

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an appeal by [the Appellant]  
AICAC File No.: AC-98-101**

**PANEL:**                               **Mr. J. F. Reeh Taylor Q.C. (Chairperson)  
Mrs. Lila Goodspeed  
Mr. F. Les Cox**

**APPEARANCES:**                   **Manitoba Public Insurance Corporation ('MPIC'),  
represented by Mr.Keith Addison  
[text deleted], the appellant, (not present in person) represented  
by her son-in-law, [text deleted], by  
conference call from [text deleted], Ontario.**

**HEARING DATE:**                   **November 23, 1998**

**ISSUE:**                               **Whether MPIC properly terminated the appellant's Personal  
Assistance benefits**

**RELEVANT SECTIONS:** **Section 131 of MPIC Act and Section 2 of Regulation 40/94,  
together with Evaluation Grids A & B in Schedule A thereto.**

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY  
AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S  
PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION  
HAVE BEEN REMOVED.**

**REASONS FOR DECISION**

The appellant was struck by a motor vehicle while crossing a street as a pedestrian. She was [text deleted] years old at that time, (April 3, 1997) and suffered a fractured right ankle, sore left knee, hip, neck and shoulder. The appellant was and is legally blind due to macular degeneration. The

appellant applied for and received personal assistance benefits from MPIC under Section 131 of the MPIC Act.

## **THE LAW:**

Section 131 provides as follows:

### **Reimbursement of personal assistance expenses**

**131** Subject to the regulations, the corporation may reimburse a victim for expenses of not more than \$3,000.00 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 every day life without assistance.

Section 2 of 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 Health Services Insurance Act or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

Schedule A forming part of Regulation 40/94 sets out a form of Grid system allocating a certain number of points to each area of daily life that a victim is either wholly or partly incapable of performing by reason of injuries sustained in a motor vehicle accident. The total number of points thus allocated must exceed 5 out of a possible 51 in order for the victim to become entitled to any compensation.

The benefits paid by MPIC to [the Appellant] were adjusted monthly according to her score on Grid evaluations completed by [text deleted], Occupational Therapist. Those scores were as follows:

For the period from May 16, 1997 to June 16, 1997.....	23.0					out of a maximum of 51.0
from June 18, 1997 to July 18, 1997 .....	16.5	"	"	"	"	"
from July 18, 1997 to August 28, 1997 .....	17.0	"	"	"	"	"
from August 28, to September 11, 1997.....	16.5	"	"	"	"	"

The appellant’s fractured ankle was being attended to by [text deleted], orthopaedic surgeon, who removed the 1<sup>st</sup> cast on her ankle and replaced it with a walking cast. However, progress was slow and, on June 16, 1997, [Appellant’s orthopaedic surgeon] recommended she change her standard walker to a wheeled walker. She was able only to tolerate 10 minutes of standing or walking at a time.

As of June 25, 1997 [Appellant’s occupational therapist] stated the appellant was showing poor tolerance for walking and standing. As a result she continued to require assistance for housekeeping, laundry and major meal preparation. However, she was able to prepare light meals and did not require assistance with bathing. The Victorian Order of Nurses had been attending upon [the Appellant] regularly at the expense of MPIC but, when the insurer quit paying for that service, [Appellant’s doctor] arranged for her to receive home care through the Manitoba Department of Health. Her home care workers attend at [the Appellant’s] home about once every

week or two, sometimes to prepare meals for her freezer and at other times to do a more thorough cleaning than she, herself, is capable of doing.

On August 6, 1997 [Appellant's occupational therapist] notes moderate edema to both knees of [the Appellant], who is taking Tylenol extra strength; [Appellant's occupational therapist] also suggests anti-inflammatory drugs to ease her condition in both knees.

The September 2, 1997 report from [Appellant's occupational therapist] confirms that the appellant received some anti-inflammatory medication prescribed by [Appellant's orthopaedic surgeon] but, due to side effects, they had to be discontinued. The appellant reported icing her knees several times a day, due to increased pain from walking, edema, and stiffness for several days after exercising - following medical advice by walking in the hallway of her apartment block and then walking across the street to accompany a friend to the nearby shopping centre.. That report indicates the appellant continues to require assistance as before.

On September 5<sup>th</sup>, MPIC's adjuster noted that [the Appellant] was not using provincial Home Care Services for the preparation of meals - she was, as the adjuster puts it 'uncomfortable with that' - and was, instead, ordering in food from a variety of sources such as Chicken Delight, Perkins, Champs (Fried Chicken) and the like. She still needed home care for house cleaning, however, and assistance when going shopping, going to her doctor, going to her hairdresser, etc.

Later in September of 1997, MPIC assigned a new adjuster to [the Appellant's] file and decided to have [Appellant's orthopaedic surgeon] complete a new set of A and B grids, along with an up-

dated report. MPIC also appears to have set aside the grids prepared by [Appellant's occupational therapist] in August; MPIC staff attended the appellant's home on September 11, 1997 and completed grids giving [the Appellant] a total of 7.5 points out of the maximum 51. In consequence, MPIC sent her \$510.88 under cover of a letter dated September 11, 1997. The period intended to be covered by that payment is not stated in that letter.

On September 17, 1997 [Appellant's orthopaedic surgeon] reports to MPIC that the appellant continues to have residual pain and throbbing and swelling in and around her right ankle. The swelling increases when she is up for a prolonged time. [Appellant's orthopaedic surgeon] recommended a Ted stocking to control leg swelling and for her to continue physiotherapy. He felt she was reasonably functional. [The Appellant] had told him that she had experienced imbalance since her motor vehicle accident ('MVA') but [Appellant's orthopaedic surgeon] could not explain that condition. She had not regained enough function to resume public transit travel. [Appellant's orthopaedic surgeon] had not found it possible to assign a specific permanent impairment rating to [the Appellant's] condition although, he said, she remained quite symptomatic but 'if she does end up with some degree of permanent impairment it would be rated quite low as she has regained good flexibility, has good alignment and has no evidence of arthritis or shortening as a result of her right tibular fracture.' Six days after MPIC's own had graded [the Appellant] with a score of 7.5, [Appellant's orthopaedic surgeon] gave the appellant a grid score of only 2 out of 51 - a discrepancy which, we have to say, is hard to reconcile.

As a result of [Appellant's orthopaedic surgeon's] report and, in particular, by reason of his grid rating, MPIC notified the appellant on October 28, 1997 that she no longer qualified for benefits under Regulation 40/94.

The appellant engaged her son-in-law, [text deleted], to make representations to MPIC on her behalf. [Appellant's son-in-law] phoned the adjuster and stated that the appellant could not use public transportation to get her groceries. He complained the Grid used was unfair to the appellant's condition. He wanted MPIC to pay for house cleaning and meal preparation.

The adjuster, sensibly, agreed that the insurer would pay for taxi services to allow the appellant to go grocery shopping as long as required. The adjuster also agreed to have the appellant's physiotherapist complete the grids and then, if necessary, to review those findings with MPIC's Medical Services team. Regarding house cleaning and meal preparation the adjuster noted that home care services were being supplied by another service provider but its identity was unknown to both [Appellant's son-in-law] and MPIC. [Appellant's son-in-law] subsequently pursued the personal care benefits denial to internal review with MPIC.

[Appellant's physiotherapist] of [text deleted] Physiotherapy was asked by MPIC to complete a set of grids A & B and [text deleted], the appellant's personal physician, was asked to do likewise. [Appellant's doctor] replied with grids totaling 12.5/51 but [Appellant's physiotherapist] produced totals of 4/51, not unlike those of [Appellant's orthopaedic surgeon].

An Internal Review was held March 12, 1998 by telephone between MPIC and [Appellant's son-in-law]. Subsequently, [MPIC's doctor] of the insurer's Medical Services Team was asked by MPIC's Internal Review Officer to comment on the grids completed by [Appellant's physiotherapist], [Appellant's orthopaedic surgeon] and [Appellant's doctor].

[MPIC's doctor's] report of March 19, 1998 notes that [Appellant's orthopaedic surgeon] considered the appellant "has remained reasonably functional." He did review [Appellant's occupational therapist's] assessment to the contrary but felt it pre-dated the grids done by [Appellant's orthopaedic surgeon] and [Appellant's physiotherapist] and was possibly outdated. He noted [Appellant's doctor's] reference to osteoarthritis and felt that that might be the reason why the appellant could not support prolonged walking, standing, or carrying.

[Appellant's doctor's] opinion was that the appellant was completely dependent on assistance for use of available facilities (as described on the back of the grid form) as a result of her symptoms stemming from the motor vehicle collision. [MPIC's doctor], for his part, was uncertain how [Appellant's doctor] could form that opinion, in light of the appellant's pre-MVA medical conditions and the injuries she sustained in the motor vehicle collision in question. [MPIC's doctor] concluded that the grid evaluations of [Appellant's orthopaedic surgeon] and [Appellant's physiotherapist] were more in keeping with the appellant's functional capabilities that had been somewhat impaired due to the injuries she sustained in the motor vehicle collision in question.

The internal review decision, quoting [MPIC's doctor] and affirming the adjuster's decision of October 28, 1997 discontinuing Personal Care benefits to the appellant, was relayed to the appellant through Mr.[Appellant's son-in-law] on April 6, 1998.

On August 14, 1998 MPIC wrote the appellant to advise that transportation expenses for hairdressing appointments of the appellant would be discontinued after August 14, 1998.

[Appellant's son-in-law] argues that the statutory provisions governing the Personal Injury Protection Plan and, in particular, the so-called grid system contained in Regulation No. 40/94 is flawed. He points out that, even using the grid evaluations of [Appellant's orthopaedic surgeon] and of [Appellant's physiotherapist], both of which are favorable to MPIC, they indicate the following:

1. partially in need of assistance for: housekeeping
2. partially in need of assistance for: laundry
3. completely dependent upon assistance for: the purchase of supplies

[Appellant's son-in-law] asks how someone who is completely dependent upon assistance for the purchase of supplies, can be denied payment for transportation, because "she doesn't qualify under the grid".

While the medical evaluations vary, [Appellant's son-in-law] points out that all the medical reports and grid evaluations agree that [the Appellant] is not in the physical condition that she enjoyed prior to her accident. [Appellant's son-in-law] argues, further, that while some of [the Appellant's] transportation costs had indeed been paid by the insurer, that only seemed to have



been done on an *ex gratia* basis, whereas, he submits, the appellant's right to be reimbursed for those expenses should be more formally established since, otherwise, when someone at MPIC decides to discontinue those payments she will have to use public transportation for her shopping, medical, hairdressing and other, similar needs and may sustain additional injuries as a result of her present medical condition.

When [the Appellant's] appeal came on for hearing before this Commission on November 23, 1998, the Commission was concerned by the apparent discrepancies between the several evaluations upon which MPIC had based its decision, namely:

- (i) on September 17<sup>th</sup>, 1997, [Appellant's orthopaedic surgeon], who had been treating the appellant only for her ankle fracture, gives her a score of 2;
- (ii) at some point in late November or early December (the date is not clear to us) [text deleted], physiotherapist (who, we note, had been provided with a copy of [Appellant's orthopaedic surgeon's] evaluation), gives her a score of 4;
- (iii) on December 6<sup>th</sup>, 1997, [Appellant's doctor], the appellant's personal physician, gave her a score of 13;
- (iv) [Appellant's occupational therapist], occupational therapist, who had performed a number of evaluations of [the Appellant] as noted above, but whose most recent appraisal had been completed toward the end of August, 1997, assigned her a score of 17.

Since one of the reasons causing MPIC, on [MPIC's doctor's] advice, to disregard the evaluation by [Appellant's occupational therapist] was that it pre-dated further physiotherapy treatments from [Appellant's physiotherapist], the Commission decided to obtain an up-to-date grid evaluation and home assessment of the appellant from [Appellant's occupational therapist]. (The

only in-home assessment performed by anyone other than [Appellant's occupational therapist] had been the one completed by MPIC staff on September 11<sup>th</sup>, 1997.) We received her report dated December 15, 1998. The Commission also requested an up-date from [Appellant's doctor] .

[Appellant's occupational therapist] reported that [Appellant's doctor] had continued to follow the appellant's condition, but that her physiotherapy treatments have been discontinued. The appellant still did some of her leg exercises. She has a wheeled walker but avoids, as much as is possible, using it in her home. She reported that she has had several near falls. She continues to have swelling in both knees, where the left is worse than the right. She also reported bilateral hip pain. She was able to dress and bath herself but requires a suction bath seat and a hand held shower. She reported that she received home care once every 2 weeks for cleaning and laundry. They also attend every 2 weeks to cook and freeze enough meals for the following 2 weeks. The appellant heats these meals in a toaster oven. The appellant takes a taxi to shop at a store where the staff assists her and delivers her purchases to her apartment.

The [Appellant's occupational therapist] report refers to mild to moderate edema in the appellant's left knee and mild edema in the right knee. Circumferential measurements at the knee crease were 34.0cm for the left and 32.0 cm for the right. The appellant demonstrated reduced leg strength as measured by manual muscle testing. Functional leg strength was measured through squatting: the appellant is reported to have been 'able to perform one squat in the 1/3 range, but.....was unsteady due to weakness, and required to support herself on a counter.'

When [the Appellant] walks about her home without her walker, she does so by holding on to various pieces of furniture for support. When asked to walk a distance in the hallway of her apartment building, she did so slowly and unsteadily, using the wall for support. She was forced to use her walker in her home during the interview and walking test, and managed a distance of some 50 feet, but as she progressed her gait became slower and unsteady. In the kitchen the appellant could reach shoulder level into cupboards. To get into lower cupboards a wide based stance was used with forward trunk flexion, and minimal squatting while leaning onto the counter for support. After 5-10 minutes of standing the appellant became unsteady and had to sit down. When dusting, the appellant sat down next to the item that she would dust with a long handled duster. [Appellant's occupational therapist] did not attempt to test the appellant's functional capacity in the contexts of vacuuming, sweeping or laundry, due to her obvious unsteadiness in standing and walking.

In summary, [Appellant's occupational therapist] reports that as of the date of her in-home assessment of [the Appellant] on December 11, 1998, the appellant still needs assistance for housekeeping, laundry and major meals, as well as the continuance of food deliveries. [Appellant's occupational therapist] completed a new set of evaluation grids, in which she gave [the Appellant] a score of 11/51.

MPIC and the Medical Services Team expert [MPIC's doctor] reviewed that assessment by [Appellant's occupational therapist]. [MPIC's doctor] felt that the limited functional capabilities of the appellant involving her hips and knees had never, medically, been casually related to the MVA in question. [MPIC's doctor] states also that [Appellant's doctor] had documented that the

appellant had osteoarthritis, and felt that ‘It may be worthwhile to obtain a report from [Appellant’s doctor] requesting his (sic) opinion pertaining to the cause of (the appellant’s) bilateral knee and hip pain.’”

On February 9, 1999 a further medical report was received from [Appellant’s doctor], who reported that her first attendance upon [the Appellant] had been on May 5, 1997 regarding the appellant’s injuries from her April 3, 1997 MVA. A review of the prior medical history supplied by her previous physician had not suggested any significant limitations. The appellant had told [Appellant’s doctor] that, before the MVA, she walked between her home and [text deleted] to shop and to bank, and did her own housekeeping and meal preparation. She stated she also walked 4 miles a day and attended aquasize classes at [text deleted] Pool 3 times a week. That description of [the Appellant], reflecting a woman who, prior to her accident, had been an active, [text deleted] year-old lady who functioned independently, was borne out by the evidence of [Appellant’s son-in-law], who described his mother-in-law in similar terms. Since the MVA, [Appellant’s doctor] found, the appellant can do little more than walk around her home and is not able to stand long enough to prepare meals or do housecleaning.

[Appellant’s doctor] in her report of February 9, 1999 states there is no doubt that the appellant has osteoarthritic changes affecting her hips and knees. She further gives her opinion that “her present limitations are secondary to the motor vehicle accident of April 3, 1997 which triggered her osteoarthritis and her subsequent incapacity. If it had not been for this motor vehicle accident it is very unlikely that her osteoarthritis would have deteriorated to its present level with the associated decreased level of functioning.”

## CONCLUSIONS

If there are anomalies or inequities in the existing grid system, as there appear to be, it is not within the mandate of this Commission to correct them; that is for the Legislature to address. But, in the event, that is unnecessary in light of the conclusions we have reached.

We accept [Appellant's doctor's] opinion and, taking that opinion into account with the most recent grid assessment of December 11, 1998 by [Appellant's occupational therapist], we are of the view that the appellant's current limitations are clearly due, in whole or in part, to her MVA. which, if it did not cause, certainly accelerated, the degenerative process of her osteoarthritis. In consequence, and although she has shewn some marked improvement over the intervening months, [the Appellant] is entitled to assistance, to the extent that she appears to need it, in caring for herself and in performing the essential activities of every day life. The grid assessment of [Appellant's occupational therapist] of 11/51 would result in an assessment of 24% of the \$3,000.00 limit or a payment of \$720.00 per month, adjusted for any increases in the Consumer Price Index since March 1<sup>st</sup>, 1994, pursuant to Section 165(3) of the MPIC Act. However, that \$720.00 is a maximum figure; it may well be that [the Appellant's] needs do not require reimbursement to that extent.

We find that [the Appellant] is entitled to be reimbursed for all expenses necessarily incurred by her in ensuring an adequate supply of proper meals and in obtaining housekeeping and housecleaning services, including laundry, (to the extent that she is unable to prepare those meals or independently to carry out housekeeping or housecleaning activities for herself), and for transportation between her home and her doctor's offices, her physiotherapist, her hairdresser, her

shopping destinations and any other public services and neighborhood facilities of which she may have need from time to time.

To the foregoing extent, the appellant is entitled to have her personal assistance payments reinstated from October 28, 1997, and to have those expenses covered by MPIC until the appellant has re-acquired a sufficient number of her pre-MVA functional capabilities that she no longer qualifies for assistance.

Dated at Winnipeg this 11th day of March, 1999.

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**J. F. REEH TAYLOR, Q.C.**

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**Mrs. LILA GOODSPEED**

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**Mr. F. LES COX**