

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-105**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Neil Cohen
Mr. Les Marks

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

HEARING DATE: August 23, 2010

ISSUE(S): 1. Whether the Appellant is entitled to Personal Care Assistance benefits.
2. Whether the Appellant is entitled to further Income Replacement Indemnity benefits.

RELEVANT SECTIONS: Sections 110(1)(a) and 131 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 34/94

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

Personal Care Assistance Benefits:

[The Appellant] [text deleted] was involved in a motor vehicle accident on October 27, 2003. As a result of the injuries the Appellant sustained in the motor vehicle accident she was in receipt of Personal Care Assistance ("PCA") benefits.

On March 9, 2009, MPIC's case manager wrote to the Appellant terminating the PCA benefits to the Appellant effective March 14, 2009 and stated:

"Entitlement to Personal Care Assistance benefits is available where a person is unable because of the accident to care for him or herself or to perform the essential activities of daily living without assistance. This is in accordance with Section 131 of the Manitoba Public Insurance Corporation Act (copy attached).

In order to determine your entitlement to further Personal Care Assistance benefits, a standard assessment tool was completed on February 11, 2009, by [Appellant's Occupational Therapist] of [text deleted].

The assessment tool is used to evaluate your personal care needs and the level of care that you require on a daily basis. In order to qualify for entitlement to Personal Care Assistance expenses, a minimum score of "9" is required. Your assessment score was "3" resulting in no further entitlement to Personal Care Assistance. Therefore, Manitoba Public Insurance will not reimburse expenses incurred subsequent to March 14, 2009." (Underlining added)

The Commission notes that MPIC's senior case manager subsequently received a fax from the [Appellant's Occupational Therapist], on March 16, 2009 which stated:

"I am resubmitting p18 and 19 of previous PCA. I neglected to note (on the report dated Feb 11/09) that [the Appellant] continues to use a commode on the first floor. Accordingly, she is not independent in toileting."

The occupational therapist's comments to that effect were reflected on the amended pages 18 and 19 of the Personal Care Assistance Assessment Tool submitted with the fax.

Subsequent to the receipt of the occupational therapist's fax, MPIC's case manager made arrangements for the medical file to be reviewed by the Medical Consultant with MPIC's Health Care Services and to comment on the requirement for the continuing use of the commode. In that respect the Medical Consultant provided an inter-departmental memorandum to the case manager dated April 14, 2009 and stated:

"Based on my review of [the Appellant's] file, it is my opinion the information does not indicate she has been noted to have a physical impairment of function arising from the incident in question that in turn prevents her from walking up and down stairs

throughout the day. It is my opinion the medical evidence does not indicate [the Appellant] requires a commode on the first floor due to her inability to access bathroom facilities on the second floor as a result of a physical impairment arising from the incident in question.

The information obtained from the file leads me to conclude that [the Appellant] has elected to use a commode on the first floor in order to help minimize symptoms she experiences. At this stage, the use of a commode on the first floor would not be viewed as being medically required as a result of the medical conditions she developed secondary to the incident in question.”

On June 9, 2009, [text deleted], the Appellant’s representative, wrote to [Appellant’s Orthopaedic Surgeon], who had operated on the Appellant’s left knee. In this letter, [Appellant’s representative] asked [Appellant’s Orthopaedic Surgeon] several questions including the following:

“Does [the Appellant’s] left knee condition limit her ability to perform any Activities of Daily Living and, if so, how?”

In response [Appellant’s Orthopaedic Surgeon] wrote to [Appellant’s representative] on June 27, 2009 and stated:

“[The Appellant] would be capable of most activities of daily living, but for the reasons alluded to above may have ongoing trouble during any routine activities that would involve crouching or kneeling or getting down into tighter spaces. These limitations may improve a little further with time, but some extent will likely be long lasting.”

Internal Review Officer’s Decision:

On July 24, 2009 the Internal Review Officer issued a decision confirming the case manager’s decision dated March 9, 2009 and rejected the Appellant’s Application for Review. The Internal Review Officer relied on the opinion of the Medical Consultant for MPIC’s Health Care Services set forth in the inter-departmental memorandum of April 14, 2009 and stated:

“During the course of the Internal Review Hearing you indicated that you reside in a two story condominium with a bathroom and laundry facilities being on the second level. You also indicated that while you are able to use the stairs you utilize the commode in an attempt to minimize the number of trips that you have to make up the stairs on a daily basis. You said you do this to avoid getting swelling and pain. You

also indicated that the February 11, 2009 assessment reflects the fact that you have not experienced any improvement in your symptoms as you continue to require assistance with toileting, heavy housework and pedicures.

I have reviewed the medical portion of your claim file and noted the following:

- That the progress notes that were obtained from [Hospital] indicate that you were attending a program at that facility between May 18, 2008 up to December 18, 2009. In that period of time you were exposed to an exercise program which included biking, step ups, hamstring curls etc. The purpose of the program was to increase your strength and maximize the knee flexion range of motion.
- In a note dated February 9, 2009 [Appellant's Orthopaedic Surgeon] requested a referral to the [Rehab Facility] for continuing therapy for your total knee replacement.
- In a memorandum dated February 18, 2009 the MPI Medical Consultant indicated, following his review of your medical file, that following participation in the program subsequent to the October 24, 2008 manipulation, you were able to regain 100 degrees of knee flexion and the strength level returned to normal resulting in your discharge in December, 2008.

Having taken into account all of the medical evidence, I am unable to conclude that your continuing use of the commode on the main floor is medically required as a result of injuries sustained in your accidents in question. While the use of the stairs may give rise to some discomfort, the medical evidence would indicate that not only are you capable of using the stairs (which you do on a regular basis), but that it would be part of your ongoing exercise program to do so.

Therefore, I am upholding the Senior Case Manager's decision with respect to this issue and dismissing your Application for Review for further Personal Care Assistance coverage."

The Appellant appealed this decision on July 7, 2009.

Appeal

The relevant provision of the MPIC Act in respect of this appeal is:

Reimbursement of personal assistance expenses

[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.

The Appellant testified at the hearing and indicated that:

1. As a result of injuries she sustained in the motor vehicle accident she had difficulties in crouching down and kneeling and she further testified that she had difficulty using the stairs to the second floor of her home to use the bathroom and to access the laundry facilities.
2. In order to avoid using the stairs she utilized a commode in an attempt to minimize the number of trips she had to make to go up the stairs on a daily basis.
3. She had not experienced any improvement in her symptoms and that she continued to require assistance in respect to toileting and heavy housework.

MPIC did not call any witnesses.

Submissions:

In his submission, [Appellant's representative] reviewed the testimony of the Appellant and submitted that:

1. MPIC failed to take into account that in carrying out her daily duties the Appellant required assistance with respect to toileting and heavy housework.
2. The Appellant had difficulty in climbing stairs in her home in order to use the bathroom and to access the laundry facilities.
3. Having regard to her restricted movements, she also required assistance in respect of heavy housework.

[Appellant's representative] requested that the Appellant's appeal be allowed and that the Internal Review Officer's decision dated July 24, 2009 be rescinded.

In response, MPIC's legal counsel submitted that the Appellant had failed to establish on a balance of probabilities that the use of a commode on the main floor of the Appellant's residence was medically required as a result of injuries she sustained in the accident. MPIC's legal counsel further submitted that the medical reports did not indicate that the Appellant was incapable of using her stairs, which she did not on a regular basis, and there was no evidence that she was unable to carry out the laundry duties or heavy housekeeping.

MPIC's legal counsel therefore requested that the Internal Review Decision of July 24, 2009 be confirmed and the Appellant's appeal be dismissed.

Discussion:

After a careful review of all of the medical evidence and the testimony of the Appellant and MPIC, the Commission concludes that the Appellant has failed to establish on a balance of probabilities that she is entitled to reinstatement of the PCA benefits. The Commission notes that [Appellant's Orthopaedic Surgeon], [text deleted] wrote a letter to the Appellant's representative on June 27, 2009 and concluded that the Appellant was capable of most activities of daily living.

“[The Appellant] would be capable of most activities of daily living, but for the reasons alluded to above may have ongoing trouble during any routine activities that would involve crouching or kneeling or getting down into tighter spaces. These limitations may improve a little further with time, but some extent will likely be long lasting.”

The Commission further notes that in a memorandum dated February 18, 2009, MPIC's Medical Consultant confirmed [Appellant's Orthopaedic Surgeon's] opinion that the Appellant would be capable of carrying out most activities of daily living. Upon a review of the Appellant's medical file, MPIC's Medical Consultant indicated that following participation in the [Rehab Facility] program subsequent to the October 24, 2008 manipulation of the Appellant's left knee, she was

able to regain 100° of knee flexion and her strength level returned to a normal level resulting in her discharge from the program in December 2008.

Having regard to the testimony of the Appellant, the medical opinions of [Appellant's Orthopaedic Surgeon] and of MPIC's Medical Consultant, the Commission finds MPIC did not err in terminating the Appellant's PCA benefits effective March 14, 2009. For these reasons the Commission concludes that the Appellant has failed on a balance of probabilities to establish her entitlement to PCA benefits. As a result the Commission dismisses the Appellant's appeal and confirms the Internal Review Decision dated July 24, 2009.

Income Replacement Indemnity Benefits:

At the time of the motor vehicle accident, the Appellant was employed as a nanny by [text deleted]. A Physical Demands Analysis was prepared by [text deleted] on December 19, 2003.

In an inter-departmental memorandum dated April 13, 2010, [MPIC's Doctor], [text deleted] reviewed the Physical Demands Analysis and stated:

“It is noted that [the Appellant's] work as a nanny involved providing child care for two children age [text deleted] and [text deleted] as well as performing some cleaning and housekeeping duties for the family. It is noted that [the Appellant] was required to work four days per week (Monday to Thursday). It is documented that her day would involve driving the children to school in the morning and returning to the home and performing some basic housekeeping duties (sweeping floors, cleaning dishes or doing laundry). It is documented that [the Appellant] would then pick the children up from school and bring them home and provide lunch to the youngest child at noon and play with the children after school. It is noted that the children were quite independent and it was unusual to have to lift either child. It is documented that [the Appellant] would be required to climb one flight of stairs within the home in order to reach the upper level. It is noted the kneeling, crouching and bending might be required to play with the children. It was once again documented that [the Appellant] was required to bend occasionally for three to five seconds. It is documented that [the Appellant] was required to crouch and kneel anywhere from five to fifteen seconds on a seldom basis.”

Case Manager's Decision:

On March 25, 2009, the case manager issued a decision terminating the Appellant's Income Replacement Indemnity "IRI" benefits. The case manager noted that the Automobile Injury Compensation Appeal Commission issued a decision on May 8, 2008 ruling that the Appellant was entitled to PIPP benefits as a result of the injury to her left knee. As a result the Appellant's entitlement to PIPP benefits were referred back to MPIC for administrating in accordance with the MPIC Act and Regulation. Following that decision the case manager reviewed the Appellant's entitlement to IRI benefits as follows:

- October 27, 2003 to May 12, 2005 (no entitlement to IRI benefits)
- May 13, 2005 to July 31, 2005 (entitlement to IRI benefits confirmed)
- August 1, 2005 to December 12, 2005 (no entitlement to IRI benefits)
- December 13, 2005 to June 12, 2006 (entitlement to IRI benefits confirmed)
- June 13, 2006 to June 12, 2008 (no entitlement to IRI benefits)
- June 13, 2008 to April 5, 2009 (entitlement to IRI benefits confirmed)

The case manager further stated:

June 13, 2008 to present:

- IRI benefits have been provided (and paid) commencing June 13, 2008 due to a second surgery on June 13, 2008 and a manipulation surgery on October 24, 2008. However, the medical information does not support an ongoing objective impairment of function which would preclude you from performing the duties of the employment you held at the time of the accident. Therefore, there is no entitlement to further IRI benefits. I have agreed to provide IRI benefits for an additional biweekly period. Your entitlement to IRI benefits will conclude as of April 5, 2009. This is in accordance with Section 110(1)(a) of the Act. (Underlining added)

As a result the Appellant made an Application for Review of the case manager's decision dated April 8, 2009.

Internal Review Officer's Decision:

On July 7, 2009, [text deleted], the Appellant's representative, filed a written submission with the Internal Review Officer.

The Internal Review Officer's hearing took place on July 7, 2009 and the Internal Review Officer issued his decision on July 24, 2009 confirming the case manager's decision and dismissing the Appellant's Application for Review on the denial of IRI benefits.

In this decision the Internal Review Officer stated:

"Most recently your representative, [text deleted], wrote to [Appellant's Orthopaedic Surgeon] on June 9, 2009 asking him to comment on whether you had any physical impairment or functional limitations that would prevent you from performing the duties of your nanny position as described in the Physical Demands Analysis. In answer to that enquiry, [Appellant's Orthopaedic Surgeon] indicated in his report of June 27, 2009:

"With respect to your questions, [the Appellant] may well have some ongoing limitations in crouching down and kneeling, which are noted as essential job duties and interrelated actions. Although it is permissible to kneel and get down on her knee, she may well have some ongoing limitations in this area. She did require postop knee manipulation for stiffness. Her surgery was a year ago, and she had a subsequent manipulation in October, 2008. This improved her range, but subsequently she lost a little bit of it. She also had an increased BMI, which reduced her overall mobility somewhat."

In answer to [Appellant's representative's] question about the effect of the injury upon your ability to carry out the activities of everyday living, [Appellant's Orthopaedic Surgeon] went on to indicate:

"[The Appellant] would be capable of most activities of daily living, but for the reasons alluded to above may have ongoing trouble during any routine activities that would involve crouching or kneeling or getting down into tighter spaces. These limitations may improve a little further with time, but to some extent will likely be long lasting."

The MPI Medical consultant reviewed your file on February 18, 2009. That review followed an earlier review by the same consultant. In his memorandum the consultant indicated, inter-alia, the following:

1. That the medical evidence does not indicate objective evidence of a physical impairment of function that would preclude you from performing work as a nanny between August, 2005 and December, 2005.
2. That there is no information indicating that you were unable to perform the work as a nanny beyond a six-month period following your December 12, 2005 accident.
3. That following your discharge from therapy in December, 2008 you no longer had a physical impairment of function of the left knee that would have prevented you from performing the required demands of a nanny in all probability.

On the basis of the opinions provided by [Appellant's Orthopaedic Surgeon] and [MPIC's Doctor], I am unable to conclude that you are unable to carry out the essential duties of a nanny. In arriving at that decision, I have taken into account the Physical Demands Analysis report which I have read in conjunction with the medical evidence in your file.

Accordingly, I am upholding the Senior Case Manager's decision of March 25, 2009 concerning your IRI entitlement and dismissing your Application for Review with respect to that issue."

The Appellant filed a Notice of Appeal dated July 7, 2009.

Hearing:

Subsequent to the Appellant filing her Notice of Appeal, [MPIC's Doctor] provided a further report to MPIC dated April 13, 2010.

The relevant provisions in respect of this appeal are:

MPIC Act:

Events that end entitlement to I.R.I.

[110\(1\)](#) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;

Manitoba Regulation 34/94

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The Appellant testified at the hearing and asserted that she was physically incapable of carrying out her work as a nanny looking after two small children ages [text deleted] and [text deleted] as well as performing some cleaning and housekeeping duties for the family. She testified that she was able to bring the children to school in the morning and was able to pick the children up from school and bring them home. She indicated that her duties included playing with the children when they returned from school and she had difficulty kneeling, crouching and bending when playing with the children. MPIC did not call any witnesses.

Submissions:

[Appellant's representative] reviewed his written submission to the Internal Review Officer dated July 7, 2009 and stated that:

1. The cumulative effect of the Appellant requiring to climb, crouch and kneel accounted for between 12 and 30 percent of the Appellant's workday and if one factored in the duration for each activity, she would be performing each of these activities a minimum of 100 times per workday to a maximum of over 250 times per workday.
2. The Physical Demands Analysis relied on by MPIC did not take these activities into account. The report did not indicate how many stairs the Appellant was required to climb each day and the amount of flexions and extensions of the left knee when she was doing so.
3. [Appellant's Doctor's] chart notes following the motor vehicle accident indicated that the Appellant should avoid lifting and repetitive activities such as vacuuming, shovelling, etc.

4. The Appellant's knee condition continued to deteriorate and as a result [Appellant's Orthopaedic Surgeon] performed arthroscopic surgery on May 13, 2005.
5. The Appellant was granted CPP Disability benefits on November 20, 2004.
6. The CPP documents indicated that the Appellant had limitations that prevented her from doing any type of physical work.
7. Since the Appellant's work as a nanny was physically demanding and this precluded the Appellant from working in that capacity.
8. [MPIC's Doctor's] medical opinion was inconsistent with CPP's decision and his opinion as to causality was rejected by the Automobile Injury Compensation Appeal Commission's decision.
9. As a result [MPIC's Doctor's] medical opinion should not be accepted by the Commission.

[Appellant's representative] requested that the Commission allow the appeal and rescind the decision of the Internal Review Officer dated July 24, 2009.

MPIC's legal counsel reviewed the case manager's decision and the Internal Review Officer's decision, as well as the medical reports of [Appellant's Orthopaedic Surgeon] and [MPIC's Doctor] and submitted that MPIC correctly terminated the Appellant's IRI benefits in accordance with Section 110(1)(a) of the Act and Section 8 of Manitoba Regulation 34/94. MPIC's legal counsel further submitted that the Appellant had failed to establish on a balance of probabilities that the Appellant was entitled to reinstatement of her IRI benefits and as a result counsel requested that the Commission dismiss the Appellant's appeal and confirm the decision of the Internal Review Officer dated July 24, 2009.

Decision:

The Commission rejects the submission of [Appellant's representative] and finds that the Appellant has failed to establish on a balance of probabilities that she was entitled to continue to receive IRI benefits. The Commission notes that [Appellant's Orthopaedic Surgeon], [text deleted], found that although the Appellant had some difficulty after surgery with kneeling and crouching, the subsequent manipulation of her knee in October 2008 resulted in an improvement of her range of motion. [Appellant's Orthopaedic Surgeon] further stated in his report of June 27, 2009 that the Appellant was capable of most activities of daily living notwithstanding her ongoing problems during routine activities. [Appellant's representative] wrote to [Appellant's Orthopaedic Surgeon] on June 9, 2009 asking him to comment on whether there were any physical impairment or functional limitations that would prevent the Appellant from performing the duties of her nanny position as described in the Physical Demands Analysis. [Appellant's Orthopaedic Surgeon] did not indicate in his report of June 27, 2009 that the Appellant was incapable of performing her duties as a nanny. [Appellant's Orthopaedic Surgeon's] medical opinion on the capacity of the Appellant in carrying out her duties as a nanny was confirmed by [MPIC's Doctor's] medical opinion in his report of February 18, 2009. [MPIC's Doctor] indicated that there was no objective medical evidence of physical impairment of function that would preclude the Appellant from performing her work as a nanny beyond a six month period following the December 12, 2005 accident. The Commission further notes [MPIC's Doctor] confirmed his opinion in his report to MPIC dated April 13, 2010 where he reviewed all of the relevant medical reports in respect of the Appellant.

The Commission finds there is no medical evidence to contradict the medical opinions of [Appellant's Orthopaedic Surgeon] and [MPIC's Doctor] as to the capacity of the Appellant to carry out her duties as a nanny to April 5, 2009. The Commission therefore concludes that MPIC correctly terminated the Appellant's IRI benefits pursuant to Section 110(1)(a) of the Act and Section 8 of Manitoba Regulation 34/94. As a result, the Commission dismisses the Appellant's appeal in respect of her claim to IRI benefits and confirms the decision of the Internal Review Officer dated July 24, 2009.

Dated at Winnipeg this 15th day of September, 2010.

MEL MYERS

NEIL COHEN

LES MARKS