

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-04**

PANEL: Mr. J. Guy Joubert, Chairperson
Ms Mary Lynn Brooks
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted]
Manitoba Public Insurance Corporation (“MPIC”), was represented by Mr. Terry B. Kumka

HEARING DATE December 11, 2006

ISSUE(S):

1. Whether the Appellant is entitled to a contribution pursuant to Section 138 of *The Manitoba Public Insurance Corporation Act*, R.S.M. 1987, c. P215 (the “Act”) toward the cost of his attendant care?
2. Whether the Appellant is entitled pursuant to Section 138 of the Act to reimbursement for the purchase and modification of a second motor vehicle for his use while in [text deleted]?

RELEVANT SECTIONS Sections 131, 138 and 184(1) of the Act. Section 10(1) of Manitoba Regulation P215 - 40/94 (“Regulation 40/94”)

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

A. BACKGROUND

The Appellant was involved in a motor vehicle accident wherein he sustained a C-4 Spinal Cord Injury. The Appellant is now a quadriplegic who is confined to a motorized wheelchair. He requires the assistance of attendants on a twenty-four hour basis.

The Appellant previously appeared before the Commission seeking an appeal from a decision of an Internal Review Officer dated September 13, 2004, with respect to eight (8) issues. On February 22, 2006, the Commission rendered a decision regarding five (5) of the eight (8) issues, and referred the remaining three (3) issues back to MPIC for reconsideration. The Commission retained jurisdiction with respect to a final determination of the remaining three (3) issues in the event the parties were unable to reach a settlement. Please see the AICAC Decision dated February 22, 2006 - File No.: AC-01-04 ("AICAC 2006 Decision").

The Appellant has now appealed two (2) of the three (3) remaining issues to the Commission. These two (2) issues had been reviewed by a Senior Case Manager of MPIC and in his decision dated August 18, 2006, the Senior Case Manager stated with respect to attendant care expenses that:

S. 131 of the Act provides for the reimbursement of personal assistance expenses, subject to a statutory maximum of \$3,841.00 (2006 rate) per month. Your condition is such that you require, and indeed receive, 24 hour care and supervision 7 days per week. This is true regardless of your employment status and remains constant whether you are in [text deleted], or in transit.

The corporation continues to provide this coverage at the maximum rate allowable under the Act. [Text deleted] has acknowledged its obligation to assist you and provides funding for care over and above our statutory maximum.

The general rehabilitation provisions of s. 138 do not override the specific personal assistance benefits contained in s. 131.

It should also be noted that you have not identified the cost of this additional attendant care. In the event this issue is referred back to AICAC the Corporation will be asking for disclosure of the additional amount claimed under this heading.

Regarding the purchase and modification of a second motor vehicle, the Senior Case Manager indicated that:

Vehicle modifications are covered by s. 10(1)(a) of Regulation 40/94 which states:

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (a) funds for an extraordinary cost required to adapt a motor vehicle for the use of the victim as a driver or passenger;

As you know, the corporation has already funded the adaptation of a vehicle – the cost of which included funding the difference in the capital cost between the type of vehicle you indicated you would have owned and operated, but for the accident, and the van that you now require.

We acknowledge that you require some form of transportation while in [text deleted]. In the normal course of affairs this is a cost that is borne by all [text deleted]. While we acknowledge that your situation is unique, this does not change the fact that you would be incurring a cost for transportation regardless of the happening of the accident.

In view of this we are prepared to consider funding the adaptation of a motor vehicle for your use in [text deleted]. Such funding will not include any allowance towards the capital cost of the vehicles [sic] purchase.

Although the decision of the Senior Case Manager provided that it was subject to review by an Internal Review Officer of MPIC, the Appellant and MPIC agreed that the two (2) issues presently under appeal would be heard directly by the Commission given that it had earlier retained jurisdiction.

The facts in this case are unique and in the AICAC 2006 Decision at page 12, the Commission made the following comments which are equally applicable to this appeal:

We have an Appellant who was the victim of a terrible accident that left him severely disabled and unable to pursue his new career as a [text deleted]. Despite the trauma of the accident and the struggle at achieving some form of normalcy in his life, the Appellant managed to re-shape his future by focusing on his abilities, interests and strengths, and then embarking upon a new educational program that would best position him for success in life. The Appellant was assisted by the Respondent throughout this process.

The Appellant was nonetheless faced with limited options as to career choices that might be available to him. This picture is perhaps best described in a report dated

April 30, 2003, and issued by the firm of [text deleted]. The report dealt with the Appellant's employability and the author concluded, in part, that:

[b]ased on the information received and analyzed, it is our opinion that while [the Appellant] has an educational background, set of skills and experiences that employers would potentially find attractive, there are significant complicating factors and a uniqueness to his case that make employability in the traditional sense less likely. The level of risk, the required accommodations an employer would have incorporate [sic] and the flexibility they would have to demonstrate significantly limits [the Appellant's] options given the labour market in which he is competing.

It is our opinion that when all factors are considered, [the Appellant's] employability is questionable. After consultation with executive recruiting and human resource industry experts we were not able to identify specific employers who would be interested in employing an individual with [the Appellant's] capabilities and requirements, nor do we feel it is realistic or practical to expect that there are many employers in [text deleted] who would do so. Those potential positions that were identified through job advertisement searches have aspects about each of them that could make them less viable options and would require further investigation before making a final determination.

Given the nature of his situation and the fact that he wants to make a contribution to society, [the Appellant] is going to have to increase his competitive advantage more than an able-bodied person.

The Appellant did ultimately obtain a [text deleted] degree and later, he secured employment in [text deleted]. With respect to his interests in [text deleted], he testified that he always had strengths in that area. He mentioned that when he looked back on his life prior to the accident, he was usually the "lead guy" in that he had participated in various organizations in some form of leadership or [text deleted] capacity. For instance, he had been president of [text deleted], president of the [text deleted] and president of the [text deleted]. In addition, he had been involved with various committees, groups and a [text deleted] in the years leading up to the accident.

The Respondent suggests that the Appellant ought to have found employment in [text deleted] and since he chose [text deleted], he should be responsible for all additional expenses associated with being [text deleted]. In his written arguments, counsel for the Respondent indicated that:

...Moreover, it is respectfully submitted that the existence of PIPP does not absolve [the Appellant] from ramifications resulting from decisions he has chosen to make along the way. In choosing [text deleted], [the Appellant] was well aware that his decisions, if

successful, would result in a significant extraordinary additional attendant and related costs which MPI would not cover under PIPP. That point was made by the Internal Review Officer [text deleted] who indicated on page 5 of his September 13, 2004 decision [Tab 2]

“[The Appellant] was well-aware when he began the pursuit of his goal to become [text deleted] that he would be faced with significant costs associated with maintaining two residences, operating two vehicles, traveling between [text deleted] and [text deleted], and providing accommodations for his attendants (including travel, meals, and sleeping accommodations). With the exception of the attendant expenses, these costs are a reality for every [text deleted] whose principal residence is not within ready driving distance of [text deleted].

Prior to seeking [text deleted], [the Appellant] was also well-aware that MPI – having already made substantial financial contributions to his education and, on an ongoing basis, to his attendant care expenses – was not prepared to fund those known, and anticipated, additional expenses.”

The Commission disagrees with this point of view. In fact, the Appellant ought to be commended for correctly assessing his abilities, interests and strengths, and then executing a plan of action that brought him to where he is today. He managed to secure a rewarding employment despite numerous obstacles.

The substance of the Appellant’s position is that he is not asking the Respondent to pay for additional expenses that he [text deleted] would otherwise incur as a result of having two residences and being required to travel between home and [text deleted]. [Text deleted] provides allowances and pays for those costs and what is not covered by [text deleted], is paid for by the [text deleted] in question, including the Appellant. What the Appellant is asking the Respondent to do is to pay for those expenses that arise as a result of his injuries and are above and beyond what [text deleted] and the Appellant would otherwise be required to shoulder.

B. RELEVANT SECTIONS OF THE ACT AND REGULATIONS

The Act

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.

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

184(1) After conducting a hearing, the commission may

(a) confirm, vary or rescind the review decision; or

(b) make any decision that the corporation could have made.

Regulation 40/94

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

(a) funds for an extraordinary cost required to adapt a motor vehicle for the use of the victim as a driver or passenger;

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

(ii) mobility aides and accessories,

C. PRELIMINARY MATTER

Shortly after the Commission issued the AICAC 2006 Decision, the Chairperson was elected as National Second Vice-president of the Canadian Bar Association. In light of this, the following statement was read by the Chairperson to the parties and their respective counsel:

As Chairperson of this Commission, I believe it is my duty to inform both the Appellant and MPIC, together with their counsel, that approximately one month after rendering the Decision dated February 22, 2006, I was elected National Second Vice-president of the Canadian Bar Association (“CBA”) on April 19, 2006.

As National Second Vice-president of the CBA, I now sit on the National Executive Committee and the National Board of Directors of that organization. Since this is a ladder position, I will therefore, become the CBA’s National President in August, 2008.

In my capacity as an Executive Officer of the CBA, I have already been called upon, and I will be called upon in the future, from time to time, to comment internally and publicly, on issues of concern to CBA members, other stakeholders of the legal system in Canada, and the public in general.

Sometimes, these comments will relate to legislation, draft Bills and government policies arising from the provincial, territorial and federal arenas. For instance, I have in the last few months been interviewed by the media and asked to share the CBA's views about the Court Challenges Program, Law Commission of Canada and Judicial Appointment Committees.

In light of the foregoing, and as we move forward with the matters with which this Commission has retained jurisdiction, I am hereby enquiring whether the Appellant and MPIC, together with their counsel, have any issues and/or concerns with respect to myself, as Chairperson, or this Commission, as presently constituted, in continuing to deal with the issues under appeal. I trust that you can appreciate my sensitivities here given that the Appellant is [text deleted], and the MPIC can be characterized as a quasi-governmental body.

If either party has any issues and/or concerns with respect to any real or perceived bias, then we would appreciate hearing from you now so that this Commission may consider your submissions, and then make an appropriate decision in response thereto. We are prepared to adjourn the hearing this morning for a few moments, or for however long you may require, so as to permit each party to consider this new matter.

Please note that the Commission is prepared to proceed today with the two issues presently under appeal.

We will take your direction as to how you wish to proceed at this time.

Following the reading of the above statement, counsel for the parties advised the Commission that their respective clients did not have any concerns with respect to the Chairperson, or the Commission as presently constituted, in continuing to deal with the issues under appeal.

D. THE POSITION OF THE PARTIES

The Appellant

With respect to attendant care expenses, the essence of the Appellant's argument is that MPIC has incorrectly focused its attention upon Section 131 which contemplates personal assistance expenses, otherwise known as "home care" expenses. The Appellant maintains that the duties

performed by the attendants he requires far exceed the duties normally performed by “home care” attendants and are therefore, beyond the scope section 131 of the Act. The Appellant submits that Section 138 should apply as this provision would cover attendant care expenses instead of “home care” expenses.

Counsel for the Appellant argued that his client needed an attendant to sit with him [text deleted], assist with turning pages of documents and otherwise, be with him twenty-four (24) hours per day, seven (7) days per week and fifty-two (52) weeks per year. It was emphasized by counsel that the services provided by an attendant in these circumstances were, as it related to the Appellant, “a part of his being – it is inseparable from him”, and therefore, not the services of a personal assistant or “home care” assistant.

As for the question surrounding the motor vehicle for use in [text deleted], Counsel for the Appellant argued that while the Appellant had a modified van for his use in [text deleted], he had nothing similar in [text deleted]. His employment required his presence in [text deleted] on a regular basis and not having access to his own motor vehicle severely limited his mobility. In addition, Counsel for the Appellant urged the Commission to apply the principle in *Dean v. Manitoba Public Insurance Corp.*, 2006 MBCA 97 and to use its discretion to find that under the circumstances, a motor vehicle purchased and adapted for use in [text deleted] by the Appellant was a mobility aide within the meaning of Section 10(1)(d)(ii) of Regulation 40/94.

MPIC

MPIC’s argument is simply that it has met its statutory obligation by ensuring the Appellant received the full benefit of Section 131 with respect to personal assistance expenses. Counsel for the MPIC pointed out that this issue is not one that falls within the ambit of Section 138 but

instead, this issue is one that deals purely with reimbursement of personal assistance expenses that come within the scope of Section 131 regardless of the label one attaches to the services rendered.

With respect to the motor vehicle, MPIC recognized that the Appellant's situation was unique and it advised the Commission that MPIC was prepared to fund the adaptation of a motor vehicle for use by the Appellant in [text deleted]. However, MPIC pointed out that it was not prepared to cover the capital cost of the vehicle in question. Counsel for MPIC also indicated that the *Dean* case was not applicable in this appeal as that decision dealt with the narrow issue of whether an all-terrain vehicle was a mobility aide.

C. DECISION – ISSUES UNDER APPEAL

1. Whether the Appellant is entitled to a contribution pursuant to Section 138 of the Act toward the costs of his attendant care?

Section 131 speaks to the reimbursement of personal assistance expenses where the victim is unable to care for himself or herself or to perform the essential activities of everyday life without assistance, and when considered in conjunction with the Regulation 40/94, provision is made for reimbursement of expenses where the victim is not otherwise covered under *The Health Services Insurance Act*. Whereas, Section 138 offers discretionary powers to MPIC, subject to the regulations, to take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, lessen the disability and facilitate the return of this person to a normal life or reintegration into society or the labor force.

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant has failed, on a balance of probabilities, to establish that the

attendant care expenses for which he seeks reimbursement are of such a character so as to be distinct from the personal assistance expenses contemplated by Section 131 and instead, captured by Section 138. There is insufficient evidence before the Commission to show that the services provided by the attendants who accompany the Appellant [text deleted] are different than the services provided by the attendants contemplated by Section 131 and for which the Appellant receives the maximum allowable reimbursement under the Act and regulations. The Appellant has not furnished adequate details with respect to the various duties of his caregivers in order to permit the Commission to determine whether these people perform, separately or in combination, specialized attendant care duties unique to the Appellant's situation, the expenses for which he would have Section 138 cover, or whether these people perform personal assistant duties as presently covered by Section 131. In addition, the Appellant has not provided the Commission with a breakdown of his expenses with respect to all services provided by all caregivers. The Commission also notes at this juncture that both parties were given an opportunity to seek an adjournment of these proceedings in order to tender additional evidence to the Commission with respect to the above and both parties declined to do so.

In light of the foregoing, we find that MPIC correctly applied Section 131 of the Act, together with Regulation 40/94, and that Section 138 is not applicable on the facts. The Appellant failed to show that MPIC erred in denying his claim. Since there is a payment regime in place under the Act and accompanying regulations with respect to the reimbursement of personal assistance expenses, Section 138 cannot be "the means by which further or greater such expenses could be reimbursed" as noted by the Manitoba Court of Appeal in *Menzies v. Manitoba Public Insurance Corporation et al.*, 2005 MBCA (CanLII) at paragraph 52.

Pursuant to the authority vested in this Commission under Section 184(1)(a), we confirm the Senior Case Manager's decision dated August 18, 2006, with respect to this issue.

2. Whether the Appellant is entitled, pursuant to Section 138 of the Act, to reimbursement for the purchase and modification of a second motor vehicle for his use while in [text deleted]?

The Commission previously noted in the AICAC 2006 Decision that Section 10(1)(a) of Regulation 40/94 provided, in part, that where MPIC considered it necessary or advisable for the rehabilitation of a victim, it could provide the victim with funds for an extraordinary cost required to adapt a motor vehicle for the use of the victim as a driver or passenger. The Commission further indicated that Regulation 40/94 was silent with respect to the notion of the purchase of a motor vehicle.

It is clear that the Appellant relies upon his mobility in order to carry on as normal a life as is possible, and to properly discharge the duties associated with his employment [text deleted]. Transportation in and about [text deleted] is critical to the Appellant. While the MPIC has taken some steps toward meeting the needs of the Appellant by now agreeing to adapt a motor vehicle for his use while in [text deleted], it has not gone far enough in order to ensure that he has adequate mobility by not covering the costs associated with the purchase of the motor vehicle. To otherwise impose upon the Appellant the requirement to purchase a second vehicle for his use while in [text deleted] is an unreasonable burden.

The discretion to be exercised by MPIC pursuant to Section 138 of the Act is only limited by Section 10(1)(a) of Regulation 40/94 with respect to the adaptation of a motor vehicle. This regulation is silent with respect to the purchase of a motor vehicle. Since there are no applicable limitations in place within this regulation regarding the purchase of a motor vehicle, this

Commission finds that Section 138 can be reasonably interpreted to cover the expenses related to the purchase of the motor vehicle given that it is necessary and advisable in order to lessen the disability resulting from the Appellant's bodily injury, and to facilitate his return to a normal life or reintegration into society or the labor market.

In this regard, we note Freedman, J.'s comments in *Menzies* at paragraph 48 wherein the learned Justice stated that:

[i]n respect of those matters outlined in some detail in s.10(1), any exercise of discretion by MPIC under s. 138 would be limited, as described in s. 10(1). If, for example, reimbursement was sought for a victim's occupational rehabilitation expense, then provided that the rehabilitative measure was necessary or advisable for the rehabilitation, the payment could be made ([text deleted]). Where, as here, the expenses sought to be reimbursed do not fall within any provision of the regulations at all, there are consequently no applicable limitations in the regulations on the exercise by MPIC of the power set out in s. 138. MPIC is then mandated to take any measure which, in its discretion, it considers necessary or advisable to achieve one or more of the objectives set out in s. 138.

Taking all of the above into consideration, we find that MPIC misinterpreted the application of Section 138 with respect to the purchase of the motor vehicle for use by the Appellant while in [text deleted]. As a result, we are of the view that MPIC erred in denying the Appellant's claim in that respect. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the Senior Case Manager's decision dated August 18, 2006, with respect to this issue is hereby varied so as to permit funding for the adaptation of a motor vehicle for use by the Appellant while in [text deleted] in accordance with Section 138 of the Act and Section 10(1)(a) of Regulation 40/94, and for the purchase of the motor vehicle in accordance with Section 138 of Act and *Menzies*.

After fully considering the arguments of the parties, and the facts before the Commission, we find that the *Dean* case is distinguishable on its facts and is therefore, not applicable to the case at hand.

Dated on March 13th, 2007.

J. Guy Joubert

Mary Lynn Brooks

Paul Johnston