

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-31**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Diane Beresford
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Danielle Robinson.

HEARING DATE: February 20, 2008

ISSUE(S):

1. Adequacy of permanent impairment awards for Tinnitus and Vertigo;
2. Entitlement to an hourly rate for time spent driving to and attending appointments; and
3. Entitlement to funding for hearing aids.

RELEVANT SECTIONS: Sections 127, 129(1) and 136 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 11, 34 and 35 of Manitoba 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

The Appellant, [text deleted], was involved in a motor vehicle accident on September 24, 2004, when his vehicle was rear-ended. Due to the bodily injuries which the Appellant sustained in this accident, he became entitled to Personal Injury Protection Plan ('PIPP') benefits pursuant to Part 2 of the MPIC Act.

The Appellant has appealed to this Commission from the following Internal Review decisions, respecting the following issues:

1. Internal Review decision dated February 3, 2006 - Re: Adequacy of permanent impairment benefit for Tinnitus and entitlement to an hourly rate for time spent driving to and attending appointments.
2. Internal Review decision dated April 2, 2007 – Re: Adequacy of permanent impairment benefit for Vertigo.
3. Internal Review decision dated September 14, 2007 – Re: Entitlement to funding for hearing aids.

1. Adequacy of Permanent Impairment Benefit for Tinnitus

The Internal Review decision of February 3, 2006 confirmed the case manager's decisions dated October 13, 2005 and October 26, 2005 and dismissed the Appellant's Application for Review. The Internal Review Officer confirmed the permanent impairment award of two (2%) percent for tinnitus (Class 3) and confirmed the case manager's decision that the Appellant was not entitled to be reimbursed an hourly rate for time spent driving to and attending medical appointments.

Upon a careful review of all of the documentary evidence made available to it, and upon hearing the submissions made by the Appellant, [text deleted], and by counsel on behalf of MPIC, the Commission finds that:

1. The permanent impairment award of two (2%) percent for tinnitus (Class 3 – Severe) was correctly assessed and calculated. A two (2%) percent award for a Class 3 (Severe) impairment is the maximum amount awarded for tinnitus.
2. There is no provision in the MPIC Act and Regulations for reimbursement of an hourly rate for the Appellant's time spent traveling to and attending medical appointments.

Accordingly, the Appellant's appeal of the Internal Review decision dated February 3, 2006 is dismissed and the Internal Review decision dated February 3, 2006 is therefore confirmed.

2. Adequacy of Permanent Impairment Benefit for Vertigo

The Internal Review decision of April 2, 2007 confirmed the case manager's decision of January 23, 2007 and dismissed the Appellant's Application for Review. The Internal Review Officer found that the Appellant's permanent impairment award of eight (8%) percent for Class 2 vertigo was correctly assessed and calculated.

The Appellant has appealed from that decision to this Commission, on the basis that the permanent impairment benefit is inadequate compensation for the negative impact that the vertigo (and the tinnitus referred to previously) have had on the quality of his life.

Upon a careful review of all of the documentary evidence made available to it, and upon hearing the submissions made by the Appellant and by counsel on behalf of MPIC, the Commission finds that the permanent impairment benefit of eight (8%) percent for vertigo (Class 2) was correctly assessed and calculated. Pursuant to Division 12, Subdivision 4.2 of the Schedule of Permanent Impairments, the Appellant was correctly assessed as Class 2 in terms of the functional criteria of this vestibular impairment. Accordingly, the Appellant is entitled to an impairment rating of seven and one-half (7.5%) percent (rounded up to eight (8%) percent by MPIC) for the vertigo.

As a result, the Appellant's appeal of the Internal Review decision of April 2, 2007 is dismissed and the Internal Review decision dated April 2, 2007 is therefore confirmed.

3. Entitlement to funding for hearing aids

The Internal Review decision of September 14, 2007 confirmed the case manager's decision of May 14, 2007 and dismissed the Appellant's Application for Review. The Internal Review Officer found that the use of hearing aids was not medically required in the management of the Appellant's motor vehicle accident-related injuries.

The Appellant submits that the hearing aids have been prescribed for him primarily as a treatment for his tinnitus, which is related to the motor vehicle accident. He therefore maintains that the treatment should be covered by MPIC.

Section 136(1) of the MPIC Act provides as follows:

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

Section 11 of Manitoba Regulation 40/94 provides that:

Prosthesis and orthosis

11 Subject to sections 12 to 18, the corporation shall pay any expense that the corporation considers reasonable and proper and that the victim incurs for the purchase, rental, repair, replacement, fitting or adjustment of a prosthesis or orthosis if the prosthesis or orthosis is medically required and prescribed by a physician, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist.

Sections 34 and 35 of Manitoba Regulation 40/94 provide that:

Prescribed appliance, medical equipment, clothing

34 Subject to sections 35 to 37 and Schedule B, the corporation shall pay an expense incurred for the purchase, rental, repair, replacement, fitting or adjustment of clothing or a medical appliance or medical equipment if the expense is incurred for a medical reason related to the accident, and on the prescription of a physician, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist.

Where victim did not wear or use object before accident

35 Where an expense is incurred under section 34 or 34.1 for an object the victim did not wear or use before the accident, the corporation shall not pay the expense unless it is incurred

- (a) owing to a changing condition resulting from the accident;
- (b) owing to ordinary usage of the object;
- (c) in order to enhance the performance of the object.

Upon a review of all of the documentary evidence made available to it, and upon hearing the submissions made by the Appellant and by counsel on behalf of MPIC, the Commission finds that pursuant to Sections 34 and 35 of Manitoba Regulation 40/94, the hearing aids are a medical appliance incurred for a medical reason related to the accident and owing to a changing condition resulting from the accident.

The Commission finds that the Internal Review Officer erred in applying Section 11 of Manitoba Regulation 40/94 to this case. We find that Section 11 is intended to apply to circumstances where a prosthesis is involved, such as in a situation where a cochlear implant was required, for example.

In this case, the request for hearing aids is more properly considered pursuant to Sections 34 and 35 of Manitoba Regulation 40/94 as an expense incurred for the purchase of a medical appliance. Section 34 provides for the reimbursement of the expense “if the expense is incurred for a medical reason related to the accident”. [Appellant’s Doctor’s] report of May 28, 2007

commented that “The hearing aids are a reasonable alternative for treatment of tinnitus as well as the hearing loss.” Based upon [Appellant’s Doctor’s] recommendation, we find that the hearing aids are required for a medical reason related to the accident, that being the treatment of the tinnitus caused by the motor vehicle accident.

Section 35 provides for the reimbursement of the expense when it is incurred:

- (a) owing to a changing condition resulting from the accident;
- (b) owing to ordinary usage of the object;
- (c) in order to enhance the performance of the object.

We find that this section must necessarily be read disjunctively in order to avoid an illogical interpretation. Otherwise, the expense would only be reimbursed if it related to the improvement or repair of the object itself (and not for the initial acquisition of the object). This would also conflict with the conditions for reimbursement set out in the following section, section 36 – where the victim wore or used the object before the accident. In that section, if the expense is incurred due to a change in a condition that results from the accident, the corporation shall pay the expense. There is no requirement that the expense be incurred in order to enhance the performance of the object. Accordingly, we find that the sub-clauses set out in section 35 are three independent conditions, any of which may be satisfied in order to qualify for reimbursement of the expense.

The report of the audiologist, [text deleted], dated July 25, 2006 noted that “He ([the Appellant]) indicated that the tinnitus is constant and present for both ears and he reported that it increases in loudness when he is tired and that it awakes him from sleep”. Based upon the foregoing, we find that the tinnitus is a changing condition resulting from the accident.

Section 34 of Manitoba Regulation 40/94 also requires a prescription of a physician. The information before the Commission established that [Appellant's Doctor] had referred the Appellant to an audiologist for fitting and assessment of the appropriate hearing aids. However, the information before the Commission was vague and ambiguous as to whether an oral or written prescription had in fact been provided for the recommended hearing aids. Therefore, the Commission finds that, subject to the Appellant obtaining a written or oral prescription from his physician for the hearing aids, the expense incurred for the purchase and fitting of the hearing aids shall be paid by MPIC.

The Commission shall retain jurisdiction in this matter if either party is unable to agree as to the payment of the expense incurred for the hearing aids.

As a result, the Appellant's appeal is allowed and the Internal Review decision dated September 14, 2007 is therefore rescinded.

Dated at Winnipeg this 18th day of March, 2008.

YVONNE TAVARES

DIANE BERESFORD

PAUL JOHNSTON