission finds the Appellant's wife and daughter complained about the Appellant's inability to look after himself in 2009, and these complaints were corroborated by the reports of [Appellant's doctor #3] and the new PCA assessment completed by [Appellant's occupational therapist #2]. For these reasons the Commission accepts the testimony of the Appellant's wife and daughter that their complaints of the Appellant's deterioration and his requirement for additional supervision were made in 2009 and not in 2010. As a result, the Commission finds that a retroactive PCA payment should have commenced on June 1, 2009, and not June 1, 2010.

The Commission therefore finds that the Appellant has established, on a balance of probabilities, that the Appellant's retroactive PCA payment in the amount of \$2,237 should begin on June 1, 2009 and allows the Appellant's appeal and varies the Internal Review Officer's decision of September 22, 2009.

Dated at Winnipeg this 17th day of January, 2013.

MEL MYERS, Q.C.

DR. SHELDON CLAMAN

NEIL COHEN