

# **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-01-114**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson  
Ms. Yvonne Tavares  
Mr. Guy Joubert

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

**HEARING DATE:** March 20, 2002

**ISSUE(S):** Entitlement to reimbursement for personal care assistance expenses.

**RELEVANT SECTIONS:** Section 131 of The Manitoba Public Insurance Act ('the Act') and Section 2 and Schedule A 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**

On November 8, 2000, [the Appellant] was involved in a motor vehicle accident which resulted in an injury to her neck and shoulders.

In a letter dated September 7, 2001, to the Commission, which accompanied her Notice of Appeal, the Appellant stated that prior to the accident in question, she suffered from myofascial pain to the left side of her neck and that, as a result of the accident, this pain was now affecting

both sides of her neck and shoulders. Notwithstanding her neck injury, the Appellant stated that she continued to work as an office clerk six hours per day, five days per week.

The Appellant is a single parent and resides in a house together with her three children. The eldest child is [text deleted] years of age, and the other two children attend day-care while the Appellant is at work. The Appellant requested personal home assistance from MPIC because, she asserted, she was unable to simultaneously work and carry out her responsibility in caring for her children. the upkeep of the house, purchase of food and preparation of meals (hereinafter referred to as 'personal home care activities').

The relevant provision of the Act in respect of reimbursement for personal assistance expenses is Section 131, which states:

**Reimbursement for personal assistance expenses**

**131** Subject to the regulations, the corporation may 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.

Once it has been established that an individual is entitled to home care expenses pursuant to Section 131 of the Act, Section 2 of Manitoba Regulation 40/94 provides for the calculation of same to be completed in accordance with the Personal Care Assistance Grids contained in Schedule A thereto.

Section 2 of Manitoba Regulation 40/94 states:

**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.

Once it is established that a claimant is entitled to personal home assistance, MPIC is required to complete several grids which are set out in Schedule A of Manitoba Regulation 40/94. This involves an assessment of the claimant's ability to carry out the essential everyday activities of 'personal home care activities.' MPIC retained the firm of [home care service] to determine whether or not the Appellant was entitled to personal home assistance. A registered nurse employed by [home care service] attended at the Appellant's home, interviewed the Appellant in respect of her 'personal home care activities', and completed a personal care assistance grid.

On January 17, 2001, the case manager wrote to the Appellant and confirmed that [home care service] had completed a Personal Care Assistance Grid. The Appellant had qualified for personal care assistance for the preparation of lunch, dinner, light housekeeping, house cleaning, laundry and purchasing of supplies because she had obtained a score of 13.5 out of 51, for a total of 31% of \$3,368 or \$1,044 per month.

On January 18, 2001, the case manager requested [Appellant's doctor] to provide a narrative report in respect of the Appellant. [Appellant's doctor] had treated the Appellant in respect of her myofascial pain syndrome prior to the motor vehicle accident on November 8, 2000, and had also treated her in respect of the injuries she sustained to her neck and shoulders caused by the accident.

On February 12, 2001, [Appellant's doctor] provided a narrative report to MPIC and made the following comments:

2. The new injuries sustained in the MVA of November 8, 2000, did not prevent her from performing the essential duties of an administrative assistant II at [text deleted]. I am not aware if she missed a few days of

work during late December or early January when she attended [Appellant's chiropractor] for chiropractic treatment.

3. I addressed her previous injury related to work in the text of my report.
4. It is my opinion that she is able to perform all essential duties as an administrative assistant. She did not relate any difficulties in carrying out her job and I did not place any restrictions. (*underlining added*)

On February 15, 2001, the case manager wrote to the Appellant and confirmed that he had processed the payment to her for Personal Care Assistance for the period from November 8, 2000, to January 31, 2001, in the total amount of \$2,703.25. The case manager further informed the Appellant that in order to determine if she would qualify for further Personal Care Assistance, he had requested [home care service] to contact her in order to complete a follow-up grid with her.

On February 28, 2001, the case manager wrote to the Appellant and indicated that arrangements were being made for [home care service] to contact her to complete a grid. In addition, the case manager provided the Appellant with a copy of [Appellant's doctor's] letter dated February 12, 2001, and advised the Appellant that [Appellant's doctor] had indicated in his report that when he examined her on February 7, 2001, he found little or no symptoms to her right head, neck and shoulder girdle. The case manager further advised the Appellant that [Appellant's doctor] had indicated that in his opinion, she was able to perform all essential duties as an administrative assistant, that she did not relate any difficulties in carrying out her job, and therefore no restrictions were placed on her employment. The case manager stated:

Based on [Appellant's doctor's] findings on February 7, 2001, Manitoba Public Insurance is unable to consider any further Personal Care Assistance relating to the motor vehicle accident of November 8, 2000.

MPIC terminated the personal home care assistance to the Appellant as of February 28, 2001.

On March 7, 2001, [home care service] completed the second assessment, and the Appellant scored 12.5 out of 27 on Grid B, being one point less than the Appellant had scored in her first assessment on January 17, 2001. A copy of this assessment was provided to MPIC by fax dated March 7, 2001.

The Appellant made application to MPIC to review the case manager's decision to terminate payment of personal home assistance expenses, and an internal review hearing was held on January 19, 2001. The Internal Review Officer confirmed the decision of the case manager and dismissed the Appellant's Application for Review.

In his decision dated January 29, 2001, the Internal Review Officer acknowledged that two Personal Assistance Grids had been completed. In respect of the first grid, completed by [home care service] on January 2, 2001, the Appellant qualified for personal care assistance as a result of scoring 13.5 out of 27 on Grid B. The Internal Review Officer also noted in a subsequent grid, completed by [home care service] on March 7, 2001, the Appellant had scored 12.5 out of 27 on Grid B.

The Internal Review Officer did not consider or give any weight to the second assessment completed on March 7, 2001, in order to determine whether or not the Appellant was qualified, pursuant to Section 131, to perform the essential activities of everyday life without assistance. The Internal Review Officer relied on [Appellant's doctor's] medical opinion to determine that the Appellant was capable of carrying out the essential activities of 'personal home care activities' and, therefore, pursuant to Section 131, she had not established that she was entitled to

have her home care expenses reimbursed by MPIC. As a result, the Internal Review Officer concluded that it was not necessary for him to consider the second assessment wherein the Appellant scored 12.5 out of 27 to determine whether or not the Appellant was qualified for personal care home assistance.

In his decision, the Internal Review Officer stated:

During the course of the hearing we discussed [Appellant's doctor's] report of February 12, 2001. In that report [Appellant's doctor] confirmed that as of the date of the treatments set out therein, you continued on a home program of self-stretching as well as working full time. In direct response to questions posed by [case manager], [Appellant's doctor] concluded his report by confirming:

“It is my opinion that she is able to perform all essential duties as an administrative assistant. She did not relate any difficulties in carrying out her job and I did not replace any restrictions.”

The Internal Review Officer further stated in his decision that in his discussions with the Appellant, she confirmed that at no time during the course of numerous attendances with [Appellant's doctor] did she mention to him that she had any problems caring for herself or performing the essential duties of everyday life without assistance.

The Internal Review Officer concluded his decision by stating:

I share [case manager's] concern as to how you would be capable on the one hand of carrying out your full employment duties but then be incapable of performing the essential activities of everyday life without assistance. Under the circumstances, having found that you do not qualify for a personal assistance expense reimbursement under Section 131 of the Act, it is not necessary to look to the Personal Care Assistance Grids to determine the amount of your entitlement.

Therefore, for the reasons stated herein, I am upholding [case manager's] decision of February 28, 2001 and dismissing your Application for Review.

The Appellant appealed the Internal Review Officer's decision to this Commission. In her Notice of Appeal, the Appellant sought compensation in respect to personal assistance expenses for the period March 1, 2001, to May 31, 2001.

At the appeal hearing, legal counsel for MPIC submitted that having regard to [Appellant's doctor's] report, the Appellant was not entitled to reimbursement for personal home assistance expenses pursuant to Section 131 of the Act. Legal counsel further submitted that the Internal Review Officer was correct in concluding that because the Appellant was capable of carrying out her full employment duties, she must have been capable of performing the essential duties of everyday life without assistance.

The Appellant testified at the appeal hearing and challenged the decision of the Internal Review Officer. In respect of her physical capacity to attend at work after the accident, the Appellant testified that she was unable to do all of the job functions that she was required to do prior to the accident. She further testified that her job duties were modified with the assistance and cooperation of her fellow employees, and she was permitted only to carry out only those duties that did not physically aggravate her. The Appellant stated that because she was able to have modified job duties, she was able to continue her employment.

The Appellant further testified that after work, she was physically and mentally exhausted and was incapable of caring for her two small children, cooking meals, doing the heavy housework, sweeping, vacuuming, washing, scrubbing floors and walls, laundry, and constantly picking up after her children. She noted that as a result of the initial assessment that was done by [home care service] for MPIC on January 2, 2001, she had qualified for personal care assistance as a result of her scoring 13.5.

The Appellant further testified that notwithstanding that she had qualified for personal care assistance as a result of the assessment, MPIC terminated her personal care assistance after

receiving [Appellant's doctor's] report dated February 12, 2001. The Appellant testified that [Appellant's doctor] did hold discussions with her in respect to her physical ability to carry out her work duties, and that these discussions were set out in [Appellant's doctor's] report dated February 12, 2001. However, she further stated that [Appellant's doctor] did not discuss with her at any time whether or not she was physically capable of carrying out her home duties, such as cooking, caring for the children, shopping, house cleaning, etc. She further indicated that because there was no discussion with [Appellant's doctor] respecting her home duties, there is no reference to these matters in [Appellant's doctor's] report dated February 12, 2001.

In the Appellant's Notice of Appeal dated September 7, 2001, she refers to a discussion she had with the Internal Review Office and states:

I discussed with [Internal Review Officer] [Appellant's doctor's] letter. I explained to him that [Appellant's doctor] and I only discussed what went on at work and he has not asked me what physical demands I have outside of the workplace. The one minute the doctor would give for discussions mainly concerned what areas on the body were problems and would ask whether my bosses are still allowing for the problems I have. I would answer that my bosses were still accommodating to me and my injury.

The Commission notes that the Appellant's testimony in respect of her discussions with [Appellant's doctor] are consistent with her statements in her Notice of Appeal referred to above.

The Appellant further testified that MPIC had obtained a second assessment from [home care service] which was completed on March 7, 2001, wherein she scored 12.5 out of 27 on Grid B. The Appellant pointed out that this assessment made by [home care service], which is a body independent of MPIC, was nearly identical to the first assessment done by [home care service] on January 2, 2001. The Appellant stated that although the second assessment was done subsequent to [Appellant's doctor's] report and was nearly identical in score to the first

assessment done, MPIC erred in ignoring this assessment and, as a result, failed to provide personal home assistance to her.

It should be noted that on May 15, 2001, the case manager advised the Appellant that MPIC had approved funding for chiropractic care of the Appellant by [Appellant's chiropractor] based on a treatment plan that he had provided to MPIC. The Appellant provided to the Commission a letter from [Appellant's chiropractor] dated December 20, 2001, which stated:

[The Appellant] was not capable of any heavy housework until the end of July, 2001. From the time of her injury on November 8, 2000 she required help with vacuuming, sweeping, grocery shopping, laundry, snow removal, grass cutting and preparing some meals during this period of time.

Even though she continued to work this was on restricted duties and continued to require on going help with her daily activities at home.

If I can be of any further help feel free to contact me at my office.

### **DECISION**

The Commission finds that the Appellant testified in a direct and candid fashion, and we accept her testimony on all material issues.

The Appellant's evidence in respect of her discussions with [Appellant's doctor] is consistent with her Notice of Appeal and was not contradicted by MPIC. MPIC could have called [Appellant's doctor] to testify before the Commission and contradict the Appellant's testimony in respect of her discussions with him, but MPIC chose not to do so.

The Commission further finds that the absence in [Appellant's doctor's] report of any reference to discussions between the Appellant and [Appellant's doctor] in respect of her physical capacity to carry out activities at home corroborates the Appellant's testimony that no such discussions took place. The Commission concludes that [Appellant's doctor] did not discuss with the

Appellant whether or not she had the physical capacity to carry out the essential duties of ‘personal home care activities.’

The Commission also finds that the two independent assessments, initiated by MPIC and carried out by [home care service], directly address the issue of whether or not the Appellant was capable of carrying out the essential duties of everyday life without assistance in respect of the preparation of meals, light housekeeping, house cleaning, laundry, purchase of supplies, and care of children. In both assessments, the Appellant was personally interviewed in respect of her ‘personal home care activities’, and the results of these interviews were reflected in the two assessments. Both assessments clearly established that the Appellant was not capable of performing these duties, and these assessments corroborate the Appellant’s testimony in this respect. MPIC provided no evidence to contradict these assessments.

In addition, [Appellant’s chiropractor] provided chiropractic treatments to the Appellant subsequent to the motor vehicle accident on November 8, 2000, and his medical report of December 20, 2001, corroborates the testimony of the Appellant that she was not capable of carrying out the essential duties of ‘personal home care activities.’

In arriving at his decision to reject the Application for Review, the Internal Review Officer mistakenly inferred from the medical report of [Appellant’s doctor] that the Appellant was capable of carrying out the essential duties of ‘personal home care activities.’ However, [Appellant’s doctor] never discussed with the Appellant her ‘personal home care activities.’ As a result, the Internal Review Officer could not have relied on [Appellant’s doctor’s] findings to determine that the Appellant was incapable of carrying out the essential duties of ‘personal home care activities.’

The Commission, therefore, finds that the Internal Review Officer erred in rejecting the Application for Review. The Internal Review Officer mistakenly assumed that because the Appellant was able to carry out the essential duties of her job, she was therefore capable of performing the essential duties of everyday life without assistance. As a result, the Internal Review Officer failed to consider the second home assessment pursuant to Section 2 of Manitoba Regulation 40/94 and denied the Appellant reimbursement in respect to personal assistance expenses pursuant to Section 131 of the Act.

The Commission determines that the evidence of the Appellant, corroborated by the two assessments by [home care service] and the medical opinion of [Appellant's chiropractor], establishes, on the balance of probabilities, that she was incapable of performing the essential duties of everyday life without assistance and, therefore, was entitled to be reimbursed for personal assistance expenses pursuant to Section 131 of the Act for the period March 1, 2001, to May 31, 2001.

The Commission further determines that the Appellant has not established, on the balance of probabilities, that she was incapable of performing essential duties of everyday life without assistance after May 31, 2001, and therefore rejects the Appellant's request for reimbursement in respect of personal assistance expenses after May 31, 2001.

Dated at Winnipeg this 19<sup>th</sup> day of April, 2002.

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**MEL MYERS, Q.C.**

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**YVONNE TAVARES**

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**GUY JOUBERT**