Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-059

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Brian Hunt** **Mr. Guy Joubert**
APPEARANCES:	**The Appellant, [the Appellant], was represented by Mr. Dan Joanisse of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**March 7, 2017**
ISSUE(S):	**Whether the Appellant is entitled to further Personal Care Assistance ("PCA") from December 30, 2003**
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

Background:

On August 27, 2003, the Appellant was injured in a motor vehicle accident (MVA) in [text deleted]. He was a passenger who reported injuries to his head, bruised discs in his back and painful knees and ankles.

Prior to the MVA the Appellant lived in [text deleted] and worked in a furniture business, as a "Helper, Lawn Care". His duties included lifting, moving, setting up the furniture store and warehouse, and lawn and garden care.

Initial insurance coverage was provided by an insurer in [text deleted]. However, on July 31, 2006 the Appellant submitted an Application for Compensation under MPIC's Personal Injury Protection Plan ("PIPP"). MPIC provided him with Income Replacement Indemnity ("IRI") benefits.

The Appellant also sought compensation for Personal Care Assistance ("PCA") required as a result of his MVA injuries. A case manager for MPIC reviewed reports from an [text deleted] occupational therapist that had assessed the Appellant and his need for assistance with household chores and activities of daily living.

On December 22, 2009, the Appellant's case manager wrote to him regarding his PCA benefits. The case manager concluded that the Appellant was entitled to receive:

- 3 hours of PCA per day from August 27, 2003 to November 20, 2003 (79 days)
- 2 hours per day from November 21, 2003 up to and including December 30, 2003 (40 days)

Based upon the occupational therapist's assessment, the case manager determined that the Appellant's entitlement to PCA benefits would have ended on December 30, 2003.

The Appellant sought Internal Review of this decision.

On April 14, 2010, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer considered both the reports from the [text deleted] occupational therapist and a report from [text deleted], of MPIC's Health Care Services. The [text deleted] occupational therapist's reports were reviewed, along with medical information on the Appellant's file, by [text deleted], an occupational therapist with MPIC's Health Care Services. She compared the [text deleted] information with the PCA Assessment Tool utilized by MPIC for assessing PCA needs and determined that on December 30, 2003 the appropriate score for the Appellant's needs was 0. A minimum score of 9 was required to establish entitlement to PCA assistance under the relevant regulations enacted pursuant to the MPIC Act. Although the Appellant argued that it was unreasonable to expect an individual to be fully able to care for himself less than four months after a serious accident, the Internal Review Officer concluded that the [text deleted] occupational therapist's opinion that the Appellant was able to complete most housekeeping and activities by December 30, 2003 was supported by the information on file. It is from this decision of the Internal Review Office that the Appellant has appealed.

Post-Internal Review PCA Calculations:

The Appellant's claim, although arising from an MVA which occurred in 2003, had not been reviewed by MPIC until 2009. In the interim, changes to the regulations had resulted in the development of a new PCA assessment tool. Following the Internal Review Decision and the Appellant's filing of his Notice of Appeal with the Commission, it was determined that the scores and PCA entitlements calculated for the Appellant in 2009 had been based on a new 2004 Assessment Tool used by MPIC to determine PCA entitlements.

MPIC's Health Care Services occupational therapy consultant was asked to prepare new score sheets for the file using the old, pre-2004 PCA system and tools and to prepare a report outlining the Appellant's entitlement to PCA under the old system.

The occupational therapy consultant proceeded to apply the appropriate PCA tool. As a result of this information, the Appellant's case manager was provided a new calculation of PCA benefit entitlement, and by letter of April 11, 2015 advised the Appellant that a further amount of $3,677.41 was owing and issued to him for his PCA entitlement between August 27, 2003 and December 29, 2003.

However, the assessment for the period from December 30, 2003 onward remained at a score of 0 and the Appellant was not found to be entitled to any further PCA benefits for that period.

A further review of this information along with more recent medical reports was considered by the Health Care Services occupational therapy consultant in a report dated January 25, 2016, but the opinion did not change.

Further medical information was also submitted to Health Care Services' psychology consultant. This included information regarding a permanent impairment benefit awarded to the Appellant for alteration of brain tissue (concussion). Following a review, the Health Care Services' psychology consultant advised that a concussion would not, on the balance of probabilities, lead to the Appellant having developed an inability to perform his activities of daily living or other such impairments.

An appeal hearing was then convened to determine the issue of the Appellant's entitlement to PCA benefits after December 30, 2003.

Evidence for the Appellant:

The Appellant submitted medical reports, including reports from his family practitioner.

As well, the Appellant and his mother, who assisted with his care, testified (by teleconference) at the appeal hearing.

Testimony of the Appellant:

The Appellant, who was [text deleted] at the time of the MVA, described his life before the MVA. He was living with his parents and working delivering furniture, as well as participating in a multitude of sports, fitness and social activities. He was fit and healthy and did not require any assistance with self-care activities or his chores around the house.

He then described the MVA, the aftermath at the scene and the pain and injuries he experienced. He believes he lost consciousness for a short period. He was taken to hospital by ambulance and admitted for a few days. He stayed in [text deleted] for a couple of weeks recovering, until he was well enough to travel back home to [text deleted]. Upon his return to [text deleted], he received treatment from his family doctor and was also assessed and treated at the [text deleted] clinic and by an occupational therapist, [text deleted], who met with him at his home to assess him.

The Appellant described changes in his daily function following the MVA, explaining that he was in pain and in bed all of the time. Getting up made him dizzy. His leg, ankle and back caused a lot of pain. He has trouble even walking in the house, to the bathroom or kitchen.

He had difficulty recalling a lot of things. He had nightmares and was confused. He also suffered from some depression, low self-esteem and anxiety.

The Appellant described getting up in the middle of the night and taking baths to ease his pain. He had difficulty getting out of bed and could not get dressed, cook, or eat on his own.

The Appellant explained that although he had seen references in documents on the indexed file to [Appellant's occupational therapist] coming to see him three times between October and December of 2003, the Appellant could only recall two visits. He said the first assessment lasted between 30 and 45 minutes. [Appellant's occupational therapist] performed an exam, measuring and testing things like range of motion and writing them down. He asked the Appellant to demonstrate the performance of some tasks and asked him some questions about his abilities.

According to the Appellant's recollection, the second visit was only 10 minutes long. [Appellant's occupational therapist] did not come into the house, but rather just gave him a cervical pillow and an extender stick (which looked like a broom handle).

The Appellant explained that before the MVA he could make basic meals for himself and had no issues with shopping or other tasks like that. Following the MVA he required assistance preparing all of his meals. It was at least two years (approximately August 2005) until he could

even make his own breakfast. He had difficulty standing and his upper back, knee and right ankle caused pain. He would also become dizzy.

The Appellant indicated that he wasn't able to prepare lunch for himself until approximately four to five years after the MVA (2007 or 2008), as he could not stand long enough to do so without suffering back pain and becoming dizzy.

He was not able to prepare his own dinner until approximately five years after the MVA (August 2008) for the same reasons.

It was also difficult for him to go out to purchase supplies since he suffered from low self-esteem and anxiety when he went out in public. He estimated that this problem lasted until approximately August or September of 2012.

Nor was he able, he explained, to do light housekeeping duties such as sweeping and dusting or heavier housecleaning and laundry, because he was in too much pain and had difficulty standing.

The Appellant also explained that he had anxiety about driving and even when he reinstated his driver's licence (which had previously been suspended for unpaid tickets) in 2010, he did not really start driving until 2011. Even then, he was still afraid in the car and could not drive on the highway.

The Appellant explained that before the MVA, he had only ever seen a counsellor for psychological problems when he was having some trouble with his parents, due to arguments and problems with a girl he was dating.

Following the MVA, he had horrible nightmares which would wake him up. He struggled with drug addiction because the pain medication prescribed was too strong for him. The Appellant only started to feel better after he embarked upon an intensive physiotherapy rehabilitation program in 2009.

The Appellant did not return to work until August 2015.

Upon cross-examination, counsel for MPIC reviewed [Appellant's occupational therapist's] reports of three separate visits to the Appellant's home. The Appellant confirmed that, in spite of his expressed concerns regarding [Appellant's occupational therapist's] failure to do testing during their second meeting, he did not complain to his insurer about this and signed the forms completed by [Appellant's occupational therapist]. When the insurer ended his entitlement to assistance benefits, the Appellant did not contact them to try to reinstate those benefits, because, he explained, he was too worried about pain every day to worry about things like that.

Counsel for MPIC also reviewed, in detail, documentary information which the Appellant had provided in 2015, indicating that he was still unable to cut grass for more than 10 minutes at a time, or to wash and fold clothes and carry laundry. He denied using a bike for transportation, as had been reported in documents on the indexed file, explaining that the farthest he ever biked was to see his cousin who lived a block away. He denied spending time at a casino, as he had indicated in earlier documents, explaining that if he went to the casino it was only to go with his mother and it would not be for long. He would maybe just eat some free food and then leave.

When asked about sessions and assessments he had undergone with his psychologist, [text deleted], the Appellant noted that they didn't really discuss any of his problems and that [Appellant's psychologist #1] was really only interested in talking with him about sports, before asking the Appellant to undergo further testing with a female assessor.

In regard to reports from [text deleted], another psychologist, the Appellant indicated that they spent much more time together during their visits and that he had opened up far more to [Appellant's psychologist #2] regarding his depression and anxiety.

Testimony of [text deleted], the Appellant's mother:

The Appellant's mother testified that the Appellant was completely independent in the activities of living before the MVA.

She explained that she only recalled [Appellant's occupational therapist] coming to their home to do an assessment twice. She thinks the first visit lasted about 20 to 30 minutes. On the second or third time she recalls he brought over a stick with a nylon mesh for tub cleaning and a cervical pillow, staying in the entrance of the house and not coming into the family room when invited. She invited him to come to the Appellant's room to see his bedroom, but he said that was not necessary. She thought that was odd.

In reviewing [Appellant's occupational therapist's] reports, she did not recall a visit at the end of December or in January.

[Appellant's mother] then described the activities which were difficult for the Appellant after the MVA. She said that it was difficult for the Appellant just to get out of bed and walk around.

Therefore, meal preparation was not possible. He could not get up from bed, walk down the hall to the kitchen, stand, open the fridge, or reach in the cupboards to get bowls. He could not do any of these things for months after the MVA. In December of 2003 he could not even open a bread container and put bread into the toaster.

[Appellant's mother] estimated that the Appellant needed assistance with these things for at least a year and a half after the MVA. The most limiting factor was probably his lower back pain, but she also described difficulties with his knee and ankle popping, and with bending and reaching. There were also issues with his mood, as he became frustrated very easily and would be upset for a long while after that.

She indicated that the Appellant did not participate in shopping or the purchase of supplies until years after the MVA. He could not drive, due to anxiety with being in the car. He couldn't go up and down the aisles, picking things off the shelves and putting them in the cart. That did not happen for quite a few years. Even when he got his driver's licence back, it was closer to eight years post MVA before he was comfortable enough to drive.

She explained that during that time the Appellant could not do light housekeeping such as sweeping and dusting. At the end of December 2003 he could still barely walk 10 feet without pain.

Until he started his rehabilitation program in 2009 (which worked wonders for him) he could not do any of those activities, due to problems with his low back, ankle and knees. He could not bend over or move a broom in a twisting motion. In December of 2003 he could not rinse out a sink or tub or do dishes. After the rehab sessions began he gradually became able to do more

and more every week. Then he joined a gym and was doing his exercises regularly. However, she noted that he still would not have been able to clean an oven or a fridge or do heavy cleaning, or even laundry in the downstairs laundry room, until the end of 2009 or the beginning of 2010. Heavy laundry would not have been possible for him until approximately 2012.

She explained that using public services and neighbourhood facilities was very difficult for the Appellant, since there was not a good bus system in [text deleted] and he could not drive on his own until about 2011, due to anxiety and fears.

She also explained that the changes that she noticed in her son after the MVA were not just physical changes. He was injured from head to toe and barely able to walk and get around. But in addition to this, where he had previously "lived for sports", after the MVA he didn't go back to hockey, or try golf or anything like that. He had horrible mood swings and would snap from frustration. He had no concentration and cried easily. There were changes in his sleep patterns and nightmares. It was difficult for the family because they could no longer do the things they used to do together. Her son also struggled with addiction, as a result of the painkillers he was prescribed. Her son was a different person after the MVA.

On cross-examination, the Appellant's mother was asked about documentation in [Appellant's psychologist #1]'s report, where the Appellant described riding a bicycle for transportation. She denied recalling the Appellant riding a bike, although she thought perhaps he might occasionally have taken her beach cruiser to go to his cousin's house to visit, which was nearby. She confirmed that approximately one and a half to two years after the MVA the Appellant could prepare his own breakfast, but it took longer for him to be able to prepare lunch and dinner. Even up until 2009, he would only cook things that were easy and because these were not

necessarily healthy foods, he gained a lot of weight. She also explained that while at one point the Appellant was addicted to prescription pain medication, the drugs bothered his stomach and he realized that he must try and do things without these drugs, using exercise and the Jacuzzi to help him instead.

Submission for the Appellant:

Counsel for the Appellant focused on a comparison between the Appellant's level of function and the medical status reported by his caregivers before and after the MVA. He also focused on the specific tasks which the Appellant was unable to perform after the MVA, and the duration that assistance was needed for each of those tasks.

Clearly the evidence had established that prior to the MVA the Appellant was independent in all of his activities of daily living including self care, personal care and home assistance. He was a normal kid, involved with sports and friends.

The MVA involved a high speed rollover where the Appellant was ejected from the vehicle with significant force, suffering a loss of consciousness that resulted in a permanent impairment benefit for concussion from MPIC. The ambulance and hospital records detail these injuries, which then resulted in a profound shift in the Appellant's function during the years which followed the MVA.

His injuries included lacerations to his head, pain in his lower back, right shoulder, both knees and ankles. He suffered damaged teeth, depression, anxiety, nightmares, interruption of sleep, and difficulties with concentration, memory and cognition. These injuries and symptoms were

set out in a report from [text deleted] (the Appellant's family doctor) to the [text deleted] insurer in approximately September or October, 2003.

Counsel then reviewed the reports provided by [Appellant's occupational therapist], the occupational therapist. The first initial assessment report showed that the Appellant needed significant assistance. The Appellant's Application for Benefits with MPIC was consistent with his description of his injuries.

[Appellant's occupational therapist's] second assessment and report indicated that the Appellant still had ongoing needs for assistance with daily activities such as grocery shopping, light and heavy cleaning. Then, in his final report, dated January 4, 2004 (assessing an encounter on December 30, 2003), [Appellant's occupational therapist] felt that the Appellant had achieved independence in all of his daily activities.

However, information and reports submitted from the Appellant's caregivers showed that the Appellant had not yet returned to his prior level of function by January 2004. The Appellant had indicated he still encountered difficulties with prolonged sitting, standing or weight bearing, and with the use of his arm. A report completed by a physiotherapist, [text deleted], described similar findings and limitations at the end of February 2004. Then, a CT scan of his lumbar spine on October 22, 2004 showed spondylolisthesis and bulging disc. A report from the Appellant's orthopedic surgeon, [text deleted], on April 7, 2005 described the Appellant's trauma as well as ossific fragments on his ankle X-ray.

Counsel relied upon a report from [Appellant's doctor] dated April 9, 2008 which described his history of seeing the Appellant prior to the MVA as well as his assessment of his condition

following the MVA. The Appellant showed severe muscolo-skeletal injuries to his right shoulder, left knee and lumbar spine, as well as memory loss/altered behaviour due to a closed head injury sustained in the MVA. [Appellant's doctor] reviewed results from the orthopedic assessment as well the CT scan and concluded that the Appellant had considerable problems maintaining his activities of daily living due to his muscolo-skeletal injuries. He also referred to the varying amounts of analgesia required to control the Appellant's pain symptoms, including Oxycontin, and referred to unfortunate dependency problems and medication-seeking behaviour issues which had resulted. He noted the Appellant's attempts to resolve this issue by weaning himself off the narcotic analgesia.

[Appellant's doctor] also noted that the patient had been diagnosed with post-traumatic stress disorder and:

> "Has trouble with his Activities of Daily Living due to cognitive lapses/memory loss. With these difficulties, I am aware that his parents remain responsible for his day to day care and advice/oversight regarding executive decisions."

Counsel reviewed physiotherapy assessments which followed and showed that the range of motion measurements for the Appellant's cervical spine was decreased for the Appellant's age. There were also continued reports of diminished strength and shoulder impingement of the right shoulder.

Counselling reports from November 2005 reflected continued psychological distress as a barrier, with non-productivity and continued alcohol and drug abuse.

During the period which led up to the Appellant's rehabilitation program in 2009 the documents on the indexed file confirmed the Appellant's requirement for assistance from his parents with

heavier tasks around the home and to drive him to all medical appointments. This is consistent with what the Appellant described regarding his fears of driving and his reliance upon his family.

Counsel addressed the difference in opinion between two psychologists who had provided reports on the file. The first, [Appellant's psychologist #1], conducted a neuropsychological evaluation to assess cognitive complaints. Counsel noted that this was not the same as a psychological assessment, but that [Appellant's psychologist #1] did report on the Appellant's not insignificant cognitive problems. His physical symptoms were listed, as well as some of his psychological difficulties, such as trouble focussing or concentrating. Still, [Appellant's psychologist #1] concluded that the Appellant had not sustained a brain injury.

Tests were not administered at that time for depression, anxiety or PTSD. In this report and a later report dated April 22, 2012, [Appellant's psychologist #1] found that there was no evidence of cognitive impairment that could be causally attributed to the head injury sustained. If he had sustained a concussion, the medical documentation suggested it was mild. Counsel submitted that this conclusion raised concerns regarding [Appellant's psychologist #1's] reports.

Counsel relied upon the psychological consultation report by [Appellant's psychologist #2] dated October 10, 2013. This report described the Appellant's struggles with pain, sleep disturbance, concentration, worry, social anxiety and anxiety around automobiles. No evidence of significant and substantiated symptom magnification, malingering or secondary gain was reported.

[Appellant's psychologist #2] provided a diagnosis of somatic symptom disorder, major depressive disorder and post traumatic stress disorder. He indicated there was no evidence that

any of these psychological conditions pre-existed the MVA. [Appellant's psychologist #2] opined:

> It would appear that the changes in mood, behavior and cognition being reported by [the Appellant] and his parents, from their perspective, would be directly related to the MVA of 2003. ...
>
> It is quite obvious that the psychological conditions identified have had a negative impact on [the Appellant's] ability to perform activities of daily living. It would appear that his parents assist him as he is unable to perform many of the daily living functions expected.

Counsel submitted that the evidence of the Appellant and his mother was corroborated by the reports on the indexed file assessing the Appellant's level of independent function at various times. He urged the panel to examine the reports of [Appellant's occupational therapist] very carefully in assessing the weight to be afforded them, and in particular to have regard to whether his reports were consistent with other medical reports around the same time, from other caregivers. The Appellant suffered severe injuries, including a head injury, which necessitated lengthy periods of rehabilitation and recovery. [Appellant's psychologist #2's] report shows that conditions of depression, anxiety and post-traumatic stress resulting from the MVA contributed to the difficulty the Appellant had in returning to his pre-MVA condition and life.

A review of all of this evidence should lead the panel to conclude, he submitted, that the Appellant had met the minimum score of 5 points on the assessment tools which would have been used by MPIC in 2003, and that the Appellant would have needed further PCA until August of 2008 when he no longer needed assistance with preparing his lunch and dinner. This would have, at that point, led to a score of only 4 points, which would not have entitled the Appellant to be in receipt of further PCA benefits.

Accordingly, counsel submitted that the panel should find, on a balance of probabilities, that the Appellant's pain and psychological impairment due to the MVA should entitle him to further PCA benefits between December 30, 2003 and August 2008.

Submission for MPIC:

Counsel for MPIC submitted that the best evidence regarding the Appellant's abilities to perform the activities of daily living can be found in the functional testing and narrative reports on file. These were based on the functional testing of the Appellant's abilities to perform the activities of daily living and should be given greater weight, as three party measurements of his capabilities provide the best evidence of what an individual can or cannot do. Therefore, counsel focused on [Appellant's occupational therapist's] in-home reports which specifically looked at the Appellant's ability to perform the tasks required for the activities of daily living. This is the most tightly focused, best evidence of the Appellant's actual abilities, which were prepared close in time to the motor vehicle accident.

Counsel moved through the three occupational therapy reports, noting the Appellant's perceived and observed tolerances and abilities. Various testing was recorded and reported.

Counsel addressed the claims of the Appellant and his mother that the second assessment took only ten minutes and that the occupational therapist did not even enter the house. He noted that the witnesses were not able to say for sure that none of the testing which was recorded in that report had been done, as they could not remember for sure. In fact, specific grip strength is measured in that report, as well as observations of behaviour, and reviews of active range of motion and strength, etc. It is implausible to suggest that the occupational therapist would have simply invented these results when reporting to an insurer. Rather, [Appellant's occupational

therapist's] reports suggest that these assessments were indeed conducted. Based on [Appellant's occupational therapist's] measurements and the Appellant's self-reports, the therapist concluded that he was able to complete most housekeeping tasks if he used proper body mechanics and that further PCA was not required at that time.

These conclusions were supported by the patient progress summary report from the [text deleted] clinic (dated December 10, 2003) which indicated that the Appellant had full range of motion in knee flexion, extension, shoulder flexion and shoulder abduction, although his compliance and motivation were found to be poor at that time.

Counsel submitted that although the Appellant and his mother called the functional reports into question, other assessments of the Appellant's function were consistent with this picture, even when done several years later. All functional testing paints the same picture, he submitted. A review of the Baseline Functional Abilities Evaluation conducted on April 20, 2009, an independent medical review by [text deleted] and a Functional Capacity Evaluation dated July 3, 2015 contained similar results and conclusions. For example, [independent doctor] reported on October 26, 2009:

> "DISABILITY
>
> In the context of:
> - soft tissue injury sustained over 6 years ago
> - results of the FAE examinations
>
> there is no medical contraindication to [the Appellant] resuming usual self-care and domestic activities"

Counsel reviewed a variety of reports on file which provided marked contrast to the evidence of the Appellant and his parents regarding the extent of the Appellant's ongoing disability. Such narrative reports included self-reports by the Appellant to his treating practitioners showing that

his pain was improving and quite mild, and that he was responsible for various daily activities both in the home and out (such as meal preparation, hygiene, bicycling, casino). The Appellant was only able to deny or claim that he does not remember such self-reports. However, it is improbable that so many care providers would made have made so many errors about what the Appellant was telling them about his ability to perform the activities of daily living. As a result, these reports should be accepted as they have been written.

In regard to the Appellant's psychological condition, counsel noted that [Appellant's psychologist #1] is a qualified psychologist who did an extensive review of information, as outlined in his report which listed the extensive tests administered, and the nature of his review. He concluded that there was no evidence of cognitive impairment which could be attributed to a head injury, and that even if there had been a mild concussion, the Appellant was not disabled by MVA related impairments. He found elevated scores for somatisation, noting that individuals with this profile tend to report their symptoms with exacerbation or magnification.

Counsel noted that this was not the only suggestion in the Appellant's file which showed a tendency to magnify symptoms. A physiotherapy report dated May 28, 2009 indicated the physiotherapist believed that the Appellant could do more than he believed he was able to, and [independent doctor] noted somatisation as a possible inorganic factor contributing to the Appellant's overall presentation.

Further, counsel submitted that the Appellant was not a credible historian. The panel was urged to compare the history given by him and his mother with the caregivers' reports and assessments. While the Appellant may have been honestly reporting to the best of his recollection, given the difficulties with memory problems which have been identified, he may not be the most accurate

historian of his own condition. The evidence of the doctors and caregivers were based on their professionals records made at the time, and should be preferred to the Appellant's oral testimony.

Counsel acknowledged that [Appellant's psychologist #2's] report stands in marked contrast to the other lengthy reports filed, particularly those of [independent doctor] and [Appellant's psychologist #1], and in particular with regards to activities of daily living. His report highlighted a severe impairment rendering the Appellant incapable of performing even minimal expectations and is very different from the other reports.

A report from MPIC's Health Care Services psychological consultant dated November 14, 2013, reviewed the psychological and other reports on the Appellant's file. In addressing [Appellant's psychologist #2's] report, it was noted that there was no record of [Appellant's psychologist #2] reviewing previous documentation or pre-accident contact with mental health providers, in order to give context and understanding to the tests administered. Further, [Appellant's psychologist #2's] data relied on information from two different psychologists over a two month period and did not report on the results of all the other tests which had been administered, which is not standard practice for a psychologist. The conclusion of the Health Care Services consultant was that, having reviewed the entire medical file, the evidence of [Appellant's psychologist #1] should be preferred to the report of [Appellant's psychologist #2].

A review by Health Care Services dated July 2, 2016 confirmed that on a balance of probabilities, any concussion the Appellant may have suffered would not lead to a continuing inability to perform the activities of daily living. [Text deleted's] (medical consultant) review of the medical, physiotherapy and occupational therapy reports on the Appellant's file led him to

the conclusion that the Appellant would have been able to perform the activities of daily living by January 2004.

Therefore, overall, counsel submitted that the most relevant information regarding the Appellant's abilities to perform the activities of daily living, would be the objective testing performed by [Appellant's occupational therapist] which was supported by two Functional Capacity Evaluation reports and an independent medical examination report. These involved supervised objective testing of the Appellant's ability to perform specific tasks and supported the Appellant's ability to perform the activities. The Appellant's self-reports to a number of his care providers, which confirmed these abilities, should also be taken into account. Particular attention should also be paid to [Appellant's psychologist #1's] extensive review which provided a detailed consideration of the Appellant's function.

These objective reports should be given more weight, it was submitted, than the testimony of the Appellant and his mother, whose accuracy suffered from the passage of time and lack of documentation.

Accordingly, counsel submitted that the Appellant had failed to meet the onus upon him to show, on a balance of probabilities, that the Internal Review Officer erred. The Appellant should not be entitled to PCA benefits beyond December 30, 2003 and the appeal should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred and that the Appellant should be entitled to further PCA benefits between December 30, 2003 and August 2008.

The MPIC Act provides

> **Reimbursement of personal assistance expenses**
>
> 131(1) Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than $3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

Manitoba Regulation 40/94 provides:

> **Reimbursement of personal home assistance under Schedule A**
>
> **2** Subject to the maximum amount set under section 131 of the Act, where a victim incurs an expense for personal home assistance that is not covered under *The Health Services Insurance Act* or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

The panel has carefully reviewed the documentary evidence on the Appellant's indexed file, the testimony of the Appellant and his mother, as well as the submissions of counsel. We have weighed the evidence of the Appellant and his mother against reports from [text deleted], [Appellant's occupational therapist], the occupational therapist and other assessments and reports. We have noted inconsistencies in the testimony of the Appellant and his mother. Understandably, their memories may have been clouded by the passage of time and they have not had the benefit, as [Appellant's occupational therapist] has, of recording contemporaneous notes of their meetings. But, their testimony and recollections were often inconsistent with self-reports made by the Appellant to the caregivers and assessors completing various reports. Their recollections and testimony left out details which were recorded in those narrative and assessment reports.

[Text deleted], Occupational Therapist:

The panel did consider that it did not have the benefit of hearing vive voce evidence from [Appellant's occupational therapist] or a cross-examination of his evidence. Nevertheless, we carefully examined all three of [Appellant's occupational therapist's] reports contained in the indexed file. We have traced the progress of the Appellant's abilities as they were recorded through the reports. For example, under certain categories of care, such as meal preparation, the Appellant was reported by [Appellant's occupational therapist] to have progressed from being partially independent in performing these tasks in October, to being independently able to perform them in November. With the exception of questions which have arisen regarding the Appellant's abilities in the area of community access/driving, which will be addressed below, our analysis concluded that [Appellant's occupational therapist's] reports show that the Appellant exhibited a steady progression towards independence in his activities of daily living across the three reports.

Although the testimony of the Appellant and his mother painted a picture of a patient who was unable to perform any of the assessed tasks independently, we must contrast their evidence with the objective third party functional assessment provided by [Appellant's occupational therapist's] three reports. The panel is of the view that greater weight should be given to [Appellant's occupational therapist's] reports, on the basis of their objective and contemporaneous recording of the Appellant's status, than we can give to the more general narrative recollection of the Appellant and his mother many years later. We also find that the records of the Appellant's caregivers which set out the Appellant's own self-reports regarding his abilities supported the findings of [Appellant's occupational therapist].

[Text deleted], Family Physician:

The panel has considered the evidence of [text deleted], the family physician, who knew the Appellant and saw him before the motor vehicle accident and examined and assessed him a month after the MVA. He continued to see him through 2003, 2004 and 2005. [Appellant's doctor] provided a report dated April 9, 2008 which stated:

> [The Appellant] had considerable problems maintaining his activities of daily living due to his musculoskeletal injuries. He required varying amounts of analgesia to control pain symptoms with Oxycontin 10mg BID-TID being most effective. Unfortunately, as is often the case with this medication, it led to dependency problems, and medication seeking behavior issues.
>
> ...
>
> Additionally, the patient has been diagnosed with a Post Traumatic Stress Disorder. [The Appellant] has trouble with his Activities of Daily Living due to cognitive lapses/memory loss. With these difficulties, I am aware that his parents remain responsible for his day to day care, and advice/oversight regarding executive decisions.

Through these comments, [Appellant's doctor] appears to comment upon a higher level of personal care/decision making, which does not form part of the scoring process for qualification under the tool for personal care assessment needs. While [Appellant's doctor] deals with an overview of the challenges which the Appellant's pain and psychological difficulties have created for maintaining his activities of daily living, unlike the occupational therapy reports, he does not assess or break down the various tasks of daily living, such as meal preparation or light housekeeping, in order to quantify and assess such needs in the way that [Appellant's occupational therapist] did in his reports. In contrast, [Appellant's occupational therapist] applied his particular expertise and experience in the area of objective assessment and evaluation of these components.

Physiotherapy Reports:

These reports describe the sequelae of the Appellant's injuries, setting out physical issues which continued to affect him and his ability to seek employment. However, the physiotherapy reports did not address how these symptoms affect the Appellant's ability to perform daily tasks of self-care.

[Appellant's psychologist #2]:

The panel has carefully reviewed the psychological consultant report of [Appellant's psychologist #2] dated October 10, 2013. Of significance is [Appellant's psychologist #2's] comment that:

> It is quite obvious that the psychological conditions identified have had a negative impact on [the Appellant's] ability to perform activities of daily living. It would appear that his parents assist him as he is unable to perform many of the daily living functions expected.

The panel notes that [Appellant's psychologist #2] did not meet or assess the Appellant until 2013, and so, these observations were not made contemporaneously with the period in question, in late 2003, when the Appellant's PCA benefits were discontinued.

Further, various comments contained in the report of [Appellant's psychologist #2] show his heavy reliance upon the subjective reports of the Appellant and his family. The language of [Appellant's psychologist #2's] report seems to acknowledge this. For example, we have noted comments such as:

> ... [The Appellant] was not known prior to the MVA of 2003. However, given [the Appellant's] reported functioning prior to the MVA of 2003, *it is quite apparent that from his perspective,* the psychological conditions identified in question 1 are product of the MVA. (emphasis ours)
>
> ...

> It would appear that the changes in mood, behavior and cognition *being reported by [the Appellant] and his parents, from their perspective*, would be directly related to the MVA of 2003. ... (emphasis ours)
>
> ...
>
> *It would appear that his parents seem to think that he may have experienced a traumatic brain injury. ...* (emphasis ours)

Therefore, [Appellant's psychologist #2] seems to have relied heavily upon subjective reports derived many years after the relevant period in question. When this is considered along with the failure of the report to identify specific areas of self-care which the Appellant was unable to perform, the panel has afforded less weight to [Appellant's psychologist #2's] report on the issue of PCA than it has to the report of [Appellant's occupational therapist] which recorded objective data and observations derived in 2003.

[Appellant's psychologist #1]:

[Appellant's psychologist #1's] reports supported the findings of [Appellant's occupational therapist]. He concluded that if the Appellant had sustained a concussion in the MVA it was mild and that his performance upon evaluation suggested no evidence of ongoing cognitive impairment as a result of the MVA. Nor was he found to be impaired by emotional difficulties caused by the collision. He also reported some scores consistent with symptom magnification, reduced mood and somatisation illness.

Conclusions:

The panel understands that this has been a lengthy and difficult process for the Appellant and his family. Due to the interplay of different jurisdictions, including [text deleted] and [text deleted], the results have often been confusing for the Appellant and his parents.

However, the Commission's task is to evaluate the evidence in light of the PCA legislation and regulations under the MPIC Act. The administration of these benefits by MPIC depends heavily upon objective measurements and tools. Our review of the evidence leads us to place greater importance upon the objective reports of the occupational therapist, [Appellant's occupational therapist], who has provided objective and quantifiable information which enables an assessment of the Appellant's condition in 2003 in light of the provisions of the relevant regulations.

Overall, with one exception, our review has shown that the Internal Review Officer was correct in accepting the findings of [Appellant's occupational therapist] and other caregivers and assessors in order to conclude that the Appellant was not entitled to further PCA benefits beyond December 30, 2003.

However, one exception which we have identified was [Appellant's occupational therapist's] assessment of the Appellant's abilities in regard to "Community Access/Driving". In this regard, we have paid careful attention to the progression, through [Appellant's occupational therapist's] reports, regarding this factor. [Appellant's occupational therapist's] first report dated October 12, 2003, indicated that for the period between August 27, 2003 and October 9, 2003, the Appellant was "Unable" to drive –" the client reported limitations in the area of community access/driving". This included the notation that:

> Client was observed to guard his right shoulder, neck, back, left knee and right ankle and foot while walking and was observed to limp on his right lower extremity. Client requires assistance for medical appointments.

For the period October 10 to November 19, 2003, [Appellant's occupational therapist's] report of November 20, 2003 reported that the client was still "Unable" in regard to community

access/driving and that the client reported limitations. A notation that the Appellant was partially independent indicated that:

> Client was observed to guard his right shoulder and right ankle and foot while walking.
>
> ...
>
> Client requires transportation assistance for medical appointments

For the period from December 20 to December 29, 2003, [Appellant's occupational therapist's] report dated January 4, 2004 indicated that community access/driving was "n/a":

> Client reported that his family members are helping him in transportation for medical appointments.

It appears that [Appellant's occupational therapist's] last report reached the conclusion that the Appellant's reported status in regard to community access/driving is "n/a", because his family members were helping him with transportation for medical appointments. The panel finds that this is not a reasonable conclusion. If the Appellant still required his family members to drive him to medical appointments, then he was still "Unable" or only "partially independent" in regard to community access/driving, and should have been awarded two points in the PCA tool (just as he had been awarded two points in that regard as a result of the reports dated October 20, 2003 and November 20, 2003). We find that the Internal Review Officer should have recognized that the Appellant still required assistance with community access and driving.

However, as noted by both counsel, a minimum score of five points must be met on the assessment tools used by MPIC in 2003, in order to entitle the Appellant to an award of PCA benefits. The two points which should have been awarded in regard to community access/driving would still not allow him to meet this minimum requirement.

As a result, the Commission finds that the Appellant is not entitled to further PCA benefits from December 20, 2003 to August 2008. The decision of the Internal Review Officer dated April 14, 2010 is upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 19th day of April, 2017.

LAURA DIAMOND

BRIAN HUNT

GUY JOUBERT